ARBITRATION WORLD

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IN THIS ISSUE

*The articles beginning on page 34 were previously published as Arbitration World alerts on klgates.com.

INTERNATIONAL ARBITRATION
K&L GATES' BENCH STRENGTH

US $13.5 BILLION IN DISPUTE

108 ARBITRATION LAWYERS ACROSS 33 OFFICES

Data valid as of September 2021

MORE THAN
50
ARBITRATION
DISPUTES
CURRENTLY

21
CURRENT
ARBITRATOR
APPOINTMENTS
(3 AS SOLE ARBITRATOR
OR CHAIR)

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FROM THE EDITORS

Welcome to the 38th Edition of Arbitration World, a publication from K&L Gates' International Arbitration group that highlights significant developments and issues in arbitration for executives and in-house counsel with responsibility for dispute resolution.

In this edition of Arbitration World, we include our usual update on developments in international arbitration, including reports on recent cases and changes in arbitration laws from regions around the globe, as well as reporting on developments with respect to arbitration institutions.

We include our usual investor-state arbitration update, including discussion of anticipated investor-state disputes arising from government measures taken to fight the COVID-19 pandemic; the process of amendment of the ICSID Arbitration Rules; and an update on the work of the Investment Support Programme for Least Developed Countries, an initiative of the International Development Law Organization; plus our usual review of significant recent cases.

We also include a compendium of articles previously published as Arbitration World alerts. In particular:

We include our article, and link to the associated podcast, on fact witness evidence in international arbitration and the issues raised by the ICC Task Force report on this topic, amid the concerns over the reliability of human memory and thoughts on ways to improve the taking of fact witness evidence. We also include an article considering common criticisms of expert evidence in international arbitration and exploring possible ways of improving the taking of expert evidence. We report on two significant developments related to Swiss arbitration: the formation of the Swiss Arbitration Centre (successor to the Swiss Chambers' Arbitration Institution) and the release of a new version of the Swiss Rules of International Arbitration. We report on a recent case from the Dubai Court of Cassation finding that the interests of justice can override an agreement to arbitrate in circumstances where a dependent contract does not also provide for arbitration. We also include a review of a decision from the Abu Dhabi Court of Cassation confirming that representatives acting under a power of attorney must have express and unambiguous authority to bind a principal to arbitration.

We report on the release of the new rules of the Australian Centre for International Commercial Arbitration (ACICA), Australia's premier international dispute resolution institution.

We review the recent Privy Council decision in *Betamax Ltd v State Trading Corp.* (on appeal from the Supreme Court of Mauritius) regarding what "contrary to public policy" may mean in the context of the recognition and enforcement of international arbitration awards. We review a decision from the English Commercial Court considering the implications of commencing an arbitration without satisfying a contractual dispute resolution "escalation" procedure and whether the subsequent arbitration award may be open to challenge.

Finally, we highlight some aspects of the Regional Comprehensive Economic Partnership (RCEP), covering 15 economies in the Asia Pacific region, of potential relevance from the perspective of foreign investors considering investment in the RCEP member states with respect to investor-state dispute settlement.

We hope you find this edition of Arbitration World of interest and we welcome any feedback (email **ian.meredith@klgates.com** or **peter.morton@klgates.com**).

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ARBITRATION NEWS FROM AROUND THE WORLD

By Henry Kim (Singapore), Jon Blaney (Dubai), and Matthew Weldon (New York)

This publication is issued by K&L Gates and K&L Gates Straits Law LLC, a Singapore law firm with full Singapore law and representation capacity and to whom any Singapore law queries should be addressed. K&L Gates Straits Law LLC is the Singapore office of K&L Gates, a fully integrated global law firm with lawyers located on five continents.

ASIA

Singapore

In *CBS v CBP*, [2021] SGCA 4, the Singapore Court of Appeal ruled that a sole arbitrator's decision to proceed on a documents-only basis constituted valid grounds for setting aside the arbitral award for breach of natural justice as (i) it was not a procedural choice open to the arbitrator in the absence of an agreement on the issue between the parties, and (ii) it caused real prejudice to the buyer's ability to present its case. The Court of Appeal further noted that the exercise of a tribunal's discretionary powers to limit witness evidence, where allowed under Rule 25 of the Singapore Chamber of Maritime Arbitration Rules (SCMA Rules), was in any event subject to an overriding obligation to ensure that the arbitration is conducted in a just manner and that fundamental rules of natural justice are upheld. This case is important as it usefully interprets Rule 28.1 of the SCMA Rules (which provides that, "Unless the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal shall hold a hearing…") and clarifies that an arbitration under the SCMA Rules cannot proceed on a documents-only basis unless that is agreed by both parties.

In *CJD v CJE and another*, [2021] SGHC 61, the Singapore High Court considered the element of consent in "forced joinder" in a case involving the interpretation of Article 22.1(viii) of the Arbitration Rules of the London Court of International Arbitration (2014) (the LCIA Rules). The CJD Court observed that an arbitral tribunal constituted under the LCIA Rules may "allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing" under Article 22.1(viii). On this basis, the Singapore High Court held that mere status as a signatory and party to a multi-party contract containing an LCIA arbitration agreement was

insufficient in and of itself to constitute written consent by a respondent "to being joined in any arbitral reference involving any of the other parties" to the multi-party contract. The Singapore High Court emphasized that the wording of the relevant institutional rule and arbitration agreement would have to be clear and unambiguous to empower an arbitral tribunal to allow such forced joinder.

Malaysia

In *MISC Berhad v Cockett Marine Oil (Asia) Pte Ltd (Admiralty in Personam No. WA-27NCC-46-05/2020)*, the Malaysian High Court issued an anti-arbitration injunction to halt a London-seated arbitration as the arbitration proceedings were in breach of an exclusive jurisdiction clause in favour of the Malaysian courts. This case provides useful guidance on the circumstances in which a Malaysian court will exercise its power to restrain a foreign-seated arbitration where the court takes the view that it has jurisdiction over the dispute.

In *Danieli & C Officine Mecchaniche SPA v Southern HRC Sdn Bhd* (WA-24NCC-471-10/2020), the Malaysian High Court clarified the extent to which judicial intervention would occur under Malaysian law once an arbitral award has been issued. In *Danieli*, the Plaintiff, an Italian company that manufactures steelmaking plants (Danieli) had commenced arbitration against the Defendant, a Malaysian company (Southern) in relation to the construction of a plant in Malaysia (the Plant). The arbitrators awarded damages to Southern. Southern then instituted court proceedings in Italy to enforce the arbitral award against Danieli. At the same time, Danieli resisted the Italian court proceedings and applied to the Malaysian High Court to, *inter alia*, allow the Court to inspect the Plant under the Malaysian Specific Relief Act 1950 and the Malaysian Rules of Court. Danieli argued that the inspection could have a material impact on the Italian recognition and enforcement proceedings. Southern resisted this application, however, and applied to the Malaysian High Court for a declaration that it lacked jurisdiction over Southern in respect of Danieli's claimed relief, arguing that, where an arbitral award had been rendered, the Malaysian High Court's powers under the Malaysian Arbitration Act were limited to enforcing the award.

Underscoring the pro-arbitration attitude of the Malaysian Courts, the Malaysian High Court dismissed Danieli's application, stating that its powers in respect of arbitral awards were limited to their recognition and enforcement under Section 389 of the Malaysian Arbitration Act and referencing the restriction under Section 8 of the Malaysian Arbitration Act that "no court shall intervene in matters governed by this Act, except where so provided in this Act." The Court observed that this was intended to discourage reliance on the Malaysian Courts' inherent powers and to restrict judicial intervention.

Hong Kong

In *X v Y,* [2020] HKCFI 2782, the Hong Kong Court of First Instance has refused to enforce an arbitral award, rejecting an appeal from its earlier decision to set aside an order to enforce an arbitration award.

The dispute arose from a series of investment structures set up between the Claimant and the Respondent. The Claimant had granted a discretionary investment management mandate in favour of the Respondent (the Mandate). The Mandate was governed by the laws of Taiwan and the parties agreed to arbitration administered by the Arbitration Association of the Republic of China. On the other hand, the Claimant had also pledged its assets in a unit trust account to the Respondent as security (the Pledge). The Pledge was governed by the laws of Singapore, and the parties agreed to submit to the non-exclusive jurisdiction of the courts of Singapore. After the Claimant was put into receivership, the Mandate was terminated and the Claimant demanded that the Respondent return all monies into the unit trust account. The Respondent, however, retained the monies subject to the Pledge and returned the remainder to the Claimant. The Claimant thus commenced arbitration pursuant to the arbitration clause in the Mandate for the Respondent's failure to return the money and assets.

In the arbitration, the tribunal had made an award in favour of the Claimant, directing that the Respondent was liable to return all monies to the unit trust account. The tribunal found that the Respondent's retention of the Claimant's assets under the Mandate and subject to the Pledge was prohibited under the Taiwan Insurance Act.

The Claimant obtained an order to enforce the arbitral award in Hong Kong and the Respondent applied to the Court in Hong Kong to set aside the enforcement order. The application was made on the grounds that the arbitral award dealt with matters beyond the scope of the arbitration clause and the parties' submission to arbitration and that the Respondent had been unable to present its case in the arbitration.

The *X v Y* Court granted the application, finding that the tribunal should have referred any disputes relating to the Pledge to the Singaporean courts as the parties had agreed to submit to the non-exclusive jurisdiction of the Singaporean courts if a dispute arose relating to the Pledge.

The Court also found that there was a denial of a fair hearing. In post-hearing submissions during the arbitration, the Claimant raised a new argument stating that the Pledge was void from a Taiwanese law perspective. While the parties exchanged post-hearing briefs, there was no opportunity for the Respondent to comment on the Claimant's new argument. Despite this, the tribunal found that the Pledge was void under Taiwanese law. The *X v Y* Court held that the tribunal had not fulfilled its duty to give the Respondent a fair opportunity to be heard, resulting in substantive injustice.

Following the Court decision, the Claimant sought leave to appeal to the Hong Kong Court of First Instance. The Court refused to grant leave to appeal on the basis that the Respondent had been denied due process.

X v Y is a rare case of a Hong Kong court refusing to enforce an arbitral award in spite of its long-established reputation as pro-arbitration and pro-enforcement, signalling that the Hong Kong Courts place great emphasis on party autonomy and the integrity of the arbitration proceedings.

In *AB v CD*, [2021] HKCFI 327, the Hong Kong Court of First Instance set aside an arbitral award on the basis that the award debtor was not the true party to the arbitration agreement and had been wrongly identified. This meant that the proper respondent was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings. This result in *AB v CD* further confirms that the Hong Kong Courts will be prepared to overturn an award where a statutorily prescribed ground is clearly established.

India

In *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*, Civil Appeal No. 1647 of 2021, the Supreme Court of India decided that two Indian parties could choose a foreign (i.e., non-Indian) seat of arbitration for the resolution of disputes between them. While some of the Indian Courts had

previously held that at least one party had to be a non-Indian person or company for such a clause to be effective, the Supreme Court of India confirmed in *PASL* that an award issued by an arbitral tribunal in such circumstances would be enforceable in India and that the parties could also seek interim relief in India.

China

In *Yue 03 Min Te* No. 719 or (2018), the Shenzhen Intermediate People's Court ordered that an arbitral award made by the Shenzhen Arbitration Commission be set aside on the ground that awarding damages in U.S. dollars in lieu of cryptocurrency is against the public interest. Here, one party (Gao) was contracted to manage the personal assets, including cryptocurrency assets, of another party (Li). Li and Gao entered into a contract under which, amongst other commercial terms, Gao had to return certain crypto assets to Li. Li alleged that Gao did not perform his obligations in accordance with the contract, resulting in Li filing for arbitration at the Shenzhen Arbitration Commission. The arbitral tribunal found that Gao had failed to deliver the crypto to Li as agreed by the parties. The arbitral tribunal awarded, *inter alia*, US$401,780 (held by the arbitral tribunal to be equivalent to the crypto assets owed to Li), which would finally be settled in Chinese Yuan Renminbi (CNY) pursuant to the CNY-US$ exchange rate at the date of the Award.

Gao subsequently applied to the Shenzhen Intermediate People's Court to set aside the award on the grounds that the arbitral award was in breach of public policy. The court allowed the setting aside application, relying on the Notice on Precautions Against the Risks of Bitcoins (the Notice) and the Announcement on Preventing the Financing Risks of Initial Coin Offerings (the Announcement), both issued by various People's Republic of China authorities. Those documents essentially prohibit the redemption, trading and circulation of Bitcoin in Mainland China as well as other illegal financial activities that disrupt financial order. The court held that by allowing Gao to compensate Li with the CNY equivalent of the value of the cryptocurrencies, the arbitral tribunal was essentially allowing the exchange of cryptocurrency with fiat currency, amounting to redemption and trading between cryptocurrency and fiat currency in a disguised form. The award was thus against the spirit of the Notice and the Announcement and violated the public interest. This case illustrates the potential challenges of enforcing a cryptocurrency-related arbitral award in jurisdictions in which trade in cryptocurrency is not readily accepted.

EUROPE

France

On 13 January 2021, the French Supreme Court in the case No. 19-22.932, upheld a Paris Court of Appeal decision granting recognition of a Cairo Regional Centre for International Commercial Arbitration (CRCICA) arbitral award rendered in Cairo and subsequently annulled at the seat of

arbitration. The Supreme Court decided that the Paris Court of Appeal had properly decided that the domestic or international nature of an arbitration did not affect the powers of French courts to review awards rendered abroad. Thus, the Paris Court of Appeal was right to grant the exequatur to the award because the prior ministerial approval for a state entity to enter into an arbitration agreement, under Egyptian law, was irrelevant to the French courts' examination of the effective nature of that agreement.

Operational since March 2018, the International Chamber of the Paris Court of Appeal (ICCP-CA) was set up to hear international trade disputes, which include cases related to international arbitration. ICCP-CA now hears all annulment proceedings of Paris-seated international arbitral awards. Exhibits can be submitted without being translated into French and pleadings can be conducted in English.

The ICCP-CA issued an interesting decision in early 2021 regarding independence and impartiality of arbitrators and a party's rights with respect to appointment of the Tribunal. In this decision of the Paris Court of Appeal dated 26 January 2021 (ref: CA Paris, Pole 5 – Ch. 16, No. 19/10666**)**, the arbitration clause provided that any dispute with respect to the relevant shareholders' agreement was to be decided by a panel of five arbitrators: each shareholder was to appoint one arbitrator, and the president of the tribunal was to be selected by the four party-appointed arbitrators. As the majority of the shareholders were against one shareholder, the appointment of arbitrators by the majority of shareholders could have rendered the tribunal partial. Thus, the ICC Court exercised its power to appoint the entirety of the arbitral tribunal to avoid a breach of equality of the parties. This award was challenged on the ground of the lack of independence of two arbitrators out of

five, as had been selected by the ICC. The Paris Court of Appeal rejected the application to set aside the award, and ruled that the ICC had correctly decided that the public policy principle of the equality of the parties means that each party must be able to participate in an equal manner in the constitution of an arbitral tribunal.

In a case before the Paris First Instance Court (*Saad Buzwair c/ G*, Tribunal Judiciaire de Paris (No. 19/795), 31 March 2021), the Paris First Instance Court declined jurisdiction over a lawsuit against an arbitrator after an award in a Paris-seated arbitration was set aside on the ground that the arbitrator had failed to comply with his disclosure duties. The French Court decided that it lacked jurisdiction because the arbitrator's activity was in Germany and not in France, relying upon Article 7(1)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (commonly referred to as the 'Brussels Regulation (recast)'). That provision of the Brussels Regulation (recast) deals with issues of jurisdiction and the place of performance in the case of a contract for the provision of services.

Germany

The Appeal Court in Frankfurt am Main, Germany, has set aside an arbitral award rendered in an ICC arbitration seated in Frankfurt based on an established violation of the right to be heard. In particular, the court determined that it was insufficient if a party's submission on an essential core of the facts is only reproduced by the tribunal in the award, but not assessed in its substance (order dated 16 January 2020, file no. 26 Sch 14/18). The case has received considerable attention by reason of an unusual *obiter dictum* with regard to a dissenting opinion issued by an arbitrator in context with an arbitral award rendered in Germany. It is the first explicit statement on a dissenting opinion's permissibility in arbitration by a German court. The court stated that a dissenting opinion violates the secrecy of deliberations, which also applies to arbitral tribunals, and which in turn is part of the German procedural public and thus cannot be waived either by the parties or by arbitral discretion. The *obiter dictum* further states that there was much to suggest that the communication of the dissenting opinion to the parties, which took place one day after the service of the arbitral award on the parties, probably would in itself have led to a setting aside of the award, albeit without elaborating the reasons. The *obiter dictum* is surprising as German jurisprudence is known to be arbitration-friendly. It touches on a sensitive issue within arbitration practice and for Germany as a place of arbitration and it has attracted much criticism from the arbitration community, taking into consideration that most jurisdictions consider dissenting opinions permissible in arbitration. Regrettably, in the subsequent appeal proceedings, the German Federal Court of Justice

deliberately refrained from commenting on the question ultimately left open by the Appeal Court in Frankfurt am Main, because the disputed award had been set aside based on another ground (Bundesgerichtshof, order dated 26 November 2020, file no. I ZB 11/20). The current situation therefore leaves users of arbitration with uncertainty as to the validity and enforceability of arbitral awards rendered in Germany which are accompanied by the disclosure of dissenting opinions. In the pursuit of legal certainty, an early clarification of this issue by the German legislator or the Supreme Court appears strongly desirable.

Spain

On 15 February 2021, in the case of *Amparo* [3956/2018], the First Chamber of the Spanish Constitutional Court reinstated an arbitral award previously annulled by the Madrid High Court. It confirmed that the Spanish courts have limited power of review when seized with an action to annul an arbitration award, and must show strict deference to arbitration tribunals.

The Constitutional Court overturned the earlier ruling and unanimously decided that the High Court of Madrid had erred in its decision to annul the award as the award did not violate public policy. The Constitutional Court reasoned that courts must treat arbitral awards as final decisions. When parties agree to binding arbitration, they remove jurisdiction from the courts, and the judiciary must respect this decision. As such, judicial review of such awards must be minimal.

The Constitutional Court also stressed that the court's role at the annulment stage is not to replace the arbitrator in the resolution of the dispute; the courts are not entitled to review the merits of the case when ruling on alleged breaches of public policy.

The Constitutional Court further confirmed that the standard for the review of arbitral awards on public policy grounds is narrow, and even if the court considers the reasoning to be incorrect, this does not mean that the award can be annulled under public policy grounds. Finally, the Constitutional Court also held that the right to judicial protection recognized in Article 24(1) of the Spanish Constitution does not guarantee a correct legal interpretation and application of the law.

Switzerland

The Federal Court of Switzerland upheld an ICC award issued in a dispute between the National Iranian Gas Company (NIGC) and Turkmengaz over the discontinuation of gas supplies due to sanctions against Iran that obliged NIGC to pay over €1.5 billion to Turkmengaz. The Court did not accept the argument that the U.S. 2007-2008 sanctions and the EU 2012 sanctions prevented Iran from making payments in U.S. dollars and Euro and confirmed the ICC award. According to the Court, there are no EU or UN sanctions that would preclude payments of compensation in Euro, and NIGC failed to prove that the U.S. sanctions constituted force majeure.

United Kingdom

Since this update was authored, on 27 October 2021 the UK Supreme Court provided further clarification as to the approach to ascertaining the governing law of an agreement to arbitrate, this time in the context of a party's attempt to enforce an arbitration award *(Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48). Please find our separate report on that decision **here**.

In *Manek and others v IIFL Wealth (UK) Ltd and others*, [2021] EWCA 625, the English Court of Appeal held that claims of deceit, allegedly perpetrated by majority shareholders against minority shareholders in connection with the sale of shares, fell outside the scope of an arbitration clause contained in the relevant sale and purchase agreements because only the majority shareholders' company, and not the individual majority shareholders themselves (against whom the claim for deceit was being pursued in their personal capacities), was a party to those agreements and the arbitration clauses they contained. The Court of Appeal further considered whether a separate agreement to arbitrate had been formed outside of the sale and purchase agreements. While finding that no such agreement was formed by exchanges between the parties, the Court of Appeal noted that such an agreement must be unqualified and clearly set out to have effect. In this context, the claim was held to fall within the jurisdiction of the English Commercial Court.

The Judicial Committee of the Privy Council (the Privy Council) issued its decision in the case of *RAV Bahamas and another v Therapy Beach Club Incorporated* (Bahamas) on 19 April 2021 *[2021] UKPC 8*. The decision considered Section 90 of the Bahamas Arbitration Act 2009, similar to Section 68 of the English Arbitration Act 1996, which allows parties to challenge arbitral awards on the basis of serious irregularities affecting the tribunal, proceedings or award which the court considers has caused or will cause substantial injustice to the applicant. The Privy Council confirmed that there is a high threshold to be met in successfully making such a challenge. However, while good practice, it is not a mandatory requirement for a challenge on the basis of serious irregularity for there to be a separate, express pleading of substantial injustice or separate and express consideration and finding by the court that a party has or will suffer substantial injustice due to the serious irregularity. Further, the Privy Council held that the focus is on due process, not the correctness of the decision reached. In assessing the substantial injustice requirement, the adoption of an unduly formalistic approach to the language used is to be avoided. It is more important whether, as a matter of substance, substantial injustice had been considered and found to have occurred.

MIDDLE EAST

Abu Dhabi

In Case 922 of 2020, the Abu Dhabi Court of Cassation refused to recognise an arbitration agreement contained in a subcontract as being valid because the individual who signed the subcontract was not specifically authorised to bind the company to arbitration and that, in any event, as both parties subsequently engaged in a court-appointed expert process, the contractor was held to have waived its right to challenge the court's jurisdiction.

Dubai

In a recent decision, [*Case No. 1308/2020 dated 3 March 2021*], the Dubai Court of Cassation held that an arbitration clause contained in standard form conditions appended to a contract did not represent an enforceable arbitration agreement. The parties in this instance included the 1987 FIDIC Red Book Conditions of Contract (the FIDIC Red Book Conditions) into their agreement, clause 67 of which contained an arbitration clause. The Dubai Appeals Court held that a binding arbitration agreement had been incorporated by way of reference to the FIDIC Red Book Conditions, relying on Article 7(2)(b) of the UAE Federal Arbitration Act, which recognised the potential for arbitration clauses to be included by reference. Overturning this decision, the Dubai Court of Cassation held that a general reference to the complete FIDIC Red Book Conditions was insufficient to evidence the parties' knowledge of the arbitration clause or their intention for it to take effect as an enforceable arbitration agreement, thereby deeming that the general reference did not constitute the parties' intention and agreement to arbitrate.

In April 2021, the Dubai Court of Cassation refused the recognition and enforcement of an arbitral award issued

under the rules of the China International Economic and Trade Arbitration Commission (CIETAC) on the basis that the sole arbitrator failed to sign the award. The Dubai Court of Cassation allowed this new argument to be heard even though it had not previously been raised before the Dubai enforcement court or the Dubai Court of Appeal on the basis that the sole arbitrator's failure to sign the award constituted a matter of public policy. After taking into account Articles V(1), V(2)(b) and Section III of The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), as well as the UAE Federal Arbitration law and Civil Procedures Law of the UAE, the Dubai Court of Cassation held that the award did not comply with the rules of procedure in the UAE for enforcement and recognition and was contrary to public policy which required the reasoning and decision to be signed by the arbitrator.

In the recent DIFC Court of Appeal case of *Lahela v Lameez* [*2020 DIFC CA 007*], the court considered and clarified the process for serving a DIFC Court order recognizing and enforcing a DIFC-seated arbitral award on a foreign defendant resident in another signatory state to the 1983 Riyadh Arab Agreement for Judicial Cooperation (Riyadh Convention). The DIFC Court of Appeal held that Article 6 of the Riyadh Convention, which provides that the service of documents relating to proceedings is to be effected by the court in the district in which the person or entity resides, does not provide the only means by which service may be validly effected. In light of this decision, as reported in our full article, the process for serving a DIFC Court order recognizing and enforcing a DIFC-seated arbitral award on a foreign defendant resident in another Riyadh Convention signatory state should now be easier.

Iraq

On 4 March 2021, the Parliament of the Republic of Iraq passed Law No. 14 of 2021 on the Accession of the Republic of Iraq to the New York Convention (the Law). The Law was published in the Iraqi Official Gazette No 4633 dated 31 May 2021 marking its entry into force. The accession of Iraq to the New York Convention was made subject to reservations which include that it will not apply to arbitral awards issued prior to entry into force of the Law, that the recognition and enforcement of awards will only apply based on reciprocity with other contracting states and that the New York Convention will only apply to matters deemed commercial under Iraq law.

NORTH AMERICA

United States

In *Henry Schein, Inc. v. Archer and White Sales*, 592 U.S. ___ (2021), the U.S. Supreme Court revoked its decision to review *Henry Schein Inc. v. Archer and White Sales Inc.*, 935 F.3d 274 (2019) as "improperly granted," a rare event. Thus, the decision of the U.S. Court of Appeals for the Fifth Circuit will stand, holding

that the federal district court should in that case decide whether the dispute with Henry Schein is subject to arbitration, rather than the tribunal in the underlying arbitration filed by Henry Schein.

More specifically, the Fifth Circuited decided in its 2019 decision that (i) the parties' contract called for arbitration of the "gateway question" of whether a dispute is arbitrable in general but (ii) that whether this particular dispute fell within an exception to the contract's arbitration clause should be decided by the court. Henry Schein's appeal to the U.S. Supreme Court focused on the second issue, which it had lost, and Archer and White cross-petitioned to appeal the first issue. The U.S. Supreme Court declined, however, to call for briefing on the first issue.

After oral argument, it appears that the justices ultimately decided that it could not sensibly render a decision on the second issue without addressing the first issue, and therefore it did not make sense to address the second issue at all—hence the decision to revoke the decision to review the Fifth Circuit's decision.

The U.S. Supreme Court granted certiorari to review *Servotronics Inc., v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), which held that 28 U.S.C. § 1782, a statute through which a party may obtain discovery from a U.S. Court for use in proceedings before a "foreign or international tribunal", does not give U.S. Courts the power to order such discovery for use in a foreign private commercial arbitration since a foreign private commercial tribunal is not a "foreign or international tribunal" within the meaning of § 1782. The Seventh Circuit held that § 1782 only applies to a "quasi-governmental tribunal." Accordingly, in the case below, New York electronics supplier, Servotronics had its bid to obtain documents from Boeing for use in an arbitration in the UK against Rolls-Royce denied.

As previously reported in an International Arbitration **alert** this issue has resulted in a clear circuit split over the past decade, with the Seventh Circuit, the Second Circuit, and the First Circuit notably holding that a party may not use § 1782 to obtain discovery for use in a foreign private international commercial arbitration, while the Fourth Circuit and the Sixth Circuit has reached the opposite opinion on the issue. Interestingly, Servotronics has actually itself obtained an order in the Fourth Circuit finding that the UK arbitration proceeding was a "foreign tribunal" within the meaning of § 1782, clearly highlighting the circuit split.

In September 2021, however, Servotronics gave notice that the parties had settled the dispute and requested dismissal of the appeal. The case was thus removed from the Supreme Court's docket. That said, it appears that the question may still may be resolved soon. As the *Servotronics* appeal was being dismissed, ZF Automotive US, Inc. (a wholly owned subsidiary of ZF Friedrichshafen AG) (ZF) and two of its executives filed a petition with the Supreme Court on 14 September 2021

presenting a "substantively identical [question] to the question presented by *Servotronics v. Rolls-Royce*." ZF wants to reverse an order entered by the U.S. District Court for the District of Michigan (part of the Sixth Circuit) granting § 1782 discovery against ZF for use in a foreign private arbitration, and requested that the Supreme Court hear the appeal before the Sixth Circuit weighed in, given that the question on appeal was substantively identical to the one presented in the *Servotronics* appeal and the importance of the issue.

The U.S. District Court in Miami, Florida in G*rupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, Case No. 1:20-cv-24867 (S.D. Fla.) will rule in a lawsuit relating to potential conflict of interest of ICC arbitrators in an arbitration between a consortium of construction firms and the operator of the Panama Canal. The panel of three arbitration awarded US$238 million to the operator in the underlying arbitration, which included the reversal of a decision issued by a dispute review board under the underlying agreement. The consortium applied to the U.S. District Court to set aside the award, and have argued that there was a conflict of interest due to "multiple cross-appointments and interrelationships among themselves and others involved in the dispute." For example, the consortium claims that the presiding arbitrator was appointed as the operator's arbitrator in another dispute, and that this arbitrator has also been involved in an earlier case related to the same issues as the arbitration.

SOUTH AMERICA AND THE CARIBBEAN

Brazil

On 1 April 2021, the Government Procurement Act (GPA) came into force, introducing changes to the processes of tendering and bidding conducted by state entities. The legal provisions of the GPA are intended to provide greater certainty for those considering investment in large projects in Brazil led by the federal, states, or local governments. Additionally, the GPA reinforces Brazil's friendly stance towards arbitration, with an entire chapter dedicated to dispute resolution. The introduction of the GPA is a welcome addition for foreign investors, especially since Brazil is not a member state of the ICSID Convention and has a relatively limited number of international investment agreements that do not extend investment protection to a range of foreign jurisdictions.

The GPA encourages parties to utilise public contracts to solve their disputes by non-judicial methods such as conciliation, mediation and arbitration. Furthermore, such methods can be used not only in new public contracts but also in pre-existing public contracts.

Cayman Islands

The Grand Court of the Cayman Islands granted third party funder Omni Bridgeway's request to wind up a Cayman-registered oil company, GBC Oil Company LTD (GBC). The application was bought by Omni Bridgeway after GBC failed to repay amounts loaned to

it under a funding agreement, and Omni Bridgeway successfully obtained an ICC award against GBC in connection with the dispute. The Court conditioned the decision on Omni Bridgeway agreeing to withdraw parallel enforcement proceedings in Ontario, Canada related to the ICC award.

Costa Rica

The Supreme Court of Costa Rica confirmed a US$23 million ICC award against the country's largest construction group, Saret, even though it had not signed the underlying arbitration agreement. The tribunal in the arbitration had held that Saret was actively involved in the implementation of the project, which allowed it to extend the arbitration agreement to that company. Saret sought to have the award against it set aside at the seat of arbitration in Panama but failed. The Supreme Court of Costa Rica refused to analyse the legality of the decision to extend the arbitration agreement to a non-signatory since that issue had been resolved by the courts in Panama.

INSTITUTIONS

DIFC-LCIA Arbitration Centre and Dubai International Arbitration Centre

Decree No. 34 of 2021 issued by the Ruler of Dubai on 14 September 2021 provides for the immediate abolishment of the Emirates Maritime Arbitration Centre and the DIFC Arbitration Institute (DAI), while granting the Dubai International Arbitration Centre (DIAC) a period of no more than six months to reorganize itself and to replace those institutions. The DIFC-LCIA Arbitration Centre is a joint venture between the DAI and the LCIA. The DIFC-LCIA Arbitration Rules have not been revoked, but the DAI employed the DIFC-LCIA Arbitration Centre secretariat staff and held DIFC-LCIA Arbitration Centre funds. The DIAC, once reconstituted, will therefore become the primary arbitral institution located in Dubai.

Swiss Arbitration Centre and Revised Swiss Arbitration Rules

As reported in more detail in our **article** appearing later in this edition, on 1 June 2021, the Swiss Chambers' Arbitration Institution transformed into the Swiss Arbitration Centre. At the same time, new arbitration rules were enacted and entered into force. Existing arbitration clauses which refer to the Swiss Chambers' Arbitration Institution will be recognized by the Swiss Arbitration Centre, however, it is recommended that parties change the reference going forward. The refreshed arbitration rules encompass changes to facilitate online management, updates to the role of the centre in arbitrations under its auspices, clarification of joinder and express provision for the stay of arbitration where parties may seek to resolve their dispute by mediation.

ICC Arbitration Rules

The 2021 Arbitration Rules of the International Chamber of Commerce's Court of Arbitration (the ICC Rules 2021)

have entered into force and apply to cases filed from 1 January 2021. The revisions introduce changes intended to make the arbitration process more efficient, flexible and transparent, as demonstrated by new provisions pertaining to consolidation, joinder, party representation and disclosure of third-party funding.

The ICC Rules 2021 widen the authority of arbitral tribunals and the ICC Court of Arbitration to decide on procedural matters, including express provision allowing for arbitral tribunals to decide to conduct hearings virtually. In particular, Article 26(1) of the ICC Rules 2021 states that "The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication."

ICDR Rules

The International Centre for Dispute Resolution (ICDR), the international branch of the American Arbitration Association (AAA), recently revised its 2014 arbitration rules, issuing a revised set of rules that entered into force on 1 March 2021. The revisions follow recent rule updates by other major arbitral institutions as they respond to users' desire for quicker and more cost-effective dispute resolution procedures, the growth of third-party funding in arbitration, the increasing use of remote hearings, risks related to data protection and cybersecurity, and potential enforcement risks related to the role played by tribunal secretaries.

LMAA Terms

The London Maritime Arbitrators Association (LMAA) has published a new set of terms (the LMAA Terms 2021) that include revisions to LMAA procedure and will apply to all arbitrations commenced on or after 1 May 2021. Among other things, the revisions address key challenges that have arisen due to the COVID-19 pandemic. Some of the key amendments include provisions for conducting virtual hearings, allowances made for awards to be signed electronically, and the empowerment of the president of the LMAA to appoint a substitute arbitrator in the event that an original arbitrator is unable to conduct proceedings or to attend hearings.

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WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Rob Houston (Singapore)

This publication is issued by K&L Gates and K&L Gates Straits Law LLC, a Singapore law firm with full Singapore law and representation capacity and to whom any Singapore law queries should be addressed. K&L Gates Straits Law LLC is the Singapore office of K&L Gates, a fully integrated global law firm with lawyers located on five continents.

In each edition of Arbitration World, our lawyers who practice in investment treaty arbitration and public international law provide updates concerning recent, significant news items involving international investment law and arbitration from around the world. This edition features brief discussions of anticipated investor-state disputes arising from government measures taken to fight the COVID-19 pandemic, recent developments in the international investment treaty landscape, the process of amendment of the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID), significant recent cases, and an update on the work of the Investment Support Programme for Least Developed Countries, an initiative of the International Development Law Organization (IDLO).

INCREASE IN INVESTOR-STATE DISPUTES ANTICIPATED WORLDWIDE IN RELATION TO GOVERNMENT MEASURES TAKEN TO FIGHT THE COVID-19 PANDEMIC

In a 21 February 2021 news release (the United Nations Conference on Trade and Development [UNCTAD] releases data on over 1,000 investor-state arbitration cases), UNCTAD warned of a risk of an increase in investor-state disputes resulting from government measures taken to fight the COVID-19 pandemic. Such measures (including lockdowns, travel bans, and export restrictions) may be seen to breach the public international law obligations states have undertaken in many of the approximately 2,300 international investment agreements (IIAs) currently in force to promote and protect foreign investment, including in

the form of bilateral investment treaties (BITs), free trade agreements (FTAs), and other treaties with investment protections.

UNCTAD recognizes that this potential wave of pandemic-related claims could be of significant magnitude, observing that states may be ordered to pay millions or even billions of dollars to affected investors. In one indication of the likely scope of this increase in claims, the World Tourism Organization reported in April 2020 that "96% of all worldwide destinations have introduced travel restrictions". Such restrictions have had significant impacts on foreign investors, particularly those involved in the commercial travel industry. Further, the World Trade Organization (WTO) reports that, as of 25 June 2021, WTO member states "had submitted a total of 385 notifications related to COVID-19" (such notifications are issued by WTO member states when their measures might affect other member states). It is evident that such measures also have impacted foreign investors in many cases and, accordingly, it is likely that such measures will also give rise to the next generation of COVID-19 pandemic-related claims in investor-state arbitration.

For those who wish to learn more about this topic, K&L Gates has developed the one-hour informational program "Investment Treaty Arbitration in an Age of Pandemic: Preparing for the Coming Wave of Investor Claims Against Host States" as a continuing legal education program in conjunction with the Practising Law Institute. Additional information is available by searching for the program name above at **www.PLI.edu**

RECENT DEVELOPMENTS IN THE INVESTMENT TREATY LANDSCAPE

UNCTAD records that over 25 new IIAs have been signed since the beginning of 2020, including the following:

- Republic of Korea - Israel FTA (2021)
- European Union - United Kingdom Trade and Cooperation Agreement (2020) (TCA)
- Turkey - United Kingdom FTA (2020)
- United Kingdom - Vietnam FTA (2020)
- Singapore - United Kingdom FTA (2020)
- Canada - United Kingdom Trade Continuity Agreement (2020)
- Israel - United Arab Emirates BIT (2020)
- Regional Comprehensive Economic Partnership (2020) (RCEP), an FTA among the Asia Pacific nations of Australia, Brunei, Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea, Thailand, and Vietnam

- Japan - United Kingdom Comprehensive Economic Partnership Agreement (2020)
- Brazil - India BIT (2020)

A number of these most recent additions to the investment treaty landscape involve the United Kingdom. In addition to those IIAs listed above, the United Kingdom has also recently signed new IIAs with Cameroon, Côte d'Ivoire, Egypt, Ghana, Kenya, Moldova, North Macedonia, and Ukraine, continuing the United Kingdom's trend of outward bilateral engagement in the wake of its recent departure from the European Union. A number of IIAs also entered into force over the past year, including the Indonesia-Singapore BIT (9 March 2021).

A great deal of attention has focused recently on December 2020 reports that China and the European Union had reached an in-principle agreement on the anticipated terms of the Comprehensive Agreement on Investment after seven years of negotiation, but this has recently been eclipsed by a European Union resolution to freeze ratification of the deal as a reaction to Chinese sanctions in March 2021 on European Union politicians, think-tanks and diplomatic bodies. These Chinese sanctions were in response, in turn, to earlier Western sanctions on Chinese officials accused of involvement with mass detentions and human rights abuses targeting the Muslim Uyghur population in north-western China. Accordingly, the future of the Comprehensive Agreement on Investment between China and the European Union is uncertain at this point.

Overall, the character of investor-state dispute settlement (ISDS) provisions in this new generation of IIAs varies widely as a reflection of the current state of flux prevalent in investment treaty design and ISDS practice. In this regard, The United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform) continued to advance its mandate to explore possible options for reform of the ISDS system by working toward the development of a workplan and project schedule extending through 2026 (although no consensus was reached during its 40th session on 4-5 May 2021 in Vienna). This conversation is expected to continue as calls for reform abound, including in such respected voices as that of Singapore's Chief Justice Sundaresh Menon, who stated that "diverse concerns suggest a mounting loss of public trust and confidence in the system of investment arbitration" during his May 2021 Lalive Lecture.

One key recent development related to the ongoing public debate around the future of ISDS is Ecuador's 21 June 2021 re-signing of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the ICSID Convention), which established ICSID to facilitate institutional oversight of investor-state arbitration and contains, *inter alia*, the agreement of ICSID member states to the recognition and enforcement of ICSID arbitral awards under the ICSID Convention. This action represents a dramatic turnabout from Ecuador's 2009 denunciation and 2010 withdrawal from the ICSID Convention as well as its 2017

announcement that all of its BITs would be terminated. This interesting recent development may hold some significance as an indicator of the future path to be taken by states that are critical of ISDS and similarly considering withdrawal from the ICSID Convention.

Within this overall context, the future of the Energy Charter Treaty (ECT) has been a subject of ongoing discussion as well. On 2 September 2021, the Court of Justice of the European Union (CJEU) issued an opinion in the case of *Komstroy v Moldova* (Case C-741/19 or *Komstroy*) in which the CJEU held that "Article 26(2)(c) ECT [expressing State consent to investor-state arbitration under the ECT] must be interpreted as not being applicable to disputes between a Member State [of the European Union] and an investor of another Member State [of the European Union] concerning an investment made by the latter in the first Member State" (Komstroy Judgment at [66] in English translation). In finding that the contract for the supply of electricity at issue in that case did not qualify as an investment under the ECT, the *Komstroy* Court also held more generally that "a mere supply contract is a commercial transaction which cannot, in itself, constitute an 'investment' within the meaning of Article 1(6) ECT" (Komstroy Judgment at [79] in English translation). This significant development follows the 3 March 2021 issuance of a non-binding opinion by Advocate General Maciej Szpunar in the same case, finding that the CJEU's 6 March 2018 judgment in *Slovak Republic v. Achmea B.V.* (Case C-284/16), which found that the arbitration clause in Article 8 of the 1991 Netherlands-Slovakia BIT was incompatible with EU law, should also apply with similar effect to intra-EU disputes under the ECT. While the full implications of the CJEU's *Komstroy* judgment for future investment structuring and disputes in the energy sector may not be known for some time, many commentators consider the decision to have dealt a significant blow at least to reliance upon the ECT in intra-EU disputes arising under that multilateral agreement. The European Commission and member states also continue to negotiate the potential modernization of the ECT, including with respect to its dispute settlement provisions, and will engage with the eighth negotiation round of this process from 9-11 November 2021.

While some of the new IIAs mentioned above continue to provide foreign investors with recourse to investor-state arbitration (e.g., the Israel - United

Arab Emirates BIT), others eliminate ISDS altogether (e.g., the EU-UK TCA instead features state-to-state arbitration perhaps comparable to that of the WTO system) or merely agree that the state parties involved will continue to negotiate the nature of such provisions in the coming years (e.g., this is the case with the RCEP among Asia-Pacific nations). Given the current uncertainty over the future evolution of the investment treaty landscape, it will remain necessary for host states to consider and for foreign investors to confirm the availability of investment protection and access to ISDS on a case-by-case basis in each relevant jurisdiction for the foreseeable future.

PROPOSED AMENDMENTS TO THE ICSID RULES AND REGULATIONS NEARING VOTE OF ICSID MEMBER STATES

ICSID, a part of the World Bank Group, is the world's leading international investment dispute settlement institution, and the ICSID Rules and Regulations (including the ICSID Rules of Arbitration) are the most commonly used procedural rules in ISDS today. For the first time since the last amendments entered into force in April 2006, ICSID is proposing a comprehensive amendment of the Rules and Regulations for ICSID Convention and ICSID Additional Facility proceedings. On 15 June 2021, ICSID released its fifth working paper (WP #5) on the rule amendments, indicating that WP #5 "reflects the emerging consensus developed over the last four years of meetings, discussions and drafting" (WP #5, p. 1). ICSID describes the purposes of the proposed rule changes in terms of modernization of the rules (based on case experience), increased time-effectiveness and cost-effectiveness, and increased use of technology for document transmission and streamlined case procedures to make ICSID procedures less paper-intensive. Key amendments are proposed to address the following:

- Improved rule drafting (plain, modern, gender-neutral language)
- Reduced time and cost from electronic filing of documents
- New proposed time limits to expedite cases
- Listing appropriate authority contact details for the ICSID contracting states
- Checklist of instructions for case filing
- Obligation to disclose third-party funding details
- Proposed enhanced arbitrator declarations of independence and impartiality
- Expedited timelines for the first session and issuance of the first procedural order
- Allowance of bifurcation
- Expedited rendering of awards
- Deemed consent for the publication of awards absent timely objection
- Expedited proceedings
- Expanded access to the ICSID Additional Facility Rules

- Inclusion of Regional Economic Integration Organizations

In addition to the amendments described above, ICSID is also proposing "new stand-alone rules for fact-finding and mediation in investment disputes." ICSID member states were invited to submit final written comments on the draft amendments in WP #5 by the end of August 2021, and ICSID intends to place the amended rules before the ICSID membership by the end of 2021 with a view toward having the amendments in place by early 2022.

SELECTION OF SIGNIFICANT AWARDS OR DECISIONS RELATED TO INVESTOR-STATE ARBITRATION

While numerous developments in recent investor-state arbitration practice merit acknowledgement, we highlight the following as developments of particular interest:

Cairn Energy PLC and Cairn UK Holdings Ltd. v. The Republic of India, PCA Case No. 2016-7.

In *Cairn Energy PLC and Cairn UK Holdings Ltd. v. The Republic of India*, PCA Case No. 2016-7 (*Cairn*), the claimants argued that the Government of India had retroactively applied certain tax measures introduced via the 2012 amendment of Section 9(1)(i) of the Income Tax Act (1961) to transactions undertaken by the claimants in 2006. The Indian Income Tax Department had issued a notice of demand for payment in a principal amount of approximately US$1.6 billion plus interest (i.e., approximately US$4.4 billion when the notice of demand was issued in 2016) (Award at [186]).

On 21 December 2020, the Cairn Tribunal found that India had "failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2)" of the UK-India BIT (1995) and ordered India to pay compensation

of over US$1.2 billion plus interest as well as the costs of the arbitration and legal fees (Award at [2032]). Since that time, the *Cairn* claimants have sought enforcement of the award against India, including by seeking to seize the assets of India's flagship airline Air India Ltd. via litigation in New York (in addition, Devas Multimedia has also reportedly sought enforcement of a separate arbitral award rendered against the Government of India in relation to the assets of Air India Ltd. (*see CC/Devas (Mauritius) Ltd., Devas Emps. Mauritius Private Ltd., and Telcom Devas Mauritius Ltd. v. The Republic of India*, PCA Case No. 2013-09)).

In May 2021, Reuters reported that "India has asked state-run banks to withdraw funds from their foreign currency accounts abroad, two government officials and a banker said, as New Delhi fears Cairn Energy … may try to seize the cash after an arbitration ruling in a tax dispute" (s*ee* **https://www.reuters.com/world/india/exclusive-india-asks-state-banks-withdraw-cash-held-abroad-over-cairn-dispute-2021-05-06/**). More recently, however, it has been reported that the Lok Sabha, the lower house of India's bicameral legislature, has taken legislative steps to scrap the controversial retroactive taxation at the heart of the dispute and that Cairn Energy executives and Indian finance ministry officials have been meeting to discuss potential settlement of the matter.

The Russian *Fed'n v. Hulley Enters. Ltd., et al.*, Supreme Court of The Netherlands, Case No. 20/01595.

On 23 April 2021, Dutch Advocate General Paul Vlas recommended to the Supreme Court of the Netherlands that Russia's application to set aside three arbitral awards with damages awarded to former shareholders of the Yukos Oil Co. in the amount of approximately US$50 billion (the Yukos Awards) should be dismissed. The 2014 Yukos Awards have been described as "historic", comprising the largest damages award in the history of international arbitration (*see Hulley Enters. Ltd. (Cyprus) v. The Russian Fed'n,* PCA Case No. AA 226, Y*ukos Universal Ltd. (Isle of Man) v. The Russian Fed'n,* PCA Case No. AA 227, and *Veteran Petroleum Ltd. (Cyprus) v. The Russian Fed'n*, PCA Case No. AA 228 (collectively, *Yukos*)). In 2016, the *Yukos* Awards were set aside by the District Court of The Hague due to concerns arising from the fact that Russia had signed but not ratified the underlying Energy Charter Treaty (ECT) upon which the jurisdiction of the *Yukos* Tribunal was based. The Dutch Court of Appeal reversed that decision, however, finding that the *Yukos* Tribunal had properly exercised jurisdiction. Russia then proceeded with the current action before the Dutch Supreme Court. Whether or not the Dutch Supreme Court follows Mr. Vlas' recent recommendation, the "historic" *Yukos* saga appears to be nearing a crucial moment.

Bridgestone Licensing Servs., Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34.

On 14 August 2020, the ICSID tribunal in *Bridgestone Licensing Services, Inc.* (BSLS) and *Bridgestone Americas, Inc.* (BSAM) *v. Republic of Panama*, ICSID Case No. ARB/16/34 (*Bridgestone*) considered a dispute arising under the United States-Panama Trade Promotion Agreement (2007) (the TPA). The *Bridgestone* claimants argued that Panama had breached its obligation to provide fair and equitable treatment to their covered investments under the TPA in that, inter alia, the Supreme Court of Panama had unfairly or inequitably issued a judgment devaluing certain trademarks with resultant damage to the claimants. Interestingly, the *Bridgestone* Tribunal found that "it is open to BSAM to invoke the delict of denial of justice in relation to litigation in which BSLS but not BSAM was a party" under the investment protection provisions of the TPA (Award at [178]). This finding may be of interest to claimants in future investment treaty disputes in which a denial of justice is alleged to have breached public international law obligations even where a claimant is not formally party to the relevant proceedings in which a denial of justice is alleged to have occurred. Ultimately, in the instant case, the Bridgestone Tribunal dismissed the claim before it on the basis of the merits.

ISP/LDCS FACILITATES PRO BONO SUPPORT IN INTERNATIONAL INVESTMENT LAW & ARBITRATION

The Investment Support Programme for Least Developed Countries (ISP/LDCs) is implemented by the International Development Law Organization (IDLO) and financed by the European Union as well as the Kuwait Fund for Arab Economic Development. ISP/LDCs was designed by the IDLO in collaboration with the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS). In collaboration with the private sector, ISP/LDCs provides technical and legal advice and assistance to least developed countries and related entities on investment-related matters, including with regard to investor-state negotiations, dispute settlement, and complementary capacity building. Further information on ISP/LDCs is available via the IDLO's **website**.

In early 2021, K&L Gates conducted capacity-building sessions in international investment law and arbitration for the Ministry of Trade, Industry, Regional Integration & Employment of the Government of The Gambia in collaboration with ISP/LDCs. These capacity-building sessions highlighted such key topics in public international law as treaty interpretation, customary international law, state attribution, state responsibility, treaty negotiation, investor-state dispute settlement, and the contemporary investment treaty landscape. Additional details on K&L Gates' collaboration with ISP/LDCs are available **here**.

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FACT WITNESS EVIDENCE IN INTERNATIONAL ARBITRATION: IS CHANGE ON THE HORIZON?

By Ian Meredith (London) and Chrissie L. Fox (London)

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In recent years, the International Chamber of Commerce (the ICC) has turned its attention to the preparation and testing of fact witness evidence in international arbitration and enlisted the help of a task force to investigate whether fact witness evidence is fit for purpose (the Task Force). The work of this Task Force has culminated in a recent report published by the ICC on "The Accuracy of Fact Witness Memory in International Arbitration" (the Report). The Report picks up on concerns that have long been held by many practitioners and which have been expressed by a number of commentators—in essence, that contemporaneous documentary records often speak louder than increasingly finely polished fact witness statements crafted by the parties' counsel. In this alert, we summarise the key recommendations made by the Report and consider how they might contribute to changes in the practice of international arbitration.

THE REPORT

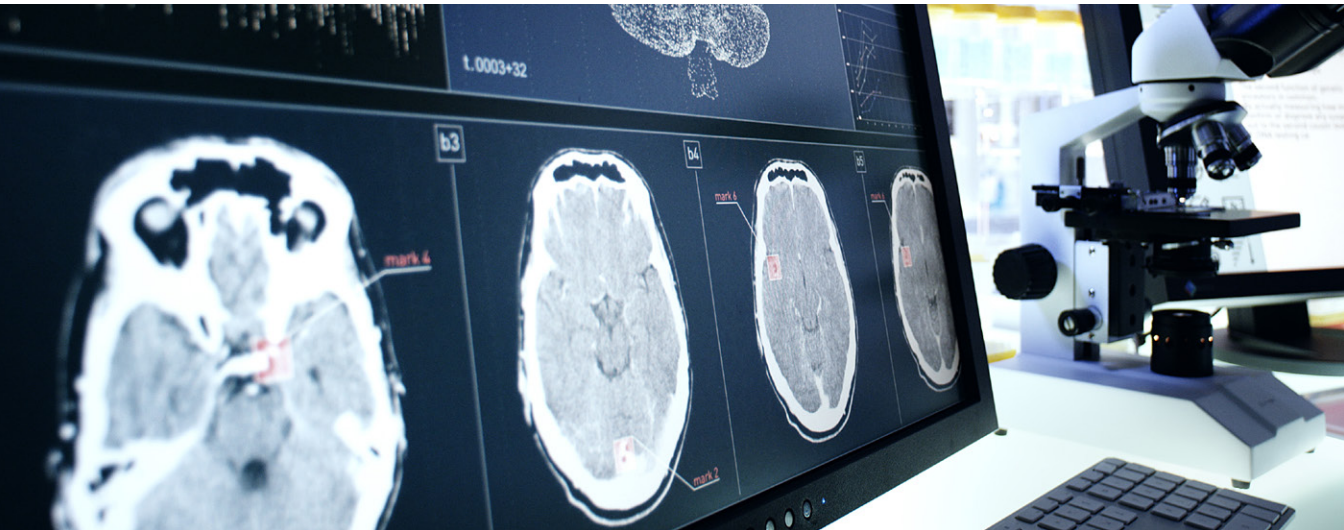
The ICC Commission created the Task Force on Maximising the Probative Value of Witness Evidence, in response to a guest speech delivered by Toby Landau QC, which highlighted the fragile and malleable nature of human memory and questioned whether commonly adopted practices in international arbitration are unwittingly corrupting the fact witness evidence that arbitral tribunals rely on for the fair resolution of disputes. The Task Force's mandate was "to look at the science (with input from eminent psychologists specialising in human memory), at arbitral practice (with input from Task Force members specialising in international arbitration around the globe) and to consider whether modifications could be made to current practices, or alternative approaches could be adopted to enhance the probative value of fact witness evidence in international arbitration…".

The Report reinforces the value and importance of witness evidence in international arbitration, but considers the reliability of memory issues on the value of that evidence and sets out recommended steps and measures that all parties can take to seek to preserve the accuracy of fact witness evidence.

WHY IS THE REPORT RELEVANT TO THE INTERNATIONAL ARBITRATION COMMUNITY?

Fact witness evidence has historically played a central role in international arbitration, particularly with parties from common law jurisdictions. Written witness statements have become a mainstay of arbitral proceedings (U.S. style depositions and direct oral examination play only a very limited role) and, for many participants, oral cross examination of fact (and expert) witnesses is considered to be one of the main functions of a 'final' hearing. Moreover, as the Report highlights, the decision of the arbitral tribunal on the merits of the case will often turn, in varying degrees, on the witness evidence that has been presented. Unsurprisingly, the preparation and examination of fact witness evidence is often time consuming for all those involved, and the amount of time committed often has a significant impact on the overall cost of proceedings. The time, effort, and cost in preparing and examining fact witness evidence is often justified on the basis that the evidence assists the tribunal in reaching a just decision in the case, but that justification is called into question if the evidence presented is not as reliable as the parties contend it to be.

The "best practices" for preparing fact witness evidence adopted by arbitration practitioners were not developed with the science of human memory in mind and that science suggests that witness memory may be imperfect and easily distorted. Accordingly, the Report considers whether fact witness evidence presented in international arbitration is as reliable as the participants in the process (and, most importantly, the tribunal) believe it to be and, thus, whether the time and expense involved in producing such evidence can continue to be justified going forward.



MEASURES TO PRESERVE THE ACCURACY OF WITNESS MEMORY

Section V of the Report sets out a detailed list of the various steps that can be taken by all involved (including in-house counsel, external counsel, and the tribunal) to mitigate or eliminate the factors that may distort the memory of witnesses and to better assess the weight that should be given to fact witness evidence in light of such distortions.

These steps include:

- Measures that can be taken to reduce distorting influences and their effect, for example:
  - Encouraging contemporaneous record keeping.
  - Discouraging potential fact witnesses from discussing the matter amongst themselves unnecessarily.
  - Interviewing potential fact witnesses separately and at the earliest opportunity.
  - Reminding witnesses that they are only required to testify on their personal knowledge of events and ensuring that the witness distinguishes between what they remember and what they have read or been informed by others.
  - Asking open-ended, unbiased, and non-leading questions of witnesses when preparing witness statements and avoid seeking to reinforce tentative or unsure responses.
  - Asking the witness, where possible, to prepare the first draft of their statement and ensuring that the first draft of any witness statement is prepared in the witness' first language.
- Steps that allow the parties and tribunal to identify and weigh the distorting influences that might exist, for example:
  - Being aware of the potential for memory to be impacted and distorted by misleading information after the event.
  - Including information about the way in which written statements were prepared and the extent to which the witness has considered or discussed evidence with the other witnesses.

Although the Task Force's recommendations provide a useful statement of best practice, they are not exhaustive, nor are they intended to be "one-size-fits-all." Each dispute will turn on its facts and practitioners will need to evaluate what steps are appropriate and proportionate to the evidence in their case.

IMPLICATIONS ON THE PRACTICE IN INTERNATIONAL ARBITRATION

The science behind human memory is an incredibly complex topic, but it is an area that has already started to influence the preparation and testing of fact witness evidence in other dispute resolution contexts. For example, the accuracy and probative value of witness evidence has also been under scrutiny in the Business and Property Courts of England and Wales (the Courts), who have recently issued a new Practice Direction in relation to fact witness evidence at trial. The Practice Direction came into force on 6 April 2021 and requires parties to take additional steps in preparing fact witness evidence for use at trial, many of which have been developed taking into consideration the science behind human memory (for further information, please see **our prior alert**.)

For the time being at least, the Report rejects the suggestion that fact witness evidence be abandoned in favour of documentary evidence and, instead, concludes that fact witness evidence is a highly regarded feature of contemporary international arbitration that will likely continue to play a central role in arbitral proceedings for the foreseeable future. Although the Report has taken an important first step in focusing the attention of the international arbitration community on fact witness evidence, it is possible that the Report may be just the start of a new chapter on exploring the probative value of, and alternatives to fact witness evidence in international arbitration.

A key question remains to what extent tribunals will seek to take the lead in directing how fact witness evidence is to be prepared. In the Courts, it is plainly far easier for the judiciary to issue Practice Directions that are applicable across all cases commenced in that court. In international arbitration, absent tribunals taking the lead, it is problematic to expect individual law firms to drive change by unilaterally adjusting their own practices if that would have the result that there is an asymmetric approach taken to fact witness evidence preparation in each case, particularly as their own clients may see their cases adversely impacted. It will be interesting to see over the coming months whether more forward thinking arbitrators and practitioners seize upon the Report to drive more developed language defining the approach to fact witness statement preparation that will find its way into Procedural Orders.

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SWISS ARBITRATION REVAMPED - NEW ARBITRATION CENTRE AND AMENDED SWISS RULES

By Dr. Johann von Pachelbel (Frankfurt)

This article was previously published as an Arbitration World Alert and is reproduced here as part of the e-magazine compendium version of Arbitration World.

Two new developments relating to Swiss arbitration have occurred, effective 1 June 2021. First, the Swiss Chambers' Arbitration Institution (SCAI), i.e., the Swiss arbitration organization created in order to administer arbitrations under the Swiss Rules of International Arbitration (the Swiss Rules), was restructured and renamed as the "Swiss Arbitration Centre." The new institution is a Swiss company whose shareholders are the Swiss Arbitration Association (ASA) and the Swiss Chambers of Commerce participating in SCAI. Second, the creation of the Swiss Arbitration Centre prompted a review of the Swiss Rules, last overhauled in 2012. The new Swiss Rules, now referred to as the "Swiss Rules of International Arbitration of the Swiss Arbitration Centre" (2021 Swiss Rules), apply to all arbitrations commencing on or after 1 June 2021 (Article 1.2, 2021 Swiss Rules). Arbitration agreements referring to the SCAI or to one of the Swiss Chambers of Commerce will continue to be valid and binding and will be recognized by the Swiss Arbitration Centre as the legal successor of SCAI.

While the rework of the Swiss Rules contains no fundamental changes, there are interesting features from a user's perspective to cope with recent technological and other developments in international arbitration, as well as an overall desire to streamline arbitration proceedings under the new rules. The services provided by the Swiss Arbitration Centre and its proposed model arbitration clause are accessible via the following **website**.

STRENGTHENED ROLE OF THE SWISS ARBITRATION CENTRE

The revised Swiss Rules give the Swiss Arbitration Centre a more prominent role. For instance, the Swiss Arbitration Centre's Secretariat (the Secretariat) shall now receive electronic copies of all communications (Article 16.2, 2021 Swiss Rules), and it is no longer the tribunal but the Secretariat who sends the originals of the arbitral award to the parties (Article 34.5, 2021 Swiss Rules) and holds the deposits paid by the parties (Appendix B, Section 4.1, 2021 Swiss Rules). Further, it is for the Swiss Arbitration Centre to decide if a case will proceed if the respondent has not submitted an answer to the notice of arbitration, if the respondent objects against the arbitration being administered under the rules, whether there is manifestly no arbitration agreement referring to the Swiss Rules, or whether the arbitration agreements are "manifestly incompatible" if more than one contract is invoked (Article 5, 2021 Swiss Rules). However, if the Arbitration Court of the Swiss Arbitration Centre (the Court) decides to administer the case, the tribunal retains the full power to rule on any jurisdictional issue, including an objection that claims brought under different arbitration agreements should not be determined together (Articles 5.2 and 23.1, 2021 Swiss Rules).

ADAPTATION TO TECHNICAL DEVELOPMENTS AND TRENDS

The new 2021 Swiss Rules, boosted by the COVID-19 pandemic, have been adapted to modern technological trends: The notice of arbitration and an answer to such notice may be submitted only electronically to the Secretariat, unless the Secretariat requests otherwise or the claimant requests that the Secretariat sends a hard copy to the other party or parties (Articles 3.1 and 4.1, 2021 Swiss Rules). Further, the revised rules now explicitly allow for hearings to be held "remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties" (Article 27.2, 2021 Swiss Rules). In addition to remote hearings, and in accordance with the previous 2012 Swiss Rules, the new 2021 Swiss Rules continue to provide for the possibility of witnesses and experts to be virtually examined: "The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)." (Article 27.5, 2021 Swiss Rules). The new rules also include an obligation upon the tribunal to discuss data protection and cybersecurity-related issues with the parties soon after having received the file from the Secretariat (Article 19.2, 2021 Swiss Rules).

PROCEDURAL INNOVATIONS REGARDING MULTIPARTY AND MULTI CONTRACT ARBITRATIONS

Based on an increased number of multiparty and multi contract arbitrations, the 2021 Swiss Rules now contain enhanced rules on cross-claims, joinder of parties, and the intervention of parties (Article 6, 2021 Swiss Rules). This refers to situations where, for example, a respondent asserts a claim against a co-respondent (cross-claim) or against an additional party (joinder) or where an additional party requests to participate in the arbitration by asserting a claim against a party to the pending arbitration (intervention). Prior to the tribunal's constitution, a separate notice of claim against the targeted party shall be submitted to the Secretariat. Following the arbitral tribunal's constitution, and upon consultation with the other parties involved, it is for the tribunal to decide on the admissibility of the notice, taking into account all relevant circumstances (Articles 6.2 and 6.3, 2021 Swiss Rules). Also, it is for the tribunal to decide on a third person's request to participate in the proceedings "in a capacity other than an additional party" and on its modalities (Article 6.4, 2021 Swiss Rules). Finally, the 2021 Swiss Rules now provide an express possibility of submitting a request to consolidate arbitration proceedings to the Court (Article. 7, 2021 Swiss Rules).

LIMITATIONS REGARDING APPOINTMENT OF NEW PARTY REPRESENTATIVE

In order to secure the integrity of the proceedings, and to avoid risks of jeopardizing the tribunal's impartiality and independence, the 2021 Swiss Rules include a new rule clarifying that "[p] roof of authority of a representative may be requested at any time. The arbitral tribunal may oppose the appointment of a new representative where this would risk jeopardising the impartiality or independence of the arbitral tribunal" (Article 16.4, 2021 Swiss Rules).

MEANS OF ACCELERATION OF THE PROCEEDINGS

The 2021 Swiss Rules contain new rules aimed at an acceleration of the proceedings and providing flexibility. In cases where the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multiparty proceedings, the Court will no longer provide fixed 30-day periods to each party to designate an arbitrator, but can—on consideration of the individual case—"set a time limit for the Claimant and for the Respondent (or group of parties) to each designate an arbitrator" (Article 11.4, 2021 Swiss Rules) allowing for more expeditious appointment of the arbitral tribunal. Once appointed, the tribunal is now obliged to hold a case management conference "as soon as practicable after receiving the file from

the Secretariat" (Article 19.2, 2021 Swiss Rules) and the tribunal shall, at the initial conference or promptly thereafter, prepare a procedural timetable and hold further organizational conferences as appropriate to ensure efficient case management (Articles 19.3 and 19.4, 2021 Swiss Rules).

Unless otherwise agreed to by the parties, the 2021 Swiss Rules further entitle the Court to refer the case to a sole arbitrator provided the complexity of the subject matter and the amount in dispute or other circumstances do not justify the case being referred to a three-member tribunal (Article 9.3, 2021 Swiss Rules). Where the amount in dispute does not exceed CHF1 million (approximately US$ 1.1 million at current exchange rates) the default rule is that the dispute shall be decided in expedited proceedings by a sole arbitrator (Articles 19.4 and 42 (et seq.), 2021 Swiss Rules).

FACILITATION OF ALTERNATIVE DISPUTE RESOLUTION

While, like the 2012 Swiss Rules, the 2021 Swiss Rules provide for the tribunal's potential role as settlement facilitator (Article 19.5, 2021 Swiss Rules), the revised rules now expressly encourage the search for alternative ways of resolving the dispute even in parallel to a pending arbitration and set out that at "any time during the arbitration proceedings, the parties may agree to resolve their dispute, or any portion of it, by mediation, including under the Swiss Rules of Mediation, or any other forms of alternative dispute resolution" and that arbitration proceedings will be stayed during such period unless the parties agree otherwise (Article 19.6, 2021 Swiss Rules).

COSTS OF PROCEEDINGS

Finally, the schedule of costs has been revised in light of the above-described increased administrative workload of the Secretariat under the 2021 Swiss Rules. At the same time, the fees of the arbitrators have been slightly reduced. The costs and fees can be assessed with the help of a cost calculator accessible on the Swiss Arbitration Centre's **website**.

SUMMARY

Notwithstanding that the changes to the former "Swiss Rules" are limited in scope, their fine-tuning and modernization undoubtedly enhance flexibility and efficiency. The establishment of the Swiss Arbitration Centre and the reinforcement of its role as an institution by bringing together the competencies and resources of the SCAI and ASA under one roof, and by offering a broad range of services in administering the proceedings, can be expected to further strengthen Switzerland's position as a leading forum of domestic and international arbitration.

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DUBAI COURT OF CASSATION FINDS THAT THE INTERESTS OF JUSTICE CAN OVERRIDE AN AGREEMENT TO ARBITRATE IN CIRCUMSTANCES WHERE A DEPENDENT CONTRACT DOES NOT ALSO PROVIDE FOR ARBITRATION

By Jennifer Paterson (Dubai) and Mohammad Rwashdeh (Dubai)

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A recent judgment from the Dubai Court of Cassation indicates that the interests of justice may require disputes arising out of separate but related contracts (not all of which contain arbitration agreements) to be determined together by a court, thereby rendering non-binding an otherwise valid and enforceable arbitration agreement.

The Dubai Court of Cassation in Case No. 290/2021 held that disputes arising out of multiple contracts (only one of which contained an arbitration agreement) relating to the same transaction were so closely connected that it was in the interests of justice, and to avoid inconsistent judgments, that the disputes should be determined in one forum. As the arbitration agreement was not binding on all of the parties, it was not possible for the whole dispute to be determined by arbitration. The Court held that the Dubai Court of First Instance was therefore the appropriate forum to resolve the entire dispute. Accordingly, notwithstanding the existence of a valid arbitration agreement in one of the contracts, the Court held that the arbitration agreement was not binding in respect of this dispute.

BACKGROUND FACTS

A developer (Developer) engaged a consultant (Consultant) to provide engineering, design and supervisory services in respect of the work of a contractor (Contractor). The contract between the Developer and the Consultant contained an arbitration clause, but the contract between the Developer and the Contractor did not.

The Developer filed a claim in the Dubai Court of First Instance against the Contractor and the Consultant jointly

and severally seeking damages for harm suffered as a result of the Consultant having certified the Contractor's work as being complete, when it was in fact not complete.

The Court of First Instance accepted the case against the Contractor but dismissed the case against the Consultant on the basis of lack of jurisdiction due to the arbitration agreement in the contract between the Developer and the Consultant.

The Developer appealed the decision to the Court of Appeal, which overturned the judgment, rejected the jurisdictional challenge and remitted the case back to the Court of First Instance to consider the case against the Consultant.

The Dubai Court of Appeal stated that, because the agreement between the Developer and the Consultant included providing design and supervision of enabling work that was carried out by the Contractor, it was necessary to determine whether the Contractor was at fault before it could determine whether the Consultant had breached its obligations. Therefore, in the interests of justice and to avoid contradictory judgments, the Court held that the disputes should be adjudicated in one forum. As the arbitration agreement in the contract between the Developer and the Consultant was not binding on the Contractor, the claims could not all be determined by arbitration. It was held therefore that the forum with jurisdiction was the Court.

The effect of this determination was that the Consultant was obliged to have its dispute determined by the Court and its otherwise valid and enforceable arbitration agreement with the Developer was not binding in these circumstances.

The Consultant appealed the judgment to the Dubai Court of Cassation and argued that the contract between the Consultant and the Developer was separate to the contract between the Developer and the Contractor and that there was no connection between the obligations of the Consultant and the obligations of the Contractor.

The Court of Cassation upheld the judgment of the Court of Appeal. The Court of Cassation agreed with the Court of Appeal's finding that, where the disputes related to a transaction that was the subject of multiple contracts and they were so closely connected that they should not be divided and determined separately, in the interests of justice and to avoid inconsistent judgments, the disputes should be adjudicated by one forum. As the arbitration agreement was only binding on the signatories to the contract containing the arbitration clause, it was not possible for the whole dispute to be determined by arbitration. Instead, the forum with jurisdiction was the court with original competence.

In reaching its conclusion, the Court of Cassation confirmed that under UAE law an agreement to resolve disputes by arbitration is generally still considered an exceptional agreement, and so arbitration

agreements are to be construed narrowly and strictly. Moreover, as arbitration agreements are based on the parties' consent, they cannot bind third parties who have not consented.

COMMENT

It is worth noting that the Dubai Court of Cassation's decision in this case turned on a specific set of facts, where the Court considered that one defendant's liability was dependent upon first establishing the fault of the other defendant. In these circumstances, the Court held that the claims should be heard together notwithstanding that they arose out of separate contracts. As the arbitration agreement between the Developer and the Consultant could not bind the Contractor, the Court held that the forum with jurisdiction was the court of original competency.

This decision highlights the importance of drafting construction contracts in light of the terms of any other dependent contracts. If parties wish for disputes to be resolved by arbitration, care should be taken to ensure that all dependent contracts contain compatible arbitration agreements, and, if appropriate, to include language which expressly reflects the parties' intention that related disputes shall be heard together in a single arbitration proceeding, or in concurrent arbitration proceedings with the same arbitral tribunal.

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EXPERT EVIDENCE IN INTERNATIONAL ARBITRATION: COMMON CRITICISMS AND INNOVATIVE SOLUTIONS

By Ian Meredith (London) and Louise Bond (London)

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An International Chamber of Commerce (ICC) task force was established to investigate whether witness evidence is fit for purpose. As discussed in our **alert**, their recently published report articulated a number of concerns held by practitioners about the probative value (or lack thereof) of overly-polished and lengthy fact witness statements that are carefully crafted by counsel. There may be change on the horizon for the use of fact witness evidence in international arbitration, but might the use of expert opinion evidence in international arbitration be similarly ripe for change?

There are certainly concerns regarding the value of expert evidence as currently utilised by parties in international arbitration, particularly in the case of party-appointed experts and concerns as to their impartiality. On 28 May 2021, Lord Hodge delivered the keynote speech at the Expert Witness Institute's **annual conference**, and he referred to a 2019 survey in which:

- Twenty five per cent of experts reported that they had felt pressurised to change their report in a way that damaged their impartiality; and
- Forty one per cent of experts indicated that they had come across other expert witnesses that they considered to be a 'hired gun.'

With many international arbitrations involving some element of expert testimony, and a clear preference in these cases for party-appointed experts, these survey results are worrying. In 2012, an **International Arbitration Survey** found that, where expert witnesses were involved, they were party-appointed 90% of the time, but less than half of respondents found expert witnesses to be more effective when appointed by the parties.

CRITICISMS OF THE CURRENT USE OF EXPERT WITNESSES

Concerns regarding the way in which party-appointed experts are currently used include:

- As indicated above, concerns regarding independence and impartiality. Party-appointed experts can be perceived to be additional advocates for the party that appointed them.
- There is no clear regulatory framework applicable to party-appointed experts in most national or institutional procedural rules. Many parties make use of the International Bar Association (IBA) Rules of Evidence, but this is voluntary and provides broad guidance rather than strict rules.
- Party-appointed expert reports have been criticised for being too long and complex, and lacking clarity.
- Lack of coordination between party-appointed experts can lead to reports being exchanged simultaneously that, like 'ships passing in the night,' cover different issues or approach the same issues in a fundamentally incompatible way.

One might suggest that the answer is to increase the use of the existing, but rarely preferred, practice of using tribunal-appointed experts. However, this practice has its own potential pitfalls:

- Tribunal-appointed experts are often distrusted by the parties. This undermines trust in the arbitration proceedings as a whole, and it should also be borne in mind that the parties will be required to pay for the tribunal-appointed expert.
- In particular, in certain jurisdictions (for example, in the Gulf Cooperation Council), single joint experts are routinely appointed by courts. Parties often harbour concerns about whether a tribunal-appointed expert may become, by default, the arbiter of fact or technical issues—effectively resulting in the delegation of the tribunal's decision-making function to the expert. This, at worst, may lead to arguments in respect of the validity of the final award and lead to challenges to the award and resistance to enforcement. Other concerns may also arise about undue influence that could be placed on a tribunal-appointed expert.
- In part as a result of the lack of trust identified above, many parties appoint their own experts in any event, in order to advise on any expert reports produced by the tribunal-appointed expert, and to assist in questioning the tribunal-appointed expert or making submissions as to the tribunal-appointed expert's findings, for example.

- The tribunal would have to analyse the issues in sufficient detail to be in a position to appoint an appropriate expert at a relatively early stage of proceedings.
- There can be a less effective flow of the complete relevant factual background from the parties when experts are appointed by the tribunal and communications are conducted with the tribunal and all parties in copy.

THE RESPONSE OF ARBITRAL INSTITUTIONS

In recent years, various arbitral institutions and arbitration community groupings have tried to address the perceived pitfalls associated with the use of party- and tribunal-appointed experts in international arbitration.

- In the absence of a clear procedural framework in institutional or national laws, the IBA Rules on the Taking of Evidence (last updated in December 2020) have provided fairly detailed procedures for experts to follow and, although these are optional and framed in terms that are more akin to guidance than optional strict rules, parties often agree to incorporate the framework into their procedural orders. The IBA Rules also encourage the use of particular tools to increase the efficiency of expert evidence, including pre-hearing meetings between experts to confer and attempt to reach agreement.
- In 2007, the ICC produced a report on reducing time and costs in arbitration, which was most recently updated in 2018. Unsurprisingly, inefficient use of expert evidence was highlighted as one issue that can significantly increase the time and costs of an arbitration. The ICC report encourages tribunals to work from the presumption that expert evidence is not required and,

in the event expert evidence is required, reminds parties that the ICC International Centre for Alternative Dispute Resolution can propose one or more experts in a particular field of activity at no additional cost and with no obligation on the parties to use that/those expert(s). The ICC report also reminds all parties to consider whether a single expert appointed by the tribunal, or jointly by the parties, may be more efficient.

- The London Court of International Arbitration (LCIA) published a note on experts in international arbitration in 2018, which notes that "The traditional role for experts, in which they draft an expert report for a party and then testify at a hearing, has been joined by a number of different methods to improve the quality and efficiency of decision-making. These methods, while providing opportunities for experts, parties, and arbitrators, do not necessarily result in experts being involved optimally." The LCIA suggests that experts working together throughout the process, and witness conferencing at a hearing, can help to narrow points of disagreement. Many practitioners with experience of witness conferencing emphasise the central importance of the tribunal properly preparing and then taking ownership of the "hot tubbing" phase. Like the ICC, the LCIA reminds the parties that it may potentially be more effective for the tribunal to appoint an expert to ensure a non-partisan view. Furthermore, the LCIA considers that "a natural extension of having a tribunal-appointed expert is to have an expert as a member of the tribunal," not least to overcome concerns that the tribunal has delegated its fundamental decision-making responsibility to a third party. In disputes where technical issues have the potential to be as determinative as legal ones, this can ensure that the tribunal has the necessary legal and technical expertise to decide the dispute. However, tribunal selection is already a highly contentious area of arbitration and the selection of an expert may lead to significant disputes between the parties regarding the type of expert to be appointed, how and by whom the expert will be appointed, and whether the expert will be appointed as a co-arbitrator (necessitating one party compromising its free choice) or the chair, thus impacting any potential time and cost savings. In our view, this practice has worked best on the fairly rare occasions when the institution has been empowered to select all three members of the tribunal.

- Recognising the potential value of expert witness conferencing in hearings, the Chartered Institute of Arbitrators (CIArb) released guidelines for witness conferencing in April 2019. The CIArb notes that conferencing makes it easier to compare experts' different views on an issue, and for experts to challenge each other's views. Furthermore, the quality of evidence may be improved more generally, because an expert will be less willing to make technically weak or incorrect assertions in front of another expert. However, there are also drawbacks to this approach. In addition to the need for full tribunal engagement and commitment to the process (as noted above) witness conferencing may result in shorter hearings, but it can also lengthen the hearing and more time and costs may be expended prior to the hearing in preparing for the expert conferencing. The quality of evidence may also be negatively affected if experts are hostile to one another, or one party's expert is more reticent due to differing levels of experience, cultural factors, or a pre-existing relationship between the experts.
- In 2018, a working group with representatives from around 30, mainly civil law, countries produced the Prague Rules on Efficient Conduct of Proceedings in International Arbitration. While the Prague Rules do not preclude the use of party-appointed experts, the focus is heavily on the use of a tribunal-appointed expert and how this might best be achieved. The Prague Rules provide for the tribunal to (i) establish requirements for potential experts, (ii) seek suggestions from the parties that will not bind the tribunal, and then (iii) appoint a candidate or a joint expert commission consisting of multiple candidates. The Prague Rules require the tribunal to continually monitor the expert(s)' work and keep the parties informed of its progress. Whilst it is still early days, the Prague Rules do not yet seem to have become established as a commonly used alternative to the IBA Rules of Evidence.
- Other ideas that are common to many rules and guidelines include:
  - Setting out as early as practical the list of issues that are to be covered by expert evidence clearly so that all experts work towards the same goal.
  - Building into the procedural timetable a process aimed at narrowing the issues in dispute as far as possible.
  - Making provision for the experts to meet (or confer by video conference) several times to discuss the issues, without the parties or counsel.
  - Encouraging the use of lists of questions and lists of agreed/not agreed issues.

- Dispensing with direct examination in favour of short focused presentations of the key opinions of each expert on the remaining issues in dispute.

These attempts by arbitral institutions and arbitration community groupings to improve the effectiveness of the way in which expert evidence is presented and then tested in international arbitration have now been around for a number of years, but some consider the criticisms about expert evidence remain as valid as ever. However, individuals active in the arbitration sector may have more innovative solutions to offer.

INNOVATIVE SOLUTIONS FROM ELSEWHERE

We have considered a number of solutions for the more effective use of expert evidence in international arbitration, as proposed by various individuals in recent years. We outline some of these proposals below, and then proceed to offer our own ideas for how expert evidence in international arbitration may be helpfully reformed for the benefit of all parties seeking to resolve their disputes through arbitration.

1. Expert Teaming

Dr. Klaus Sachs proposed a new approach (in a paper presented at the International Council for Commercial Arbitration Conference in Rio de Janeiro in 2010) to expert evidence that he termed "**expert teaming**," which combines elements of both party- and tribunal appointments.

Dr. Sachs proposed that the parties each provide a shortlist of independent candidates, and the tribunal selects an expert from each list to establish an expert team. The team works up a preliminary report, which is circulated to the parties and the tribunal for comment, following which the experts prepare a final joint report, identifying areas on which they cannot reach a joint conclusion. The experts will be present at the hearing, and can be questioned by the tribunal, the parties or a party-appointed expert.

There appear to be some clear advantages to this hybrid approach. Unlike pure tribunal-appointments, it is more likely to get buy in from the parties who are each represented on the expert team. It also provides a system of checks and balances that is absent where the tribunal relies on a single tribunal-appointed expert. Carefully drafted terms of reference for the expert team, which clearly set out the issues they are required to opine on, will make it clear that the dispute itself will still be properly decided by the tribunal.

As against party-appointed experts, terms of reference also encourage the experts to draw up reports that respond specifically to the issues identified in the terms of reference, limiting the scope for expert reports that are too long and broad reaching. There is also an obvious advantage to severing the link between experts giving evidence, and their fees for so doing being paid by one of the parties. In Dr. Sachs's proposal, the expert team fees are shared equally between the parties. Finally, this proposal sees the

experts draft reports from scratch, relying only on the evidence and their expertise, and preventing parties from being tempted to provide outline reports or any other guidance on what the report should contain.

While seemingly carrying a number of attractive features, Dr. Sachs's approach does not seem to have secured the traction that many felt it merited when it was first proposed. This may be a result of party's (and counsel's) unease with the loss of control that they may perceive to result from the formation of a "team."

2. A Technical Secretary

In an **article** for the *German Arbitration Journal* in 2020, Lisa Reiser and Kathrin Hüttman proposed that tribunals start appointing technical secretaries.

This proposal is partly borne out of the nature of expert evidence in the German courts: the German Code of Civil Procedure provides for the appointment of court-appointed experts only, and any party-appointed expert reports are considered part of the party's submissions. While party-appointed experts are allowed in German arbitrations, they are regarded as less credible.

Reiser and Hüttman suggest that the appointment of tribunal-appointed experts often happens far too late in proceedings. Their solution is to equip the tribunal with a technical secretary at the outset, who can help explain technical details to the tribunal, identify the differences in reports by party-appointed experts, and explain to the tribunal which issues are technically conclusive. A technical secretary could help to focus the minds of the tribunals, and the experts, on the technical issues that are genuinely most important to and problematic for the dispute.

The key criticism of this approach, which Reiser and Hüttman acknowledge, is that the parties may argue that it infringes their right to be heard, particularly if the technical secretary can make arguments to the tribunal that the parties have not been privy to and have not had a chance to comment on. However, Reiser and Hüttman seek to overcome this criticism by suggesting that the technical secretary share its findings with the parties for comment. Furthermore, they note that tribunals already employ administrative secretaries to assist with work behind the scenes (although we note that the use of administrative secretaries is not free from controversy), and plenty of judicial systems (including the Supreme Court of the United States) rely on junior lawyers to do a lot of significant work in the background, yet there is no question that the decision is ultimately that of the judges and arbitrators on the case, as a result of the submissions of the parties.

If the appointment of a technical secretary can help in focussing the attention of all parties on the key technical issues, and reducing the time and cost spent on battles between party-appointed experts, perhaps it is worth trying.

3. Adapting the Practice of Party-Appointed Experts

Rather than introducing something other than party-appointed experts, Professor Doug Jones AO **proposes** changing how they are used. Professor Jones proposes adopting a procedure that allows the experts to limit their differences prior to submitting any evidence, streamlining the issues at each stage and ensuring that reports respond to one another.

Professor Jones suggests that this be achieved by:

- Agreeing a common list of questions for experts to work from.
- Deferring the production of expert reports until all factual evidence is available.
- Party-appointed experts working together to prepare a joint report first, identifying areas of agreement and disagreement. This allows experts to discuss their positions without prejudice before committing themselves to a particular position in evidence.
- Individual reports follow, on areas of disagreement only. Where disagreement flows from an underlying dispute of fact, the experts should set out their conclusions on the basis of the counter-expert's assumptions so that, when the tribunal makes the relevant finding of fact either way, it has the input of both experts on the consequences of this.

Professor Jones also suggests that, particularly in the case of quantum experts, the tribunal should be allowed to hold confidential discussions with the experts and without the parties, in order to perform the calculations required to make a final award on quantum. Professor Jones makes it clear that there would be no discussion of anything that requires the provision of an expert opinion, but that discussions would be limited to assistance that the tribunal needs in working out the calculations required for an award based on the tribunal's conclusions.

There has been discussion of the use of models that quantum experts can design together, and then provide to

the tribunal to use alone. However, the reality of complex arbitrations is that there can often be too many variables and complexities for the creation of a model that can be used by the tribunal without assistance to be cost-effective or even possible. See, for example, our **alert** on the potential pitfalls in the use of damages models by tribunals.

Allowing quantum experts to work confidentially with the tribunal in drawing up an award is something that has been raised as a possibility in arbitrations that K&L Gates has been involved in. Although the idea of an expert discussing issues without the knowledge of the parties, and directly with the tribunal and counter-expert, may make the parties feel uncomfortable, if it is clearly limited to the working out of an award based upon conclusions on matters of fact and law that the tribunal has already decided, it may be a sensible way of approaching complex issues of quantum. After all, an expert's duty ought properly to be to assist the tribunal, not to advocate for the party that appointed it.

4. Early Agreed Protocol

Another less radical, but certainly helpful, proposal has been employed by tribunals sitting in cases in which K&L Gates has been acting as counsel in recent years. This involves the tribunal taking an active role in formulating detailed guidance in the form of protocols incorporated into early procedural orders that set out how the party appointed experts will approach the preparation of their evidence. In our experience, this has the potential to have particular application to disputes that involve highly technical expert evidence on issues of liability, perhaps more so than damages-related expert evidence relevant to issues of quantum.

In drafting an appropriate protocol for the use of expert evidence, a tribunal can set out:

- The questions to be answered by expert testimony, and a requirement for reports to be limited to these issues.
- A date from which meetings of experts, without counsel, will commence with a view to more precisely defining the issues in dispute prior to them preparing their reports.
- Requirements for experts to set out agreed and not agreed issues, often after the exchange of the first round of reports.
- In the case of technical experts, the early identification and disclosure of pre-existing test results, and the setting of a clear timetable for identifying the need, and a timetable, for the conduct of any further testing.
- A target date for final reports, to be limited to matters on which the experts disagree.
- Protocols for presentations by and questioning of experts at the hearing.

Although this solution may appear simple, and perhaps draws on some of the existing 'good practice' that all

practitioners are already aware of, the active involvement of the tribunal and the setting out of these parameters in a procedural order at an early stage in proceedings can ensure that good practice is actually followed by the parties.

It also enables the parties to agree to bring expert evidence forward in the procedural timetable and avoids testing becoming a driver of procedural delay. This gives the experts a much longer period to agree and narrow the issues between them, and reduces the chances of issues remaining not agreed simply because the experts have not had time to properly consider them.

An advantage of this proposal is that it does not radically alter the existing status quo, is less likely to undermine party (and their counsel's) trust in the process and can be readily adopted by parties and tribunals now. There may be some risk of greater cost and more 'front loading' as to when the expert costs are incurred but, when used effectively, it can ultimately prove to have a significant streamlining effect and bring about the efficient use of experts that in some cases can become unwieldly.

CONCLUSION

In our view, Dr. Klaus Sachs's 'expert teaming' idea has much to commend it, being an innovative solution that appears to combine the strengths and tackle the weaknesses of both party-appointed and tribunal-appointed experts. However, in the several years since it was first floated, the fact is that it has not gained the traction that perhaps it ought to have and it is rarely adopted by practitioners.

The approach that has a better chance of securing broader acceptance in practice at the current time is for an early agreed protocol to be set out by the tribunal. As noted above, this is something that can be adopted by parties and tribunals without delay, and does not require a significant conceptual change in the way expert evidence is approached. However, a pro-active tribunal that sets out a clear framework for expert evidence at an early stage in proceedings can nevertheless make significant progress in addressing some of the concerns practitioners have raised regarding the use of expert evidence in international arbitration.

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INTERNATIONAL ARBITRATION IN AUSTRALIA: ACICA RELEASES 2021 EDITION OF ARBITRATION RULES

By John Kelly (Melbourne) and Angus Groves (Melbourne)

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Australia's premier international dispute resolution institution, the Australian Centre for International Commercial Arbitration (ACICA), released its 2021 Edition of its Arbitration Rules (2021 Rules) earlier this year. The 2021 Rules are ACICA's first new edition of its Arbitration Rules since 2016 (2016 Rules), reflecting global developments in international arbitration practice during the COVID-19 era, with a focus on digital technology, flexibility, and transparency.

NOTICE AND ELECTRONIC FILING

A claimant's notice of arbitration and a respondent's answer to notice of arbitration must now be submitted to ACICA by email or other electronic means (Article 6.1; Article 7.1). This replaces the 2016 Rules requirement for physical submission of two paper copies. Any other notice under the 2021 Rules can now also be provided by email or other electronic communication (Article 4.1), without the need to first obtain a party's designation or authorisation for email notices (as was required in the 2016 Rules).

Notice is now deemed to be received, among other ways, if it is delivered "according to the practice of the parties in prior dealings" (Article 4.2(d)). This may, for example, permit notice to be served between opposing counsel already corresponding on a matter.

Given a notice of arbitration (and any other notice) can now be provided by email without the recipient's prior authorisation for email notice, there may be tension with the parties' underlying contract if the contractual notice provision does not permit notice by email. Whilst an arbitration agreement incorporating the 2021 Rules might arguably prevail over a general contractual notice provision, a claimant may seek to manage any risk by noting in any cover email serving a notice of arbitration that it is being provided pursuant to Article 4.1 and the relevant subparagraph of paragraph 4.2. Alternatively, given the parties are entitled to expressly modify the rules by

written agreement (Article 2.1), parties could seek to expressly modify Article 4.1 in their arbitration agreement to exclude provision of a notice of arbitration by email.

VIRTUAL ATTENDANCES

In another nod to evolving work practices during the COVID-19 pandemic, the 2021 Rules make express provision for procedural conferences and hearings to be held by videoconference (Article 25.3; Article 35.5), with discretion ultimately residing in the arbitral tribunal (Article 24.4). If a hearing is held virtually, it will be deemed to be held at the seat of arbitration (Article 27.2). The arbitral tribunal's requirement to sign and circulate an award can also be done electronically (Article 42.4; Article 42.5). The arbitral tribunal also now has the express power to order the inspection of goods, property or documents to be undertaken virtually (Article 25.5). Given Australia's stringent international travel restrictions during the pandemic, virtual attendances for Australian-seated international arbitrations will likely be the norm for some time to come.

DATA PROTECTION

The arbitral tribunal now has the express power to adopt any measure to protect any physical and electronic information shared in the arbitration, and to ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law (Article 26.6).

ARBITRATOR APPOINTMENT

In line with arbitral bodies worldwide (e.g., ICC, LCIA), the 2021 Rules enshrine ACICA's ultimate control over the process of the formal appointment of the arbitral tribunal. Parties now nominate arbitrator candidates for confirmation by ACICA (Article 12.1; Article 13.1), rather than appoint arbitrators themselves. In order to expedite the process, the Secretary-General of ACICA can confirm a nomination if the nominee has not disclosed any circumstances likely to give rise to justifiable doubts as to his or her availability, independence, or impartiality, or where such circumstances have been disclosed but no objections have been raised by any party (Article 14). Discretion to confirm a nominee otherwise rests with ACICA itself (Article 14.3).

CONSOLIDATION

The 2021 Rules require a party requesting that ACICA consolidate arbitrations to submit a detailed request for consolidation particularising the request and the reasons in support (Article 16.3). ACICA must then consult with the other parties and any confirmed or appointed arbitrators before any arbitrations are consolidated (Article 16.1), which may include requesting those other parties or arbitrators to comment on the particulars contained in the request for consolidation (Article 16.5). The 2021 Rules also permit arbitrations made under different arbitration agreements to be consolidated

by ACICA even if the arbitrations are not between the same parties, unlike ACICA's 2016 rules (Article 16.1(c); cf. Article 14.1(b) of the 2016 Rules). For such consolidations under ACICA's 2021 Rules, there must still be a common question of law or fact, the rights to relief must arise out of the same transaction or series of transactions, and the arbitration agreements must be compatible

JOINDER

The arbitral tribunal's power to allow an additional party to be joined to the arbitration is now subject to an express requirement that the arbitral tribunal give all parties, including the additional party to be joined, the opportunity to be heard (Article 17.1). Further, a joinder can now be allowed when all parties including the additional party expressly agree to including that additional party even if the additional party is not prima facie bound by the same arbitration agreement between the existing parties to the arbitration (Article 17.1).

MULTI-CONTRACT ARBITRATIONS

The 2021 Rules provides what ACICA describe as a 'streamlined' approach for multi-contract arbitration, with parties able to consolidate multi-contract claims into a single arbitration by filing a single notice of arbitration, provided the same criteria are met as those required to consolidate arbitrations already on foot (Article 18.1).

CONCURRENT PROCEEDINGS

The 2021 Rules expressly permit the arbitral tribunal to conduct two or more arbitrations under the Rules at the same time, or one immediately after another, or suspend any of those arbitrations until after the determination of any other of them, provided the same arbitral tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations (Article 19.1).

EARLY DISMISSAL OF ARBITRATION

The new Article 25.7 expressly provides that the powers of the arbitral tribunal include the power on the application of any party to make an award granting early dismissal or termination of any claim, defence or counterclaim, the subject of the arbitration. This is similar to the early determination power now seen in many other institutional arbitration rules.

TIME FOR RENDERING AWARD

Unless a shorter period is specified by law or the parties agree otherwise, the final award must now be made within the earlier of nine months from the date ACICA initially transmits its file to the arbitral tribunal pursuant to Article 7.5, or three months from the date the arbitral tribunal declares the arbitration proceedings closed (Article 39.3). ACICA can extend this timeframe however, upon a reasoned request from the arbitral tribunal or if ACICA otherwise deems it necessary (Article 39.3). The

2016 Rules provided no time limit on rendering the award. It remains to be seen how strictly the new time limits will be enforced by ACICA and how readily it will grant extensions of time. ACICA has said of this amendment (perhaps to reassure concerned parties) that "[a]s a matter of practice, ACICA will consider the procedural timetable developed by the Tribunal in conjunction with the parties and liaise with the Tribunal early in the proceedings and throughout the process as necessary, to confirm any reasonable extensions with reference to the particular requirements of the dispute at hand."

COSTS OF ARBITRATION

ACICA has new powers to oversee and, if it decides, reduce the fees payable to the arbitral tribunal based on the conduct of the arbitral proceeding (Article 50). One factor for consideration by ACICA is whether the final award (if any) was made within the Article 39.3 time limit (Article 50.4).

The arbitral tribunal also now has an express power to make interim or interlocutory costs awards (Article 51.2).

THIRD PARTY FUNDING

Similar to the equivalent obligation in the ICC Rules, a party must now disclose the existence of third party funding and the identity of the funder to the arbitral tribunal, ACICA, and the other parties. Disclosure must be given upon that party submitting a notice of arbitration or answer to notice of arbitration, the provision of third party funding, or after entering into an arrangement for third party funding, whichever is earlier (Article 54.2). The party then has a continuing obligation to disclose any changes to this information (Article 54.2). The arbitral tribunal may also at any time order a party to disclose the existence of third party funding or the identity of a third party funder (Article 54.3).

MEDIATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION

The arbitral tribunal is now required to raise for discussion with the parties the possibility of using mediation or other forms of alternative dispute resolution to resolve the dispute (Article 55.1; cf. Article 25.3). The arbitral tribunal also now has the express power to suspend the arbitration to allow for such alternative dispute resolution, but with the arbitration to resume at any time upon the written request of a party (Article 55.2).

In an instance of ACICA increasing its case management role, any mediation of the dispute the subject of the arbitration must now be conducted in accordance with the ACICA Mediation Rules (Article 55.3). This requirement has no carve out for the parties to agree otherwise – such as if the parties were desirous of a more informal mediation process. Parties may wish to consider modifying Article 55.3 by agreement to allow greater flexibility (e.g., expressly excluding Article 55.3 in their arbitration agreement), in accordance with Article 2.1.

The immunity from liability of the arbitral tribunal has now been extended to any act or omission in connection with any mediation conducted by reference to the Rules (Article 53). This does not appear to be directed towards situations where an arbitrator also acts as mediator in a dispute, given Article 20 of the ACICA Mediation Rules (2007) bars a mediator acting as arbitrator in respect of the same dispute.

COMMENT

For parties wanting strong institutional oversight and safeguards in international arbitration, ACICA's 2021 Rules are worth considering. The focus on virtual accessibility in the 2021 Rules also reflects a welcome modernisation, incorporating lessons learned by international arbitration practitioners during the COVID-19 pandemic and mirroring changes made by other leading arbitration institutions globally.

Time will tell whether the 2021 Rules will help address the two most common objections for seating international arbitration in Australia – unfamiliarity and a perceived lack of neutrality (ACICA FTI Consulting 2020 Australian Arbitration Report). The 2021 Rules are nevertheless a step in the right direction for raising the appeal of the ACICA Rules and, more broadly, arbitrations seated in Australia.

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PRIVY COUNCIL ADOPTS A RESTRICTIVE APPROACH TO PUBLIC POLICY IN INTERNATIONAL ARBITRATION – *BETAMAX LTD V STATE TRADING CORPORATION* (MAURITIUS)

By Ben Holland (London)

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Under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," the recognition and enforcement of an arbitration award may be refused if the court where recognition and enforcement is sought finds that the award would be contrary to the public policy of that country. However, what should "contrary to public policy" mean?

Should it mean, for example, that the award, or its decision or decision-making process, is tainted by fraud, by a breach of natural justice, or by any other vitiating factor abhorrent to public policy of the state concerned? Does it also, for example, encompass a situation where the enforcement court finds that the contract on which the award is based is illegal under its local law, such that enforcing the contract conflicts with the public policy of the state concerned?

In finding that international arbitral awards will only be set aside on grounds of public policy in very limited circumstances, which should not, unless there are "exceptional" circumstances, include the latter situation above, the Judicial Committee of the Privy Council (the Privy Council), the highest court of appeal for certain British Commonwealth countries, has supported the principle of finality in arbitration, in *Betamax Ltd v State Trading Corp.*,[1] on appeal from the Supreme Court of Mauritius.

This is an important decision of the Privy Council, which is likely to resonate across the many countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Allegations of illegality flowing from alleged bribery and corruption and

[1] [2021] UKPC 14.

allegations of breach of public policy are increasingly common challenges to international commercial and investment arbitration awards.

OIL AND POLITICS

In 2009, the former government of Mauritius wished to secure for the nation a long-term uninterrupted supply of petroleum products. A 15-year contract of affreightment (COA) was signed, under which Betamax, a Mauritian private company, agreed with a state-owned company, State Trading Corporation (STC), to transport Mauritius' entire petroleum product needs from a refinery in India by a specially designed vessel. In 2014, a new government took over, having campaigned on a platform that the COA was skewed towards Betamax, and it had been entered into without the prior approval required under the Public Procurement Act 2008 (PPA), which was in force when the COA had been signed.

The new government of Mauritius announced that STC would halt performance under the COA, and Betamax terminated it as a result of STC's repudiation. Betamax claimed over US$150 million in losses and interest. The COA provided for Singapore International Arbitration Centre (SIAC) arbitration, seated in Port Louis (Mauritius), and the substantive law of the COA was Mauritian law, under which the dispute was an international, not domestic, arbitration, as a result of the international nature of the oil supply. This had the effect that the enforcement of the award was treated the same way as the enforcement of foreign arbitral awards.

Before the sole arbitrator, Dr. Michael Pryles (a well-regarded arbitrator and former chairman of SIAC), STC argued in detail that the COA was illegal, as it breached the PPA. The sole arbitrator heard all these points, and he decided that the PPA did not apply to the COA. As the sole arbitrator held that the COA had

not been unlawfully executed, damages were awarded to Betamax. Betamax applied to the courts of Mauritius to enforce, and STC applied to the courts of Mauritius to set aside the award as being contrary to the public policy of Mauritius.

THE MODEL LAW, COMMON LAW, AND THE RESTRICTIVE APPROACH TO PUBLIC POLICY

The Supreme Court of Mauritius set the award aside on the basis that the COA flouted legislation designed to protect public funds. The Supreme Court of Mauritius concluded that:

> The enforcement of an illegal contract of such magnitude, in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius.[2]

The Supreme Court of Mauritius respected the very narrow application of the public policy exception in many jurisdictions, but it held that a breach of the PPA was an exceptional case. Public funds had been wasted. The COA was incompatible with Mauritius' economic and legal system, which was striving to stamp out corruption in governmental contracting by way of the PPA, which was intended to maintain integrity and competition and to prevent fraud. With the permission of the Supreme Court of Mauritius, an appeal was allowed to the Privy Council, as the apex court of Mauritius, which considered the situation anew.

The Privy Council (Lord Hodge, Lady Arden, Lord Leggatt, Lord Burrows, and Lord Thomas, who gave the judgment of the Board) noted that, according to Article V(2)(b) of the New York Convention, the recognition and enforcement of an arbitration award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the award would be contrary to the public policy of that country. This exception is incorporated into Article 34 of the Model Law, which forms the basis of many national arbitration statutes, including in Mauritius. As the public policy exception is similarly expressed across many territories that have adopted the Model Law, the Privy Council's views are widely significant.

The public policy exception has been narrowly applied in many territories. Under English law, the English Court of Appeal in *Westacre Investments Inc v Jugoimport SPDR Holding Co. Ltd*.[3] was asked to enforce an International Chamber of Commerce award under a contract governed by Swiss law that had been made by an arbitral tribunal sitting in Geneva. The arbitral tribunal

[2] Cited by the Privy Coucil at [2021] UKPC 14, para 28.

[3] [1999] QB 740 and [2000] QB 288.

had heard, and rejected, arguments that the contract had been influenced by bribery in Kuwait, holding instead that the contract was not illegal. The Swiss Federal Appeals Tribunal declined to overturn the award. Upon enforcement in England and Wales, new evidence of bribery was presented, such that it was said that enforcement would be contrary to the public policy of England and Wales. A majority in the Court of Appeal (Mantell LJ and Sir David Hirst) held that the arbitral tribunal had jurisdiction to determine the issue of illegality and had determined it on the evidence presented to it, so that the courts of England and Wales should prima facie enforce the award. Balancing all the considerations of public policy, including finality; the prior determination of the issue of illegality before the arbitrators; and the need to combat corruption, the award should be enforced. Waller LJ, in the minority, dissented, basing this dissent on his earlier decision in *Soleimany v Soleimany*.[4] The Supreme Court of Mauritius had referred to and relied on *Soleimany*, but it did not follow *Westacre*.

FINALITY

The Supreme Court of Mauritius gave only brief consideration to whether it was open to it to review the arbitrator's decision. The Privy Council turned this around: The first issue it considered was whether the arbitrator's decision that the COA was not subject to the provisions of the PPA, and therefore was not illegal, could be reviewed.

The Privy Council noted that finality of awards is an outweighing factor. If courts could use public policy as a means of reviewing any decision in an award on an issue of interpretation of the contract or of legislative provisions applicable to its legality, there would be far greater scope for review than has been the case previously. It follows that questions in relation to the legality of a contract, such as whether it did or did not go afoul of anti-bribery statutes or public procurement laws, was simply a matter of interpretation. The Privy Council held that these matters of interpretation ought not give rise to any issue of public policy on enforcement.

The Privy Council noted that there may be some "exceptional" cases where the court under the Model Law provision may be entitled to review the decision on legality, "but it is not easy to think of such a case arising in practice."[5]

Although not necessary to do so, the Privy Council went on to analyze a new whether it considered that the PPA applied to the COA. The Privy Council determined that the sole arbitrator was correct, and the Supreme Court of Mauritius had misdirected itself when it found the COA to have been illegally executed.

[4] [1999] QB 785, 800.

[5] [2021] UKPC 14, para 52.

COMMENTARY

Despite the fact that no single case was identified to the Supreme Court of Mauritius where a court had held a breach of public procurement laws as amounting to a breach of public policy, it might appear superficially compelling that an award based on a contract that was held to be "flagrantly" incompatible with Mauritius' economic and legal system will be contrary to public policy in Mauritius, particularly when the contract had attracted overwhelming press and public interest.

However, there are other principles at play. The Privy Council held that an arbitral tribunal's decision that a contract is not illegal is, if within its jurisdiction, a final decision, in the absence of fraud, a breach of natural justice or any other vitiating factor in the award. Therefore:

- If a tribunal has found that a contract is illegal but proceeds to take no cognizance of the illegality in the award, it may be appropriate for enforcement to be refused on the basis that it will be against public policy to seek to enforce an illegal contract; but
- If a tribunal has found that a contract is legal, and makes an award that enforces the contract, the court is not normally entitled to set aside the award at the enforcement stage, even though it is for the court to determine the nature and extent of the public policy of the state.

Challenges to awards due to underlying corruption and illegality have become increasingly common across the globe. This alleged illegality often turns on the interpretation of regulations or other legislative provisions said to be applicable to the contract (for example, anti-bribery statutes). There are many cases where the arbitral tribunal will have looked into these allegations and set out reasons for holding that there was no illegality. In such cases, the Privy Council has held that the award should stand. The tribunal's decision on fact and on law will be final, in the absence of fraud, a breach of natural justice, or any other vitiating factor in the award.

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EVALUATING FOREIGN INVESTMENT IN RCEP MEMBER STATES FROM A DISPUTE RESOLUTION PERSPECTIVE

By Raja Bose (Singapore) and Robert L. Houston (Singapore)

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The recent signing of the RCEP in November 2020 has been heralded as a "historic milestone" for economies across Southeast Asia. Many investors may find this historic development to be of interest, whether in terms of any immediate implications that may arise for planned foreign investment in the region or as a strategic consideration in longer term planning. Undoubtedly, any benefits arising from the RCEP will be specific to the relevant investment or trade context, but foreign investors would be wise to conduct reasonable due diligence before finalizing business plans in anticipation of the potential opportunities afforded by the RCEP.

This alert highlights a few aspects of the RCEP with respect to investor-state dispute settlement that will have some relevance from the perspective of foreign investors considering investment in the RCEP member states.

LEGAL PROTECTIONS AND REMEDIES

One important aspect of due diligence in preparation for investment in the RCEP member states is an exploration of the legal remedies potentially available in the event that a host state were to breach any public international law obligation it may have for the promotion and protection of investment in its territory. This perspective can be particularly important, for example, in the event that a foreign investment receives unfair treatment by a host state or is expropriated directly or indirectly, resulting in potentially significant loss in the value of the investment. Indeed, the outcome of this analysis may provide the determining factor for a foreign investor's decision to invest in one jurisdiction

rather than another, and may well have direct implications for the legal remedies (and consequent tone of any negotiations with a respondent state) in the event that an investor-state dispute were to arise.

As an initial matter, RCEP Article 10 (Investment) does contain a number of treaty obligations with regard to the promotion and protection of foreign investments, including the following standards of investment protection:

- National Treatment (Article 10.3)
- Most-Favored-Nation Treatment (Article 10.4)
- Fair and Equitable Treatment (Article 10.5)
- Full Protection and Security (Article 10.5)
- Expropriation (Article 10.13)

There are, however, some variations from the familiar terms of many international investment agreements in the RCEP formulation of investment protection. For example, RCEP Article 10.5(1) creates the following substantive public international law obligation for the RCEP member states:

> Each party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.

To further confirm the scope of investment protection created by this language, RCEP Article 10.5(2)(c) confirms as follows:

> …the concepts of fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.

This language limits the much broader scope of investment protection that is present in some earlier generations of bilateral investment treaties. For example, the 1981 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (the UK-Malaysia BIT) provides as follows at Article 2(2):

> Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

This broader formulation of the "fair and equitable treatment" standard allows for a greater degree of interpretation by arbitral tribunals considering investor-state disputes arising under such treaties. By contrast, as noted above, the amended form of the "fair and equitable treatment" standard employed in the RCEP limits the scope of such protection to "the customary international law minimum standard of treatment of aliens." As such, the guarantee of "fair and equitable treatment" under the RCEP may not provide the same degree of substantive protection available under other international investment agreements into which an RCEP member state may have entered, including any other bilateral investment treaties, free trade agreements, or domestic investment protection laws that may be applicable.

Further, RCEP Article 10.14 (Denial of Benefits) provides that RCEP Parties may deny any benefits that may otherwise be applicable under RCEP Article 10 in certain circumstances. For example, RCEP Article 10.14(1) states that "[a] Party may deny the benefits of this Chapter to an investor of another Party that is a juridical person of that other Party and to investments of that investor if the juridical person:

a. is owned or controlled by a person of a non-Party or of the denying Party; and

b. has no substantial business activities in the territory of any Party other than the denying Party."

This language would seem potentially to deny benefits under the RCEP to a foreign investor of a non-RCEP member state (or to an investor of the host state itself), preventing such an investor from benefitting from the investment protections of the RCEP by, for example, incorporating a subsidiary in one RCEP member state for the sole purpose of investment in another. Corporate foreign investors will also need to consider whether their present or future ownership or control structures may affect any benefits they may otherwise have received under the RCEP. In this regard, RCEP Article 10.14(3) provides that RCEP member states may deny the benefits of RCEP Article 10 to foreign investors where "persons of a non-Party own or control the juridical person [i.e., the investing entity] and the denying

Party does not maintain diplomatic relations with the non-Party." As such, foreign investors would be wise to remain aware of any implications of a relevant change in control, ownership, or diplomatic relations that could trigger a heightened risk of diminished investment protection under the RCEP.

Most importantly, however, it remains to be seen whether and how the RCEP may provide a mechanism for dispute resolution between foreign investors and RCEP member states at all. RCEP Article 10.18(1) (Work Programme) provides that "[t]he Parties shall, without prejudice to their respective positions, enter into discussions" with regard to (i) "the settlement of investment disputes between a Party and an investor of another Party"; and (ii) "the application of Article 10.13 (Expropriation) to taxation measures that constitute expropriation" within two years after the RCEP's date of entry into force, with the outcomes of such discussions remaining "subject to agreement by all Parties." Until such a mechanism for investor-state dispute settlement is agreed among RCEP member states, investors will be unable to initiate proceedings independently under the RCEP as the need may arise from the breach of substantive obligations for the promotion and protection of covered investments. As such, other existing international investment agreements that are applicable in a given jurisdiction (as discussed above) are likely to continue to serve as important points of comparison for foreign investors considering investment in RCEP member states.

OPPORTUNITIES BECKON, BUT LOOK BEFORE YOU LEAP

From the analysis of new opportunities under the RCEP to the negotiation and drafting of contracts arising from such opportunities, considerations of legal rights in dispute resolution provide one important perspective for the evaluation of foreign investment opportunities in the territories of RCEP member states. Ultimately, while the RCEP may open interesting doors of opportunity for trade, foreign investors would be wise to consider the broader context of investment promotion and protection in specific jurisdictions (including any investment protections that may exist under other applicable international investment agreements) prior to entering into investments in RCEP member states.

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ENGLISH COURT DISMISSES JURISDICTION CHALLENGE TO ICC ARBITRATION AWARD FOR ALLEGED FAILURE TO COMPLY WITH AN "ESCALATION" CLAUSE, RULING IT AN ADMISSIBILITY ISSUE

By Peter R. Morton (London) and Edward A. Brown-Humes (London)

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In *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) the English Commercial Court dismissed a challenge to an ICC arbitration award made under section 67 of the Arbitration Act 1996 (the Act). The Court found that the basis of challenge, in particular alleged non-compliance with a pre-arbitration procedural requirement (under a multi-tiered dispute resolution/escalation clause), was one of admissibility to be determined by the arbitrators rather than an issue of jurisdiction falling within section 67 of the Act.

The Court also found that the claimant had in any event waived its rights under the escalation clause, and that non-compliance with the clause did not act as an absolute bar to commencing arbitration proceedings.

BACKGROUND

The parties had entered into a mining licence agreement (the Agreement) in 2017, which was suspended and subsequently cancelled by Sierra Leone.

SL Mining commenced ICC arbitration proceedings (as claimant) against Sierra Leone (as respondent) in respect of that cancellation. It served its Notice of Dispute (the Notice) on 14 July 2019, and the Request for Arbitration (RFA) followed on 30 August 2019.

However, the escalation clause in the Agreement required a three month period between service of the Notice and the commencement of arbitration proceedings for the parties to attempt to resolve the dispute by "amicable settlement" (the Notice Period).

Sierra Leone contended that SL Mining could not serve its RFA until 14 October 2019 (following the expiration of the three month Notice Period), and accordingly, that the ICC tribunal lacked the jurisdiction to hear that dispute.

The Tribunal dismissed those arguments in its partial final award on jurisdiction of 6 March 2020 (the Award), and Sierra Leone challenged the Award in these High Court proceedings under section 67 of the Act.

JURISDICTION VS ADMISSIBILITY

Section 67 of the Act enables a party to arbitration proceedings to apply to the Court to determine issues of "substantive jurisdiction" only (i.e., not issues of admissibility).

The difference between these two concepts is a subtle one. Jurisdictional issues relate to whether the forum in question is the correct one. Examples of jurisdictional issues can be found in other sections of the Act[1], where the term "substantive jurisdiction" is defined to include:

a. Whether there is a valid arbitration agreement;

b. Whether the tribunal is properly constituted; and

c. What matters have been submitted to arbitration in accordance with the arbitration agreement.

Sierra Leone relied on (c) in the above list to argue that because SL Mining had not complied with the Notice Period, the matter had not been submitted to arbitration in accordance with the Agreement.

Conversely, admissibility issues relate to whether the claim should be heard at all, or whether the claim has been brought prematurely or too late. For instance, a question as to whether the claim is time-barred goes to its admissibility.

Having considered the authorities (including those from the United States and Singapore), the Court held that they "plainly overwhelmingly" all point "one way"—namely that, when it came to considering issues regarding compliance with pre-arbitration procedural requirements, the arbitral tribunal was better placed than the Court to do so. This was because these issues are capable of being resolved by the tribunal, and by opting for arbitration as the forum in the Agreement, it was assumed that the parties wanted a "one stop shop" for the resolution of any dispute.

Accordingly, the Court held that the claimant's challenge under section 67 of the Act failed. The basis of challenge was a question of admissibility to be determined by the arbitrators rather than an issue of jurisdiction falling within section 67 of the Act.

CONSENT/WAIVER

Having filed its Notice on 14 July 2019, SL Mining then applied for the appointment of an emergency arbitrator under the ICC Rules. Those rules

[1] Sections 82(1) and Section 30(1)

required that the RFA be filed within 10 days of that application. SL Mining proposed deferring service of its RFA until the Notice Period had expired. However, Sierra Leone insisted on holding SL Mining to the 10 day deadline.

Consequently, the Court found that the claimant had in any event waived its right to rely on the Notice Period.

OTHER FINDINGS

The judge further held that even if section 67 of the Act was engaged, and even if the claimant had not waived its right to the Notice Period, the challenge would still have failed.

This was because the purpose of the escalation clause in the Agreement was to give the parties a three month window, during which the parties could explore "amicable settlement," but always subject to earlier proceedings if the objective of a settlement could not be achieved.

The question posed by the relevant clause was whether the parties "shall be unable to reach an amicable settlement" by 14 October. Thus, the question was not whether the parties were unable or had been unable, but whether objectively they would be able to reach an amicable settlement, given another six weeks.

The judge noted that the conduct of the parties toward one another had been "all very far from "'amicable'" and there was a "massive gulf" between them. On any analysis, the parties would never have resolved the dispute within the Notice Period, and that non-compliance with the escalation clause was not an absolute bar to SL Mining commencing arbitration proceedings.

COMMENT

The judgment demonstrates the English Court's reluctance to find that an obligation to negotiate in an escalation clause constitutes an absolute bar to the commencement of arbitration proceedings.

The decision is noteworthy for its discussion of the distinction between issues of admissibility and jurisdiction. The judgment indicates that similar challenges under section 67 of the Act, based on an alleged lack of jurisdiction by reason of an alleged failure to comply with pre-arbitral steps specified in escalation clauses, are unlikely to be successful.

Parties intending to rely on the provisions of multi-tiered dispute resolution/ escalation clauses must take care not to waive their rights granted by them.

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THE ABU DHABI COURT OF CASSATION CONFIRMS THAT REPRESENTATIVES ACTING UNDER A POWER OF ATTORNEY MUST HAVE EXPRESS AND UNAMBIGUOUS AUTHORITY TO BIND A PRINCIPAL TO ARBITRATION

By Jennifer Paterson (Dubai), Mohammad Rwashdeh (Dubai) and Sholto Hanvey (Dubai)

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A decision by the Abu Dhabi Court of Cassation in Case No. 922 of 2020 has confirmed that a party's representative (Representative) acting under a power of attorney (POA) will only have the authority to enter into an arbitration agreement on behalf of the party it represents (the Principal) if the POA grants the Representative the authority to do so in clear and unambiguous terms.

BACKGROUND FACTS

A contractor (Contractor) entered into two subcontracts with a subcontractor (Subcontractor) for construction works (Subcontracts). Both Subcontracts contained arbitration agreements (Arbitration Agreements). The Subcontractor's representative (Subcontractor's Representative), who was acting under a duly notarized POA (First POA), signed the Subcontracts on behalf of the Subcontractor. The First POA granted the Subcontractor's Representative full power and authority to act on behalf of the Subcontractor, but that authority was stated to be without prejudice to Article 58(2) of the United Arab Emirates (UAE) Civil Procedures Law.[1] Article 58(2) of the UAE Civil Procedures Law states that no admission or waiver of a right, settlement, or submission to arbitration may be made without special authority. Several years later and after completion of the Subcontracts work, the Subcontractor granted a further POA to its representative (Second POA). The

[1] Federal Law No. 11 of 1992, as amended.

Second POA granted the Subcontractor's Representative all the powers of company management and the power to perform the acts described in Article 58(2) of the UAE Civil Procedures Law, which includes the authority to bind the Subcontractor to arbitration agreements.

A dispute arose regarding the Contractor's failure to pay amounts due under the Subcontracts. The Subcontractor commenced proceedings before the Court of First Instance, which dismissed the claim due to the existence of the Arbitration Agreements. On appeal, the Court of Appeal upheld the judgment of the Court of First Instance. The Court of Appeal relied upon the authority granted to the Subcontractor's Representative by the Second POA to perform the acts contained in Article 58(2) of the UAE Civil Procedures Law, and it held that the Second POA ratified the earlier Arbitration Agreements. Upon further appeal, the Court of Cassation

reversed the ruling and held that the Arbitration Agreements were void and unenforceable. The Court of Cassation therefore remanded the case back to the Court of First Instance for adjudication of the merits of the claim.

In reaching this decision, the Court of Cassation held that, at the time of signing the Subcontracts, the Subcontractor's Representative did not have the authority to agree to resolve disputes by arbitration, which authority must be clearly established without any ambiguity or doubt. The Court of Cassation rejected the argument that the Second POA was issued to confirm the Subcontractor's Representative's authority to sign the Subcontracts and operates as a subsequent ratification of the Arbitration Agreements. Although it is possible to ratify an existing arbitration agreement, there was no such ratification in this case. The Second POA was granted after the completion of the Subcontracts work and was only applicable to new contracts.

ANALYSIS

In the United Arab Emirates, an arbitration agreement is generally still considered an exceptional arrangement whereby the parties agree to resolve disputes by arbitration rather than through court litigation. The UAE Civil Procedures Law is clear that any submission to arbitration requires special authority (e.g., a POA).

The Abu Dhabi Court of Cassation's decision in this case confirms that the authority granted under a POA will be narrowly interpreted and that, in the event of any ambiguity or doubt as to the Representative's authority to bind the Principal to arbitration, it is likely to be decided that there is no valid and enforceable arbitration agreement.

This case emphasizes the importance of clear and precise drafting when preparing a POA. If the Principal intends to grant its Representative the authority to enter into arbitration agreements on its behalf, that authority should be clearly and expressly stated in the POA to reduce the risk of challenges to the enforceability of the arbitration agreement and subsequent disputes over jurisdiction.

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22639