Asia Pacific Arbitration Roundup 2022

DLA PIPER

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Introduction

Welcome to our annual Asia Pacific Arbitration RoundUp.

In this annual publication, we review significant case updates and key developments in international arbitration across various Asia Pacific jurisdictions in the year 2022.

2022 continued to be a year of challenge as the region navigated the recovery from COVID. The pace of this recovery differed across countries but arbitration-related development remained active and consistent throughout the region. In China, the Supreme People's Court published new guidance on cross-border commercial and procedural legal issues which covers common issues relating to judicial supervision of arbitration such as the validity of arbitration agreements, setting-aside of or refusal to enforce arbitral awards and recognition and enforcement of foreign arbitral awards. In Hong Kong and Singapore, legislations regarding outcome related fee structures/conditional fee agreements were enacted. A new mediation act was proposed by the Ministry of Justice in Japan and the KCAB in South Korea kicked off the review of its arbitration rules. In Thailand, the TAI issued new regulations on an e-Notice system and e-arbitration system. Meanwhile, in New Zealand, an inaugural arbitration survey report was published and in Australia, ACICA capped off the year by publishing its "Reflections on Ten Years of Activity Report", the key findings of which are summarised in this publication.

The past year also saw a number of important judicial decisions, including the Shanghai Higher People's Court case regarding the enforcement of a LMAA arbitral award, the landmark case of *C v D* in Hong Kong regarding the issue of non-compliance of preconditions to arbitration, two rare cases handed down by the Singapore Court of Appeal setting aside arbitral awards for breach of fair hearing, the first reported case under the JCAA Interactive Arbitration Rules in Japan, the landmark Korean Supreme Court decision allowing enforcement of arbitral awards granting punitive damages and the appeal of arbitral award by the state authority, the Ministry of Digital Economy and Society in Thailand, all of which are covered in this publication.

If you have any questions about this publication, please feel free to contact us.

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Case updates

KINGDOM OF SPAIN v INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L. CASE NO. S43/2022

In our 2021 publication, we covered the Full Federal Court decision of this case, which distinguished between the 'recognition' and 'enforcement' of an award. The decision concluded that it was clear that Spain had waived its immunity as to 'recognition' by reference to Article 54 of the ICSID Convention. It held that the 'recognition' contemplated by Article 54(1) and (2) does not extend to 'execution' from which there may be immunity under Article 55 of the ICSID Convention.

In March 2022, Spain appealed the decision to the High Court arguing that, *inter alia*, express words are required to waive foreign State immunity and that Spain did not waive its immunity expressly or by any implication because Article 54 of the ICSID Convention does not refer to immunity in terms, or at all. On the other hand, Infrastructure Services Luxembourg S.à.r.l. argued, *inter alia*, that the plain words of Article 55 confirm that Contracting States understood Article 54 as a waiver of immunity to the extent that an award is recognised as if it were a judgment of the court.

The appeal was heard on 10 November 2022 with a decision expected in the next few months.

The High Court of Australia serves as Australia's highest court, and any decision made by the High Court is considered a significant precedent, setting a legal standard for all future cases in Australia. Thus, we can expect the Court to hand down an important precedent regarding the recognition and enforcement of awards under the ICSID Convention and the application of state immunity.

TESSERACT INTERNATIONAL PTY LTD v PASCALE CONSTRUCTION PTY LTD [2022] SASCA 107

In this case, the South Australian Court of Appeal issued a ruling on the question of whether proportionate liability laws from state and federal legislation can be applied in arbitration. The South Australian Court of Appeal decided that these laws do not automatically apply to an arbitration unless there is a specific agreement to that effect in the arbitration agreement.

This decision is significant as it clarifies that proportionate liability laws, which often allow plaintiffs to join third parties in court proceedings, are not intended to apply to arbitration by default.

As domestic arbitration legislation in Australia is based on the Model Law, this decision is reflective of uniform best practice. As an intermediate appellate court decision, the principles established by *Tesseract* are likely to have wider implications and be followed in other Australian jurisdictions. This decision is particularly important for those involved in arbitration across Australia, especially in cases where duties of care may be an issue.

SIEMENS WLL v BIC CONTRACTING LLC [2022] FCA 1029

This case concerned an application for judgment enforcing two arbitral awards under s 8(3) of the IAA before the Federal Court of Australia. The awards arose from two arbitrations conducted under the London Court of International Arbitration (**LCIA**) Rules and the International Chamber of Commerce Arbitration (**ICC**) Rules.

In considering enforcement, the Court was faced with several procedural questions. First, the Court considered the adequacy of service. Ultimately, the Court was satisfied that serviced had been validly effected pursuant to orders allowing the service of the amended originating application and other documents in the proceedings on the respondent in the United Arab Emirates.

The Court next considered the sufficiency of evidence of the original awards. An issue arose because the applicants did not have authenticated or certified hard copy originals of the arbitration awards for the purpose of satisfying the requirement in s 9(1)(a) of the IAA. However, the arbitral awards were provided to the applicants by the secretariats of each of the LCIA and the ICC by email, and each award was apparently signed by all three members of the arbitral tribunals. The rules of both the LCIA and the ICC permit the transmission of awards by electronic means by officers of their secretariats. The Court was therefore satisfied that the awards relied on by the applicants fulfilled the requirement of authentication in s 9(1)(a) of the IAA with reference to s 9(2) of the IAA.

Finally, the Court considered what currency judgment should be awarded. The applicant sought judgment in Australian dollars. The Court held that it could issue a judgment in Australian dollars where such request has been made by the applicant. A question then arose as to what date the foreign currency amounts should be converted to Australian dollars. The Court held that the appropriate date for the conversion to Australian dollars was the date of judgment. However, it noted that there was some considerable impracticality in converting to Australian dollars at exchange rates on the date of judgment when, typically, the Court sits in the morning when exchange rates are not yet available. On that basis, the Court accepted the exchange rates from the day before the hearing as sufficiently closely reflecting the rates of exchange as at the date of judgment where, as in this instance, judgment was pronounced and entered on the date of the hearing.

This case heralds the continuing trend of Australian courts to enforce foreign arbitral awards in circumstances where procedural requirements are satisfied by the applicant.

HANCOCK v HANCOCK PROSPECTING PTY LTD [2022] NSWSC 724

The case confirmed the application of the test where the impartiality of arbitrators is challenged. The case is significant given the domestic arbitration legislation in Australia is also based on the Model Law, and the Court's decision reflects this.

In this case, the plaintiffs sought a declaration pursuant to s 13(4) of the Commercial Arbitration Act 2012 (WA) ("**CA Act**"), that there were justifiable doubts as to the impartiality of the Hon Mr Wayne Martin AC QC to act as an arbitrator in their arbitral dispute and a corollary order terminating Mr Martin AC QC's mandate as an arbitrator in the proceedings.

Under s 12 of the CA Act, there are justifiable doubts as to the impartiality of a person with a possible appointment as arbitrator only if there is a 'real danger of bias' on the part of the person in conducting said arbitration. This reflects the test set out in *R v Gough* [1993] AC 646. Whereas, the test for apprehending bias at common law is that set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337- that is, whether a fair-minded observer might 'reasonably apprehend' that the person might not bring an impartial mind (the reasonable observer test).

The Court confirmed that the relevant test is the higher standard set out in the CA Act of a real danger of actual bias, rather than the lower common law threshold of reasonable apprehension of bias. Further, the Court stated that the test in the CA Act is purely objective, in contrast to the common law test.

Ultimately the plaintiffs were unsuccessful, and the Court found that there was no real risk that Mr Martin AC QC would not be able to be impartial in the arbitration.

WCX M4-M5 LINK AT PTY LTD v ACCIONA INFRASTRUCTURE PROJECTS AUSTRALIA PTY LTD (NO 2) [2022] NSWSC 505

In this case, the Court considered a dispute between the two companies over a contract for the construction of a road linking the M4 and M5 motorways in New South Wales, Australia.

The underlying dispute arose under back-to-back contracts containing a multi-stage dispute resolution mechanism.

The dispute related to whether communications from the plaintiff to the contractor constituted directions to implement a solution to a contamination claim on the construction project. The plaintiff commenced court proceedings seeking to injunct the contractor from referring the dispute to expert determination. The contractor applied for a stay of proceedings under s 8 of the Commercial Arbitration Act 2010 (NSW) ("**CAA**"), on the basis that the dispute ought to be arbitrated. The domestic arbitration legislation in Australia is based on the Model Law.

While both parties agreed that the tiered dispute resolution clause contained an arbitration agreement, the plaintiff argued that the arbitration agreement was inoperative because neither party had issued a notice of dissatisfaction with the expert determination in order to trigger the next step of arbitration for the dispute.

The Court stayed the proceedings and confirmed that the parties' failure to complete the preliminary steps in a tiered dispute resolution clause does not render the arbitration agreement 'inoperative' for the purpose of s 8 of the CAA. In other words, an arbitration agreement is not "inoperative" under the CAA s 8 merely because it has not yet been exercised.

Other key developments

On 7 November 2022, at the Australian Arbitration Week 2022, held in Melbourne, the Australian Centre for International Commercial Arbitration (**ACICA**) launched its publication, "Reflections on Ten Years of Activity Report". Among other things, the report highlighted some interesting statistics and trends and made some observations, including the following:

- ACICA has been involved in arbitrations concerning a collective USD24 billion over the last 10 years, covering 100 arbitrations with over 60 of these from within the last 4 years;
- 54% of ACICA's cases were resolved within 12 months;
- The industries which dominated ACICA cases were energy and resources, construction and infrastructure, and maritime. These made up around 69% of all ACICA-administered cases;
- In 2019, 27% of appointments in ACICA cases were female, increasing to 38% in 2020 and 40% in 2021;
- In 2022 the ACICA Diversity Committee was established, the Executive Committee reached gender parity, ACICA entered into a referral relationship with Dexus Place to offer world-class hearing venues across Australia, ACICA signed the 'Green Pledge' and signed the Equal Representation for Expert Witnesses Pledge;
- Australia provides ideal conditions for international arbitration due to its stable and transparent legislative framework, quality of the legal expertise of its practitioners and the leading internationalist approach of the judiciary; and
- Australia is in a unique position as a seat for arbitrations involving foreign parties, as it conducts significant trade with North and Southeast Asian countries, the US, UK and several South American jurisdictions. Australia also has strong relationships with countries new to the New York Convention such as Papua New Guinea and Fiji. As such, it offers a stable environment for parties based in the region to resolve their disputes.

China

Xiaoshan Chen, Eva Yao

Case updates

ZHONGSHAN FUCHENG v NIGERIA

Over the past few decades, China has concluded a large number of bilateral and multilateral investment treaties with countries around the world, of which over 120 are in force. These investment treaties provide substantial protection for Chinese investments abroad. Crucially, they allow qualifying Chinese investors, both companies and natural persons, to bring claims against host States before a neutral, independent arbitral tribunal and obtain compensation for wrongful treatment of their investments. The recent victory of Zhongshan Fucheng Industrial Investment Co Ltd ("**Zhongshan**") in its USD70 million investment treaty arbitration against the Republic of Nigeria demonstrated how this can be achieved.

In 2010, through its Chinese parent company, Zhuhai Zhongfu Industrial Group Co Ltd ("**Zhuhai**"), Zhongshan acquired rights to develop a substantial area of land, known as the Ogun Guangdong Free Trade Zone (the "**Zone**"), in the Ogun State in southwestern Nigeria. Zhongshan entered into a framework agreement with OGFTZ, a subsidiary of the Ogun State of Nigeria. In 2011, Zhongshan set up a local Nigerian entity, Zhongfu International Investment (NIG) FZE ("**Zhongfu**") in order to manage the work on the ground in Nigeria. Zhuhai and Zhongfu then carried out a significant amount of work in the Zone, developing infrastructure such as roads, sewerage and power networks, and marketing and letting sites within the Zone.

In 2012, the Ogun State appointed Zhongfu as the interim manager of the Zone. Zhongfu's appointment was made permanent in a joint venture agreement concluded in September 2013 between Zhongfu and the Ogun State (among others) under which Zhongfu also acquired a majority shareholding in OGFTZ (the "**2013 JVA**").

In July 2016, the Ogun State purported to terminate Zhongfu's appointment (whilst attempting to install a new manager for the Zone with immediate effect) and took a series of actions allegedly aimed at driving Zhongfu out of Nigeria. It was noted in the final award that some individuals working for Zhongfu were harassed by the Nigerian police and faced threats of prosecution and prison sentence. It was further noted in the final award that the Nigerian Immigration Service took away the immigration papers of Zhongfu's foreign staff so that none of them would be able to work in Nigeria. Furthermore, arrest warrants were issued for two senior managers of OGFTZ, which resulted in one of them, Mr Zhao Wenxiao, "*[being] arrested at gunpoint*, [...] *then deprived initially of food and water, intimidated, physically beaten, and detained for a total of ten days*".

In August 2018, Zhongshan commenced an investment treaty arbitration against Nigeria under the Bilateral Investment Treaty between the People's Republic of China and Nigeria (the "**China-Nigeria BIT**"). The tribunal, chaired by Lord Neuberger, the former President of the UK Supreme Court, issued its final award in March 2021 which was published on 27 January 2022, finding Nigeria in breach of its obligations under the China-Nigeria BIT and awarding Zhongshan compensation of around USD70 million.

This decision highlighted the advantage of investment treaty arbitrations in providing recourse for Chinese investors to obtain compensation against host States where international law obligations have been violated. The case is considered to be the first ever investment arbitration win by a Mainland Chinese investor against an African State (if not more widely). Whilst the case may have turned heavily on its own facts, Zhongshan's success nonetheless underscores why Chinese investors should consider using China's extensive network of investment treaties in order to safeguard their business and investments abroad.

ORIENTAL PRIME SHIPPING CO., LIMITED v HONG GLORY INTERNATIONAL SHIPPING COMPANY LIMITED

In the recent case of *Oriental Prime Shipping Co., Limited* v *Hong Glory International Shipping Company Limited*, the Shanghai Higher People's Court reaffirmed the Shanghai Maritime Court's decision to recognise and enforce a foreign arbitral award against a Marshall Island company by finding that the Marshall Island company was domiciled in Mainland China through having a principal place of business in Shanghai.

The Court held that if the principal business office of the offshore company is situated in Mainland China, the Mainland Courts may be empowered to recognise and enforce foreign arbitral awards in accordance with the New York Convention. The relevant test to determine the "principal business office of the offshore company" is whether there is evidence to prove that the respondent has operations or work in that place and has a degree of connection with the Court in Mainland China.

The applicant in this case is the owner of a vessel who alleged that it entered into a charterparty with the charterer/respondent. A dispute subsequently arose between the parties regarding the execution of the charterparty, and the owner applied to the London Maritime Arbitrators Association (**LMAA**) for arbitration in accordance with the clauses of the charterparty. A two-member arbitral tribunal heard the dispute and published the arbitral award, ordering the charterer/respondent to pay USD90,790.28 plus arbitration fees, costs as well as the interests. As the charterer/respondent failed to comply with the arbitral award, the owner applied to the Shanghai Maritime Court for recognition and enforcement.

The charterer/respondent challenged the Shanghai Maritime Court's jurisdiction on the basis that it was a company registered in the Marshall Islands which had no principal business office or assets within Mainland China. Consequently, the owner had no right to apply for recognition and enforcement of the arbitral award at the Shanghai Maritime Court due to the lack of jurisdiction.

The LMAA arbitral award is a foreign arbitral award. Under Article 11 of the Special Maritime Procedure Law of the People's Republic of China (the "**Special Maritime Procedure Law**"), an applicant can apply to the maritime court of the place where the property against which enforcement is sought or the domicile of the person against whom enforcement is sought is located for recognition and enforcement of the arbitral award.

In finding that the charterer/respondent's principal business office was in Shanghai, the Shanghai Maritime Court considered the following factors:

- the address of the charterer/respondent on the written charter confirmation was stated as Shanghai, China;
- the arbitral award also stated that the charterer/respondent was a company registered in the Marshall Islands and operated in Shanghai, China; and
- according to the correspondences between the parties during the period of the charterparty, the charterers/respondent's signature was a different company named HONG GLORY SHIPPING CO., LIMITED, which had the same business address as that on the written charter confirmation.

Accordingly, the Shanghai Maritime Court ruled that since the charterer/respondent had its principal business office in Shanghai, it was domiciled in Shanghai and hence the Shanghai Maritime Court had jurisdiction over the application.

The charterer/respondent subsequently appealed to the Shanghai Higher People's Court against the Shanghai Maritime Court's decision. The Shanghai Higher People's Court rejected the appeal and upheld the original decision of the Shanghai Maritime Court.

This ruling reminds parties seeking to enforce arbitral decisions in Mainland China that the PRC Courts are willing to establish jurisdiction over an offshore company if it is found that its "principal business office" is in Mainland China. It also offers stakeholders confidence in the enforceability of arbitral awards in Mainland China when starting arbitration or winning legal battles.

According to Article 280 of the PRC Civil Procedure Law, the application for recognition and enforcement of a foreign arbitral award shall be made to the intermediate people's court where the respondent is located or where its assets are located. Since Mainland China is a civil law jurisdiction and does not apply judicial precedent (*stare decisis*), this decision may not be followed by other Courts in Mainland China. Each application to recognise and enforce a foreign arbitral award against an offshore company is considered on a case-by-case basis. Thus, it is worth watching whether other Courts in Mainland China will continue applying the same "principal business office of the offshore company" standard going forward.

Other key developments

SPC ISSUES NEW GUIDANCE ON CROSS-BORDER COMMERCIAL & PROCEDURAL LEGAL ISSUES

On 31 December 2021, the Supreme People's Court of PRC (**SPC**) issued a Meeting Note of the National Symposium on Foreign-related Commercial and Maritime Trials (**全国法院涉外商事海事审判工作座谈会会议纪要**) (the "**Meeting Note**").

The Meeting Note contains 111 articles and are divided into three sections, namely: (1) foreign-related commercial matters; (2) maritime matters; and (3) judicial supervision of arbitration. Pursuant to Article 111 of the Meeting Note, the Meeting Note applies to cases related to Hong Kong, Macau and Taiwan.

The third section of the Meeting Note covers common issues relating to judicial supervision of arbitration in areas such as the validity of arbitration agreements, setting-aside of or refusal to enforce arbitral awards, and recognition and enforcement of foreign arbitral awards. The key provisions of the Meeting Note, which are important to the arbitration practitioners, are set out below.

- Article 91 provides that if an arbitration institution has accepted an application for confirmation of the validity of an arbitration agreement and has made a decision before the same application is made to a court, the court shall not accept the application. This article makes it clear that PRC Courts only have jurisdiction to rule on the validity of an arbitration agreement if it has not been decided by any arbitration institution.
- Article 94 confirms that the fact that parties have agreed in their arbitration agreement to "arbitrate first and litigate later" does not render the arbitration agreement invalid under Article 7 of the SPC's Interpretation on the PRC Arbitration Law.
- Under PRC law, *ad hoc* arbitrations are generally not allowed. In practice, where parties have agreed to apply the UNCITRAL Arbitration Rules in an arbitration administrated by a PRC arbitration institution, it was uncertain if such arbitration would be treated as an *ad hoc* arbitration. Article 96 seeks to address this issue and confirms that the UNCITRAL Arbitration Rules may be applied by PRC arbitration institutions if the parties so agree, which will not render the arbitration agreement invalid.
- Further, Article 100 of the Meeting Note clarifies that any arbitral award made by a foreign arbitral institution with the seat in Mainland China, shall be regarded as a foreign-related arbitral award made in Mainland China, recognising the jurisdiction of PRC Courts over such awards.
- Article 107 of the Meeting Note provides that a party's failure to engage in negotiations before the commencement of an arbitration as agreed in the arbitration agreement shall not be a ground for setting aside the arbitral award pursuant to Article V.1.(d) of the New York Convention. This clarification facilitates enforcement of arbitral awards in China made in a contracting State to the New York Convention.

Although the Meeting Note is not an official judicial interpretation of any legislation, it is crucially important to legal professionals dealing with cross-border commercial issues/disputes involving China.

THE FIRST AD HOC ARBITRATION RULES IN MAINLAND CHINA AND THE FIRST APPOINTMENT MADE

On 18 March 2022, China Maritime Law Association (**CMLA**) and China Maritime Arbitration Commission (**CMAC**) jointly released CMLA Rules for Ad Hoc Arbitration (the "**CMLA Ad Hoc Arbitration Rules**") and the CMAC Ad Hoc Arbitration Service Rules (the "**CMAC Ad Hoc Arbitration Service Rules**"). These were the first institutional rules governing *ad hoc* arbitrations in Mainland China.

CMAC recently reported that it was appointed as the appointing authority for an *ad hoc* arbitration under the CMLA Ad Hoc Arbitration Rules for the first time, marking it the first CMAC *ad hoc* arbitration case. The case involved a dispute arising out of a co-operation agreement between a Hong Kong entity and a Mainland Chinese entity. The dispute resolution clause provided that "*all disputes arising out of or in connection with this Agreement shall be subject to the Ad Hoc Arbitration Rules of the China Maritime Law Association...*", "*The Hong Kong Arbitration Law shall govern the arbitration agreement...*" and "*China Maritime Arbitration Commission shall be the appointing authority.*" The parties jointly applied to CMAC to appoint a sole arbitrator for the case during the arbitration proceedings.

Hong Kong

Ernest Yang, Queenie Chan

Case updates

C v D [2022] *HKCA 729*

In our last edition, we covered the Court of First Instance (**CFI**) judgment of *C v D*. The CFI held that non-compliance with a precondition to arbitration (for instance, a condition that the parties should engage in good-faith negotiation before arbitration) does not affect the jurisdiction of the tribunal unless expressly provided by the parties. The tribunal may choose to give effect to the contractual precondition by ordering a stay of the arbitral proceedings pending compliance with the clause, by imposing cost sanction or by dismissing the claim as inadmissible.

In other words, whether or not pre-arbitration conditions for arbitration have been or should be fulfilled is a question of admissibility rather than the jurisdiction of the tribunal, and the tribunal's decision is final and the award cannot be set aside under Article 34(2)(a)(iii) of the Model Law on grounds that the tribunal has ruled on matters beyond the "scope of the submission to arbitration".

The case was granted leave to appeal and on 7 June 2022, the Court of Appeal (**CA**) handed down its decision dismissing the appeal.

In dismissing the appeal, the CA rejected the argument that the distinction between admissibility and jurisdiction should not be adopted as it was not found in the text of Article 34(2)(a)(iii) of the Model Law, and observed that such distinction is a concept rooted in the nature of arbitration itself which is well recognised in case law (and academic writing) in England and Wales, Singapore, Australia and the United States.

The CA also rejected the distinction between a dispute resolution clause which provides that a reference to arbitration is subject to some conditions precedent and a dispute resolution clause which is intended to stipulate the procedural regulation of the arbitral process only. The CA held that the proper question to be asked is whether the parties intended that any dispute about the fulfilment of a condition precedent would be determined by the arbitral tribunal. Further relying on the "*Fiona Trust* presumption" in the English case of *Fiona Trust & Holding Corp & others v Privalov & others* [2007] UKHL 40 that rational business people are likely to have intended any dispute arising out of their relationship to be decided by one and the same tribunal, the CA found that there was no reason why the parties in this case would intend to exclude disputes on the basis of whether the pre-conditions had been complied with from the scope of submission to arbitration.

H v G [2022] HKCFI 1327

On the other hand, on 10 May 2022, the CFI handed down a judgment which underscores the limitations of the "*Fiona Trust* presumption" in the interpretation of inconsistent dispute resolution clauses in different contractual agreements.

This case concerned a building contract between a property developer and its building contractor for certain building works. The building contract required the building contractor and its third-party subcontractor to execute a warranty for the waterproofing system installed as result of the building works. The building contract provided that the dispute shall be resolved by arbitration, but the warranty provided that the warrantors agreed to submit to the non-exclusive jurisdiction of the Hong Kong Court.

G commenced arbitration against H claiming negligence and breach of contract under the building contract and the warranty. On the other hand, H contended that the tribunal did not have jurisdiction over any claims made by G under the warranty.

In deciding that the tribunal had no jurisdiction over the claims made under the warranty, the CFI ruled that the *Fiona Trust* presumption was not directly applicable as in this case, the building contract was between G and H and there was a separate warranty between G, H and a third-party subcontractor which was not privy to the building contract. The Court also highlighted the important point in *Fiona Trust* that if there is language in the relevant contract which makes it clear either that certain disputes were to be excluded or that the parties did not intend to have all their disputes resolved by one tribunal, the presumption has no role to play.

Considering that at the time when the building contract was negotiated and signed by G and H, both parties had anticipated the execution of the warranty and the separate dispute resolution clause contained in the warranty, and considering the sensible and apparent rationale for having a free-standing and independent dispute resolution mechanism in the warranty which deals with separate and independent matters, the CFI found that G and H had clearly intended that disputes under the warranty be carved out from the arbitration agreement in the building contract.

李明實, 方壘 AND 史洪源 v ACE LEAD PROFITS [2022] HKCFI 3342

In the case of ***李明實, 方壘*** *and* ***史洪源*** *v Ace Lead Profits*, the CFI rejected an application for stay in favour of arbitration on the basis that the claim in question did not fall within the ambit of the arbitration agreement.

This case concerned a business specialising in industrial automation and railway transport automation. The 1st plaintiffs (P1) were the eligible employees suing on their own behalf and on behalf of the employees employed by the HollySys Group who were eligible for subscription under a trust scheme. The 2nd plaintiff (P2) was the founder of the business. As the business expanded, there had been re-structuring in anticipation of public listing and a number of overseas companies were incorporated and amongst them were the 1st defendant (D1) and 3rd plaintiff (P3), both incorporated in the BVI and the 2nd Defendant (D2) was the sole director and shareholder of D1.

In 2006, HollySys was incorporated in the BVI and became the holding company of the business and HollySys Group was the PRC intermediate holding company holding all the subsidiaries in the PRC.

To share the success of the business with its employees and to reward them, a trust scheme was set up. The HollySys Trust Committee ("**Trust Committee**") was formed and regulated by its own set of articles ("**Articles**") and P2 intended for D2 to administer and manage the trust scheme through D1. The trust scheme consisted of different layers between P3, D1 and the employees. Eligible employees would obtain shares at a certain subscription price and declaration of trusts ("**Declaration of Trusts**") would then be signed with the participating employee as the beneficiary. The arbitration agreements invoked were found in each of these Declaration of Trusts which provided that "*either party shall have the rights to, when mediation is ineffective, refer any disputes arising from the trust relationship between the settlor and the trustee to the Hong Kong arbitration committee for adjudication*".

The plaintiffs commenced the present proceedings against the defendants for, among other things, a declaration that the shares held in the name of D1 were held on trust for the employees under the trust scheme and the defendants applied for a stay of the claim in favour of arbitration.

In refusing the defendants' application, the CFI considered that the relevant terms of the Articles of the Trust Committee and noted that the Articles clearly stated that the shares held by P3 and D1 were to be used for the trust scheme. The Declaration of Trusts were created for the purpose of implementing the trust scheme. It was held that the nature of the overarching trust scheme was different from the trusts created by the Declaration of Trusts, which was between the individual beneficiaries of the shares awarded under the trust scheme. Accordingly, it was decided that the dispute regarding the scheme trust fell outside of the scope of the arbitration agreements contained in the Declaration of Trusts.

This case highlighted the importance of ascertaining the scope and coverage of arbitration agreements for disputes arising out of complex commercial arrangements involving multiple parties and inter-related arrangements.

G v X [2002] HKCFI 829; [2002] HKCFI 1864

The case of *G v X* concerned a series of applications for enforcement of a China International Economic and Trade Arbitration (**CIETAC**) award.

On 5 July 2021, G applied *ex parte* for leave to enforce a CIETAC arbitral award ("**Award**") against X for payment of damages, interests and arbitration fees. G also applied for a *Mareva* injunction to restrain X and other respondents from disposing of their Hong Kong and worldwide assets up to the amount of the Award and for a disclosure order for disclosure of their assets. The *Mareva* injunction and disclosure orders were granted against X and against the other respondents under the *Charbra* jurisdiction on *ex parte* basis and the enforcement application was directed to be proceeded on *inter-parte* basis.

After the handing down of the Award, X had applied to the Beijing Intermediate Court to set aside the Award and G in turn applied for enforcement of the Award to the Beijing Court.

The parties eventually agreed for X to make payment of a sum into Court for immediate discharge of the *Mareva* injunction and the disclosure orders. X subsequently applied for payment out of the sum paid into Court in lieu of the *Mareva* and disclosure orders on the basis that the orders should never have been granted on an *ex parte* basis for lack of good arguable case and should be discharged for material non-disclosure. X also sought fortification of G's undertaking as to damages in respect of the *Mareva* injunction.

On 22 March 2022, the Court handed down its decision and refused X's payment out application and fortification application and found that had it not been for X's payment made into Court and the parties' agreement to discharge the orders, G's application for continuation of the *Mareva* injunction and disclosure orders would have been granted.

In finding that there was a good arguable case for the grant of the *Mareva* injunction and the ancillary disclosure orders, the Court highlighted that the application was made on the basis of a final arbitral award and not at the interlocutory stage, which was after the tribunal had decided in a contested hearing on the merits of all the claims made in the arbitration. The fact that there was an application to set aside the Award did not render it less binding, or unenforceable until and unless it has been set aside. Citing the case of *China CITIC Bank Corp Ltd (Quanzhou Branch) v Li Kwai Chun* [2018] HKCFI 1800, it was confirmed that the Courts are in general more prepared to grant a *Mareva* injunction post-judgment and in aid of execution, both in terms of the assessment of whether there is a risk of dissipation of assets and as to whether the defendant is likely to sustain damages as a result of the grant of the injunction.

The Court also did not find any material non-disclosure and remarked that applications for discharge based on material non-disclosure were not to be abused or to become a "rambling and roving investigation" of what should have been disclosed. As such, the Court did not find that there had been material non-disclosure of G's financial means. X's claim that G must have known of the disposal of the assets (which had been the subject matter of the CIETAC arbitration) before the injunction application was made and the claim that G had misled the Court as to the full extent and reason of his failure to apply for an asset preservation order in the Mainland was also rejected.

On 21 June 2022, the Court handed down its decision on G's application to enforce the Award and X's application to set aside or to stay the enforcement of the Award pending the Beijing Court's decision on the setting aside application.

X's case for resisting enforcement was that it had been deprived of the opportunity to present its case in the arbitration on G's amended claim for revised damages and that the Award dealt with matters beyond the scope of the submission to arbitration due to the consolidation of disputes under 8 different agreements in question.

The Court found that X had not been deprived of a reasonable opportunity to address G's case as the Court was not persuaded that the tribunal was required to invite further submissions on quantum after finding that liability was established in the case where X chose to confine his submissions that the quantum should be nil. The Court also noted that X had the right to correct any calculation error in the Award under the CIETAC rules. As to the question on the scope of the arbitration agreement, the Court decided that the Beijing Court was in the best position to decide the scope of the arbitration agreement based on PRC law and it therefore ordered a stay of enforcement of the Award for three months or until the decision of the Beijing Court.

Other key developments

OUTCOME RELATED FEE STRUCTURES ALLOWED FOR ARBITRATIONS IN HONG KONG

On 22 June 2022, the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 (the "**Amendment Ordinance**") was enacted and the new Arbitration (Outcome Related Fee Structures for Arbitration) Rules (the "**Rules**") along with Divisions 3, 4 and 7 of Part 10B of the Arbitration Ordinance (Cap. 609) came into force on 16 December 2022. The Amendment Ordinance and the subsidiary Rules were enacted with a main objective to provide a new regulatory regime for outcome-related fee structures ("**ORFSA**") which were previously prohibited in Hong Kong.

The Amendment Ordinance allows the following agreements to be in place between a lawyer and the client in arbitrations, mediations and related court proceedings in Hong Kong:

CONDITIONAL FEE AGREEMENT (CFA)
An agreement under which the lawyer agrees with the client to be paid a success fee for the matter only in the event of a successful outcome for the client in the matter.

DAMAGES-BASED AGREEMENT (DBA)
An agreement under which: (a) the lawyer agrees with the client to be paid for the matter only in the event the client obtains a financial benefit in the matter ("**DBA Payment**"); and (b) the DBA Payment is calculated by reference to the financial benefit that is obtained by the client in the matter.

HYBRID DAMAGES-BASED AGREEMENT (HYBRID DBA)
An agreement under which the lawyer agrees with the client to be paid for the matter: (a) in the event the client obtains a financial benefit in the matter, a payment calculated by reference to the financial benefit; and (b) in any event, a fee, usually calculated at a discount, for the legal services rendered by the lawyer for the client during the course of the matter.

The Rules set out the detailed regulatory framework for ORFSA with general and specific conditions required for the agreements in order to ensure their validity and enforceability.

Under the general conditions of the Rules, all three types of ORFSA must be in writing and signed by lawyer and the client, state the matter to which the agreement relates, state that the lawyer has informed the client of the right to seek independent legal advice, and for a cooling-off period of not less than seven days.

Specific conditions for CFAs include the uplift element must not exceed 100% of the benchmark fee and the agreement must state the circumstances that constitute a successful outcome of the matter.

Specific conditions for the DBAs and Hybrid DBAs include the DBA Payment must not exceed 50% of the financial benefit and the agreement must state the financial benefit to which it relates. For Hybrid DBAs, additional specific conditions applies including that in case no financial benefit is obtained by the client, the client is not required to pay to the lawyer more than 50% of the irrecoverable costs.

The Rules also provide for the maximum aggregate sum of the DBA Payments where there are multiple DBAs or Hybrid DBAs, and information in relation to the ORFSA that the lawyer must provide to the client, as well as the termination of the ORFSA.

HKIAC'S USERS GAIN ADDITIONAL ROUTE TO MAINLAND INTERIM RELIEF AND ENFORCEMENT

On 22 June 2022, the Supreme People's Court (**SPC**) issued a notice on the "Inclusion of the Second Group of International Commercial Arbitration Institutions" and announced that the Hong Kong International Arbitration Centre (**HKIAC**) will be the first arbitral institution outside the Mainland to be included in the "One-Stop" Platform for Diversified International Commercial Dispute Resolution ("**One-Stop Platform**") of the China International Commercial Court ("**CICC**").

The CICC was established by the SPC in 2018 to determine international commercial disputes.

The new arrangement means that parties to cases administered by the HKIAC with an amount in dispute over RMB300 million or with a significant impact, may apply for interim relief and/or the enforcement of arbitral awards directly to the CICC. Parties to arbitral proceedings in Hong Kong and administered by the HKIAC can already apply to the competent Intermediate People's Court for interim relief and enforcement of awards but the direct access to the CICC for interim relief and enforcement of arbitral awards can save considerable time and costs.

THE NEW SOUTH CHINA INTERNATIONAL ARBITRATION CENTER (HONG KONG) ARBITRATION RULES

The South China International Arbitration Center (Hong Kong) (**SCIAHK**) is a newly registered Hong Kong arbitral institution affiliated to, but independent of the Shenzhen Court of International Arbitration (also known as the South China International Economic and Trade Arbitration Commission). It is one of the two Hong Kong-seated Mainland arbitral institutions besides CIETAC.

On 1 May 2022, the SCIAHK Arbitration Rules took effect. The new rules were drafted based on the 2013 UNCITRAL Arbitration Rules and contains an appendix setting out the modifications to the UNCITRAL Rules.

The rules make provisions for, *among others*, the application of list procedure for appointing arbitrators, consolidation, parallel proceedings and single arbitration under multiple contracts, expedited procedure, summary dismissal of claims, counterclaims and defences, emergency arbitrations, Med-Arb, an optional appellate procedure, 'off-panel' appointment of arbitrators, electronic conduct of arbitration, confidentiality of arbitration and third-party funding or insurance of arbitrations.

Japan

Tony Andriotis, Shingo Okada, Eric Yao, Queenie Chan

Case updates

THE FIRST CASE UNDER THE JCAA INTERACTIVE ARBITRATION RULES REPORTED

In the 2022 edition of the Japan Commercial Arbitration Journal published by the Japan Commercial Arbitration Association (**JCAA**), the JCAA reported and discussed the first case concluded under its new Interactive Arbitration Rules introduced in 2019 ("**Interactive Rules**").

The Interactive Rules was introduced by the JCAA aimed at providing a more "civil law approach" by encouraging active administration of the proceedings and an open "dialogue" between the arbitral tribunal and the parties. One of the most distinctive features of the Interactive Rules is that it requires the tribunal to provide the parties with its summary of the parties' positions and a provisional list of factual and legal issues and to inform the parties of its non-binding and preliminary views about the factual and legal issues that it considers important before deciding whether to examine a witness.

The first case concluded under the Interactive Rules concerned a dispute between two Japanese companies in relation to a supply contract. Defects were found in the claimant's final product at the market and the issue in dispute was whether the parts supplied by the respondent were defective. The amount of the claim was over 1 billion yen (approximately USD7,476,000).

The supply contract did not contain an arbitration clause but the parties eventually agreed to submit the dispute to the JCAA under the Interactive Rules.

It was reported that the tribunal took the opportunity to discuss the case with the parties at the very first meeting and identified to the parties the points that the tribunal was tentatively interested in with regard to the parties' positions having reviewed the request for arbitration and answer. The parties then submitted their arguments and evidence according to the tentative and provisional points of interest indicated by the tribunal. The tribunal then presented to the parties a provisional but refined summary of the parties' positions and issues and exchanged views with the parties at the second meeting. The parties commented on the summary and the tribunal later provided a revised draft summary, taking into account the parties' comments and additional documentary evidence.

Subsequently, the tribunal issued its non-binding and preliminary views on important issues along with a detailed explanation and invited the parties to submit written opinions on the preliminary views. The tribunal also invited the parties to comment on how they wished to conduct the further proceedings and it was agreed, through the dialogue with the tribunal, that witness examination was not needed.

It was also through these dialogues with the tribunal that the parties were able to agree to refer the dispute to mediation under the JCAA Commercial Mediation Rules and the parties agreed to appoint the three arbitrators as mediators which resulted in a comprehensive settlement of the dispute and the tribunal issued a consent award according to the settlement agreement.

Overall, the case was settled after 12.5 months from the request for arbitration and the total amount of the arbitrators' remuneration was 9.9 million yen (approximately USD76,000). The administration fee was approximately 4.2 million yen (approximately USD32,000). The arbitrator's expense and other costs were approximately 130,000 yen (approximately USD1,000). It was reported that the parties gave an overall positive evaluation of the arbitration conducted under the Interactive Rules and considered that the tribunal's non-binding and preliminary views on important issues were helpful to decide the further course of action that they should take.

Other key developments

PROPOSAL FOR A NEW MEDIATION ACT BY THE MINISTRY OF JUSTICE

On 4 February 2022, the Ministry of Justice of Japan published a proposal for Japan to become a signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention**") and to implement the Singapore Convention into the domestic laws.

According to the proposal, the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 1 December 2004) ("**ADR Act**") will be amended to allow the Japanese Courts to enforce settlement agreements arising from domestic mediations and a new piece of legislation will be promulgated to allow the Japanese Courts to enforce settlement agreements arising from international mediations.

Under the proposed legislation, a mediation will be considered to be an international mediation if:

- All or some of the parties have addresses, offices and places of business in different countries. Where a party has multiple offices, the office most relevant to the subject matter of the dispute applies.
- All or some of the parties' addresses, offices and places of business are different from the places of performance of a substantial part of the obligations of the agreement or the places of the subject matter of the agreement.
- All of some of the parties' addresses, offices and places of business are outside of Japan or a majority of their shareholders or equity holders have addresses, offices and places of business outside of Japan.

Currently, parties to a civil court action in Japan may request the court to record their agreement for settlement and such court-recorded settlement agreements are enforceable as court judgments. However, settlement agreements arising out of private mediations do not enjoy the same ease of enforcement and must be enforced through a new court action in Japan.

Under the new law, parties to an international settlement agreement can enforce the settlement agreement directly by submitting the agreement to the Japanese Courts that have jurisdiction provided that the agreement is in writing and the parties have opted-in to the application of the Singapore Convention or the new law implementing the Singapore Convention. An international mediation may be conducted by an independent mediator whereas a domestic mediation must be administered by a certified mediation institution provided under the Act.

In line with the Singapore Convention, international settlement agreements relating to consumers, employment, human resources, family matters and court-related mediations will not be captured by the new legislation. However, domestic settlement agreements relating to child support disputes will be enforceable under the amended Act.

NEW ACTION PLAN FOR PROMOTION OF ONLINE DISPUTE RESOLUTION

On 31 March 2022, the Ministry of Justice announced the "Basic Policy on the Promotion of ODR – Action Plan for making ODR familiar to citizens". The action plan draws up the targets for promoting online dispute resolution ("**ODR**").

The short-term targets include: penetration of ODR into the daily lives of citizens (making ODR a lifestyle infrastructure), improving access to ODR and quality of ODR and support for entry into ODR business. The medium-term targets include creating an environment to provide one-stop consultation, negotiation and mediation services, facilitating an environment where world-class ODR can be provided and develop infrastructure for using AI technology in ODR.

It is expected that an organisation will be formed with participation from the public, private and academic sectors to implement the measures to achieve the targets of promoting ODR.

AMENDMENT OF THE ARBITRATION ACT

As covered in the last edition of our Asia Pacific Arbitration Roundup, Japan will likely soon amend its Arbitration Act (Act No. 138 of 1 August 2003) (the "**Act**") to bring into conformity with the UNCITRAL Arbitration Rules. Although the UNCITRAL Arbitration Rules ("**Model Rules**") have been revised several times since 2003, the Act has not been completely updated to harmonise with the revised Model Rules. On 18 June 2021, the Government of Japan published the "Follow-up on the Growth Strategy" ("**Strategy**"), which described the progress of past growth strategies and new initiatives.

Under the Strategy, the Government of Japan indicated that, as part of supporting overseas expansion of domestic small and middle-sized companies, they would work on having the Act match up with the Model Rules to stimulate the utilisation of international arbitrations in Japan. Finally, on 8 October 2021, the Legislative Council of the Ministry of Justice published an outline of the amendment of the Arbitration Act.

The following is a summary list of outstanding topics from the outline of the amendment of the Act:

- **Establishing organised rules for interim measures:** In accordance with the Model Rules, the amended Act will set rules on tentative preservation orders. For example, the arbitral tribunal can request "deposits" to be paid from the parties seeking tentative preservation orders, such as the following:
  - Prohibit any transfer or transformation of assets if such action may render future enforcement unfeasible or seriously difficult.
  - Prohibit any transfer or transformation of the assets subject to the claim except for money if such action may render future enforcement unfeasible or seriously difficult.
  - Prevent significant damage or imminent danger to property or rights subject to the arbitration from occurring and restore the said property and rights to their original state.
  - Prohibit obstruction of arbitration process.
  - Prohibit the destruction, erasure, or alteration of evidence necessary for the arbitration process.

- **The form of Arbitration Agreements:** The amendment will add the following provision to Article 13 of the Act:

  "*If the contract is executed in a form other than in writing, the arbitration agreement shall be deemed to have been made in writing if a document or electromagnetic record containing the terms of the arbitration agreement is cited as part of the contract.*"

  This allows an oral agreement to satisfy the written requirement of the arbitration agreement whenever a document or electromagnetic record makes a written reference to the arbitration clause originally agreed upon orally.

- **Revision of procedural requirements:** The Act currently recognises the following three types of district courts as having jurisdiction with respect to the enforcement (and setting aside) of arbitration awards (including other arbitral processes which the Act allows Japanese Courts to handle):
  - The district court determined by an agreement between the parties;
  - The district court which has jurisdiction over the place of arbitration; or
  - The district court which has jurisdiction over the location of the general venue of the respondent of said case.

  In addition to the above, the amendment will recognise the Tokyo District Court and the Osaka District Court as having jurisdiction for all cases where the seat of the arbitration is in Japan. Therefore, for example, the parties can apply for the enforcement of an arbitral award in the Tokyo or Osaka District Court even if these Courts do not meet one of the three abovementioned requirements as long as the seat of the arbitration is in Japan. The rationale behind this modification is that it often requires advanced expertise in specific fields (e.g. IPT, construction, etc.) to handle these cases. Judges equipped with advanced expertise in these fields are mostly found in Tokyo and Osaka. Therefore, this amendment will provide the parties with the option to rely on Tokyo's and Osaka's District Courts and their expertises on specific cases that require advanced technical knowledge.

- **Simplifying the translation requirement:** The amendment will simplify the translation requirement. The current Article 46(2) of the Act requires parties to translate documents written in foreign languages for applications to enforce arbitral awards. According to the amended Article 46(2), the Court may exempt arbitral award enforcement applicants from preparing and submitting Japanese translations of required documents, such as the arbitral award.

  Moreover, the Court may permit the parties to submit evidence written in foreign languages without attaching Japanese translations. This change will mitigate the parties' burden to seek enforcement orders.

  At a cabinet meeting on 28 February 2023, the Government of Japan has adopted a Bill to revise the Act which follows the Strategy and the Bill has been submitted to the national legislature of Japan for approval.

New Zealand

Iain Thain, Michael Robbins, In Sook Scorgie

Case updates

NAVARATNAM v HG METAL MANUFACTURING LTD [2022] NZCA 425

This case related to an award dated 23 April 2020 finding that Mr and Mrs Navaratnam were jointly and severally liable to HG Metal for certain amounts, together with interest and the fees and expenses of the arbitration. Mr and Mrs Navaratnam did not pay the amount due under the Award. By October 2020 they were living in New Zealand.

HG Metal then applied pursuant to Article 35 of Schedule 1 of the Arbitration Act 1996 ("**Arbitration Act**") for recognition and enforcement of the award. That application triggered a lengthy procedural battle between HG Metal and Mr and Mrs Navaratnam that culminated in applications by HG Metal to strike out two appeals brought by Mr and Mrs Navaratnam. In both appeals, Mr and Mrs Navaratnam raised the same substantive complaint. They said that HG Metal had not satisfied the statutory requirements for recognition and enforcement of the award under the Arbitration Act because it has not provided a properly authenticated copy of the award itself. They said that, as a result, no obligation had arisen for them to take any steps in the proceeding.

The appeals were ultimately struck out because of failure to comply with High Court Rules and specific directions of the Court.

In making its decision, the Court confirmed that the purposes of the Arbitration Act included the encouragement of arbitration to resolve commercial disputes, the facilitation of the recognition and enforcement of arbitral awards and to give effect to New Zealand's obligations under the New York Convention. The Court held that there is, accordingly, a general presumption in favour of the enforcement of foreign arbitral awards. This is reflected in the limited requirements to support an application for recognition and enforcement under Article 35 of Schedule 1 of the Arbitration Act. An applicant is required only to supply the duly authenticated original award or a duly certified copy, the original arbitration agreement or a duly certified copy and, if those documents are not in English, a duly certified translation.

The grounds on which an application for recognition and enforcement can be resisted are limited to those specified in Article 36. Although Mr and Mrs Navaratnam initially sought to rely on some of these grounds, their main complaint was that HG Metal failed to supply the duly authenticated award as required by Article 35(2)(a). The Court found that none of these complaints had any substance.

TAVENDALE & PARTNERS LTD v DINEEN [2022] NZHC 1530

In this case, the plaintiff ("**Tavendale**") sued the defendant ("**Mr Dineen**") for breach of fiduciary duties and for retaining electronic data in breach of his personal undertaking. In reliance upon Article 8(1) of Schedule 1 of the Arbitration Act, Mr Dineen applied for a stay of the proceeding and a referral of the disputes to arbitration. Tavendale opposed Mr Dineen's application. The Court held that as there was at least a *prima facie* case that the claims brought by Tavendale were subject to an arbitration agreement, and were capable of resolution through arbitration. While accepting that *prima facie* review approach has not been universally applied in New Zealand, the Court did not see any reason to depart from that approach in this case and therefore ordered that the proceedings be stayed pending determination by the arbitral tribunal as to whether it has jurisdiction to determine the disputes.

HWD NZ INVESTMENT CO LTD v BODY CORPORATE 392418 [2022] NZHC 3472

In this case, the defendant, Body Corporate 392418 ("**Body Corporate**"), protested the jurisdiction of the Court to determine a proceeding brought by HWD NZ Investment Co Ltd's ("**HWD**"), arguing that the dispute must be determined by arbitration. The case was unusual in that the alleged agreement to arbitrate was contained in a scheme imposed by court order pursuant to section 74 of the Unit Titles Act 2010. The arbitration clause was therefore an example of a non-consensual arbitration provision (being imposed by the Court) and Article 8(1) of Schedule 1 to the Arbitration Act did not apply. However, the Court accepted that it had jurisdiction to stay the proceeding in any event under the High Court Rules and to enforce the arbitration provision as a court order.

Unlike in the *Tavendale* case referred to above, in this case the Court found that a full review was appropriate. The Court gave three reasons: (i) there was no *prima facie* case for the existence of a valid arbitration agreement; (ii) in the particular unusual circumstances, the public policy of upholding voluntary arbitration agreements was not engaged and nor were concerns about party autonomy; and (iii) detailed argument was heard on the scope of the reference to arbitration and neither party contended that the jurisdiction issue should be dealt with by the arbitral tribunal, which was yet to be constituted. The Court also found that conventional principles of interpretation should apply, rather than the ordinary, liberal, approach to interpretation of consensual arbitration clauses.

Ultimately, the Court found that the dispute fell outside of the scope of the arbitration provision in the scheme and set aside the Body Corporate's protest to the Court's jurisdiction.

HUSKY FOOD IMPORTERS & DISTRIBUTORS LTD v JH WHITTAKER & SONS LTD [2022] ONSC 1679

Although not a New Zealand decision, the case of *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2022 ONSC 1679 involved a New Zealand company in the Ontario Supreme Court. The case demonstrated the importance of clearly outlining the terms of an arbitration agreement in a contract. In this case, JH Whittaker & Sons Limited ("**Whittaker's**") was successful in arguing for a stay of an action brought against it by Husky Food Importers & Distributors Ltd ("**Husky**") due to the existence of an arbitration clause in the alleged distribution contract between the two parties. The Court thus referred the parties to arbitration administered by the New Zealand International Arbitration Centre.

The Court held that an arbitration clause existed and was arguably enforceable, and emphasised the low threshold for establishing the existence of an arbitration agreement and that the mere presence of an arbitration clause in a contract can, in some cases, constitute an arbitration agreement.

This decision highlighted the need for parties to thoroughly review and understand the terms of a contract, including any arbitration clauses, before executing it. It also highlighted, the Courts' willingness to enforce valid arbitration agreements and refer parties to arbitration to resolve disputes.

Other key developments

THE INAUGURAL AOTEAROA NEW ZEALAND ARBITRATION SURVEY 2022

2022 saw the publication of a comprehensive report that uses data to reveal the number of arbitrations in New Zealand every year, types of cases, costs involved, time taken to complete arbitration, plus data on the demographics of arbitrators. The report was made in collaboration with the New Zealand Dispute Resolution Centre. It reflects survey responses from 56 arbitrators comprising 213 completed appointments between 1 January 2019 and 31 December 2020.

The results of the survey certainly demonstrate that arbitration is a staple of the modern dispute resolution landscape. It makes up a significant part of determinative dispute resolution in New Zealand and works in a complementary way to alleviate the workload of the Courts in respect of civil disputes.

The report concludes that there has been a maturing of the arbitration market in New Zealand. It found a spread of disputes that are conducted by a range of arbitrators in a broad cross-section of legal areas. Arbitration in New Zealand is no longer dominated by construction disputes, but covers contractual and commercial disputes, property disputes, Treaty of Waitangi settlement cases, and many other subjects.

TE AKA MATUA O TE TURE LAW COMMISSION: REVIEW OF CLASS ACTIONS AND LITIGATION FUNDING IN NEW ZEALAND

The Law Commission of New Zealand published its final report on the regulation of class action and litigation funding on 27 June 2022. This report was the result of the Commission's initial review in 2019. The Commission found that no further regulation was necessary for arbitration clauses that prevent claimants from participating in class action and instead require them to use arbitration. This conclusion was based on the fact that the Arbitration Act provides special protections for consumers. The Commission also stated that the policy, as evident in the Act, is to discourage consumer arbitration due to the potential for unequal bargaining power, standard form contracts, and lack of true consent.

The Government has advised that it intends to begin policy works to advance the Commission's recommendations this year.

Singapore

Zachary Song, Apoorvaa Paranjpe, Queenie Chan

Case updates

BZW AND ANOTHER v BZV [2022] SGCA 1

In the case of *BZW and another v BZV*, the Singapore Court of Appeal stated the law on the fair hearing rule and upheld the decision of the Singapore High Court to set aside a Singapore International Arbitration Centre (**SIAC**) award on the basis that there was a breach of natural justice.

The case involved a shipbuilding contract for the construction and delivery of a vessel to the respondent. After the appellants delivered the vessel to the respondent, the respondent commenced arbitration against the appellants claiming: (a) liquidated damages arising from the delay in delivery ("**Delay Claim**"); and (b) damages for the installation of contractually inadequate generators (the "**Rating Claim**"). Both the Delay Claim and Rating claim were dismissed by the tribunal.

The Court of Appeal, agreeing with the High Court, found that there had been a breach of the fair hearing rule as the tribunal had failed to apply its mind to the essential issues arising from the parties' arguments and adopted a chain of reasoning that had no nexus with the parties' submissions.

In respect of the Delay Claim, the Court found that, apart from the prevention principle, there was no indication anywhere in the award that the tribunal adopted as part of its reasoning any aspects of the appellants' six other defences. Whether the prevention principle applied as a defence turned on three questions which the tribunal ought to have posed to itself in the context: (i) did the respondent commit an act of prevention; (ii) was there a mechanism in the contract to claim an extension of time arising from the act of prevention; and (iii) did the act of prevention cause the delay. In failing to apply its mind to the essential issues on the prevention principle, the tribunal expressly stated that it did not need to deal with the issue of extension of time and did not apply its mind to the causation point.

As to the Rating Claim, the tribunal found that the upgrade of the vessel generators was a reasonable explanation why there has been a modification fee in the contract and the pleadings and evidence pointed to the conclusion that the parties understood the vessel's generators had to be upgraded from IP23 to IP44. These findings could only mean that the tribunal was rejecting the appellants' defence that delivering the vessel with IP23-rated generator was not a breach of contract. However, the tribunal then stated that there was no breach by the appellants because the respondent itself had confirmed that IP23 was fit for purpose – this was never the appellants' case and the Court considered that such finding would in any event have no nexus to the issue before the tribunal which was whether the installation of IP23-rated generators was in breach of contractual obligation.

In dismissing the appeal, the Court of Appeal stated that a breach of the fair hearing rule could arise from a tribunal's failure to apply its mind to the essential issues arising from the parties' arguments. However, the Court accords the tribunal "fair latitude" to determine what is and is not an essential issue and an award will not be set aside unless such failure is a clear and virtually inescapable inference from the award.

A breach of the fair hearing rule can also arise from the chain of reasoning which the tribunal adopts in its award. The Court of Appeal stated that to comply with the fair hearing rule, the tribunal's chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments.

A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it was unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flowed reasonably from the arguments actually advanced by either party or was related to those arguments. To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award".

CEF AND CEG v CEH [2022] SGCA 54

In *CEF and CEG v CEH*, the Singapore Court of Appeal considered a number of orders made in an International Court of Arbitration (**ICC**) arbitral award and partially set aside the award, again on the basis that there has been a breach of the fair hearing rule.

This case involved a dispute concerning contracts to provide engineering equipment and services to design and build a steel-making plant on a site in Ruritania. Disputes over the construction and production capabilities of the plant arose and the contracts were terminated. The appellants and the respondent commenced arbitrations against each other with the appellants alleging wrongful repudiation and the respondent claiming misrepresentation.

In 2019, the tribunal issued its award finding that the respondent was entitled to recission of the contracts and made various orders including an order to retransfer the title to the plant to the appellants, an order for the appellants to repay the contract price to the respondent and an order for the appellants to pay damages for the appellants' misrepresentation. In the award, the tribunal noted that there were deficiencies in the respondent's evidence with regard to the proof of its reliance loss but nonetheless proceeded to award the respondent, 25% of each claimed head of reliance loss, applying a "flexible approach".

The appellants applied to the Singapore High Court to set aside the award and the application was dismissed.

On appeal, the Court of Appeal referred to the earlier case of *BZW and another v BZV* on the fair hearing rule and considered that the tribunal's chain of reasoning regarding the award on damage was not one which the parties had reasonable notice that the tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments. The Court found that the parties would have expected that the tribunal would only award the respondent's loss that the respondent could prove and the case law relied on by the tribunal to adopt "flexible approach" was only contained in the respondent's reply post-hearing submission and it was not even the respondent's submission that the tribunal could rely on the "flexible approach" to award a certain percentage of the respondent's total claim.

It should be noted however that the Court of Appeal decided that the "no evidence rule" should not be adopted as part of Singapore law. This rule which has sometimes been applied in Australia and New Zealand means that an award which contains findings of fact made with no evidential basis at all is liable to be set aside for breach of natural justice. The Court of Appeal has refused to apply the "no evidence rule" as it would run contrary to the policy of minimal curial intervention in the arbitral proceedings and considered that it would not add anything to the existing grounds for setting aside an award but would instead be an impermissible invitation to the Courts to reconsider the merits of a tribunal's findings of fact.

The cases of *BZW and another v BZV* and *CEF and CEG v CEH* represented the rare and exceptional instances where the Court of Appeal decided to set aside arbitral awards for breach of justice. In both judgments, the Singapore Court has nonetheless reaffirmed its pro-arbitration policy, and emphasised the principle that plain error of law and facts and inadequate reasons and explanations given in the awards are generally not capable of sustaining a challenge against an arbitral award. In order to set aside an award for breach of fair hearing, it has to be manifestly clear that the reasoning of the arbitral award is clearly detached from the parties' case and submissions.

YORK INTERNATIONAL PTE LTD v VOLTAS LTD [2022] SGHC 153

In the case of *York International*, the Singapore High Court allowed an application under Section 21(9) of the Arbitration Act and determined that the tribunal had no jurisdiction to issue a further award after issuing an arbitral award that included certain conditional reliefs on the grounds that it was *functus officio*.

The case concerned a dispute arising from a purchase agreement for water-cooled dual centrifugal chillers for a district cooling plant on Sentosa Island. The plaintiff claimed for outstanding payments and the defendant counterclaimed for damages due to the failure of the chillers which the defendant was liable to pay under a main contract to design, construct and maintain the Sentosa cooling plant ("**Main Contract**"). The parties agreed to resolve their dispute through *ad hoc* arbitration.

The arbitration proceedings commenced in Singapore and the arbitrator issued an award titled "Final Award" in 2014 in which he found that the plaintiff was liable to the defendant for the damages under the Main Contract but noted that the defendant had not yet paid for the claims under the Main Contract. The arbitrator therefore made the relevant part of his orders for relief conditional upon the defendant making the payment.

The defendant later settled its claim under the Main Contract and sought payment from the plaintiff but the plaintiff refused to make payment on the basis that the defendant had not provided satisfactory evidence of payment under the Main Contract.

The defendant applied to the arbitrator for a further award to determine the sums to be paid by the plaintiff and the plaintiff contended that the arbitrator did not retain any jurisdiction after the "Final Award" in 2014.

In deciding that the arbitrator was *functus offio* (Latin phrase meaning that once an arbitrator renders a decision regarding the issues submitted, he lacks any power to reexamine the decision), the Court considered that an award can be final and conclusive in its terms where it clearly provides for specific relief even though it may be conditional. Whilst this might present difficulties for enforcement purposes, the Court considered that it did not prevent it from being an award which bound the parties. As the arbitrator did not expressly reserve any jurisdiction in the 2014 award and has intended for it to be fully dispositive of all issues in the arbitration, the Court found that the award was final and fully resolved all the disputes that formed the subject of the arbitration.

Other key developments

CONDITIONAL FEE ARRANGEMENTS ALLOWED IN SINGAPORE

Following the passing of the Legal Profession (Amendment) Bill on 12 January 2022, lawyers in Singapore can enter in conditional fee agreements ("**CFAs**") from 4 May 2022, with the passing of the Legal Profession (Conditional Fee Agreement) Regulations.

A CFA is a mutually agreed arrangement for the payment of fees. Under the new CFA framework in Singapore, examples of CFAs that parties may enter into include "win, more fee", "no win, no fee" and "no win, less fee" agreements. Contingency fee agreements, which are agreements where lawyers agree to accept an agreed percentage of the sum or damages recovered by a client are still prohibited under Singapore law. In other words, the uplift fee in a CFA cannot be a percentage of the damages in an arbitral award.

CFAs can be entered into for international and domestic arbitration proceedings, some proceedings in the Singapore International Commercial Court and related court and mediation proceedings. This includes work done for the purposes of, and before, the contemplated proceedings, such as preliminary advice, negotiations or the settlement of disputes.

A number of safeguards are put in place to mitigate the risk of any potential abuse:

- a lawyer is required to provide information on the CFA to the client before entering into a CFA; and
- the CFA must include various prescribed terms including:
  - the particulars of any uplift fee, if applicable;
  - that lawyers and clients must comply with the cooling-off period of five days after a CFA is entered into, during which either party may terminate the agreement via a written notice;
  - that any variation of the CFA must be in writing and expressly agreed to by all parties to the CFA; and
  - that on termination during the cooling-off period, the client is not liable for any remuneration or costs incurred during the cooling-off period.

The Law Society of Singapore has issued its Council's Guidance Note 5.6.1 of 2022 on Conditional Fee Agreements which took effect on 1 August 2022. The Guidance Note provides a sample CFA and a summary of topics a practitioner may encounter when preparing a CFA. The Law Society recommends practitioners to remind their clients of their rights to seek independent legal advice before entering into a CFA.

South Korea

Ted Yi, Queenie Chan

Case updates

SUPREME COURT DECISION 2018DA231550 DATED 11 MARCH 2022

On 11 March 2022, the Korean Supreme Court issued a landmark decision which may allow enforcement of arbitral awards granting exemplary or punitive damages in Korea in certain circumstances.

Previously, Article 217 of the Korean Civil Procedure Act provided that a Court may refuse to enforce or make a partial recognition of a foreign judgment if the compensation for damages awarded in the judgment is against Korean law. As Korea is a member State of the New York Convention, the Korean Courts are required to recognise and enforce arbitral awards issued in other member jurisdictions but the award will not be recognised if it is "in conflict with the good morals and other forms of social order" in Korea. Historically, the Korean civil law system only recognised awards of actual and compensatory damages and as such the Korean Courts may refuse to recognise an arbitral award which grants exemplary or punitive damages on the basis that such damages may be against the public policy in Korea.

The Supreme Court decision concerned the enforcement of a judgment by the Hawaii Court which awarded the plaintiffs treble damages under the Hawaii State Legislature on Unfair or Deceptive Acts or Practices. In deciding to allow the enforcement of the full award, the Korean Supreme Court noted that the amended Monopoly Regulation and Fair Trade Act in Korea now also allows for damages in an amount not exceeding three times the actual damages (i.e. treble damages) and in the circumstances, the award of treble damages in the Hawaii Court judgment would not be contrary to Korean law or public policy.

A number of legislations in Korea now provide and allow for punitive damages including the Personal Information Protection Act, Product Liability Act, Fair Trade Act, Unfair Competition Prevention and Trade Secret Protection Act, Trademark Act, Patent Act, Design Protection Act etc.

Based on the Supreme Court decision, it is likely that enforcement of an arbitral award granting exemplary or punitive damages will be allowed if such exemplary or punitive damages are allowed under the relevant laws and regulations in Korea.

SUPREME COURT ORDER 2020MA7667 DATED 15 OCTOBER 2021

In a recent Supreme Court order, the calculation of attorney's fees for enforcement proceedings under the Arbitration Act was clarified.

Upon the amendment of the Arbitration Act in 2016, an arbitral award is required to be enforced only by a court's "order". A court's "decision" required before the amendment of the Arbitration Act is no longer necessary and seeking a court's "order" is a more simplified process.

However, the Rules on the Stamps Attached for Civil Litigation ("**Stamp Rules**") only provided for the calculation of the "value of the object of litigation" in proceedings seeking a "decision" for enforcement of an arbitral award. The "value of the object of litigation" is used for calculating an attorney's fees in enforcement proceedings for arbitral awards.

Considering that the amendment to the Arbitration Act made no meaningful changes to the standard of enforcement of an arbitral award and that the parties are still required to plead and provide evidence for the enforcement proceedings, the Supreme Court decision held that the Stamp Rules apply the same way to proceedings seeking for an "order" for enforcement of an arbitral award.

ARBITRATION ON NUCLEAR REACTOR TECHNOLOGY BY THE KOREAN STATE UTILITY

On 21 October 2022, a Pittsburgh-based Energy Company ("**W**") sued a Korean state utility and its subsidiary (collectively, the "**Korean entities**") in the US District Court for the District of Columbia and claimed that the reactor designs are derivative of the technology that W previously licensed to the Korean entities under the 10-year licensing agreement – which granted the Korean entities a 10-year license for its

pressurised water reactor technology used in electricity generation. W argued that the delivery of the reactor design by the Korean entities to bid for overseas project would amount to a "retransfer" of technology subject to export control rules under the US Atomic Energy Act and requested the US Court to block the Korean entities from delivering technical information for bidding overseas projects.

The Korean entities, in turn, filed an arbitration against W before the Korean Commercial Arbitration Board (**KCAB**) on 25 October 2022 claiming for losses resulting from the interferences by W for bidding overseas projects. The arbitration was brought under the licensing agreement mentioned above.

Other key developments

KCAB KICKED OFF REVIEW OF ITS ARBITRATION RULES

On 28 September 2022, KCAB announced that KCAB International, the international division of the KCAB, has kicked off a review of its international arbitration rules to address the recent changes in the arbitration ecosystem and to better reflect the astute requests of arbitration clients. The review will be an evaluation and update of its arbitration rules since 2016 and aims to ensure that the KCAB arbitrations are carried out in a more timely and effective manner.

A public consultation will be conducted following an internal review process by a revision committee.

Thailand

Robert Tang, Akyn Suttawatanadech, Prin Laomanutsak, Jia Xiang Ang, Coran Darling

Case updates

STATE RAILWAYS AUTHORITY OF THAILAND v HOPEWELL (THAILAND) LIMITED AND *THAICOM PUBLIC COMPANY LIMITED V MINISTRY OF DIGITAL ECONOMY AND SOCIETY*

In the 2019 edition of our Asia Pacific Arbitration Roundup, we covered the landmark case of *State Railways Authority of Thailand* ("**SRT**") *v Hopewell (Thailand) Limited* ("**Hopewell**") where the Supreme Administrative Court had made a ruling against the SRT and overturned the ruling of the Central Administrative Court that had annulled the enforcement of a TAI award made against the SRT. In 2019, the SRT and the Ministry of Transport authorised public prosecutors to bring a case in the Central Administrative Court to request for a new trial. This was rejected and was subsequently appealed to the Supreme Administrative Court. However, the Supreme Administrative Court affirmed the earlier decision to reject a request for a new trial.

In an arbitration between *Thaicom Public Company Limited* ("**Thaicom**") *v Ministry of Digital Economy and Society* ("**MDES**"), also involving a dispute between a private party against a government entity, the arbitration panel found that the satellites (the subject of the arbitration) were not part of an agreement between Thaicom and MDES. It has been reported that the MDES is planning to petition to the Central Administrative Court to challenge the arbitration award made against it, on procedural grounds.

These cases show that, although state entities are keen to seek all possible avenues for appeal, the Thai Courts will remain impartial in cases where state entities seek annulment of an award. It also demonstrated that the Thai Courts adopt a pro-arbitration approach in support of arbitration as a dispute resolution forum between private parties and government entities.

KINGSGATE v KINGDOM OF THAILAND

The case of *Kingsgate v Kingdom of Thailand* which involved a claim filed to the Permanent Court of Arbitration made pursuant to the Australia-Thailand FTA ("**FTA**") remains pending. Kingsgate, an Australian company alleged indirect expropriation of the Chatree gold mine, a mine owned and operated by Kingsgate's local subsidiary. It alleged that the Thai government's use of emergency powers to close the mine following serious concerns about the health and wellbeing of the residents around the mine amounted to breaches of the indirect expropriation and fair and equitable treatment clauses of the FTA. The issuance of the award is pending and it has been reported that settlement negotiations are on-going between the parties.

Other key developments

THE NEW E-NOTICE SYSTEM FOR THE TAI

On 4 January 2022, the Thai Arbitration Institute ("**TAI**") issued Notification RE: Sending of Documents and Announcing of Hearing Dates By Way of Publications via Electronic Notice (e-Notice System) ("**Notification**"). The Notification aims to create another means for official publication of case documents and hearing dates. In particular, the e-Notice System (https//enotice.coj.go.th) will serve as a centralised online bulletin board for such official publications. This is used when a party's address remains unknown despite reasonable steps being taken to discover the absentee party's address. Case documents published via the e-Notice System are deemed duly served upon a party and the hearing dates are deemed known such that the arbitral proceeding is then permitted to proceed. This is similar to the well-established method of publishing hearing notices in the Royal Gazette and deeming such publication to be notice in litigation. Prior to this, parties had to demonstrate their best-efforts and that they had exhausted all means to reach the other party which is extremely time consuming in practice. This development is encouraging for parties who submit their disputes to the TAI as it makes the process of notice against absentee parties significantly more efficient.

NEW TAI REGULATIONS ON E-ARBITRATION SYSTEM

The TAI has repealed Regulation of the TAI on Criteria for the Use of the Electronic Arbitration System (E-Arbitration) B.E. 2563 (2020) ("**2020 Regulation**") and has replaced it with an updated 2022 version ("**2022 Regulation**"). The 2022 Regulation saw an addition of a new set of sections that deal specifically with procedures on online witness trials and sets out the parties' role during the witness trial. While the 2020 Regulation allowed for online witness trial, there was no clear sets of procedure in place. The 2022 Regulation

stipulates that the party who the witness is testifying on behalf of has the duty to control the 'share-screen' function. Other new features of the 2022 Regulations include: explicitly allowing display of exhibits to witnesses via 'share-screen' during witness trial via online meeting solutions; adding more features for parties' self-identification such as facial recognition and biometric scans; requiring the parties to go paper-less by default and to upload all evidence into the system (uploaded documents will now be treated by default as the original copy).

The primary purpose of 2022 Regulation is to deal with practical issues and ambiguities that arose out of the implementation of its predecessor. This is generally done by providing scenario-based solutions to technical issues that may arise during an online hearing.

Notwithstanding the above strides, there remain hurdles that institutions such as the TAI will need to overcome. For instance, the TAI e-arbitration system is unable to cope with files larger than 10 MB. This is problematic as arbitration proceedings may involve significant volumes of documentary, audiovisual and other evidence which may be greater than 10 MB per file. Although parties may agree to use alternative methods of service i.e. cloud systems/download links, this remains an issue which the TAI should address.

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