K&L GATES

ARBITRATION WORLD

40TH EDITION DECEMBER 2024

40TH EDITION

FROM THE EDITORS

We are proud to mark the release of the **40th edition** of *Arbitration World*, a publication from K&L Gates' International Arbitration practice group, which highlights significant developments and issues in international arbitration for executives and in-house counsel with responsibility for dispute resolution.

As this is a notable edition, we have taken the opportunity to look back at the stories featured in the very first edition in 2005 (a 12-page, glossy magazine) and reflect on how the practice of international arbitration has developed across 20 years.

This edition includes 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 some developments with respect to arbitration institutions. Also included is our usual investor-state arbitration update, with a roundup of some of the recent developments of note in international investment law and practice.

Details are provided of topics covered in our most recent podcasts in our *Arbitration World* podcast series and where to access those.

This edition also includes a compendium of some articles previously published as *Arbitration World* alerts. In particular:

- An important October 2024 decision of the Dubai Court of Cassation on the enforceability of unilateral arbitration agreements under United Arab Emirates (UAE) law.
- A case from the English Commercial Court on some of the key practical considerations that need to be taken into account when assessing arbitrator bias and disqualification of arbitrators.
- A case from the UAE on the ramifications of a failure to comply with contractual preconditions to arbitration.
- A case from the English Court of Appeal in which it was found that consumer rights can render an otherwise valid arbitration award unenforceable.

Finally, we would like to mention that as part of Hong Kong Arbitration Week 2024, our International Arbitration practice group hosted (on 22 October 2024) a panel discussion event in our Hong Kong office on different approaches to principles of good faith in arbitrations conducted under common law and civil law. A link to the recording of that event is made available **here**.

We hope you find this edition of *Arbitration World* of interest, and we welcome any feedback.

Ian Meredith and Peter Morton

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ARBITRATION WORLD PODCAST SERIES

In addition to written alerts, our International Arbitration practice group produces the ***Arbitration World*** **podcast**, which is part of the HUB Talks podcast program covering critical issues at the intersection of business and law. The 10–20 minute episodes cover significant developments and important topics impacting international arbitration.

In 2024, the topics we have covered include the following:

- In discussion with Wendy Miles KC (Twenty Essex), the path to net zero, general trends in the international arbitration world and how they relate to the energy transition.
- In discussion with Dr. Stephen Minas of Peking University Transnational Law School, the general ins and outs of interstate (or state v. state) arbitration and how it differs from other forms of arbitration, the basis for jurisdiction in interstate arbitration, and its potential role in resolving major international disputes.
- In discussion with Ellex law firm, arbitration in the Baltic states, exploring key aspects of how arbitration is conducted in the region.
- The Hague Court of Arbitration for Aviation (the HCAA), in discussion with Paul Jebely, the founder and chairperson of the HCAA.

You can subscribe to HUB Talks via your favourite podcast app to have our episodes delivered directly to you as they become available.

EACH 10–20 MINUTE EPISODE COVERS SIGNIFICANT DEVELOPMENTS AND IMPORTANT TOPICS IMPACTING INTERNATIONAL ARBITRATION

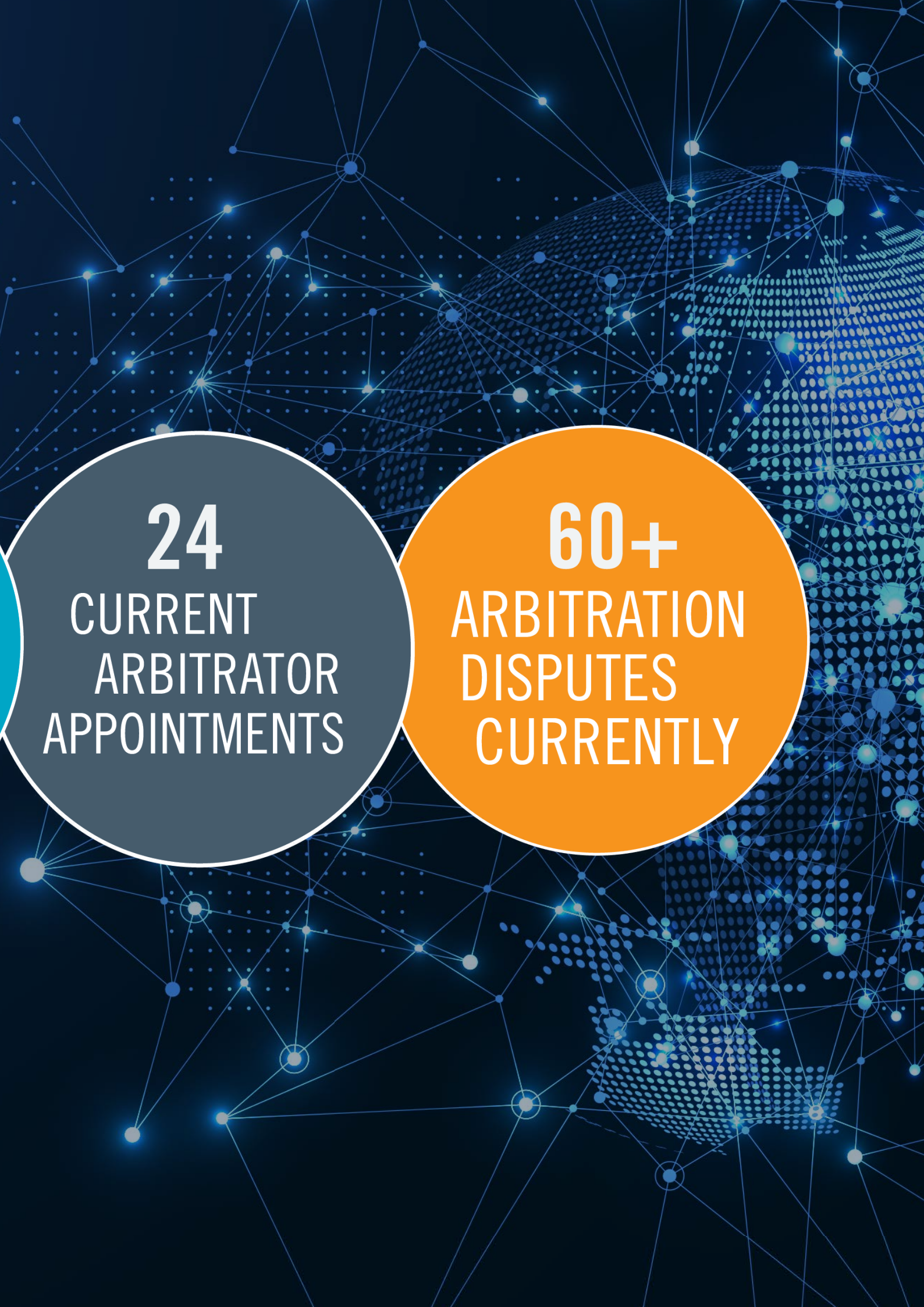
IN THIS ISSUE

K&L GATES INTERNATIONAL ARBITRATION

BENCH STRENGTH

US $18+ BILLION IN DISPUTES

110+ ARBITRATION LAWYERS ACROSS **30+** OFFICES


24
CURRENT ARBITRATOR APPOINTMENTS
60+
ARBITRATION DISPUTES CURRENTLY

LOOKING BACK ON 20 YEARS OF ARBITRATION WORLD

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

It is incredible to think that the publication we started way back in 2005 as a hard copy, 12-page, glossy magazine on developments in the world of international arbitration is now in its 40th edition, spanning 20 years. In this article, I want to look back at some of the stories we featured in that first edition and reflect a little on how the practice of international arbitration at K&L Gates, including my own, has interconnected with some of the stories we covered almost 20 years ago.

BRUSSELS I AND THE ARBITRATION EXCEPTION

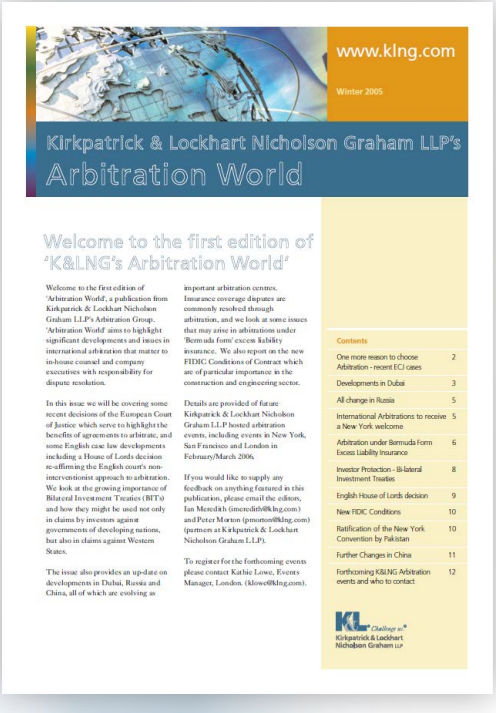
Several of the stories from our first edition have proved to be rather prescient. Little did we know in late 2005 that the very first article on page one, discussing the Court of Justice of the European Union (CJEU) case law underpinning *Brussels I* and specifically the *"Arbitration Exception"*, would become such an important part of a client representation that continues for this firm to this day. A short time before that first edition was published, in November 2002, the oil tanker the *M/T Prestige* was lost in a storm off the coast of Spain. This led to significant pollution on the coasts of both Spain and France. The battle to recover the clean-up costs and related business interruption and other losses resulting from the spillage has involved: court proceedings in the Spanish courts, which went up to the Spanish Supreme Court; two sets of London-seated arbitrations; related s66 proceedings and challenges to the awards under s67, 68 and 69; several appeals to the English Court of Appeal; the last referral by the English court to the CJEU before Brexit came into full effect; and challenges before the European Court of Human Rights (amongst other things). One of the key issues in these proceedings is whether judgments which seek to enforce arbitral awards are caught by the arbitration exception or properly fall within the scope of *Brussels I*. We continue to represent the French State in these cases, which included a seven-day hearing in the English Court of Appeal in autumn 2024.

BERMUDA FORM ARBITRATIONS

We also included an article looking at features of what are known as 'Bermuda Form' arbitrations. These are generally London-seated arbitrations under (substantive) New York law that arise out of insurance policies written by Bermuda-based insurers providing coverage for inter alia catastrophic losses. Claims made under such policies result from natural disasters such as hurricane-related damage, product failures and pharma-product issues that lead through to mass tort claims often conducted as class actions before the US courts. Over the last 20 years, the firm has had the fortune to be instructed in a large number of such arbitrations and it was one such arbitration in which we acted for Halliburton that led to the landmark UK Supreme Court decision on arbitrator duties known as *Halliburton v Chubb* (which is shortly to be enshrined in legislation by the Arbitration Bill which has been brought back before the UK Parliament by the new Labour government).

40TH EDITION

Edition 6



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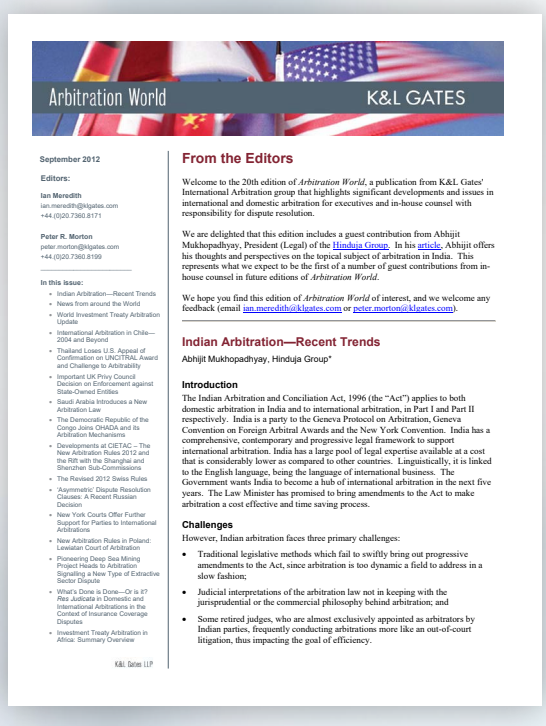

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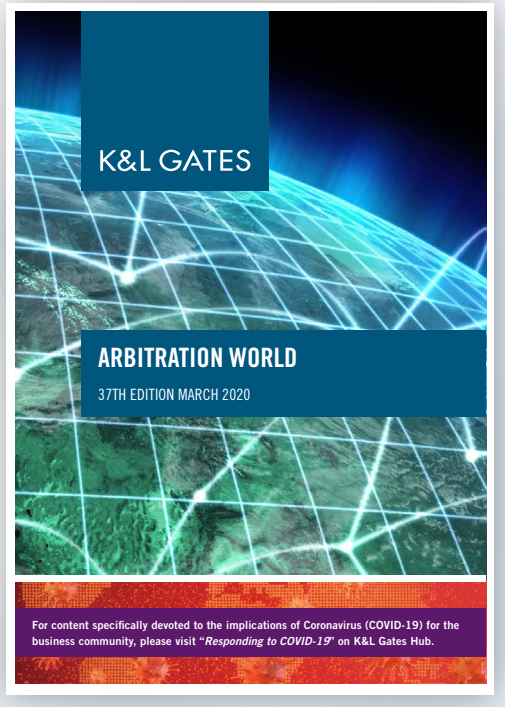

Edition 37

ENGLISH COURT'S NON-INTERVENTIONIST APPROACH

In our first edition, we noted the case of *Lesotho Highlands Development Authority*, at the time only the second case involving the Arbitration Act 1996 to reach the country's highest court (then, the House of Lords). That case confirmed the English Court's non-interventionist approach, an approach which is now well established by the Arbitration Act 1996 and its treatment by the English Courts for nearly 30 years. It remains difficult to successfully challenge an arbitration award in the English Courts, which provides comfort to parties who want to know that their arbitration agreements and awards will be respected, thereby helping to ensure London remains a popular choice for international arbitration.

INVESTOR STATE DISPUTE SETTLEMENT

In an article on investor-state dispute settlement (ISDS), we looked at the degree to which western governments really understood what they signed up to in the form of the various international treaties to which they were party. Certainly, many western governments (particularly in the European Union (EU)) have faced a large number of claims by investors (particularly in the area of renewable energy) and we have seen, over the last decade in particular, a marked cooling of state enthusiasm for ISDS. The landmark CJEU decision in *Achmea* of course led on to *Komstroy* and the EU-wide cancellation of intra-EU member state bilateral investment treaties (BITs) and the withdrawal of the EU and EU members states from the Energy Charter Treaty. Perhaps it is fair to say that many governments did not fully appreciate the implications of the commitments they had entered into.

INTERNATIONAL ARBITRATION IN THE UNITED ARAB EMIRATES (UAE)

Outside of London and the EU, in an article on developments in Dubai, we discussed the expectation that the UAE would soon sign up to the New York Convention and the then-recent establishment of the Dubai International Financial Centre (DIFC), an English language, common law jurisdiction, with its own arbitration law. There have been significant developments and growth in arbitration in the UAE over the last 20 years. Not only did the UAE join the New York Convention in 2006, but the UAE is now commonly viewed as a pro-arbitration jurisdiction, with Dubai widely considered as the regional heart of arbitration in the Middle East. The UAE has a modern legislative framework, and recent trends show a willingness of the UAE courts (both onshore and offshore in the financial free zones of the DIFC and the Abu Dhabi Global Market (established in 2013)) to enforce arbitral awards in accordance with the New York Convention. The Dubai International Arbitration Centre (DIAC) remains the main arbitration centre in Dubai, after a decree in 2021 abolished its competitors in Dubai, but it now benefits from the modernization and update of its rules in 2022. Abu Dhabi also launched a new arbitration centre in 2024, the Abu Dhabi International Arbitration Centre (arbitrateAD), to replace the Abu Dhabi Commercial Conciliation and Arbitration Centre. There are many reasons to conclude that the UAE has succeeded in its efforts to place itself as a top choice for international arbitration.

40TH EDITION

INTERNATIONAL ARBITRATION AND GEOPOLITICAL EVENTS

Over the nearly two decades that we have produced *Arbitration World*, we have touched on the implications for international arbitration of geopolitical events. In the first edition, we covered the changes then being made by arbitral institutions in Russia and China. The articles included in that publication then linked to presentations made by the heads of the International Commercial Arbitration Court (ICAC) and China International Economic and Trade Arbitration Commission (CIETAC) at our first in-person arbitration event, which was held in March 2006 at Claridge's Hotel in London. In his article, Professor Komorov looked forward to what was hoped would be a positive future for Russia-seated arbitration. Sadly, at time of publication of our 40th Edition, the position is of course more challenging with the geopolitical tensions prevalent in the world leading to many disputes, including those related to the supply of gas, the seizure of aircraft and other assets in Russia, and the implications of damage caused in the territory of Ukraine both following the annexation of Crimea in 2014 and the actions taken since February 2022. Meanwhile in China, the last 20 years have seen a marked growth in state and commercial parties' acceptance of international (and indeed domestic) arbitration as a means of resolving disputes, as can be seen from the growth of the main PRC arbitration centres CIETAC, Beijing Arbitration Commission, Shanghai Arbitration Commission, Shanghai International Arbitration Centre and Shenzhen Court of International Arbitration, to name a few, and the volume of cases being conducted by them. By way of example, in 2005 CIETAC received only 979 domestic and international cases whereas last year (2023) they received 5,237.

What is clear from our coverage over the last 20 years is that international arbitration across all regions is constantly evolving, and we look forward to sharing its developments with you over the next 40 editions.

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ARBITRATION NEWS FROM AROUND THE WORLD

By Chris Abraham (Doha), Raja Bose (Singapore), Louis Degos (Paris), Burak Eryigit (Doha and London), Sarra Saïdi (Paris), Declan Gallivan (London), Cindy Ha (Hong Kong), Benjamin Kang (Singapore), Joseph Nayar (Singapore), Jennifer Paterson (Dubai), Dr. Johann von Pachelbel (Frankfurt), Jonathan Sutcliffe (Dubai), Christopher Tung (Hong Kong), Thomas Warns (New York), Matthew Weldon (New York)

ASIA PACIFIC

Singapore

Privacy Orders Not Made if Confidentiality Already Lost

In *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4, the Singapore Court of Appeal declined to grant privacy orders to protect the confidentiality of arbitration-related court proceedings after finding that much of the confidentiality of the arbitration had already been lost through multiple disclosures of information in Singapore and abroad.

Additionally, the Singapore Court of Appeal opined that open justice meant that the conduct of all parties would be open to scrutiny to all who might be interested. The invocation of the court's inherent powers to make privacy orders would not be justified for the private interest of a party not to be viewed in an adverse light.

Transnational Issue Estoppel Could and Should Be Applied by Singapore Enforcement Court

In *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, the Singapore Court of Appeal held that the doctrine of transnational issue estoppel (i.e., prevention of an issue from being relitigated by a party in a domestic court when said issue, involving the same parties, had been decided by a foreign court) could and should be applied by a Singapore enforcement court in the context of international commercial arbitration. This would respect the parties' choice of the arbitral seat; at the same time, this is consistent with the comity of nations and their courts where each other's decisions are respected.

The majority of the court, in *obiter* comments, also considered that where the enforcement court is not precluded by transnational issue estoppel from considering an issue going to the validity of an arbitral award, it may nonetheless be appropriate for the enforcement court to grant primacy to a prior decision of the court at the seat of arbitration.

Japan

Amended Japanese Arbitration Act Comes Into Effect

From 1 April 2024, international arbitration in Japan became governed by the amended Japanese Arbitration Act (the Act), which incorporated the amendments made in the 2006 UNCITRAL Model Law. The effort to modernize the Act, so that it meets current international standards, started with proposed reforms by the government of Japan in 2021. The four key amendments to the Act are: (1) specific procedural rules for Japan's courts to enforce interim or provisional measures ordered by arbitral tribunals; (2) non-written contracts that incorporate a written, electronic, or magnetic record by reference shall be deemed to have been made in writing; (3) Japan's courts have discretion to decide whether a full Japanese or partial translation of a written arbitral award is required in applications for recognition or enforcement of arbitral awards; and (4) Tokyo and Osaka district courts may exercise jurisdiction over arbitral proceedings whose seat of arbitration is in Japan, allowing concentration of international arbitration expertise and improving certainty and consistency in arbitration-related court decisions.

Hong Kong

Greater Bay Area Rule of Law Action Plan

The Guangdong-Hong Kong-Macao Greater Bay Area (GBA) is one of the most economically vibrant regions in the People's Republic of China (PRC), established with the aim of becoming a strategic fulcrum for development in the PRC. The GBA is unique in that it will operate under the principles of "one country, two systems, and three jurisdictions."

The Department of Justice of Hong Kong has released the Action Plan on the Construction of Rule of Law in the Guangdong-Hong Kong-Macao GBA (the Action Plan). With a view to facilitate the resolution of cross-border disputes and to leverage Hong Kong's competitive advantage as a leading international dispute resolution center, the Action Plan has promoted

certain measures, including "allowing Hong Kong-invested enterprises to adopt Hong Kong law" and "allowing Hong Kong-invested enterprises to choose for arbitration to be seated in Hong Kong" (collectively, the Measures). The Measures allow Hong Kong-invested companies in the Pilot Free-Trade Zones to choose Hong Kong as the governing jurisdiction of their contracts and the seat of arbitration.

With the benefit of the Action Plan and the Measures, the GBA, with over RMB$13 trillion of GDP in 2022, will serve as a significant opportunity for the legal industry in Hong Kong. The Action Plan and the Measures may also bolster the confidence of investors planning to invest in GBA companies, as companies could leverage Hong Kong's well-established ability to handle cross-border commercial disputes under arbitration, mediation, and other dispute resolution mechanisms. It is expected that more companies in the GBA will adopt Hong Kong as the governing law in their contracts and include arbitration clauses with Hong Kong chosen as the seat of arbitration.

"Centre of Gravity" Test When Determining Appropriate Forum Under Dispute Resolution Clauses

In *AAA v. DDD* [2024] HKCFI 513, the Hong Kong Court of First Instance (HKCFI) considered and provided welcome guidance on the scenario where there is a group of related contracts and two or more of them have different dispute resolution clauses—a scenario that the HKCFI noted as "not infrequently [arising] in commercial disputes today."

The Hong Kong court expressed reservations about the notion that a mere reference to a document, accompanied as an exhibit, would suffice to invoke the arbitration agreement in that document. Instead, the court emphasized that clear and explicit language is required to indicate that a dispute is being brought to arbitration under a specific provision in a particular contract.

The court also clarified that when dealing with conflicting dispute resolution clauses in multiple related contracts, the "centre of gravity" approach applies. In such cases, there is no presumption that parties intended to resolve their disputes in a single forum, even if the contracts constitute a package. To determine the appropriate forum, one must identify the "centre of gravity" of the issue or dispute and assess which dispute resolution provisions are closer to the issue or dispute.

The People's Republic of China

Amendment to the PRC Civil Procedure Law

The amended 2021 PRC Civil Procedure Law came into effect on 1 January 2024. PRC laws were previously in conflict with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on determining the nationality of arbitral awards, such that awards issued by foreign arbitration institutions would be considered "foreign awards" even when the seat of arbitration is the PRC. However, they now both establish that nationality is based on the seat of arbitration, making awards from foreign institutions in the PRC enforceable as Chinese awards.

Changes to Foreign State Immunity Law

PRC Law on the Immunity of Foreign States (effective from 1 January 2024) now introduces a "restrictive" approach to state immunity, deviating from the former "absolute" doctrine. Foreign states will not have immunity from the jurisdiction of the PRC courts in the following arbitration matters that are subject to review by the courts: (1) validity of an arbitration agreement, (2) recognition and enforcement of an arbitral award, (3) setting aside of an arbitral award, and (4) other arbitration matters that are subject to judicial review by a Chinese court as provided by law.

AMERICAS

United States

US Federal Courts Continue to Narrow Applicability of Section 1782 Discovery

The US Court of Appeals for the Second Circuit ruled in *Webuild S.p.A. v. WSP USA Inc.* that a tribunal administered by the International Centre for Settlement of Investment Disputes (ICSID) was not a foreign or international tribunal under Section 1782. Under Section 1782, private parties are permitted to obtain discovery from US persons for use in certain foreign proceedings before a foreign or international tribunal. In 2022, the US Supreme Court resolved a split in authority among the lower courts and narrowed the scope of Section 1782 considerably, while ruling in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022) that the phrase "foreign or international tribunal" was limited to a "tribunal imbued with government authority." While courts have understood that international commercial arbitration tribunals are clearly not "imbued with government authority" under Section 1782, there was some question as to whether an ICSID panel could meet the test. In *Webuild S.p.A v. WSP USA Inc.,* the Second Circuit

held that an ICSID panel was too similar to the ad hoc UNCITRAL arbitration panel in *ZF Automotive* that the Supreme Court found was not "imbued with government authority." The Second Circuit thus denied Webuild S.p.A.'s petition under Section 1782 that sought discovery from WSP USA, Inc., to aid an ICSID proceeding to which Webuild S.p.A. was a party.

US Federal Appeals Court Finds That Personal Jurisdiction for Enforcement of Award Includes Contacts With Forum Related to Underlying Dispute

In *Conti 11. Container Schiffarts-GMBH & Co. KG M.S. et al. v. MSC Mediterranean Shipping Company S.A.*, the Fifth Circuit Court of Appeals declined to adopt an overly restrictive interpretation of personal jurisdiction in the context of enforcement disputes. In that case, defendant Mediterranean Shipping Company (MSC) chartered a vessel from Conti, a German corporation. In 2012, the vessel exploded while carrying hazardous cargo, killing three crewmembers and causing over US$100 million in damage. Conti brought an arbitration proceeding in London and received an award of about US$200 million in damages against MSC. Conti filed a lawsuit against MSC in the Eastern District of Louisiana to confirm the award under the New York Convention. MSC filed a motion to dismiss arguing that the court lacked personal jurisdiction, since MSC's only contacts with the forum did not arise out of or relate to the confirmation of the award. The district court denied MSC's argument and found that personal jurisdiction existed over MSC when considering its contacts to the forum that related to the underlying dispute. The Fifth Circuit Court of Appeals agreed with the district court's formulation of the personal jurisdiction test, finding that courts should examine contacts with the forum related to the underlying dispute when determining personal jurisdiction. The Fifth Circuit reversed, however, finding that the forum contacts credited as sufficient by the district court—that the cargo that later exploded on the vessel was loaded in New Orleans—were insufficient because that action was attributable to a legally distinct subsidiary of MSC. Thus, because MSC's limited contacts with the forum (the State of Louisiana) were the result of the activities of other parties, the Fifth Circuit found that MSC had not purposefully availed itself of the privileges of conducting activities within the forum such that it could be haled into the jurisdiction.

US Supreme Court Rules That Trial Court May Only Stay Litigation After Compelling Arbitration Rather Than Dismissing It

In *Smith v. Spizzirri* (16 May 2024), the US Supreme Court ruled that under the US Federal Arbitration Act (FAA), when parties seek to compel arbitration and request a stay of the court proceeding pending the conclusion of the arbitration, the court must stay the litigation if it finds an arbitrable dispute. This ruling resolved a split between US federal courts and found that lower courts do not have discretion to dismiss a lawsuit pending the outcome of an arbitral proceeding it has compelled under the FAA.

Brazil

Brazilian Chamber of Deputies Debates "Anti-Arbitration Law Project"

Brazil's legislature continues to debate Law Project No. 3.293/2021, a bill known as the "Anti-Arbitration Law Project." While arbitration has become popular in Brazil since the Brazilian Arbitration Act was enacted in 1996, Brazil's current government has proposed a number of amendments to the Brazilian Arbitration Act that threaten to reduce the number of disputes submitted to arbitration. The most troubling potential amendments include a prohibition against (1) any arbitrator serving as an arbitrator in more than 10 arbitration proceedings concurrently, (2) total or partial overlap of the members of any two tribunals currently in session, and (3) members of an arbitration institution's secretariat or executive board serving as arbitrators in proceedings handled by that institution. The amendments would also impose greater disclosure requirements on arbitrators by lowering the standards for disclosure of potential conflicts. Supporters of the amendments in the Brazilian legislature argue that the changes to the law will minimize the delays that result from arbitrators acting in too many arbitrations at once and will also reduce bias and conflicts of interest. Critics have pointed out that there is no data to back up the assertion that arbitrators serving on too many panels have caused delays and that the parties and the arbitrator(s) are best positioned to determine whether the arbitrator has sufficient time to participate in the arbitration. The fate of Law Project No. 3.293/2021 is still up in the air in Brazil's legislature.

MIDDLE EAST

Kingdom of Saudi Arabia

Riyadh International Disputes Week (RIDW)

The inaugural Riyadh International Disputes Week (RIDW24) took place in March 2024 and established an annual week of events to connect the global community of arbitration practitioners. It aims to promote Riyadh as an international leader in commercial alternative dispute resolution and litigation. RIDW24 was a resounding success, supported and sponsored by 54 local and international organisations involved in commercial dispute resolution. More than 4,900 individuals from over 79 countries attended, and there were more than 90 events organised by 105 organisations.

Several agreements and strategic partnerships for dispute resolution services were signed during RIDW24. Amongst other agreements, the Saudi Center for Commercial Arbitration (SCCA) entered into cooperation agreements with the International Centre for Settlement of Investment Disputes, the Chartered Institute of Arbitrators (CIArb), and the Singapore International Arbitration Centre (SIAC).

The second edition of RIDW is scheduled to take place from 23–27 February 2025.

Saudi Arabia's New Civil Transaction Law

The Kingdom of Saudi Arabia's new Civil Transactions Law (CTL) entered into force on 16 December 2023. The CTL is a comprehensive law that governs all aspects of civil (and, to some extent, commercial) transactions in Saudi Arabia. It is a key component of the reforms to the legal system under the Kingdom's Vision 2030 program which, amongst other things, aims to enhance investor and consumer confidence in the Saudi economy.

The CTL applies with retroactive effect, subject to certain exceptions. Accordingly, the CTL creates a rebuttable presumption that pre-existing relationships and disputes will automatically be governed by the provisions of the CTL from the promulgation date, instead of the uncodified rules of Sharia. However, where there is no statutory provision for a particular matter, relevant Sharia principles shall apply by default.

The CTL is a welcome development as it seeks to neutralise the perceived risks and uncertainties associated with the application of Sharia principles to disputes. Further, the CTL promotes the use of alternative dispute resolution, including mediation and arbitration to resolve disputes. However, it remains to be seen how the Saudi courts will apply the CTL in practice.

Other legal developments are also in progress, with legislators expected to soon publish a Commercial Transactions Law.

Qatar

New Qatari Enforcement Law

The new Qatari Enforcement Law came into force on 6 October 2024 (Law No. 4 of 2024). This significant piece of legislation will amend the current enforcement regime in Qatar (in place since 1990) and sets out a comprehensive process for the enforcement of writs of execution, including foreign judgments and arbitral awards.

The Qatari Enforcement Law provides much-needed clarity as to the procedure for the enforcement of arbitral awards under the Qatari Arbitration Law (Law No. 2 of 2017). Further, the Qatari Enforcement Law sets out simplified and expedited enforcement procedures. The Qatari Enforcement Law establishes the Enforcement Court, replacing the previous Enforcement Department under the repealed provisions of the Civil and Commercial Procedures Law. The Enforcement Judge will be responsible for deciding on applications for enforcement, in line with international best practices, with broad powers to take appropriate precautionary measures without prior notification of the debtor. This includes inquiring about the debtor's assets, imposing precautionary attachments on them, and implementing travel bans.

United Arab Emirates (UAE)

Amended Federal Arbitration Law

In September 2023, the UAE issued Federal Law No. 15 of 2023, providing certain amendments to Federal Law No. 6 of 2018 on Arbitration (Federal Arbitration Law).

Article 33(1) now confirms that confidentiality is extended to the entirety of the arbitration proceedings. Previously, the Federal Arbitration Law provided for arbitral hearings to be held in private but did not expressly extend that confidentiality to the whole arbitral proceedings.

Article 10(1) introduces a requirement that an arbitrator shall not have a direct relationship with any of the parties to the arbitration that would prejudice his impartiality or independence. Previously, an arbitrator had to declare in writing all circumstances likely to give rise to doubts about their independence or impartiality. More often than not, a direct relationship between a party and an arbitrator would be caught by this provision and may well be a ground of challenge to the appointment of an arbitrator with a direct relationship with a party who does not recuse themselves. The amended law strengthens and clarifies this with a prohibition.

Article 10 allows individuals with supervisory roles in arbitral institutions to act as arbitrators in proceedings administered by those institutions, provided certain conditions are met.

Virtual hearings were already expressly permitted by the Federal Arbitration Law. However, Article 28(3) now obligates the arbitral institution to provide the necessary technology.

EUROPE

United Kingdom

Navigating Change: The New Arbitration Bill (England and Wales)

Introduction

On 17 July 2024, King Charles delivered the Labour government's first King's Speech (the Speech), outlining the draft laws the government plans to introduce in the months ahead. In what was a surprise to many, the Speech ended up marking a pivotal moment in the evolution of arbitration law in the UK, as one of the 40 draft bills included was the Arbitration Bill (the Bill). The Bill is a long-awaited piece of legislation aimed at modernising the existing Arbitration Act 1996 (1996 Act), which provides a framework for arbitration in England, Wales, and Northern Ireland. The 1996 Act is now over 25 years old, and other jurisdictions have updated their legislation more recently (e.g., Singapore in 2023, Hong Kong in 2022, and Sweden and UAE in 2018).

The Bill stems from recommendations by the Law Commission following a comprehensive two-and-a-half-year review of the 1996 Act. Originally introduced by the previous Conservative government in November 2023, the Bill was halted due to the general election but has now been revived. As of December 2024, the Bill is still progressing through the legislative process.

Summary of Key Changes

The Law Commission found the 1996 Act still effective but in need of targeted updates to maintain the UK's status as a global hub for arbitration (as such, the proposed changes seek to fine tune rather than overhaul the 1996 Act). Below is a summary of the most significant amendments:

1. **Duty of Disclosure for Arbitrators:** One of the Bill's major initiatives is the codification of the duty of disclosure for arbitrators regarding potential conflicts of interest. This codification follows from the 2020 case of *Halliburton v Chubb*, in which the Supreme Court recognised the duty of disclosure as essential to maintain impartiality. Arbitrators must now disclose any circumstances that might give rise to doubts about their impartiality, both before and after their appointment.
2. **Arbitrator Immunity:** The Bill strengthens the immunity of arbitrators. Under the new provisions, arbitrators will not be held liable for costs in relation to applications for their removal unless

they acted in bad faith. Additionally, arbitrators will have immunity in cases of resignation, provided their resignation is not deemed unreasonable.

3. **Summary Dismissal of Claims:** A significant procedural change is the introduction of powers for arbitrators to issue summary awards on claims that have no real prospect of success. This measure aims to streamline proceedings by enabling quicker resolutions for weak claims, thus reducing unnecessary costs and delays.
4. **Clarifying the Governing Law:** The Bill provides clarity on the governing law applicable to arbitration agreements. In response to ambiguities highlighted by the *Enka v Chubb* case, the Bill establishes that the law governing the arbitration agreement will be the law of the seat of arbitration unless otherwise agreed by the parties.
5. **Emergency Arbitrators:** The Bill also extends the powers of emergency arbitrators, a role introduced in many arbitration rules to handle urgent interim measures before the full tribunal is constituted. The new provisions ensure that court orders can support the orders of emergency arbitrators.
6. **Court Support for Arbitration:** Another key change is the clarification of court powers in support of arbitral proceedings. Courts will now have the authority to issue orders against third parties in support of arbitration, ensuring that arbitrators' orders are fully enforceable.
7. **Miscellaneous Reforms:** Other minor amendments include provisions related to challenging awards, the time limits for such challenges, and the availability of appeals from applications to stay legal proceedings.

Reaction to the Bill

The reintroduction of the Bill has largely been met with strong support from legal practitioners and arbitration institutions alike. Commentators have praised the Bill for promoting greater transparency and efficiency without overhauling the entire arbitration system, which the Law Commission found to be functioning well.

Despite broad support, the Bill has not been without controversy. One key area of controversy has been the proposed changes surrounding governing law. While the Bill provides much-needed clarity on the law applicable to arbitration agreements, some commentators believe that the default rule regarding the law of the seat could lead to complications in international cases involving multiple jurisdictions. Further, there have been calls by consultees and commentators for the Bill to expressly tackle the issue of corruption, particularly following the high-profile case of *Nigeria v P&ID* in which the High Court set aside a US$11 billion-dollar award against Nigeria on the basis of (inter alia) fraud. However, the government decided against inserting a new provision into the Bill requiring tribunals to safeguard arbitral proceedings against fraud and corruption. It was argued (e.g., by Lord Bellamy, a key driver behind the Bill when the prior government was in power), that the common law, arbitration institutions, and the arbitration community as a whole had the means to tackle the (inevitable) issue of corruption.

Conclusion

As the Bill continues its passage through Parliament, the legal community remains optimistic about its potential to drive positive change and maintain the UK's status as a global leader in arbitration.

Germany

New Government Bill on the Modernisation of Arbitration Law Is on Its Way

The existing German law on arbitration proceedings was last revised in 1998. In light of the further development in domestic and international arbitration law and practice since then, the German government launched a process of revising and modernizing the current law. This process included a broad-based expert consultation.

On 26 June 2024, the federal government, taking into account the wide range of comments received on the first draft of the proposed bill, published an updated draft bill for the modernisation of German arbitration law (the Bill). The Bill's express aims are to adjust the existing law to the needs of today's world, to increase efficiency, and to further strengthen Germany's attractiveness as a seat for arbitration proceedings.

The proposed changes include the following:

- The legislative proposal allows, in certain cases, for documents from arbitration proceedings in related German court proceedings, to be introduced in the English language, without the need to submit a German translation.
- By instituting specific court chambers—so-called commercial courts—within some of the higher regional courts or within the supreme court, the individual federal states in Germany shall be able to introduce rules that allow the courts to conduct proceedings in English, upon agreement of the parties.

- Under certain conditions, the rules allow for the conduct of virtual arbitral proceedings and the drafting and delivery of the arbitral award in an electronic format, together with qualified electronic signatures of the arbitrator(s).
- With regard to international arbitrations seated in Germany, the draft Bill will allow an arbitrator serving in a tribunal with more than one arbitrator to issue a concurring or dissenting opinion, which will not be part of the award. The latter proposal is deemed to establish legal certainty in the face of recent contrary case law in Germany.
- A clarifying regulation is proposed that allows arbitral awards to be published in anonymized form, provided a party does not object to this upon request. This rule aims to increase transparency in arbitration.
- The draft Bill also contains a proposal to introduce an application for restitution to set aside arbitral awards even after the expiry of the time limit for filing a request for setting aside, if the applicant, in exceptional circumstances, can show that certain requirements are met.

The above proposals for reforming the German statutory provisions on arbitration are still to be conclusively discussed in the legislative process, but it is likely that a final version of the Government Bill on the Modernisation of Arbitration Law will be adopted in the near future.

France

2024 Paris Olympics: The Court of Arbitration for Sport's Ad Hoc Division Reallocates Bronze Medal from US Gymnast Jordan Chiles to Romanian Gymnast Ana Maria Bărbosu

On 14 August 2024, the Court of Arbitration for Sport (CAS) issued its final, reasoned award determining the applications (CAS OG 24-15 / OG 24-16) brought by the Romanian Gymnastics Federation and Romanian gymnasts Ana Maria Bărbosu and Sabrina Maneca-Voinea, challenging the final rankings in the Women's Artistic Gymnastics Floor exercise competition in the 2024 Paris Olympics. The arbitration was chaired by Dr. Hamid Ghavari, with Prof. Philippe Sands KC and Prof. Song Lu completing the arbitral panel.

Ms. Jordan Chiles, the last of nine gymnasts to perform, initially scored 13.666. Ms. Chiles' coach then submitted an inquiry, which was accepted by the judges, leading to a revision in Ms. Chiles' score

to 13.766. Pursuant to Article 8.5 of the Technical Regulations of the *Fédération Internationale de Gymnastique* (FIG), an inquiry must be filed within one minute of the announcement of the score. Chiles' coach submitted the inquiry one minute and ***four seconds*** after the score was posted. Nonetheless, the inquiry was accepted at the time of the event and resulted in Ana Maria Bărbosu and Sabrina Maneca-Voinea being bumped into fourth and fifth place behind Ms. Chiles.

The CAS panel acknowledged the breach of the one-minute rule and furthermore noted the lack of a system to monitor the timeliness of such inquiries, which raised procedural concerns.

Throughout the proceedings, it was revealed that no objections regarding the timeliness of the inquiry were raised during the event. However, subsequent evidence supplied by Omega, the official timekeeper, confirmed the late submission. The CAS panel ruled that the inquiry constituted a violation of FIG's Article 8.5, stating that late verbal inquiries should be rejected. Consequently, the original score of 13.666 awarded to Jordan Chiles, which would have placed her in fifth position, should have been maintained. Following the award, Ms. Bărbosu received a bronze medal.

This ruling has garnered significant attention due to its ramifications for the final standings in the competition and the scrutiny it casts on the governance and arbitration processes within international sport.

Successful Challenge of an Arbitration Award for Lack of Impartiality and Independence Under Article 1456(2) of the French Code of Civil Procedure and Article 11 of ICC Rules

On 19 June 2024, in the ICC case *Douala International Terminal* (DIT) *v. Douala Port Authority* (DPA), the French Court of Cassation (No. 23-10.972) endorsed the annulment of an arbitral award due to the undisclosed personal relationship between the president of the arbitral tribunal and the counsel for DIT.

This undisclosed personal relationship was unveiled in a eulogy penned by the president of the arbitral tribunal, which stated that he "consulted [DIT counsel] before making any important choice", raising concerns over his impartiality and independence.

Initially, DPA contested the composition of the tribunal before the ICC, asserting that the president's undisclosed relationship with DIT's counsel created a conflict of interest. The ICC dismissed the challenge, but DPA subsequently brought the matter before the Paris Court of Appeal, which ruled in favor of setting aside the award on 10 January 2023 (No. 20/18330). The Court of Appeal concluded that the president's omission of his personal tie with the counsel could reasonably lead to doubts about his independence and impartiality in the arbitration between DIT and DPA.

The Court of Appeal's ruling relied on Article 1456(2) of the French Code of Civil Procedure and the ICC Rules, which mandate arbitrators to disclose any circumstances that might affect their independence or impartiality. Upon appeal, the Court of Cassation (the highest court in the French judicial system) confirmed this decision on 19 June 2024, emphasizing that the integrity of the arbitration process depends on the arbitrator's duty to maintain both actual and perceived impartiality and independence throughout the proceedings.

This decision reinforces the obligation for transparency and full disclosure by arbitrators to prevent any conflicts of interest from impairing the arbitration process.

INSTITUTIONS

Singapore International Arbitration Centre—Public Consultation on Draft Seventh Edition of SIAC Rules

Between 22 August 2023 and 21 November 2024, the Singapore International Arbitration Centre (SIAC) commenced a public consultation on the draft seventh edition of the SIAC Rules (Rules). The new Rules seek to enhance user experience and raise the bar on efficiency, expedition and cost effectiveness. Some of the key proposed changes include:

- A new streamlined procedure to provide quicker and lower-cost dispute resolution for claims up to S$1 million. Such claims will be heard by a sole arbitrator, on the basis of written submissions alone (with no documentary production or witness evidence) and with a final award issued within three months of the tribunal's constitution.
- A new preliminary determination procedure, which will permit parties to apply for preliminary determination of issues and which will require the tribunal to decide on such issues within 45 days of the application being filed.
- The incorporation of SIAC Gateway, the SIAC's new digital case management system, which centralises case documents on an electronic platform.

Hong Kong International Arbitration Centre—Update to Administered Arbitration Rules

For the first time since 2018, the Hong Kong International Arbitration Centre (HKIAC) has released an update to its Administered Arbitration Rules (2024 Administered Arbitration Rules), which took effect on 1 June 2024.

In line with other leading arbitration institutions, the 2024 Administered Arbitration Rules will require parties and the HKIAC to consider gender diversity when appointing arbitrators. They also require parties and tribunals to consider issues of (i) information security, and (ii) environmental impact when contemplating the procedure for an arbitration. Tribunals are empowered to make directions and order sanctions for any noncompliance with information security, as well as to make costs orders when a party's conduct has an adverse environmental impact.

Also, HKIAC is given more power in conducting the arbitration, including the power to revoke the appointment of an arbitrator when he or she could not fulfil their function. Tribunals are required to follow a stringent time limit for the close of proceedings (45 days from the last oral or written submissions) and issuing of awards (three months from the close of proceedings).

Separately, in March 2024, HKIAC released its 2023 statistics, which reaffirmed Hong Kong's position as one of the prime international arbitration hubs. While the total number of matters submitted to the HKIAC (500) was similar to that in 2022, 281 filings were made, which is the third-highest figure since 2017. A total of 771 parties and 382 contracts were involved, and a record-breaking HK$92.8 billion (approximately US$12.5 billion) was involved in the disputes handled by the HKIAC. The average amount of each dispute was HK$467.6 million (approximately US$60.1 million), another new record.

China International Economic and Trade Arbitration Commission—Amendment to CIETAC Arbitration Rules 2024

Changes made to the Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) took effect on 1 January 2024. Key changes include:

- Recognizing the *kompetenz-kompetenz* principle.
- Allowing contracts involving related subject matters but different contracting parties to be filed under a single arbitration.
- Acceptance and forwarding of preservation applications to non-People's Republic of China courts.

Judicial Arbitration and Mediation Services Releases New Rules Impacting Arbitrations Concerning Artificial Intelligence Disputes

On 23 April 2024, Judicial Arbitration and Mediation Services (JAMS)—the alternative dispute resolution provider—released its new Rules Governing Disputes Involving Artificial Intelligence Systems (the JAMS AI Rules). The rule changes are effective immediately. The JAMS AI Rules apply to disputes involving artificial intelligence (AI) systems where the parties agree to the applicability of the JAMS AI Rules. The new rules define "artificial intelligence" as a "machine-based system capable of completing tasks that would otherwise require cognition." The JAMS AI Rules would allow "AI systems and related materials" to be made available only to one or more experts mutually agreed upon by the parties or otherwise designated by the arbitral tribunal, and also contain a default protective order that allows the parties to limit sensitive trade or commercial information to another party's lawyers.

Silicon Valley Arbitration and Mediation Center Publishes Guidelines on the Use of AI in Arbitration

On 30 April 2024, the Silicon Valley Arbitration and Mediation Center (SVAMC) published its first edition of the Guidelines on the Use of AI in International Arbitration (the AI Guidelines). The AI Guidelines impose an obligation to safeguard confidentiality when using AI tools, which may include redacting or anonymizing information submitted to any AI tool. The AI Guidelines also prohibit an arbitrator from delegating any part of their decision-making process to AI tools and emphasizes that arbitrators are not to replace their independent analysis of the facts, law, or evidence with analysis performed by an AI tool. An arbitrator is also prohibited from relying on AI-generated information from outside the record without making appropriate disclosures to the parties and allowing the parties to comment on such use.

A Glimpse at the Future? AAA-ICDR Launches AI-Powered Tool to Select Arbitrators

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution (ICDR), have recently launched an internal

beta version of a new AI-powered tool called AAAi Panelist Search. Announced on 10 October 2024, this tool aims to assist case managers in selecting and appointing arbitrators and mediators by leveraging generative AI to analyze the AAA-ICDR roster of arbitrators and suggest the most suitable candidates for each case. According to Cindy Rumney, AAA's vice president of panel resources and development, the tool's performance during a test phase showed it "effectively identifies the best fits for each case, aligning closely with the selections made by our experienced case managers."

Initially, the tool will be used exclusively by AAA-ICDR case managers as a supplement to their traditional methods, but the AAA-ICDR has indicated that it plans to extend access to this tool in select cases, allowing parties to view potential panelists through links provided by their assigned case managers.

SCC Arbitration Institute Releases Guide to the Use of AI in Arbitration Under Its Rules

The SCC Arbitration Institute in Sweden (the SCC) has issued a non-binding **guide** on using Artificial Intelligence (AI) in cases administered under the SCC Rules of Arbitration. In announcing the guide, Jake Lowther, Specialist Counsel at the SCC, declared that "AI is the future! Already now its use represents significant potential benefits for arbitration users in terms of time and cost efficiency. We expect to see an exponential increase in the use of AI."

The "light-touch" guide aims to provide "flexible guidance to participants in an SCC case without imposing specific obligations." The SCC's guide on AI in arbitration emphasizes that, while AI can enhance efficiency and reduce costs, it should be used carefully to uphold confidentiality, ensure decision quality, maintain transparency, and preserve the integrity of the arbitral process. Arbitral tribunals are encouraged to oversee AI outputs rigorously, disclose AI use to ensure accountability, and not delegate decision-making responsibilities to AI.

Abu Dhabi International Arbitration Centre—Launch of New Institution

On 29 January 2024, the Abu Dhabi Chamber of Commerce launched a new arbitral institution called the Abu Dhabi International Arbitration Centre (Centre), branded as "arbitrateAD," to replace the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). The Centre's new arbitration rules (Rules),

which came into force on 1 February 2024, replace the previously applicable 2013 ADCCAC Arbitration Rules (ADCCAC Rules).

The Rules shall apply in circumstances where the parties have agreed to submit their disputes to the Centre or the Abu Dhabi Chamber of Commerce or have agreed to arbitration under the Rules. The Rules shall also apply where parties have agreed to submit to arbitration under the ADCCAC Rules; however, Article 35 (Emergency Arbitrator) and Article 36 (Expedited Proceedings) shall not apply unless the parties expressly agree. The Rules apply to cases registered after 1 February 2024, with ADCCAC cases commenced prior to 1 February 2024 continuing to be administered under the ADCCAC Rules.

The Rules introduce a number of welcome developments more in line with other modern arbitration rules. Of particular significance is the creation of an independent court of arbitration (Court) to act as an independent administrative body of the Centre. The Court's role includes appointing and replacing arbitrators, resolving challenges against arbitrators or arbitration agreements, considering requests for joinder or consolidation, and scrutinizing draft awards. The new Rules also introduce rules regarding multiple parties, multiple contracts, joinder and consolidation. In the absence of an agreement between the parties, the new Rules provide that the default seat shall be the Abu Dhabi Global Market (rather than onshore Abu Dhabi).

Cairo Regional Centre for International Commercial Arbitration—New Rules

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) issued its new Arbitration Rules, with effect from 15 January 2024 (CRCICA Arbitration Rules). The CRCICA Arbitration Rules have been updated to account for recent trends in the arbitration landscape. The new rules largely mirror the UNCITRAL Arbitration Rules, and the updates are mostly aimed at promoting the efficient conduct of arbitrations administered by the CRCICA. Amongst other notable additions, the CRCICA Arbitration Rules now include provision for consolidation of arbitration proceedings, early dismissal of claims, appointment of emergency arbitrators, expedited arbitration procedures, third-party funding and a number of new provisions related to using electronic tools in proceedings. In doing so, CRCICA aims to promotes user-friendly, flexible and efficient arbitration proceedings.

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WORLD INVESTMENT TREATY UPDATE

By Robert Houston (Singapore), Raja Bose (Singapore), Ian Meredith (London)

For this 40th edition of K&L Gates' *Arbitration World*, our Investor-State Dispute Settlement (ISDS) team takes *Arbitration World* readers on a guided tour of some of the recent developments of note in international investment law and practice around the world. We first touch upon global practice developments before turning to regional points of interest.

GLOBAL DEVELOPMENTS

Climate Change and the Energy Transition

Efforts to balance environmental protection or climate change measures with sustainable economic development as part of the energy transition from fossil fuels has driven some of the most significant changes in international investment law and practice in 2024. The ***"Pact for the Future"***, for example, was adopted by global leaders at the 79th UN General Assembly as a major initiative that "focuses on making the global trading system a driver of sustainable development." The current advisory proceedings before the International Court of Justice (ICJ) in *Obligations of States in respect of Climate Change* has reportedly prompted **62 states to file written comments** with public hearings set to open on 2 December 2024. Both states and foreign investors interested in ISDS are watching this process closely as the result of the ICJ's consideration of this issue may inform tribunal perceptions on state obligations related to climate change under multilateral treaties such as the Paris Agreement and under customary international law when interpreting and applying international investment agreements.

One major development in this space has already come from the International Tribunal for the Law of the Sea (ITLOS), which issued a **related advisory opinion** on 21 May 2024 finding that Article 194 of the UN Convention on the Law of the Sea "imposes upon States an obligation to take all necessary measures to prevent, reduce and control marine pollution from any source, regardless of the specific sources of such pollution," and that this obligation also applies to the release of anthropogenic greenhouse gas emissions into the atmosphere as such release constitutes pollution of the marine environment.

Finally, in what may be a sign of what is to come in broader state practice, the Joint Committee of the Comprehensive Economic Trade Agreement (CETA) between the European Union (EU) and Canada issued a **joint interpretive statement** indicating that, "the Parties' rights and obligations under Chapter Eight (Investment) of [CETA] should be interpreted in a manner that supports the ability of the Parties to give effect to their respective commitments to reduce greenhouse gas emissions by adopting or maintaining measures designed and applied to mitigate or combat climate change or address its present or future consequences."

Sustainable Development and ISDS

Other developments of global interest in relation to sustainable development include the development of the ***Draft Statute of an Advisory Centre on International Investment Dispute Resolution*** by the UN Commission on International Trade Law Working Group III and the International Seabed Mining Authority's release of the consolidated text of its ***Draft Regulations on Exploitation of Mineral Resources in the Area.***

DEVELOPMENTS IN EUROPE

Energy Charter Treaty (ECT) and Intra-EU Investment Arbitration

In Europe, the trend toward withdrawal from investment protection under the ECT has continued apace with the EU's written notification of withdrawal issued on 27 June 2024, shortly after the withdrawal of the United Kingdom (UK) on 26 April 2024 (both effective after one year). EU Member States that have recently notified their withdrawal from the ECT include France, Germany, Poland, Luxembourg, Slovenia, Portugal, Spain, and the Netherlands.

In a further chapter of the EU's storied efforts to end intra-EU investment arbitration as counter to EU law, the European Commission **announced its decision** to "open an infringement procedure by sending a letter of formal

notice to Hungary (INFR(2024)2206) for undermining the [EU]'s position on the international stage with regard to the prohibition of intra-EU investor-State arbitrations related to the Energy Charter Treaty (ECT), and for contradicting the case law of the Court of Justice of the European Union." Separately, the Court of Justice of the European Union (CJEU) found in *European Commission v United Kingdom*, **Case C-516/22**, that the UK Supreme Court had violated the UK's EU law obligations by lifting a stay on the enforcement of an intra-EU International Centre for Settlement of Investment Disputes (ICSID) arbitral award.

In a sharp rebuke to the EU's position rejecting intra-EU investment arbitration, however, the Swiss Federal Supreme Court recently upheld an intra-EU arbitral award under the ECT in **Spain v EDF Energies Nouvelles**, ordering Spain to pay €29.6 million to France's EDF and "finding that the prohibition on intra-EU ECT arbitrations established in Komstroy was based on an erroneous reading of the treaty."

DEVELOPMENTS IN THE AMERICAS

One notable development at the headquarters of ICSID in Washington, D.C., was the **30 April 2024 election of Martina Polasek** as the new ICSID Secretary-General taking over from Meg Kinnear.

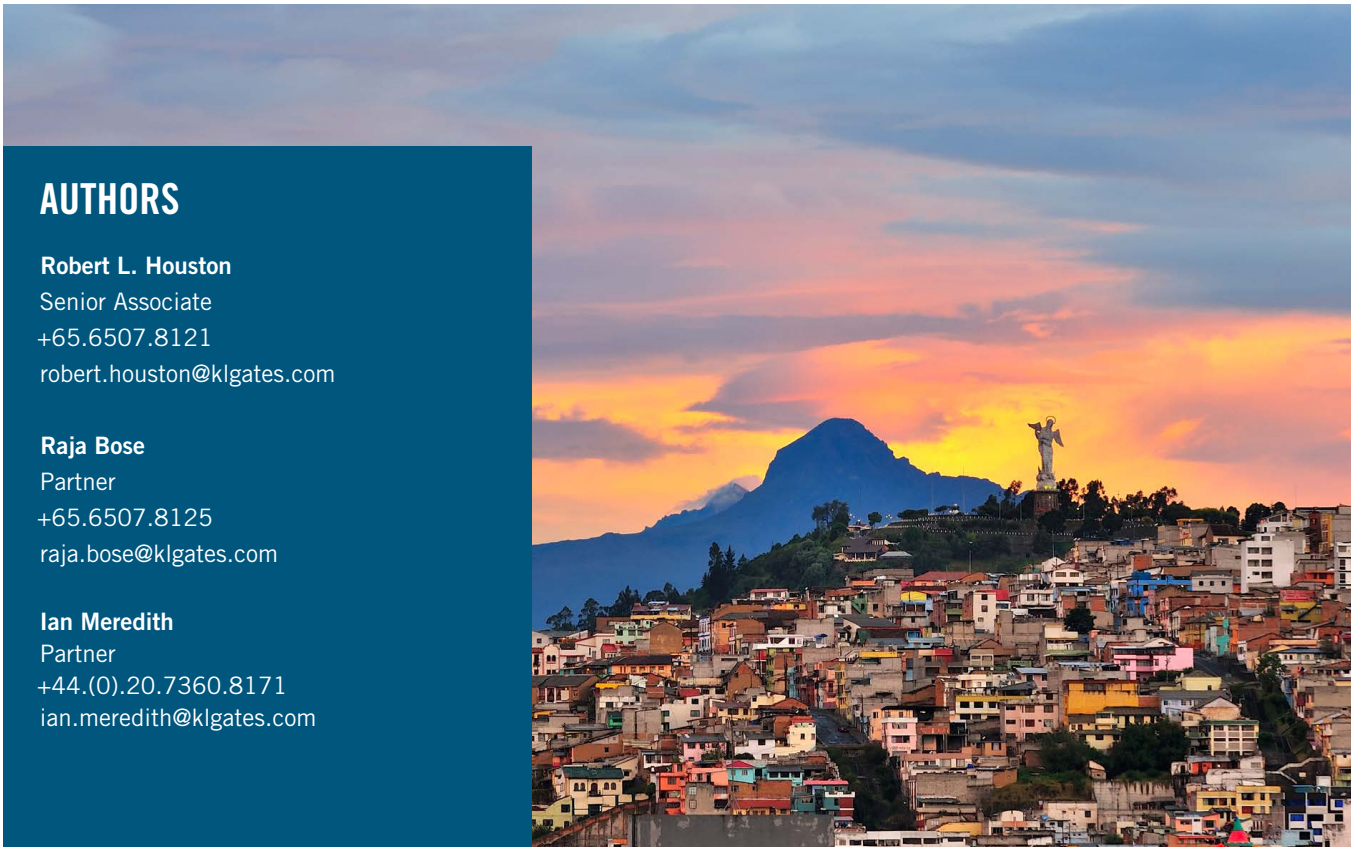
In South America, Ecuadorian citizens reportedly voted in a **referendum on 21 April 2024** "to keep Article 422 of the country's 2008 constitution, which prevents Ecuador from using international arbitration to settle disputes between Ecuador and foreign investors or private individuals in international treaties or instruments."

DEVELOPMENTS IN AFRICA

A number of sizable international investment disputes have arisen in Africa recently. Orca Energy affiliates PanAfrican Energy (PAET) and Pan African Energy Corporation (PAEM), for example, are **reportedly** gearing up to pursue investor-state arbitration claims totaling US$1.2 billion against Tanzania in a gas field dispute. News of this new dispute followed on from earlier **reports** this year that Tanzania had settled an ICSID case brought by Indiana Resources for US$90 million (i.e., 82.5% of the amount awarded). Separately, in *International Holding Project Group, et al. v Egypt* (ICSID Case No ARB/18/31), an arbitral award was issued, which according to the Egyptian State Lawsuits Authority (ESLA), ordered Egypt to pay around US$18.5 million, inclusive of interest and costs or less than 1% of the US$8 billion in damages sought.

DEVELOPMENTS IN ASIA AND OCEANIA

The Permanent Court of Arbitration (PCA) has announced the pending opening of an office in Delhi, adding a sixth overseas location to its current list, i.e., Mauritius (2010), Singapore (2017), Buenos Aires (2019), Vienna (2022), and Hanoi (2022). The PCA's headquarters remains at the Peace Palace in The Hague (established 1899).



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UAE LAW ON THE ENFORCEABILITY OF UNILATERAL ARBITRATION AGREEMENTS

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

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In a recent decision dated 29 October 2024, the Dubai Court of Cassation (Court of Cassation) in Case No. 735 of 2024 (Commercial) confirmed that a unilateral (or asymmetric) arbitration agreement—an agreement which provides one party with the unilateral option to choose between arbitration and court proceedings—is not a valid arbitration agreement under United Arab Emirates (UAE) law and does not preclude the onshore UAE courts from hearing the dispute.

BACKGROUND

A subcontractor filed a claim against the main contractor before the Dubai Court of First Instance (Court of First Instance) seeking payment for work performed under two subcontracts. The subcontracts contained an identical dispute resolution clause. The clause provided that in the event of a dispute arising out of the subcontract, such dispute, if not resolved by amicable settlement, shall be referred to either (a) arbitration at the Dubai Chamber of Commerce or (b) the local courts in the UAE, and specified that the forum to be used shall be decided by the main contractor. The main contractor invoked the arbitration agreement and argued that the Court of First Instance lacked jurisdiction over the dispute. The Court of First Instance dismissed the main contractor's jurisdictional argument. The main contractor appealed to the Court of Appeal on the basis of lack of jurisdiction due to the arbitration agreement, which gave the main contractor the sole power to determine which forum would resolve any dispute between the parties. The Court of Appeal dismissed the appeal. The main contractor appealed to the Court of Cassation.

RULING OF THE COURT OF CASSATION

The Court of Cassation noted that the approach to unilateral arbitration agreements differs between jurisdictions. Some judicial systems enforce the parties' agreement under the principle of party autonomy of will. Others find that there is no valid arbitration agreement, either because such a clause violates the principle of equality between the parties or because a valid arbitration agreement must reflect a conclusive meeting of the minds to adopt arbitration as the sole forum for resolving disputes.

The Court of Cassation confirmed that, under UAE law, an arbitration agreement must be a clear and explicit agreement between the parties to resolve any disputes arising between them by arbitration to the exclusion of the courts. The Court of Cassation held that the unilateral arbitration agreement at issue was not a valid arbitration agreement because it did not provide a clear agreement to resolve disputes solely by arbitration. The Court of Cassation stated that the clause in issue was invalid, as it prevented the subcontractor from referring a dispute to any authority for resolution until the contractor had elected which forum to adopt.

CONCLUSION

This judgment confirms that a unilateral arbitration agreement is not a valid arbitration agreement under UAE law. However, the significance of this judgment is not limited to contracts governed by UAE law. Pursuant to Article 21 of the UAE Civil Code, Federal Law No. 5 of 1985 (as amended), the rules of jurisdiction and all procedural matters shall be governed by the law of the state in which the case is filed. Accordingly, if the onshore UAE courts would in principle have jurisdiction over a dispute arising between contracting parties and those parties wish for any dispute between them to be resolved by arbitration, care should be taken to ensure that the parties' dispute resolution clause clearly and explicitly provides for arbitration as the sole forum for resolving disputes. These considerations

apply irrespective of the governing law of the contract, or the seat (or legal place) specified in the arbitration agreement. This is because if proceedings are filed before the onshore UAE courts, the court will consider the validity of the unilateral arbitration agreement and therefore the court's jurisdiction over the dispute under UAE law.

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ARBITRATOR BIAS: THE ENGLISH COMMERCIAL COURT OFFERS FURTHER GUIDANCE ON DISQUALIFICATION OF ARBITRATORS

By Andrew D. Connelly (London), Ian Meredith (London)

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The leading English authority on arbitrator impartiality is the case of *Halliburton Co v. Chubb Bermuda Insurance Ltd [2021] AC 1083*, a well-known case in which K&L Gates acted for Halliburton. *Halliburton v. Chubb* clarified how apparent bias will be assessed by the courts and set an arguably high bar for arbitrator removal. The Supreme Court confirmed that the relevant test for arbitrator bias was objective and involved determining whether a fair-minded and informed observer would conclude that there was a real possibility of bias. So how is this applied in practice?

In the recent case of *H1 & Anor v. W & Ors [2024] EWHC 382 (Comm)*, the English Commercial Court removed a sole arbitrator under section 24 of the Arbitration Act 1996 due to justifiable doubts about his impartiality and a real possibility of bias, offering further guidance on the disqualification on arbitrators.

In *Halliburton*, the Supreme Court set out a number of relevant factors that should be taken into account when assessing potential arbitrator bias, some of which were helpfully summarised by Mr. Justice Calver in *H1 v. W*, namely:

- The private and confidential nature of arbitration and limited discovery means there is a premium on frank disclosure;
- An arbitrator is not subject to appeals on issues of fact nor often on issues of law in the same way that a judge may be;
- There is a difference between a judge, as a holder of public office funded by taxation, and an arbitrator who has a financial interest in obtaining income from arbitral appointments and may therefore be more wary of taking actions that would alienate parties to an arbitration;
- Arbitrators may have limited involvement or experience of arbitration; and
- The professional reputation and experience of an arbitrator is relevant when assessing whether there is apparent bias (an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify).

Clearly, potential arbitrator bias is not assessed in a vacuum, and parties should consider an arbitrator's experience (or inexperience) against the context they find themselves in before seeking to remove an arbitrator.

Given the popularity of arbitration as a method of dispute resolution, arbitrator impartiality is essential. Whilst the bar may be high, the case of *H1 v. W* reaffirms some of the key practical considerations that need to be taken into account when assessing arbitrator bias and highlights how an arbitrator's ill-chosen words can clear that bar, leading to court removal under section 24.

H1 & ANOR V. W & ORS

The Facts

The underlying arbitration involved a dispute between a film company and an insurer arising from an accident that happened on set during filming. Filming was delayed after the lead actor suffered injuries. The film company submitted a claim to its insurer seeking indemnity for the added expense arising from the delay, which amounted to around £3 million. The insurer denied the claim, arguing that the insured was

responsible for safety on the set. The sole arbitrator, a well-known film producer and industry specialist, was nominated by the British Film Institute.

At a procedural hearing, the sole arbitrator made statements regarding the expert witnesses that gave the insurer cause for concern. The arbitrator said that he did not need to hear from expert witnesses as the insured's experts were "exceptional people in their fields" and that he knew "them all personally extremely well" and was "good friends with them" but did not know the insurer's expert who he did not think added much. In respect of one of the insured's experts, the arbitrator added "what he says is what I will believe" despite not having heard any evidence or submissions.

The insurer applied to the court for an order removing the sole arbitrator under section 24(1) due to concerns about the arbitrator's statements, which suggested a lack of impartiality and an apparent bias towards the insured and its experts.

Decision

In making his decision, Mr. Justice Calver confirmed that removing an arbitrator for apparent bias is not a discretionary matter but rather an objective assessment of whether there is either a "real possibility of bias or not." He added that, if there was a real possibility that an arbitrator's decision was influenced by factors that should not have been part of the decision-making process, there was a real possibility of bias.

Mr. Justice Calver found that:

- The fact that the arbitrator was professionally acquainted with the insured's experts did not give rise to justifiable doubts about his impartiality. It was not surprising that there was familiarity between experienced practitioners in the television production industry;
- The suggestion that the arbitrator did not need to hear the expert evidence because he knew the insured's experts extremely well and they were exceptional people in their fields indicated that he would accept the insured's experts' evidence at face value. Pre-judging the merits of the dispute in this way suggested a prejudice in favour of the insured's experts that would prevent an impartial assessment of the evidence; and
- By saying that he would believe what the insured's expert said before any evidence was presented, the arbitrator gave an appearance of bias that suggested he did not have an open mind and would judge the evidence by reference to his personal knowledge of the insured's expert's status.

Mr. Justice Calver determined that the statements made by the arbitrator would lead a fair-minded and informed observer to conclude that there was justifiable doubt as to his impartiality and a real possibility of bias. The insurer's application was therefore granted and the arbitrator was removed.

Comment

The independence and impartiality of arbitrators is of the utmost importance, especially given the limited avenues of appeal in arbitration when compared with court litigation. Arbitrators need to be carefully selected, giving consideration to their professional qualification, and in some circumstances, arbitration experience.

As arbitrators (as distinct from judges) are commonly nominated by the parties, there is an increased risk of lack of impartiality or bias impacting the decision-making process. When faced with apparent bias, parties need to be aware of the relevant factors that a court might take into consideration when considering the removal of an arbitrator.

In this case, the Court's job may have been made easier by the ill-chosen and blatant language of the arbitrator, but the case acts as a helpful reminder of the relevant considerations when faced with potential arbitrator bias.

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DUBAI COURT OF CASSATION CONFIRMS THAT CONTRACTUAL PRECONDITIONS TO ARBITRATION ARE MATTERS OF ADMISSIBILITY AND NOT JURISDICTION

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

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The Dubai Court of Cassation (Court of Cassation), in its recently surfaced decision in Case No. 1514 of 2022, held that issues relating to the parties' compliance with contractual preconditions to arbitration are matters of admissibility rather than jurisdiction, bringing the United Arab Emirates (UAE) in line with other jurisdictions, such as England and Wales.

COURT OF CASSATION PROCEEDINGS

The respondent in an arbitration administered by the Dubai International Arbitration Centre (DIAC) commenced proceedings in the Dubai Court of Appeal (Court of Appeal) to set aside the arbitral award. The Court of Appeal held that the arbitral award was enforceable and dismissed the case. The respondent appealed that decision to the Court of Cassation.

The respondent argued, among other things, that the arbitral award was invalid because the claimant had not satisfied the contractual preconditions to arbitration, which first required the claim to be submitted to the project engineer for determination, followed by a mandatory period of amicable settlement discussions for 56 days before referring the dispute to arbitration.

The Court of Cassation rejected this argument. The Court of Cassation held that contractual preconditions to arbitration are not matters related to the jurisdiction of the arbitral tribunal, but rather are questions of admissibility (i.e., whether the substantive claims asserted in the arbitration can be heard at that time or whether there is a legal impediment that prevents them from being heard, such as the claim being prematurely filed). Accordingly, even if a party can demonstrate that any preconditions to arbitration have not been fulfilled, it does not result in the UAE courts assuming jurisdiction over the dispute. Jurisdiction to determine the dispute remains with the arbitral tribunal. However, if a party can demonstrate that the preconditions to arbitration have not been fulfilled, it may result in the arbitral tribunal postponing the arbitration pending fulfilment (if possible) of those preconditions.

In this case, the Court of Cassation determined that the contractual preconditions to arbitration had been satisfied to the extent necessary and logical. While the onshore UAE courts have consistently held that contractual dispute escalation provisions act as mandatory preconditions that must be satisfied before commencing arbitration proceedings, the Court of Cassation stated that such clauses should not be interpreted in a manner that leads to unjustifiable delays. The Court of Cassation found that, as the dispute related to interim payment certificates that had already been approved by the engineer, it was illogical to assume that the parties intended to refer to the engineer the same matter that the engineer had already determined. The Court of Cassation further held that the mandatory period of amicable settlement discussions had been satisfied because the claimant had requested the respondent to engage in settlement negotiations on two occasions, without any response from the respondent, and the claimant had only commenced arbitration proceedings after more than 56 days had passed since its second request.

COMMENTARY

This judgment is important, as it should reduce the risk of parties arguing that noncompliance with contractual preconditions to arbitration means that the arbitral tribunal lacks jurisdiction to determine the dispute. It also serves as a reminder of the importance of parties ensuring that they have, to the extent possible, satisfied all contractual preconditions prior to commencing arbitration proceedings.

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CONSUMER RIGHTS CAN RENDER AN OTHERWISE VALID ARBITRATION AWARD UNENFORCEABLE

By Peter R. Morton (London), Declan C. Gallivan (London)

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A warning to all consumer-facing businesses...

The UK's Court of Appeal has upheld the enforcement of a US$64 million Hong Kong-seated arbitration award against a Mrs Zhang, rejecting her argument that she was protected by the UK Consumer Rights Act 2015 (CRA).[1]

So far, so unremarkable. But, apart from convoluted underlying facts which Lord Justice Stephen Males (Males LJ) likened to "the facts of a students' moot," the case is notable for more substantive comments made by Males LJ in the leading judgment. He made clear that, if the CRA applied and was infringed, consumer rights would prevail over an arbitration award on UK public policy grounds, and the court would have to refuse enforcement of the award.

This decision follows on from Payward v Chechetki[n2], a rare decision in 2023 in which the Commercial Court refused to recognise a US arbitration award on public policy grounds, partly on the basis of the CRA. See our alert on that decision **here.**

BACKGROUND

- Mrs Zhang, a Chinese businessman's widow, was found liable under a personal guarantee, which the Commercial Court said she signed "predominantly out of love."
- Mrs Zhang argued that under the CRA, the personal guarantee she signed was non-transparent and unfair, thus making the arbitration award unenforceable on public policy grounds.
- The court concluded that, on the facts, the CRA did not apply.
- However, the claimant, Eternity Sky claimed that even if Mrs. Zhang succeeded on all of the issues, the court should still not refuse enforcement on public policy grounds under s.103(3) of the Arbitration Act 1996.
- Eternity Sky argued that s.103(3) afforded the court discretion, and in exercising that discretion, the court would need to balance two competing public policies, the policy of enforcing arbitration awards on the one hand and the policy of effective consumer protection on the other.
- Mrs Zhang countered, insisting that the CRA created a special rule which should prevail over the general rule of enforcement of awards.
- In obiter commentary, Males LJ rejected Eternity Sky's 'balancing exercise' argument. Males LJ acknowledged that there is a competing public policy in favour of enforcing arbitral awards, but said that had the CRA applied and been infringed, the arbitration award would not be enforceable. Males LJ stated that the CRA provided unequivocally that "an unfair term of a consumer contract is not binding on the consumer" and that this was a public policy principle found in primary legislation.
- The decision was unanimous (Lord Justice James Dingemans and Lady Justice Sarah Falk agreed with Males LJ).

[1] *Eternity Sky Investments Ltd v Xiaomin Zhang* [2024] EWCA Civ 630
[2] [2023] EWHC 1780 (Comm)

WHAT ARE THE PRACTICAL TAKEAWAYS?

These judgments should make businesses that deal directly with consumers stop and think about the following:

- Assess the connections of contracts (e.g., consumers' jurisdictions) and what local laws apply, particularly in multijurisdictional situations and where cross-border contracts are involved;
- Consider the choice of dispute resolution clauses and, when arbitration is chosen, the seat of arbitration. Wherever you are in the world, consumer rights may be relevant;
- Take account of where you may want to enforce; and
- Seek to navigate relevant consumer protection legislation, and other public policy considerations, in relevant jurisdictions.

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