K&L GATES

ARBITRATION WORLD

39TH EDITION JUNE 2023

FROM THE EDITORS

Welcome to the 39th Edition of Arbitration World, a publication from K&L Gates' International Arbitration practice group highlighting significant developments and issues in arbitration for executives and in-house counsel with responsibility for dispute resolution.

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

We include our usual investor-state arbitration update, with (1) brief discussions of anticipated investor-state disputes arising from the Russian invasion of Ukraine; (2) the impact of public conversation around climate change on international investment law and investor-state dispute settlement (ISDS); (3) developments in the international investment agreement landscape and the ongoing discussion of potential reform of the architecture of ISDS; (4) newly revised rules and regulations of the International Centre for Settlement of Investment Disputes (ICSID); and (5) a selection of significant awards or decisions of interest involving investor-state disputes.

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

- Our report on the Singapore International Commercial Court's (SICC) launch of a model clause to aid parties in designating the SICC as the supervisory court to hear arbitration-related applications.
- An alert on the judgment of the Dubai Court of Cassation confirming that it is a mandatory requirement for factual and expert witnesses in arbitration seated in the onshore United Arab Emirates to give evidence under oath.
- Our report on the review of the Arbitration Act 1996 by the Law Commission of England and Wales.
- An alert on the decision of the United States District Court for the Eastern District of New York on the availability of discovery under 28 U.S.C. § 1782 (Section 1782) in aid of an arbitration conducted under the auspices of ICSID.
- Our report on the steps taken to modernise and update the arbitration law (effective 25 April 2023) in Luxembourg to seek to enhance the appeal of Luxembourg as a potential seat of arbitration.

Finally, with considerable turbulence in global energy markets, we report on our authorship of a new chapter titled "LNG Arbitrations" in the latest (5th) edition of Global Arbitration Review's (GAR) "Guide to Energy Arbitrations," available **here**.

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

EDITORS

Ian Meredith
London
Partner
+44.(0).20.7360.8171
ian.meredith@klgates.com

Peter Morton
London
Partner
+44.(0).20.7360.8199
peter.morton@klgates.com

K&L GATES 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.

This podcast features K&L Gates lawyers, often in conversation with special guests such as professor Doug Jones (leading construction arbitrator), and representatives from prominent third-party funders of arbitration and litigation such as Augusta Ventures, Longford Capital LLC, and Therium Capital Management Ltd.

We have covered topics including:

- A mini-series on claim financing, discussing:
  - **Relevant Considerations When Applying for Funding**
  - **Key Issues in Third-Party Funding**
  - Bringing Claim Funding to a Successful Conclusion, **Part I** and **Part II**
- U.S. Supreme Court cases regarding **discovery through the U.S. courts in assistance to foreign arbitrations** and **prejudice requirements for the waiver of arbitration agreements**
- **How to Deal With Expert Evidence in International Arbitration**

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

IN THIS ISSUE

ARBITRATION NEWS FROM AROUND THE WORLD..... 10

Asia.....10
Americas.....14
Brazil.....16
Middle East.....16
Europe.....17
Institutions.....20
New York Convention.....23

WORLD INVESTMENT TREATY ARBITRATION UPDATE..... 24

Anticipated Investor-State Disputes Arising from the Russian Federation's Invasion of Ukraine.....24
Impact of the Public Conversation Around Climate Change.....24
Recent Developments in the International Investment Law Landscape, Including Possible Reform of the ISDS Architecture.....26
The Newly Revised ICSID Rules.....27
Developments in Proceedings Related to ISDS.....27

SINGAPORE INTERNATIONAL COMMERCIAL COURT ISSUES: MODEL CLAUSE FOR INTERNATIONAL ARBITRATION-RELATED LITIGATION..... 29

About the SICC and its Advantages.....29
Singapore is Pro-Arbitration.....30

SWEARING AN OATH REMAINS A REQUIREMENT FOR WITNESSES IN ONSHORE UAE ARBITRATION..... 31

Background.....31
Decision of the Dubai Court of Cassation.....31
Implications.....31

THE LAW COMMISSION REVIEW OF THE ARBITRATION ACT 1996 33

Arbitrator Independence and Impartiality 33
Immunity of Arbitrators 33
Summary Disposal 34
Enforcement of Orders of Emergency Arbitrators 34
Confidentiality 34
Appeals on Jurisdiction 34
Appeals on Points of Law 34
Conclusion 35

EASTERN DISTRICT OF NEW YORK RULES ON USE OF SECTION 1782 IN AID OF ICSID ARBITRATION 36

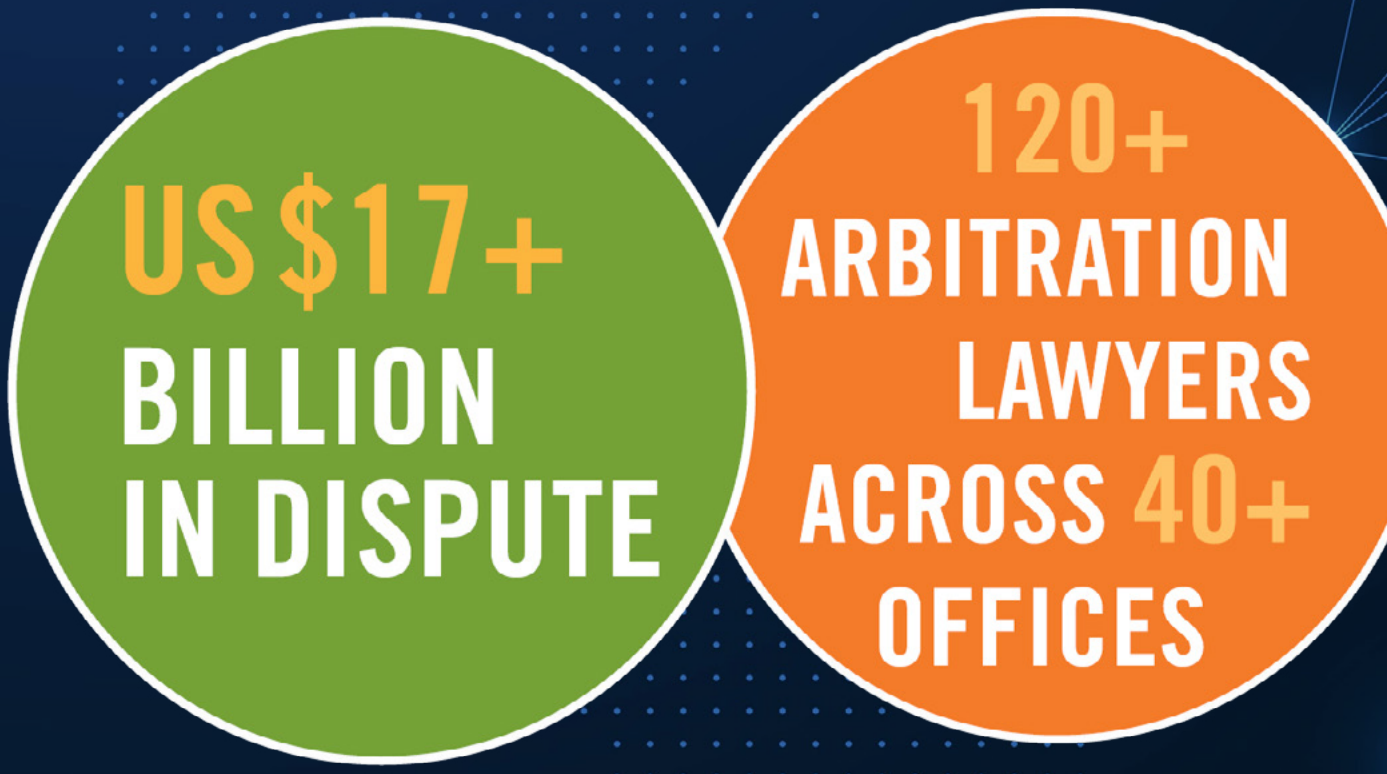
Section 1782 36
The Alpene Decision 36
Conclusion 37

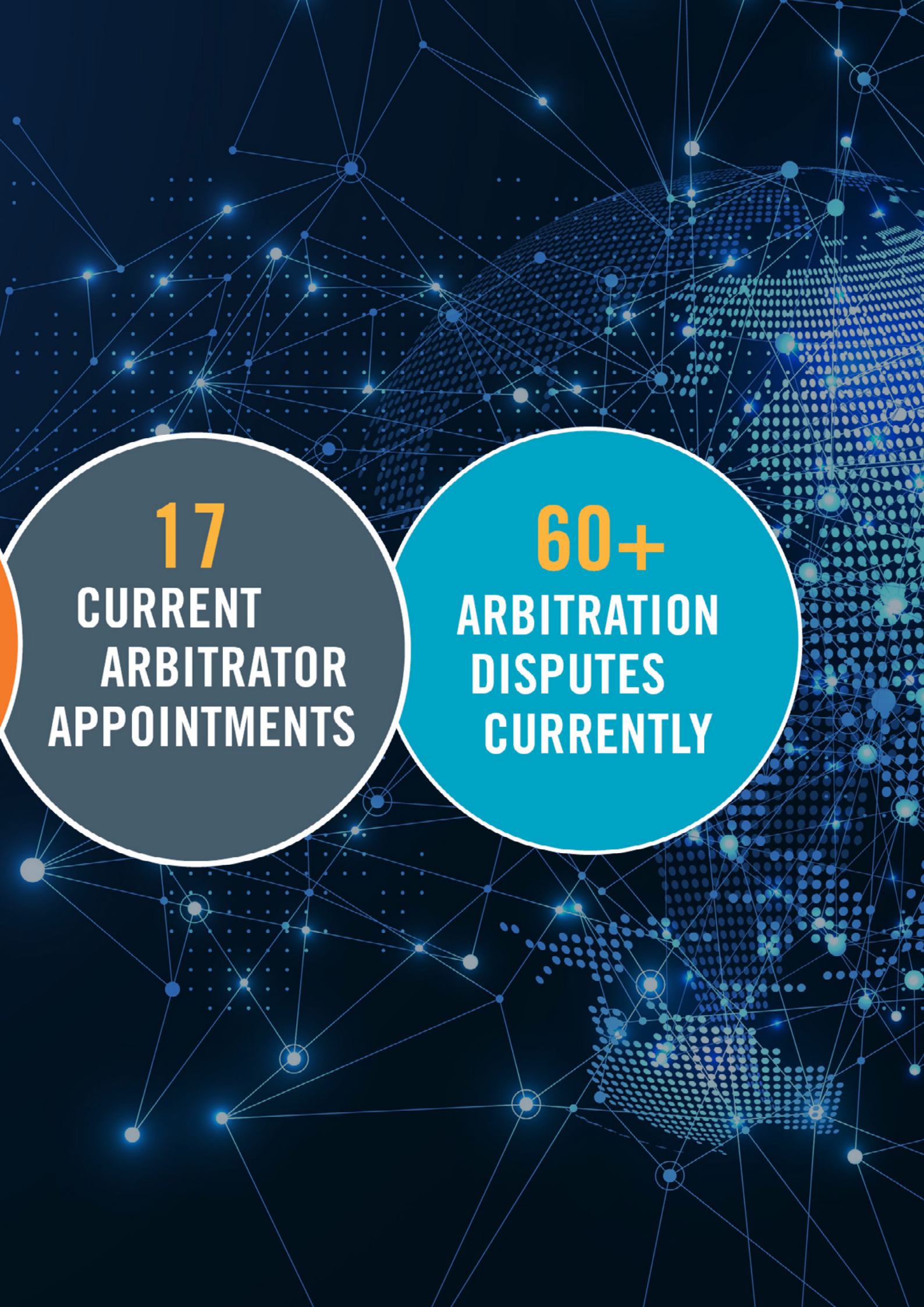
NEW ARBITRATION LAW IN LUXEMBOURG – A KICK-START FOR LUXEMBOURG AS AN ARBITRATION VENUE? 38

Key features of the New Arbitration Law 38
Arbitration Stakeholders in Luxembourg 39
Reform Fine-Tuned With Current Market? 39

ENERGY PRACTITIONERS PUBLISH CHAPTER ON LNG ARBITRATION IN GLOBAL ARBITRATION REVIEW'S GUIDE TO ENERGY ARBITRATIONS, 5TH EDITION 40

K&L GATES INTERNATIONAL ARBITRATION
BENCH STRENGTH




17
CURRENT ARBITRATOR APPOINTMENTS
60+
ARBITRATION DISPUTES CURRENTLY

ARBITRATION NEWS FROM AROUND THE WORLD

By Cindy Ha (Hong Kong), Susan Munro (Beijing/Hong Kong), Matthew J. Weldon (New York), Grace M. Haidar (Houston), Jennifer Paterson (Dubai), Louise Bond (London), Dr. Johann von Pachelbel (Frankfurt)

ASIA

Hong Kong

Escalation Clauses and Pre-arbitration Conditions

By the case of C v D [2022] HKCA 729, the Hong Kong Court of Appeal affirmed the distinction between objections to admissibility and objections to jurisdiction, in the context of an alleged failure to comply with a multi-tiered escalation dispute resolution clause. The case arose out of a cooperation agreement between a Hong Kong company (Company C) and a Thai company (Company D) related to the operation of satellites (the Agreement). In April 2019, Company D commenced arbitration proceedings against Company C for breach of the Agreement. Company C objected to the jurisdiction of the tribunal and argued that the condition precedent in the multitiered dispute resolution clause—that the parties must first make a request in writing to attempt resolution by negotiation before an arbitration can be commenced—was not fulfilled. After the hearing in February 2021, the arbitral tribunal found that the condition precedent was fulfilled and rejected the jurisdictional challenge in a partial award. Company C sought a declaration from the Hong Kong High Court that the partial award was made without jurisdiction. In addition to arguing that the condition precedent was satisfied, Company D argued that the dispute involved only a question of admissibility of Company D's claim rather than jurisdiction. In May 2021, the Court of First Instance held that compliance with the condition in the escalation clause was an issue of admissibility instead of jurisdiction because (1) there was no indication that the parties intended for the provision to be a matter of jurisdiction and (2) it is unlikely that such was the parties' intention. Therefore, the court should not conduct a *de novo* review of the tribunal's finding, and the setting aside of the partial award was not justified under Section 81 of the Hong Kong Arbitration Ordinance (adopts Article 34 of the Model Law) *(C v D* [2021] HKCFI 1474). This principle was quickly applied in later cases in the same year (*T v B* [2021] HKCFI 3645 and *Kinli Civil Engineering Limited v Geotech Engineering Limited* [2021] HKCFI 2503). In June 2022, the Court of Appeal affirmed the distinction between objections to admissibility and objections to jurisdiction (*C v D* [2022] HKCA 729). While it is ultimately up to the parties to agree whether the fulfilment of a condition should be determined by the tribunal, the Court of Appeal confirmed that, in this case, the question was intrinsically suitable for determination by the tribunal. This was especially so given the presumed intention of rational businessmen to achieve a quick, efficient, and private adjudication of their dispute by arbitrators chosen by them as referred to in the landmark case of *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40. This case continues the trend of Hong Kong courts' pro-arbitration approach and aligns the legal position with those of other pro-arbitration jurisdictions, such as the United Kingdom and Singapore.

Jurisdictional Challenge – Multiple Conflicting Dispute Resolution Clauses

In the case of *H v G* [2022] HKCFI 1327, the Hong Kong High Court considered a case involving two different dispute resolution clauses in the Main Contract and the ancillary Deed of Warranty (Warranty) relating to a construction project. The Main Contract entered into between the developer, company G (Developer) and the main contractor, company H (Contractor) contained an arbitration clause, while the Warranty jointly executed by the Contractor and its subcontractor contained a clause specifying that the Hong Kong court had non-exclusive jurisdiction. In February 2020, the Developer commenced arbitration against the Contractor in relation to defects in the building project and claimed for breach of the Main Contract or the Warranty. The Contractor objected to the jurisdiction of the tribunal on the basis that the claims made arose under the Warranty. The arbitral tribunal found that the breaches of the Warranty could be determined within the arbitration. The Contractor commenced proceedings at the Hong Kong High Court and successfully set aside this determination. The Court considered the presumption in the landmark case of *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 that rational businessmen would prefer to have the

disputes determined in one forum by arbitration. The Court distinguished the facts of this case on the basis that there were two contracts instead of just one. The parties knew and agreed on a different mechanism contained in the Warranty, which involved a third party. In this context, the court considered that the parties intended to carve out particular and specific disputes under the Warranty from the arbitration clause in the Main Contract. Therefore, the language displaced the presumption in *Fiona Trust*.

Setting Aside of Enforcement Order of Arbitration Award

The case of 廣東順德展煒商貿有限公司 *v Sun Fung Timber Company Limited* [2021] HKCFI 3823 is a rare example of an award being set aside by the court in Hong Kong for being contrary to public policy. In this case, a dispute arose between two shareholders and directors of a joint venture company (the Company) in late 2016. In April 2017, one of the shareholders (ST) purportedly entered into a contract (the Contract) on behalf of the Company with 廣東順德展煒商貿有限公司 (GD), a company which had only been incorporated for three months. The Contract was not in the Company's usual course of business and contained a harsh penalty clause. The Company failed to perform the Contract. In May 2017, GD commenced arbitration proceedings against the Company; ST conducted the proceedings on behalf of the Company and procured its admission to liability without informing the other shareholder of the Company, New Intertrade Foods Co Ltd (NI). GD obtained an award against the Company within only four days (the Award). NI did not know about the arbitration or the Award until GD sought to wind up the Company based on the Award and to enforce the Award. NI intervened and applied to the Court of First Instance in Hong Kong to set the enforcement order aside. The court drew inferences of fraud and collusion between GD and ST based on the suspicious circumstances. The court found the Contract (and, hence, the arbitration agreement contained therein) to be invalid for ST's lack of authority to act on behalf of the Company, and that the Company was not given proper notice of the arbitration and was unable to present its case. The court therefore decided that the Award should be set aside for being contrary to public policy pursuant to Section 95(3) of the Hong Kong Arbitration Ordinance.

Legal Fee Arrangement for Arbitration – Outcome Related Fee Structures

Outcome related fee structures (ORFS) are historically prohibited by the common law doctrines of maintenance, champerty, and barratry in Hong Kong. In light of trends in international arbitration, and consistent with Hong Kong's recently-enacted third-party funding regime that allows a non-litigant to acquire an interest in legal proceedings, the Hong Kong Arbitration Ordinance (Cap. 609) and the Legal Practitioners Ordinance (Cap. 159) were amended and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D) (the ORFSA Rules) came into operation on 16 December 2022, allowing agreements between lawyers and clients to use ORFS for arbitration. The types of ORFS available include:

- Conditional fee agreements (CFAs) – Client pays a success fee—or any fee—only if the claim is successful, i.e., "No-Win, No-Fee", or "No-Win, Low-Fee" arrangement. Under Section 4(1) of the ORFSA Rules, the success fee is expressed as a percentage of the benchmark fee (i.e., the lawyer's fees that must be paid if no ORFS agreement had been made) and the uplift element (i.e., the portion of total fee that must be paid to the lawyer when the amount awarded or recovered exceeds the benchmark fee) cannot exceed 100% of such benchmark fee. A CFA must state the circumstances that constitute a successful outcome, the basis for calculating the success fee, and the timing of payment.
- Damage-based agreements (DBAs) – The lawyer receives a proportion of the amount awarded or recovered in addition to the recoverable lawyer's fees. The percentage of the amount awarded or recovered payable to the lawyers (DBA Payment) should not exceed 50% of the financial benefit (i.e., money's worth excluding the awards of lawyer's costs and expenses) under Section 5 of the ORFSA Rules. A DBA must state the financial benefit, the basis for calculating the DBA Payment, the timing of DBA Payment, and whether the payment of barrister's fees is additional to the DBA Payment.
- Hybrid damage-based agreements (HDBA) – The lawyer receives a lower legal fee during the proceedings and a proportion of the amount awarded or recovered. Under Section 6(1) of the ORFSA Rules, a HDBA must state that when there is no financial benefit obtained by the client, the client is not required to pay to the lawyer more

than 50% of the irrecoverable costs. The agreement must also provide that when the client obtains a financial benefit but the amount obtained is less than the lawyer's fees that a client has to pay as if no financial benefit has been obtained (capped amount), the lawyer may elect to receive the higher capped amount. Further, such agreement must state the lawyer's fees that have to be paid in any event and the benchmark fee.

In addition to these specific conditions, any valid and enforceable ORFS agreements must: (1) be in writing; (2) be signed by the lawyer and the client; (3) state the matter to which the agreement relates; (4) state the circumstances that the lawyer's fees and expenses are payable; (5) state that the client is informed with the right to seek independent legal advice before entering into the agreement; (6) state that the client may terminate the agreement by written notice not less than seven days after entering into the agreement; (7) state the disbursement arrangement; (8) state the grounds that such agreement can be terminated; and (9) the payment of lawyer's fees when the agreement is terminated (Section 3 of the ORFSA Rules). These requirements provide statutory safeguards to layman clients when entering into ORFS agreements with legal professionals.

Under the amendments to the Arbitration Ordinance, once a party enters into an ORFS agreement with its lawyer, the lawyer must give a written notice to the other parties and to the relevant arbitration body administering the arbitration (Section 98ZQ of the Arbitration Ordinance). This seeks to minimize the risk of challenges to arbitration proceedings on the basis of conflict of interest. As the amendments came into effect, the Secretary for Justice has appointed an Advisory Body on Outcome Related Fee Structures for Arbitration in order to monitor and review the operation of the provisions on ORFS for arbitration.

Singapore

Legal Fee Arrangement for Arbitration – Conditional Fee Agreement

Singapore's amendments to the Legal Profession Act and Legal Profession (Professional Conduct) Rules came into effect on 4 May 2022. It is now permissible for lawyers and their clients to enter into a conditional fee agreement (CFA) for arbitrations, Singapore International Commercial Court proceedings, and related court and mediation proceedings. The CFA can also cover preliminary and preparatory advice and the negotiation or settlement of any contemplated proceedings. However, unlike the expected amendments to Hong Kong law, a damages-based contingency fee arrangement is still unlawful. This means lawyers cannot receive a proportion of damages awarded or recovered as a success fee. However, a party awarded costs cannot recover more than the amount payable to its lawyers under a CFA. In other words, any additional success-based fee cannot be recovered from the losing party under any adverse costs order. This is aimed to encourage the negotiation of reasonable uplift fees and to prevent satellite litigation, where losing parties challenge the validity of the CFA. The Law Society of Singapore published a Guidance Note on CFAs on 1 August 2022 to facilitate the introduction of a CFA, including sample CFAs for reference.

Default Rule on Costs Awards for Unsuccessful Challenges to Arbitral Awards

In *BTN v BTP* [2021] SGHC 38, the High Court of Singapore decided that the default rule on costs awards in unsuccessful challenges to arbitral awards should be set on the standard basis of party-and-party scale (where the parties must agree on the amount or submit to taxation by the court) instead of the higher rate under the indemnity basis (where the paying party must pay the full amount unless they are unreasonably incurred). The High Court judge considered case law in Hong Kong and specifically decided against treating unsuccessful challenges to arbitral awards—in and of themselves—being in an exceptional category regarding the allocation of costs. Instead, courts in exercising judicial discretion should consider the factors set out in Order 59 rule 5 of the Rules of Court before awarding indemnity costs. This position is in sharp contrast with Hong Kong, where the default position in such circumstances is costs on an indemnity basis in order to deter unmeritorious challenges. The court also referred to a non-exhaustive list of circumstances that would justify an indemnity costs order—as set out in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103—including those in which the action is brought in bad faith; is speculative, hypothetical or clearly without basis; is an abuse of process; or dishonest, abusive, or improper conduct in the course of proceedings. This principle was later affirmed by the Singapore Court of Appeal in *CDM v CDP* [2021] SGCA 45.

China

Proposed Amendments to Arbitration Law

Public comments on proposed amendments to the Arbitration Law of the People's Republic of China, which was enacted in 1994 and subsequently amended in 2009 and 2017 (Arbitration Law), have been received by the Ministry of Justice since publication

of the draft law on 17 August 2021. The amendments include significant changes that are hotly debated by arbitration professionals and academics in mainland China. Work on the amended Arbitration Law has been included in the National People's Congress **2022 Legislative Work Plan** and tabled for discussion at the bi-weekly meetings of members of the Chinese People's Political Consultative Conference National Committee. However, there is currently no date scheduled for promulgation of the amended law.

Among other things, the amended Arbitration Law seeks to align arbitration practice in China with international arbitration practice. The proposed amendments include:

- Provision of the legal basis for foreign arbitration institutions to set up secretariats in mainland China in order to administer arbitrations;
- Removal of the requirement that an arbitration agreement must specify the choice of arbitral institution in order for the arbitration clause to be deemed valid; removal of the prohibition on conduct of ad hoc arbitrations in mainland China; and, provision of the statutory basis for relevant courts to designate arbitral institutions as appointing authorities for arbitral tribunals;
- Recognition of the legal concept of the seat of an arbitration and the deeming of an award to have been made at the seat, instead of at the place of the arbitral institution (which is the current position);
- Widening the scope of interim measures that an arbitral tribunal is allowed to grant, beyond the current power to preserve property and evidence;
- Recognition of the principle of *kompetenz-kompetenz*, whereby any jurisdictional challenge is made to a tribunal for determination and arbitration proceedings are not stayed pending determination by a court;
- Statutory basis for emergency arbitrations and appointment of emergency arbitrators;
- Statutory support for appointment of arbitrators who are not on the panel of arbitrators of an arbitral institution (currently various arbitration rules of institutions established in mainland China permit selection of non-panel arbitrators if the parties agree);
- An express obligation on arbitrators to disclose any circumstance that gives rise to reasonable doubts regarding independence and impartiality;
- Unification of existing separate legal regimes for setting aside domestic and foreign-related arbitration awards, together with shortening the time limit for setting aside an award from six to three months; and,
- Removal of the current requirement that parties to an arbitration shall be of equal status, thereby providing statutory support for other types of arbitrations, including investor-state and sports arbitration.

AMERICAS

United States

Section 1782 – Documents for Use in a Proceeding in a Foreign or International Tribunal

In *ZF Automotive U.S., Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), the U.S. Supreme Court (the Court) held that 28 U.S.C. § 1782 (Section 1782) does not permit a U.S. district court to grant discovery for use in foreign commercial or ad hoc investor-state arbitrations. Pursuant to Section 1782, U.S. courts may order the production of documents "for use in a proceeding in a foreign or international tribunal." The Court found that a "foreign or international tribunal" in the statute refers to "only governmental or intergovernmental adjudicative bodies," and does not include "private adjudicative bodies." The Court reasoned that extending Section 1782 to permit discovery in disputes before private international arbitration tribunals would be at odds with the Federal Arbitration Act (FAA), because this use of Section 1782 would permit much broader discovery than the FAA allows.

U.S. District Court Jurisdiction under the Federal Arbitration Act

In *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the U.S. Supreme Court determined that U.S. district courts may not review the substantive dispute underlying an arbitration award in determining their jurisdiction under the Federal Arbitration Act (FAA). Chapter 1 of the FAA does not create independent federal question jurisdiction, and a party must therefore establish diversity jurisdiction or federal question jurisdiction independently in order to support a district court's jurisdiction. In *Badgerow*, the Court addressed whether a federal court may "look through" to the underlying dispute when a party seeks to confirm or challenge an arbitration award in order to determine whether the underlying substantive controversy establishes federal question jurisdiction. The U.S. Supreme Court held based upon the plain language of the FAA that such look-through jurisdictional inquiry is not permitted.

Requirements to Waive the Right to Compel Arbitration

In *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), the U.S. Supreme Court held that a party resisting arbitration does not need to prove prejudice in order to establish that its adversary waived its right to compel arbitration. In Morgan, the defendant moved to compel arbitration around eight months after the filing of the underlying litigation, and the Eighth Circuit granted the motion, finding the plaintiff had not shown it was prejudiced by the delay. Such a prejudice requirement is not generally required under federal law on waiver, however, and the U.S. Supreme Court found the FAA's "policy favoring arbitration" did not permit U.S. federal courts to create arbitration-specific rules such as a prejudice requirement in this context.

Employment Contracts Exemption under the Federal Arbitration Act

In *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), the U.S. Supreme Court held that an employment contract between airlines and a ramp supervisor for the airline, who frequently loaded and unloaded cargo on and off planes traveling across the country, is exempt from the FAA. Pursuant to Section 1 of the FAA, employment contracts of any class of workers engaged in foreign or interstate commerce are exempted. The U.S. Supreme Court found that, while the ramp supervisor did not transport goods across state lines herself, she qualified as "engaged in interstate commerce" so as to qualify for the exemption.

The Racketeer Influenced and Corrupt Organizations (RICO) Act and the Enforcement of International Arbitration Award

In two consolidated cases involving a US$92 million arbitral award, *Ashot Yegiazaryan v. Vitaly Ivanovich Smagin* and *CMB Monaco v. Vitaly Ivanovich Smagin*, the U.S. Supreme Court will decide whether a foreign party may enforce an international arbitration award using U.S. racketeering statutes. A claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act requires injury to business or property located in the United States. The U.S. Supreme Court will thus resolve a circuit split between the Seventh Circuit and the Ninth Circuit, the latter of which held that a ruling obtained by a foreign plaintiff within the United States enforcing an international award counts as property in the United States, even though the award itself was issued in a foreign country.

Enforcing Parts of an International Arbitration Award

The Second Circuit, in *Esso Exploration and Production v. Nigerian National Petroleum Co.*, No. 19-31-59 (2022), confirmed in part a judgment from the U.S. District Court for the Southern District of New York, which refused to enforce a US$2.7 billion arbitration award—part of which had been set aside by the Nigerian courts as it related to taxes, which cannot be

arbitrated under Nigerian law. However, the Second Circuit determined that the district court judgment went too far in refusing to enforce the entire award, since the Nigerian courts had upheld the parts of the award not relating to taxes. The Second Circuit further clarified that the four considerations of *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir. Aug. 2, 2016) (containing the applicable standing for enforcing annulled arbitral awards) are not exclusive, and that a district court may, and should, also consider other factors relevant to the circumstances of a particular case.

Grounds of Vacatur of an International Arbitration Award

In *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 34 F.4th 1290 (11th Cir. May 27, 2022), the Eleventh Circuit recognized that the vacatur of an international arbitration award rendered in the United States (a so-called "non-domestic" award) is governed by both Chapter 2 of the FAA (the New York Convention) and Chapter 1 of the FAA (applicable to U.S. domestic awards). Thus, such awards can be challenged on the basis that the arbitral tribunal exceeded its powers, which is one of the grounds of vacatur specified in Chapter 1 of the FAA (although such basis is not specified in the New York Convention). This decision is at odds with the Eleventh Circuit's holding in *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, 921 F.3d 1291 (11th Cir. 2019), which held that even non-domestic awards are limited to challenges enumerated in the New York Convention. In response to this decision and a subsequent request, the Eleventh Circuit has taken up the case en banc, and is thus poised to reconsider its en banc ruling in the *Inversiones* case.

Attachment in Aid of Arbitration

In *Iraq Telecom Ltd. v IBL Bank S.A.L.*, 43 F.4th 263 (2d Cir. 2022), the Second Circuit held that courts addressing attachment in aid of arbitration under New York law may consider both statutory and non-statutory factors in deciding whether to attach a party's assets or to vacate or modify an existing attachment. However, the Court clarified that the non-statutory factors can only be considered if they are "extraordinary."

Denial of Request for Stay of Enforcement

In *Hulley Enterprises Ltd et al v. Russian Federation*, No. 14-cv-01996 (2022), the U.S. District Court for the District of Columbia denied Russia's request for a renewed stay of the enforcement proceedings brought by the former majority shareholders of Yukos Oil Company. The former shareholders won three arbitral awards totaling US$50 billion from an international tribunal in The Hague, and Russia argued that the enforcement litigation—first filed nearly a decade ago—should be stayed while the Amsterdam Court of Appeal considers the last remaining argument in its appeal. The district court said the "protracted nature" of the litigation and "concerns about asset liquidation" following Russia's invasion of Ukraine weighed against a continued stay. Russia's request to set aside the awards is still before the Dutch appeal court at the seat of arbitration.

Enforcement Against Alleged State-Owned Entities

In *Uni-TOP Asia Investment Limited v. Sinopec International Petroleum Exploration and Production Corporation*, No. 1:20-cv-01770 (2022), the U.S. District Court for the District of Columbia refused to enforce Uni-Top's US$21 million award against Sinopec International Petroleum Exploration and Production, a subsidiary of Chinese state-owned oil and gas company Sinopec. While a court in Beijing first annulled the award, Uni-Top sought to invoke the New York Convention and the Foreign Sovereign Immunities Act (FSIA) to confer personal jurisdiction over the foreign entity. The district court found that Sinopec could not be considered a "political subdivision" of the Chinese state for the purposes of the FSIA. The court further held that allowing discovery in the matter would implicate issues of comity, potentially leading the court to make factual findings that "could plausibly have foreign relations implications."

In *UAB Skyroad Leasing v. OJSC Tajik Air*, No. 21-7015 (D.C. Cir. Jun. 17, 2022), the U.S. Court of Appeals for the District of Columbia Circuit held that it lacked personal jurisdiction over Tajikistan's national airline, Tajik Air, in an action brought by Skyroad to enforce a US$20 million award. The Court held that Skyroad failed to show that OJSC Tajik Air is controlled by Tajikistan (despite it being wholly owned by the state), which would have allowed the court to uphold personal jurisdiction over the airline under the FSIA.

BRAZIL

Bill to Amend the Brazilian Arbitration Act

On 6 July 2022, Brazilian party leaders signed a Motion of Urgency to bypass the standard legislative process and called for a vote on a controversial bill to amend the Brazilian Arbitration Act (the Bill), two years after it was first introduced in Congress. The Bill was introduced to further regulate arbitrators' conduct, with its first proposed change to forbid arbitrators from acting in more than 10 ongoing arbitrations. Second, the Bill proposes to forbid identical arbitral tribunals (either fully or partially) to conduct ongoing arbitrations, regardless of whether they relate to the same subject matter. Third, the Bill establishes a legal regime on the conflict of interest for arbitrators, preventing arbitral institutions' executive committees or secretariat members from acting as arbitrators in cases administered by the institution they are affiliated with. It also expands their duty to disclose, forcing arbitrators to disclose the number of tribunals of which they are members, as well as any other facts that raise "minimum doubts" as to their impartiality or independence. Fourth, the Bill imposes a broad scope of transparency in all types of arbitrations, and proposes to make publicly available not only (1) the names of the arbitrators once the tribunal is constituted and (2) information about set aside applications, but also (3) the award itself—noting, however, that parties may request to omit confidential information they may deem necessary. The Bill has been greatly criticized by the Brazilian legal community for being against party autonomy. In this regard, the Brazilian Institute of Lawyers has called the Bill the "Anti-Arbitration Bill," as it would make Brazilian arbitration unattractive as an alternative to litigation.

MIDDLE EAST

United Arab Emirates

Signature of the Dispositive Section and Reasoning of an Arbitration Award

In Case No. 109/2022, the Dubai Court of Cassation ruled that the United Arab Emirates (UAE) procedural rules of arbitration require the arbitral tribunal to sign the dispositive section and the reasoning of the arbitral award. This case follows a line of judgments, primarily issued under the old Civil Procedure Law (Federal Law No. 11 of 1992) in which the Dubai onshore courts held that—although not expressly stated in the law—arbitrators were required to sign the dispositive section

and the reasoning of the award, and that a failure to do so would render the award invalid. The only circumstances in which the courts enforced awards not signed on every page were those in which the tribunal had signed the dispositive section of the award, which also included, on the same page, part of the tribunal's reasoning. Case No. 109/2022 is significant because, notwithstanding that the applicable law regarding the signing of awards is now Article 41(3) of the UAE Arbitration Law (Federal Law No. 6 of 2018), the Court of Cassation has maintained the established position that both the dispositive section and reasoning of the award must be signed.

Kingdom of Saudi Arabia

Saudi Arabia's New Law of Evidence

On 8 July 2022, the Kingdom of Saudi Arabia's new Law of Evidence (enacted by Royal Decree No. M/43) came into force. This new law supersedes the chapters regulating evidence under Saudi Arabia's Law of Civil Procedures and the Law of Commercial Court, unifying the provisions and procedures of evidence under one law. Pursuant to Article 1, the Law of Evidence shall apply to civil and commercial transactions—and is potentially applicable in criminal and administrative cases, in the absence of regulating provisions in other laws. However, Article 6 permits contracting parties to agree to different rules of evidence provided they do not violate Saudi public order. Accordingly, if the governing law of the contract is Saudi law, the court or arbitral tribunal is required to apply the provisions of this new Law of Evidence unless there is a valid agreement of the parties to the contrary.

This new law codifies the law governing evidence and provides examples of admissible evidence, in order to limit the judge or arbitral tribunal's discretion and provide more certainty and predictability in judicial rulings on matters relating to evidence. Significant features of the new law include: the right to submit digital evidence, which now holds the same status as written evidence; the concept of direct examination of witnesses (whereas litigants previously directed questions to the judge, who had the discretion to direct such questions to the witness); the power of the court (or arbitral tribunal) to call a witness on its own volition; the prohibition on harming, intimidating, or influencing witnesses; and the right to request disclosure of relevant documents in the possession of the other party.

Party Representation in the Conduct of Arbitration Proceedings in Saudi Arabia

On 16 August 2022, the Saudi Center for Commercial Arbitration (SCCA) released the outcome of a study, undertaken in collaboration with the Saudi Ministry of Justice, the judiciary, and other authorities, into the 2012 Saudi Arbitration Law (enacted by Royal Decree No. M/34) and 2012 Saudi Enforcement Law (enacted by Royal Decree No. M/53) regarding parties' freedom to select their representatives in the conduct of arbitration proceedings. The SCCA has concluded that these laws do not prevent non-Saudis or non-lawyers from appearing before arbitral tribunals on behalf of the parties. Accordingly, representation of a party by a non-Saudi or non-lawyer in a Saudi-seated arbitration is not one of the grounds for annulment specified in Article 50 of the Arbitration Law. This conclusion should assist in resolving concerns over such issues in arbitrations seated in the Kingdom of Saudi Arabia.

EUROPE

United Kingdom

Successful Appeal of LMAA Arbitration Award Under Section 69 of the Arbitration Act 1996 Related to Force Majeure

In *Mur Shipping BV v RTI Ltd* [2022] EWCA Civ 1406, the Court of Appeal, by a 2:1 majority, overturned an English High Court judgment ([2022] EWHC 467 (Comm)) upholding an appeal of an London Maritime Arbitrators Association arbitration award on a point of law under Section 69 of the Arbitration Act 1996 (Section 69). The relevant issue related to a party's obligation to use "reasonable endeavours" to overcome a force majeure event, in this case in the context of an affreightment contract. The contract defined a force majeure event as an event that occurs outside the immediate control of the party, which prevents or delays the party from loading or discharging cargo, which is caused by one or more specified events, and which cannot be overcome by the reasonable endeavours of the affected party. The relevant force majeure event was the placement of the defendant's (RTI) parent company on a sanctions list. Therefore, delays in payment of U.S. dollars (US$)—as provided for in the contract—by RTI to the claimant (Mur) were highly likely, due to U.S. intermediary banks stopping transfers pending investigation into the transaction's compliance with the sanctions. Mur served a force majeure notice to suspend the obligations under the contract. RTI argued that Mur had to exercise reasonable endeavours

to overcome the force majeure event, which included accepting payment in Euros (rather than US$) in circumstances where RTI agreed to cover the costs of converting the payment from Euros into US$.

The arbitral tribunal had held that the force majeure event could have been overcome by reasonable endeavours, in that Mur could have accepted the proposal made by RTI to make payment in Euros. As the parties had not contracted out of the right to appeal the tribunal's award (as is common in many institutional rules of arbitration), the owners appealed to the High Court under Section 69. The High Court held that the owners were not required to sacrifice their contractual right to payment in US$, and that "reasonable endeavours" in this context do not require a party to accept non-contractual performance, even if doing so would mitigate the effects of the force majeure event.

The Court of Appeal overturned the High Court's decision, holding that force majeure clauses must be considered on their own terms and in the context of the contract as a whole. The majority considered the requirement for payment in US$ was only concerned with ensuring that Mur received the right quantity of US$ in its bank account at the right time. Therefore, RTI's proposition of payment in Euros—with RTI bearing the conversion costs—would have overcome the force majeure event. Any delays to payment caused by the sanctions, and adverse consequences to Mur, would have been avoided.

Failed Challenge under Section 67 of the Arbitration Act 1996: Issues of Jurisdiction and Arbitrability

In *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm), the English High Court considered issues of jurisdiction and the arbitrability of claims arising from both the articles of association of a company and a shareholders' agreement. The dispute between joint venture parties concerned provisions on shareholder rights contained in the articles of association for the special purpose vehicle (SPV), as well as the shareholders' agreement between the joint venture parties. The articles of association were governed by Cypriot law (with no jurisdiction clause), and the shareholders' agreement was governed by English law and provided for London Court of International Arbitration (LCIA) arbitration. Multiple arbitrations were commenced, and the claimant (NDK) also commenced court proceedings in Cyprus over breaches of shareholder rights provisions in the articles of association (the Cypriot Proceedings). In one of the LCIA arbitrations, the respondents (HUO Holding Ltd and KXF Trading Ltd) successfully obtained an anti-suit injunction against the claimant on the basis that the Cypriot Proceedings had been brought in breach of the LCIA arbitration clause in the shareholders' agreement.

NDK challenged the anti-suit award under Section 67 of the Arbitration Act 1996 on the basis that the tribunal in the LCIA arbitration lacked jurisdiction, alleging that claims brought under the articles of association did not fall within the arbitration clause in the shareholders' agreement. The High Court dismissed the challenge, holding that the shareholders' agreement (which provided for LCIA arbitration) was the most commercially significant document governing the relationship between the parties. In addition, the Court considered that (i) the articles of association did not stand on a different or higher legal plane to the shareholders' agreement; and that (ii) any rational businessperson would have intended for the arbitration clause to apply to any dispute arising out of the subject matter of the shareholders' agreement—and would therefore include breaches of shareholder rights also held in the articles of association of the SPV.

NDK also argued that the matters raised in the Cypriot Proceedings were not arbitrable, as the relief sought (a rectification of the register of members) could not be obtained from an arbitral tribunal. The High Court also dismissed this ground of challenge, holding that even if a tribunal cannot award the relief sought, it does not take those matters outside of the scope of the arbitration agreement. The tribunal can still decide on the merits of a claim, and a party can then seek enforcement from the courts on the basis of the tribunal's determination.

Successful Challenge of an Arbitration Award Under Section 68 of the Arbitration Act 1996 for Procedural Irregularity

In *Royal & Sun Alliance Insurance Ltd v Tughans* (A Firm) [2022] EWHC 2589 (Comm), the High Court upheld a challenge of an arbitration award on a serious irregularity under Section 68 of the Arbitration Act 1996 (Section 68). The court held that the arbitrator's decision to grant relief on the basis of a point expressly disclaimed by the claimant in the arbitration amounted to a serious irregularity.

A claim in misrepresentation was brought against the Defendant (Tughans) by a third party with which Tughans had worked in relation to a sale of loans. The third party entered into an engagement letter with Tughans, providing for a success fee to be paid upon completion of the sale of loans (the Success Fee) and to be split with Tughans. Tughans represented that no part

of their Success Fee would go to a specified group of persons. The third party claimed that Tughans breached this representation, claiming damages including—amongst other things—the Success Fee paid to Tughans.

Tughans notified its insurers, the claimant (RSA), of the claim by the third party. RSA refused to provide cover to Tughans under their professional indemnity insurance policy. Tughans commenced arbitration proceedings against RSA under the arbitration rules of the Insurance and Reinsurance Arbitration Society (ARIAS), claiming an entitlement for RSA to indemnify them of their legal costs in defending the third party's claim, as well as losses established by it. Tughans made no claim for an indemnity in respect to the Success Fee insofar as it could be recovered by Tughans (from the persons it had been paid to, in breach of the contractual representation). However, Tughans claimed that it was entitled to an indemnity in respect to the Success Fee insofar as it could not be recovered from the persons it had been paid to (e.g., because it was retained pursuant to the Proceeds of Crime Act 2002, or because value-added tax paid in respect of it could not be recovered) (the Qualification). The sole arbitrator found in favour of Tughans, but went further to declare that RSA was liable to indemnify Tughans for any award of damages in respect of the Success Fee.

RSA challenged the award under Section 68 on the basis that—because Tughans did not claim a full indemnity over the Success Fee—RSA did not advance arguments against such unqualified claim, and it was therefore a serious irregularity for the arbitrator to award an indemnity including the Success Fee without recognising the Qualification. The High Court agreed with RSA, holding that both the procedure followed by the arbitrator and the decision to grant Tughans a declaration in the final award (in respect to the indemnity for the Success Fee) amounted to a serious irregularity. RSA was deprived of a reasonable opportunity to present its case. The High Court ordered, under Section 68, to remit the award to the arbitrator to determine whether Tughans could advance their claim regarding the Success Fee on an unqualified basis, and to reconsider the appropriate relief in respect of the qualified claim.

Law Commission Review of the Arbitration Act 1996

The Law Commission of England and Wales has published a number of consultation papers setting out its provisional proposals to update the Arbitration Act 1996, which applies to arbitrations seated in England, Wales, and Northern Ireland. Whilst the Law Commission and some stakeholders consulted have been reported to feel that "the Act works very well, with major reform neither needed nor wanted," a number of areas have been identified for potential development, including updating provisions regarding arbitrators' duties of impartiality and disclosure, expressly providing for the summary disposal of claims and defences by a tribunal, and improving the enforceability of orders by emergency arbitrators. You can read our fuller update summarizing the Law Commission's proposals in its first consultation paper in this **Arbitration World alert**.

Since our alert was published on 4 October 2022, the Law Commission has published a second consultation paper (on 27 March 2023) inviting responses on one new issue, and further consideration of two issues that were raised in the first consultation. These issues are: (i) the law of the arbitration agreement in light of the decision of the Supreme Court of the United Kingdom in Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38; (ii) whether a challenge to an arbitral award on the basis the tribunal lacked substantive jurisdiction should be by way of an appeal or a rehearing; and (iii) the Law Commission's further analysis of discrimination in the appointment of arbitrators. The deadline for responses to this second consultation was 22 May 2023.

Germany

Confidentiality of the Tribunal's Case Files and Documentation of Deliberations

A German court has issued a decision regarding the protection of the confidentiality of the arbitral tribunal's case files and the deliberations documented therein. In particular, on 16 May 2022, the Higher Regional Court of Frankfurt am Main (file no. 26 Sch 19/21) declared an award enforceable which had been rendered in a German Arbitration Institute (DIS) arbitration seated in Frankfurt am Main. The respondent's lawyer objected to the application for a declaration of enforceability, on the grounds that the respondent was not represented by a lawyer in the arbitration proceedings and therefore could not know whether all or only part of the documents in the arbitration had been duly provided to him. The president of the arbitral tribunal had already refused to release the case file to the respondent, on the grounds that the respondent lacked a legitimate interest and had received all documents electronically and by courier during the arbitration. Therefore, the defendant's counsel applied to the Higher Regional Court of Frankfurt am Main to compel the arbitrators to produce the case file. The Higher Regional Court of Frankfurt am Main was the first German court to consider this issue, holding that a party in proceedings for a declaration of enforceability

of an arbitral award is not entitled to have the court order the arbitrators to produce the case file. The court justified its decision by stating that the respondent lacks any statutory legal basis for such disclosure, that even the applicable arbitral DIS rules would not provide such right, and that, otherwise, the confidentiality of the arbitral tribunal's deliberations (which also extended to the case file) would be jeopardised. An order for production could therefore only be considered if agreed to by all parties and arbitrators: a requirement that was not met, as the president of the arbitral tribunal had already objected to the disclosure of the case file. The decision is in line with the predominant opinion in the German legal literature, but has triggered a debate about the scope of protection of the arbitrators' case file. One argument not addressed by the Higher Regional Court of Frankfurt am Main questions whether a differentiation must be made between the case file containing (i) all information (letters, orders, etc.) communicated with the parties and the arbitral institution, and (ii) any other documents of the arbitral tribunal (e.g., information concerning the arbitrators' deliberations).

Luxembourg

Growing Opportunities for Luxembourg as an Arbitral Seat With the Passing of a New Arbitration Law

As reported in our alert **here**, in April 2023, Luxembourg adopted a new law reforming the conduct of commercial arbitrations in its jurisdiction. The new law codifies a number of important arbitral principles, including kompetenz-kompetenz, the power of tribunals to order interim measures, confidentiality, and the grounds and process for challenging awards. It also introduces the role of a supporting judge (juge d'appui), who is empowered to support arbitrations seated in or closely linked to Luxembourg by resolving disputes (e.g., regarding tribunal constitution or obtaining evidence).

The new law, which will apply to arbitration agreements concluded after its entry into force (as well as tribunals constituted and awards given after this date), aims to reform the process of conducting commercial arbitrations in Luxembourg and enhance the popularity of Luxembourg as a seat of arbitration.

INSTITUTIONS

DIAC, DIFC-LCIA, Emirates Maritime Arbitration Centre

On 20 September 2021, Decree No. 34 of 2021 (the Decree) concerning the Dubai International Arbitration Centre (DIAC) came into force, making significant changes to the arbitral institutions in Dubai. The Decree abolished the Emirates Maritime Arbitration Centre, as well as the Dubai International Financial Centre (DIFC) Arbitration Institute—the body previously responsible (in joint venture with the London Court of International Arbitration (LCIA)) for administering arbitrations subject to the DIFC-LCIA Arbitration Rules under the auspices of the DIFC-LCIA Arbitration Centre. The Decree transferred all rights and obligations of the abolished centres to DIAC. Although the intention of the Decree was clear, uncertainties remained regarding the practicalities surrounding the transfer of existing DIFC-LCIA cases to the DIAC, as well as the DIAC's ability to administer DIFC-LCIA cases in accordance with the DIFC-LCIA rules. In order to seek a resolution to these issues, on the DIAC and LCIA made a joint press release 28 March 2022, confirming that the LCIA (rather than the DIAC) would handle all DIFC-LCIA cases registered before 20 March 2022 from London, and all proceedings commenced thereafter would be handled by the DIAC in accordance with the DIAC rules.

Another positive development was the release of the new DIAC Arbitration Rules 2022 (New Rules), which came into effect on 21 March 2022. The New Rules have made significant changes to the previous 2007 DIAC rules, including provisions dealing with consolidation, joinder of parties, expedited proceedings, and an alternative process for appointing arbitrators, as well as exceptional proceedings (such as the appointment of an emergency arbitrator and conciliation proceedings). In addition, the default seat of arbitration is now the DIFC, rather than onshore Dubai, and the fees and expenses of a party's legal representatives are expressly stated to be part of the costs of the arbitration—thereby enabling parties to seek recovery of legal costs.

Bahrain Chamber for Dispute Resolution (BCDR) – New Rules

On 17 March 2022, the Bahrain Chamber for Dispute Resolution (BCDR) published the 2022 Sports Arbitration Rules (Sports Arbitration Rules), a new set of arbitration rules aimed at catering to the specific needs of the sporting sector in Bahrain and the wider region. The Sports Arbitration Rules—which are available in equally authoritative Arabic, English, and French versions—are based on the more general 2017 BCDR Rules of Arbitration. However, the two sets of rules differ in certain key respects. For example, parties may agree to arbitrate a first-instance sports-related dispute, appeal against the decision of a sporting body, or (where permitted by the statutes or regulations of a sporting body) appeal an award rendered in a first instance arbitration. Further, only arbitrators listed in the approved roster may be appointed, thereby seeking

to ensure the tribunal's appropriate knowledge of and competence in sports arbitration, and to minimize delay in the selection and appointment process. Filing fees, case management fees, and arbitrators' fees are also generally lower for smaller-value sports disputes.

SCC Arbitration Institute - Renamed Institution and Updated Rules 2023

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) changed its official name to the SCC Arbitration Institute as of 1 January 2023, and has issued revised **rules** (i.e., the SCC Arbitration Rules, the SCC Expedited Arbitration Rules, the SCC Mediation Rules, the SCC Express Rules of Dispute Assessment, and the SCC Procedures for the Administration of Cases under the UNCITRAL Arbitration Rules). The new SCC rules contain comparatively few substantive changes. These include a slight expansion and clarification of the powers of the arbitral tribunal under the **SCC Arbitration Rules 2023 and the SCC Expedited Arbitrations Rules 2023**. The arbitral tribunal may now (i) terminate the arbitration for any other reason than a settlement before the final award is made—not only by award, but also by order (Article 45 (2) of the SCC Arbitration Rules 2023/Article 45 (2) of the SCC Rules for Expedited Arbitrations), (ii) after consulting with the parties, decide on whether hearings shall be conducted in person or remotely (Article 32 (2) of the SCC Rules/Article 33 of the SCC Expedited Arbitration Rules 2023), and (iii) after the case having been referred to it, decide to terminate a case in whole or in part due to a failure of a party to pay the advance on costs (Article 51 (5) of the SCC Arbitration Rules 2023/Article 51 (5) of the SCC Expedited Arbitration Rules 2023).

In addition, the SCC updated and supplemented the **SCC Mediation Rules**, with the aim of increasing the clarity and coherency of the rules for this potentially constructive and efficient alternative dispute resolution mechanism.

The New Hague Court of Arbitration for Aviation

On 21 July 2022, the Hague Court of Arbitration for Aviation (the CAA) was officially launched in The Hague, Netherlands. This new court of arbitration and centre for mediation aims to provide specialised dispute resolution services for the aviation industry. Administered by the Netherlands Arbitration Institute, the CAA has its own arbitration rules (in force as of 31 August 2022) and model arbitration agreements for parties who wish to provide for CAA arbitration in their aviation contracts.

Vancouver International Arbitration Centre – New Rules

Vancouver International Arbitration Centre (VanIAC) has released updated International Arbitration Rules, effective 1 July 2022, more than two decades after they were last amended. The new rules adopt several features seen in updates to other international arbitration rules aimed at increasing the efficiency in arbitration proceedings. The new rules, for example, include expedited procedures for cases in which a claim or counterclaim does not exceed CAN$500,000, and in which an arbitral tribunal generally consists of a sole arbitrator unless otherwise agreed by the parties. The new rules also allow a party to apply for early disposition of one or more issues of fact or law at any stage of the proceedings.

The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC)

The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) has revised its Arbitration Rules, making progressive institutional improvements to its case management regime. The revised Arbitration Rules have compiled the improvements approved by the CAM-CCBC during the 10 years the 2012 Arbitration Rules remained in force, including the 2021 Expedited Arbitration Rules and the 2020 Emergency Arbitrator Procedure. It also has new provisions on joinder of additional parties, consolidation of arbitral proceedings, multiple contracts, and data protection.'

Santiago Arbitration and Mediation Centre (CAM Santiago) and Singapore International Arbitration Centre (SIAC)

The Singapore International Arbitration Centre (SIAC) entered into a Memorandum of Understanding (MOU) with the Santiago Arbitration and Mediation Centre (CAM Santiago) to promote international arbitration as a preferred method for resolving international disputes, as well as to enhance the accessibility, efficiency, and effectiveness of international arbitration. Under the MOU, SIAC and CAM Santiago will jointly organize in-person, hybrid, and virtual conferences, seminars, and workshops on international arbitration in Chile and Singapore. The International Centre for Settlement of Investment Disputes (ICSID) has also entered into an agreement on general arrangements with CAM Santiago, which provides for the use of CAM Santiago's facilities and services for arbitration and mediation proceedings conducted under the auspices of ICSID, as well as enhanced technical collaboration between the two centres.

South China International Arbitration Centre (Hong Kong)

The South China International Arbitration Centre (Hong Kong) (SCIAHK) has been registered as a new arbitral institution. Its arbitration rules (the Rules), which came into effect in May 2022, are based on the 2013 UNICITRAL Arbitration Rules. The Rules include some of the best practices in international arbitration, such as consolidation of proceedings, concurrent proceedings, expedited procedure, summary dismissal, emergency arbitration, the electronic conduct of arbitration, and appointment of arbitrators from outside the panel of SCIAHK. SCIAHK's affiliation with Shenzhen Court of International Arbitration has been helpful in facilitating the conduct of cross-border disputes, including the conduct of hybrid virtual hearings at the facilities of both institutions.

One-Stop International Commercial Dispute Resolution Platform in China

In support of China's Belt and Road Initiative, the China International Commercial Court (CICC) formed a "one-stop" diversified international commercial dispute resolution mechanism in 2021, comprising leading domestic arbitral institutions and mediation institutions based in mainland China (the One-Stop DR Mechanism). In order to attract both domestic and foreign parties to use the One-Stop DR Mechanism, a bilingual (English and Chinese) one-stop online international commercial dispute resolution platform (One-Stop DR Platform) has been established. The One-Stop DR Platform integrates litigation, mediation, and arbitration, and parties can select the online dispute resolution method applicable to their disputes. Among other things, the One-Stop DR Platform provides for use of smart courts and services to conduct legal research in relation to foreign laws relevant to disputes. In June 2022, the Supreme People's Court issued a notice adding five more institutions to the One-Stop DR Mechanism and the One-Stop DR Platform, including the Hong Kong International Arbitration Centre (HKIAC). Currently the HKIAC is the only institution outside mainland China permitted to operate on the One-Stop DR Platform. The addition of the HKIAC means that parties engaged in cases administered by the HKIAC can apply directly to the CICC for interim relief, or for recognition and enforcement of arbitration awards in mainland China, provided that the disputed amount exceeds RMB300 million (approx. US$41,897)—or the case is otherwise significant. In theory, this means that enforcement of Hong Kong arbitration awards should be more efficient, since a party holding an award has the choice whether or not to apply to a domestic court in mainland China or to the CICC for recognition and enforcement of an award.

Online Dispute Resolution in China

Similar to many jurisdictions worldwide, Chinese arbitral institutions have focused on developing online arbitration procedures over the past two to three years. In 2020, the China International Economic and Trade Arbitration Commission (CIETAC) published a guide for conducting arbitrations during the COVID-19 pandemic and built an online filing system and hearing platform. Similarly, the Beijing Arbitration Commission (BAC) updated its rules at the end of 2021 to provide for online arbitration. The amended BAC rules now recognize virtual hearings as one method of holding a hearing, also addressing online arbitration services. The tribunal in a BAC arbitration is empowered to determine which online procedures will be used in an arbitration, as well as the method of conducting hearings, after receiving submissions from the parties. In addition to CIETAC and BAC, many other arbitral institutions—out of the approximately 259 institutions established in mainland China—have established online dispute resolution platforms.

NEW YORK CONVENTION

Suriname, South America's smallest sovereign state, has become the 171st country to accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), completing the New York Convention's coverage in the mainland Americas. The Convention entered into force for Suriname on 8 February 2023.

AUTHORS

Cindy Ha
Associate
+852.2230.3536
cindy.ha@klgates.com

Susan Munro
Registered Foreign Lawyer
+852.2230.3518
+86.10.5817.6124
susan.munro@klgates.com

Matthew Weldon
Partner
+212.536.4042
matthew.weldon@klgates.com

Grace M. Haidar
Associate
+1.713.815.7353
grace.haidar@klgates.com

Jennifer Paterson
Partner
+971.4.427.2728
jennifer.paterson@klgates.com

Louise Bond
Associate
+44.20.7360.6447
louise.bond@klgates.com

Dr. Johann von Pachelbel
Partner
+49.69.945.196.390
johann.pachelbel@klgates.com

WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Robert L. Houston, Raja Bose (Singapore)

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

In each edition of Arbitration World, members of our International Arbitration practice provide updates concerning significant news items involving international investment law and investor-state arbitration from around the world.

ANTICIPATED INVESTOR-STATE DISPUTES ARISING FROM THE RUSSIAN FEDERATION'S INVASION OF UKRAINE

The Russian Federation's 2022 invasion of Ukraine is associated with a wide range of humanitarian, geopolitical, and economic implications, including implications for the future of international investment law and arbitration. The United Nations Conference on Trade and Development (UNCTAD), which tracks international investment agreements (IIAs) such as bilateral investment treaties (BITs), free trade agreements (FTAs), and other treaties with investment protections for each State, **reports** that the Russian Federation currently maintains over 60 BITs and other IIAs in force with other states. Among those states with BITs currently in force with the Russian Federation, as reported in our previous **April 2022 article**, over two dozen have been deemed "unfriendly" by the Russian Federation in response to international sanctions imposed on it as a result of the 2022 invasion of Ukraine. In response, Russia has subjected such states' foreign investors or investments in Russia to targeted economic measures reportedly including currency transfer restrictions, transaction approval requirements, the prohibition of foreign currency export, restrictions on debt repayment, the prohibition of certain exports and imports, and the non-enforcement of intellectual property rights.

It may be anticipated that many investors that have suffered damage as a result of such Russian economic measures, while also qualifying as covered investors under BITs or other IIAs in force with the Russian Federation, will advance their claims against the Russian Federation in investor-state arbitration in the near future. The impact of the Russian Federation's 2014 invasion and ongoing occupation of the Crimean Peninsula in Ukraine may provide a useful comparison point to estimate the potential scale of the wave of claims anticipated to arise from the 2022 invasion of Ukraine. Since the Russian invasion and occupation of Crimea occurred nearly a decade ago, it has resulted in no less than ten investor-state arbitrations with over US$8 billion in claims advanced by foreign investors against the Russian Federation under the ***Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments*** (1998) (the Russia-Ukraine BIT). Against that context, it may be anticipated that the Russian Federation's 2022 invasion of Ukraine, and targeted imposition of economic measures on foreign investors benefitting from the protection of more than two dozen BITs and other IIAs, may generate a wave of investor-state claims of a different order of magnitude in the years to come.

IMPACT OF THE PUBLIC CONVERSATION AROUND CLIMATE CHANGE

According to the United Nations, the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 27), which was held from 6 to 20 November 2022, hosted "more than 100 Heads of State and Governments, over 35,000 participants and numerous pavilions showcasing

climate action around the world and across different sectors." It **reportedly** concluded with "a historic decision to establish and operationalize a loss and damage fund."

This strong public momentum toward international cooperation to address climate change is also having a significant effect in international investment law and ISDS. UNCTAD, for example, has **stated** that "[r]eforms are essential to ensure investment treaties and associated investor-state disputes don't hinder countries' efforts to tackle climate change," having recently "launched two issues' notes dealing with the international investment treaty regime and climate action." UNCTAD has also **identified** the following "broad approaches to reforming the IIA regime for climate action" for states to consider in current treaty practice:

(i) Making individual IIAs climate-responsive by limiting treaty coverage to sustainable investments and by safeguarding the right and duty of states to regulate in the public interest. This can be coupled with provisions aimed at promoting and facilitating sustainable investment.

(ii) Exploring the possibilities to reconceptualise the scope, purpose, and design of the IIA regime through engagement in holistic IIA reform actions at the multilateral, regional, bilateral, and national levels.

In light of the above, UNCTAD confirms that it "will intensify its work with governments and other stakeholders to support efforts aimed at making the IIA regime more aligned with public policy concerns, including those relating to climate change."

Within this broader context of a strong international emphasis on amending the international investment law regime to promote greater freedom of state action to address climate change, the future of the Energy Charter Treaty (ECT) has been a subject of ongoing discussion as well. While the ECT modernisation process had been well underway, and even advanced to the point of prompting the European Commission to **announce an agreement** in principle in June 2022, the winds have since shifted as several EU member states have reportedly decided instead to withdraw from the ECT (including France, Germany, the Netherlands, Poland, Slovenia, and Spain). While foreign investors in the energy sector may continue to benefit from the ECT's sunset clause, which provides investment protection for a further 20 years following a given state's withdrawal from the ECT (pursuant to ECT Art 47(3)), the future of investment treaty protection with respect to fossil fuel-based energy investments (and perhaps with respect to energy investments more broadly) has become less certain.

RECENT DEVELOPMENTS IN THE INTERNATIONAL INVESTMENT LAW LANDSCAPE, INCLUDING POSSIBLE REFORM OF THE ISDS ARCHITECTURE

Across the broader investment treaty landscape, UNCTAD recorded 28 new IIAs that have been signed since the beginning of 2021, including the following:

- Indonesia - United Arab Emirates - Comprehensive Economic Partnership Agreement (CEPA) (2022)
- Bahrain - Japan BIT (2022)
- Philippines - United Arab Emirates BIT (2022)
- Israel - Philippines BIT (2022)
- Indonesia - Switzerland BIT (2022)
- Türkiye - Uruguay BIT (2022)
- New Zealand - United Kingdom FTA (2022)
- Mozambique - United Arab Emirates BIT (2022)
- Hungary - Oman BIT (2022)
- Australia - United Kingdom FTA (2021)
- Chile - Paraguay FTA (2021)
- Cambodia - Republic of Korea FTA (2021)
- Democratic Republic of the Congo - United Arab Emirates BIT (2021)
- Colombia - Spain BIT (2021)
- Israel - Republic of Korea FTA (2021)

The number of IIAs above is largely in line with recent treaty practice generally, confirming that states continue to be active in concluding agreements in the international investment law space. This is the case in spite of the continuing climate of uncertainty over the future of ISDS that persists amid the ongoing discussions of ISDS reform among the states participating in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). Since receiving its "broad mandate to work on the possible reform of [ISDS]", Working Group III is **reported** to have "identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns." It has also "considered concrete solutions for ISDS reform," with current efforts **reported** to include the development of draft codes of conduct for arbitrators and judges in international investment dispute resolution as well as a possible appellate mechanism for future investment claims.

This current climate of uncertainty with respect to the future of ISDS architecture and practice is reflected in the text of some of the newly-signed IIAs. Some of these, such as the Israel - Republic of Korea FTA (2021), do provide for ISDS, albeit with a more constrained scope of investment protection and arbitral procedure than that contained in more traditional IIAs. By contrast, neither the Australia - United Kingdom FTA (2021) nor the New Zealand - United Kingdom FTA (2022) provide for ISDS at all (i.e., there is no state consent to ISDS in these IIAs). Both do contain, however, a range of substantive investment protection standards as obligations applicable to the relevant state parties in relation to covered foreign investments (e.g., National Treatment, Most-Favoured-Nation, and Minimum Standard of Treatment). Interestingly, in keeping with the current trend toward increased responsibility for private actors in international investment contexts, both of these FTAs also include an article on corporate social responsibility to promote application of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (1976) and the United Nations Guiding Principles on Business and Human Rights (2011).

One ongoing development of interest is the current negotiation of the Investment Protocol for the African Continental Free Trade Area (AfCFTA), "the world's largest free trade area bringing together the 55 countries of the African Union (AU) and eight Regional Economic Communities (RECs)". According to the AfCFTA **website**, "[t]he Protocol is expected to establish a transparent and sound continental legal framework on investment, taking into account the interests of State Parties and investors," and "[t]he outcome of the negotiations on investment will be incorporated into the AfCFTA Agreement." Recent **reports** have indicated that negotiations are ongoing as "[t]he states parties had two further rounds of negotiations in September 2022, aiming to propose a final text for adoption soon."

Also of interest is the signing of the Pacific Alliance-Singapore FTA, marking the first signature of such an FTA between the collective members of the Pacific Alliance (i.e., Chile, Colombia, Mexico, and Peru) and a third state, opening to Singapore what is **reported** as "an increasingly integrated collective market that makes up the eighth-largest economy in the world with a combined gross domestic product of over US$2 trillion in 2021."

THE NEWLY REVISED ICSID RULES

In 2022, ICSID completed "the most extensive amendment to date" of the ICSID rules and regulations, including the ICSID Rules of Arbitration (together, the ICSID Rules). This marks the culmination of a review process that began in 2016 and only the fourth such update since the 1966 entry into force of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the ICSID Convention), which established ICSID. As ICSID remains the world's leading international investment dispute settlement institution, the ICSID Rules are the most commonly used procedural rules in ISDS practice today. ICSID has **stated** that the "overarching goals of the rule amendments are to modernize, simplify, and streamline the rules, while also leveraging information technology to reduce the environmental footprint of ICSID proceedings."

Some of the key updates to the ICSID Arbitration Rules include the following:

- New requirements for the disclosure of third-party funding (Rule 14);
- Clarified rules for objections to claims manifestly lacking legal merit (Rule 41);
- Procedure for requests for bifurcation (Rule 42);
- Guidelines on cost allocation (Rule 52);
- Clarified procedure and tribunal considerations in ordering security for costs (Rule 53);
- Deemed party consent to publication of awards and decisions on annulment absent objection within 60 days of dispatch (Rule 62);
- Updated rules for submissions of non-disputing parties (Rule 67);
- New time limits for the issuance of awards (Rule 58); and
- Rules for expedited arbitration (Chapter XII).

Simultaneously, ICSID released a new set of **Fact-Finding Rules** that "offer parties the opportunity to constitute a Committee to inquire into and report on relevant circumstances in the pre-dispute phase" with the intent being "to avoid legal disputes by providing an impartial assessment of facts arising in a contractual or other business dispute between the parties." ICSID confirms that "[a]ny State and a national of any other State may agree to use the Fact-Finding Rules."

Also in 2022, ICSID introduced **mediation rules** that are specifically designed for investment-related disputes (the ICSID Mediation Rules), **highlighting** the following two distinct features of the ICSID Mediation Rules as noteworthy:

- [T]here is no nationality requirement for parties, and therefore ICSID mediations may involve investors and nationals of the State party to the dispute; and
- [T]here is no requirement for either party to be linked to an ICSID Convention member state.

DEVELOPMENTS IN PROCEEDINGS RELATED TO ISDS

UNCTAD **reports** that there are currently 1,229 known treaty-based ISDS cases in total (359 pending, 852 concluded and 18 with an unknown status). This number does not reflect the number of current domestic court proceedings ongoing in relation to the enforcement of arbitral awards or other aspects of ISDS. While numerous developments in recent ISDS practice merit acknowledgement, we highlight the following as of particular interest:

- ***RSE Holdings AG v. Republic of Latvia, PCA Case No. AA861, Decision on the Challenge to Ms. Amy Frey (24 June 2022).***

  In a decision with potential implications for future 'double-hatting' in ISDS (i.e., the simultaneous involvement of a legal practitioner as counsel and arbitrator in different ISDS proceedings), Secretary-General Marcin Czepelak of the Permanent Court of Arbitration (PCA) accepted the challenge of the respondent to the appointment of arbitrator Amy Frey in a dispute arising under the ECT. In the proceedings, the respondent "challenge[d] Ms. Frey's impartiality and independence essentially based on her work as counsel in a number of past and 13 pending ECT arbitrations," arguing that "there is an inherent conflict of interest in the duality of Ms. Frey's professional roles as arbitrator and counsel to investors when the subject matter of the disputes is the same or similar."

  In considering this argument, Secretary-General Czepelak concluded as follows:

  "In this particular context, the sheer number of cases generates a serious risk that overlapping questions of interpretation and application of the ECT will arise in this case as in those other arbitrations under the same treaty, notwithstanding

the difference in factual matrix as between the cases. This would, in turn, seed justifiable doubts in the mind of a reasonable and informed third person as to whether Ms. Frey's consideration of the present case will be influenced by her duty to defend the interests of her investor claimant clients in disputes arising under the ECT."

- ***Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan, 2022 WL 715215 (D.D.C. Mar. 10, 2022).***

  The U.S. District Court for the District of Columbia recently denied Pakistan's request to stay proceedings in relation to the enforcement of a US$6 billion ICSID arbitral award in favour of the claimant, Australian mining company Tethyan Copper Co. Pty Ltd. Where the Court had already applied all "automatic provisional stays of enforcement" and a further stay until the relevant ICSID annulment proceedings were concluded would be "somewhat detrimental to judicial economy" and "would prejudice Tethyan, particularly given Pakistan's refusal to commit to paying the Award," the Court instead enforced the award under the arbitration exception to the United States' Foreign Sovereign Immunities Act.

AUTHOR

Robert L. Houston
Senior Associate
+65.6507.8121
robert.houston@klgates.com

Raja Bose
Partner
+65.6507.8125
raja.bose@klgates.com

SINGAPORE INTERNATIONAL COMMERCIAL COURT ISSUES: MODEL CLAUSE FOR INTERNATIONAL ARBITRATION-RELATED LITIGATION

By Joan Lim-Casanova, Raja Bose (Singapore)

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

When companies are embroiled in a dispute, what they want are justice and efficiency. Otherwise, justice delayed is justice denied. On 12 January 2023, the Singapore International Commercial Court (SICC) launched a model clause to aid parties in designating the SICC as the supervisory court to hear arbitration-related applications.

The model clause reads:

> "In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree: (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC."

Parties may incorporate this clause into their contracts, or at any other time such as after a dispute has arisen.

See the joint press release of the Singapore Supreme Court and the SICC **here**.

The Singapore International Arbitration Centre (SIAC), one of the most preferred arbitration institutions globally, will also be including the clause as one of the options in its Model Clause, where the international arbitration is Singapore-seated.

Without such an express designation of SICC as the relevant supervisory court to hear arbitration-related applications, the parties may have arbitration-related matters heard by the General Division of the High Court.

ABOUT THE SICC AND ITS ADVANTAGES

The SICC is a division of the Singapore High Court and is designed to deal with transnational commercial disputes. The advantages of the SICC to its users are as follows:

Eminent Panel of Judges

The SICC bench comprises a diverse panel of eminent international and local Judges experienced in specialist commercial disputes. Most recently, Justice Zhang Yongjian (张勇健法官) from the People's Republic of China was appointed as an International Judge to the SICC. Justice Zhang had served as a Judge of the Supreme People's Court of the People's Republic of China for almost two decades.

Efficiency

Applications are heard quickly and SICC judgments are delivered swiftly thereafter.

Cost Recovery

As observed from the SICC judgments that have been released, the costs awards are reflective of actual costs involved in the application and give users more certainty on cost recovery.

SINGAPORE IS PRO-ARBITRATION

The Singapore courts are known for their deep expertise in international arbitration and pro-arbitration decisions. The courts only set aside arbitration awards where it is mandated by law and the grounds for challenge are very narrow (e.g., breach of natural justice).

We fully expect that the SICC will prove itself to be a robust supervisory court—while it will not reconsider the merits of an arbitral tribunal's decision, it will not hesitate to set aside an award when there is a breach of natural justice. Most importantly, given the eminent panel of international and local judges and the speed at which the disputes are determined at the SICC, international parties can rest assured that their disputes will be determined fairly and efficiently.

For more information, please reach out to our authors or our wider **International Arbitration team**.

AUTHORS

Joan Lim-Casanova
Partner
+65.6713.0267
joan.lim-casanova@klgates.com

Raja Bose
Partner
+65.6507.8125
raja.bose@klgates.com

SWEARING AN OATH REMAINS A REQUIREMENT FOR WITNESSES IN ONSHORE UAE ARBITRATION

By Jonathan H. Sutcliffe, Mohammad Rwashdeh, Thomas Parkin (Dubai)

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

A recent judgment of the Dubai Court of Cassation confirms that it is a mandatory requirement for factual and expert witnesses in arbitration seated in the onshore United Arab Emirates (UAE) to give evidence under oath. Where an award was rendered on the basis of decisive testimony which could not be shown to have been given under oath, the Court of Cassation ruled that the award was invalid.

BACKGROUND

In recent years, it became unclear whether the traditional requirement that witness evidence in arbitration in the UAE be given under oath still applied. The old Arbitration Chapter of the Civil Procedure Code contained an express requirement that, *"The arbitrators shall cause the witnesses to take oath"* (Article 211).

The Arbitration Chapter was repealed following the adoption of the new Federal Arbitration Law (Law No. 6/2018) in June 2018. The Federal Arbitration Law does not contain a similar oath-taking requirement, giving rise to the implicit suggestion that there was no longer a requirement in law for witness evidence to be given under oath. It does, however, provide that *"Unless otherwise agreed by the Parties, the statements of the witnesses (including experts) shall be heard according to the applicable laws in the State"* (Article 33 (7)), raising questions about whether the mandatory laws of evidence in the UAE nevertheless applied this requirement to evidence in arbitration, and if so, whether that requirement could be contracted out of.

DECISION OF THE DUBAI COURT OF CASSATION

In a case recently brought before the Dubai Court of Cassation (Case Nos. 78 and 96/2022), the court was asked to consider whether the apparent failure to administer the oath to witnesses invalidated an award in an arbitration conducted under the old Dubai International Arbitration Centre (DIAC) Arbitration Rules (2007).

The court noted that the Federal Arbitration Law provides for witnesses to give testimony in accordance with the state's rules of evidence unless otherwise agreed by the parties; and that the DIAC Rules 2007 also contained a requirement that the witnesses swear an oath before giving evidence, in accordance with the mandatory rules of procedure. It also referred to Articles 41, 43, and 46 of the Federal Law of Evidence (Law No. 10/1992), which require a witness to give an oath in accordance with their religious beliefs. From 2 January 2023, the Federal Law of Evidence will be replaced by the new Federal Decree-Law No. 35/2022 Promulgating the Law of Evidence in Civil and Commercial Transactions, Articles 76 and 96 of which provide that an oath may be administered *"according to the practices observed in the witness's religion or belief, if he requests so,"* which may open the door to a non-religious oath.

However, in the case in question, the minutes of the hearing did not show that an oath had been sworn by the witnesses before giving evidence, nor was this stated in the award itself. The award did refer to the relevant witness statements as decisive evidence. Since the award was made on the basis of witness evidence not given under oath, the Court of Cassation declared it to be invalid.

IMPLICATIONS

The decision confirms the wisdom of witness evidence (including both witnesses of fact and expert witnesses) being given under oath in onshore UAE seated

arbitrations notwithstanding the absence of an explicit requirement in the Federal Arbitration Law. There are some points which are not clear from the court's decision, in particular whether the outcome might have been different if the arbitration was subject to different procedural rules not requiring an oath to be given. It is certainly arguable that if the parties had expressly agreed that witness evidence would not be given in accordance with the state's law of evidence, as Article 33(7) of the Federal Arbitration Law appears to permit, then an oath would not be strictly necessary. However, the overarching point is that the onshore UAE courts are prepared to nullify an arbitral award on the basis of a technicality relating to oaths, and out of an abundance of caution, ensuring that an oath is properly administered to factual and expert witnesses is the sensible course in order to avoid the risk of invalidity of the final award.

In conclusion, this decision of the Dubai Court of Cassation indicates that the prudent course is:

- In an arbitration seated in onshore UAE, factual and expert witnesses should swear an oath in accordance with paragraph 41 of the Federal Law of Evidence.
- Both the transcript of the hearing and the arbitral award itself should record that the evidence was given under oath, to forestall any potential challenge.

AUTHORS

Jonathan H. Sutcliffe
Partner
+971.4.427.2747
jonathan.sutcliffe@klgates.com

Mohammad Rwashdeh
Special Counsel
+971.4.427.2742
mohammad.rwashdeh@klgates.com

Thomas Parkin
Associate
+971.4.427.2715
thomas.parkin@klgates.com

THE LAW COMMISSION REVIEW OF THE ARBITRATION ACT 1996

By Peter R. Morton, Louise Bond, Eklavya M. Sharma (London)

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

The Law Commission of England and Wales has published a **Consultation Paper** (the Paper) setting out its provisional proposals to update the Arbitration Act 1996 (the Act), applicable to arbitrations seated in England, Wales, and Northern Ireland, to ensure that it remains "state of the art." The Paper is the result of the Law Commission's own research and conversations with stakeholders.

It is reported that the Law Commission and the stakeholders it consulted agree "the Act works very well, with major reform neither needed nor wanted." However, a number of areas have been identified for potential development.

ARBITRATOR INDEPENDENCE AND IMPARTIALITY

The Paper considers whether the Act should impose an explicit duty on arbitrators to be independent. However, the Law Commission decided a duty of independence is "not practicable" in many areas of arbitration and it is more important for arbitrators to be impartial. The Act already contains, at Section 33, a duty of impartiality on arbitrators, and under English common law, arbitrators have a duty to disclose any matters that might reasonably give rise to justifiable doubts as to his or her impartiality (as was confirmed by the Supreme Court in ***Halliburton Co v Chubb Bermuda Insurance Ltd*** [2020] UKSC 48, in which K&L Gates acted for the appellant). The Law Commission proposes to codify this key case law by imposing an explicit continuing duty on arbitrators to disclose to the parties any information that may reasonably give rise to justifiable doubts as to their impartiality (although, in her judgment in the Halliburton decision, Lady Arden considered whether the law might be better able to keep pace with change if the courts were left to develop the law in this respect).

The Law Commission specifically invites responses from stakeholders on whether the Act should specify the state of knowledge required of an arbitrator's duty of disclosure and if so, whether this should be based upon an arbitrator's actual knowledge, or also upon what they ought to know after making reasonable inquiries. The Paper does not, however, get into whether the proper assessment of the duty of disclosure is by reference to the so called 'fair-minded and informed observer,' or alternatively by reference to matters that may give rise in the mind of any party to any justifiable doubts as to the arbitrator's impartiality, which is the formulation used in some rules of arbitration (for example LCIA Rules Art 5.4).

IMMUNITY OF ARBITRATORS

The Paper stresses the importance of strengthening the immunity of arbitrators in order to support impartiality. The Paper notes that the impartiality of arbitrators may be undermined if they are concerned about personal challenges by parties dissatisfied with their judgments. Further, the Paper considers some "problematic" case law that holds that arbitrators may be liable for the costs of applications to remove them, even where applications are unsuccessful. The Law Commission proposes that case law holding arbitrators potentially liable for the costs of court applications should be reversed.

The Paper invites responses on whether arbitrators should incur liability for resignations at all or only if resignation is seen to be unreasonable.

SUMMARY DISPOSAL

The power to summarily dispose of issues is not explicitly available for arbitrations under the Act. Some arbitration rules now contain an explicit summary disposal procedure, often stated to be in respect of claims/defences which are manifestly without merit. Whilst the Act requires the arbitral tribunal to adopt procedures to avoid unnecessary delay or expense, it also requires the tribunal to give each party a reasonable opportunity to state their case. This has led to arbitrators being reluctant to summarily dispose of issues for fear of the award being challenged for procedural irregularity. Therefore, the Law Commission proposes to amend the Act to expressly allow arbitrators to summarily dispose of a claim or defence in order to save on time and expenses of arbitration. The provision would be non-mandatory, allowing parties to opt out of it in their arbitration agreements.

ENFORCEMENT OF ORDERS OF EMERGENCY ARBITRATORS

The Act does not provide clear remedies for when a party ignores an emergency arbitrator's interim order. The Law Commission proposes two ways to amend the Act to address this issue. One would be to allow an emergency arbitrator to issue a peremptory order in accordance with Section 41(5) of the Act. This provision gives a tribunal the power to act in the event of non-compliance, including by dismissing a claim or applying to the court for an order for compliance. The Law Commission's proposal would give an emergency arbitrator similar powers to fully constituted arbitral tribunals where a party does not comply with an order. A second proposal is to extend Section 44 of the Act, allowing courts to make orders (e.g., interim orders) in support of arbitral proceedings. Currently, for non-urgent applications under this provision, the permission of a fully constituted tribunal or arbitral parties is needed.

The Law Commission invites responses from stakeholders regarding which option should be implemented to improve the enforceability of orders by emergency arbitrators.

CONFIDENTIALITY

The Law Commission notes that the Act does not explicitly contain provisions on confidentiality. However, as noted by the Supreme Court in Halliburton, features of privacy and confidentiality are assumed to be implicit in arbitrations seated in England. Nevertheless, the Law Commission is not persuaded that confidentiality should be the default presumption in all arbitrations, as in some type of arbitrations (e.g., investor-state arbitrations), the default favours transparency.

Whilst the Law Commission is reluctant to propose explicit provisions in the Act in respect of confidentiality, the Paper states that parties seeking confidentiality should ensure their arbitration clauses refer to arbitral rules which provide for schemes of confidentiality (e.g., the LCIA rules).

APPEALS ON JURISDICTION

Currently, applications to the court to challenge arbitral awards on jurisdictional grounds may involve a full rehearing. The court can rehear the evidence and arguments on jurisdiction, and the tribunal's decision is given no weight. The Paper notes the potential unfairness of a full rehearing. This is because a party can make a jurisdictional challenge before a tribunal and receive comments on the deficiencies of their evidence and arguments. The party can then challenge the award before the court and develop new arguments with new evidence at the rehearing.

The Law Commission proposes that, where a party challenges a tribunal's award on jurisdiction in the court, this should be by way of an appeal and not a rehearing. This means that the court would be unable to hear oral or new evidence and be limited to reviewing the tribunal's ruling.

APPEALS ON POINTS OF LAW

The Act currently allows for parties to challenge the validity of arbitral awards where they believe the tribunal erred on a question of law. The Law Commission rejects calls for this ground of challenge to be repealed on the basis that it would aid the finality of arbitral awards. The Paper explains that the relevant section in the Act (Section 69) is relied on sparingly in applications for permission to appeal (in less than 1% of cases seated

in England), but enough meritorious appeals arise to warrant the availability of such a challenge. Further, the parties can opt out of this non-mandatory provision in their arbitration agreements, including through incorporation of arbitral rules which exclude appeals on a point of law.

CONCLUSION

Overall, the limited number of changes proposed in the Paper show that the Act, issued over 25 years ago, has stood the test of time very well. Some of the more significant proposed adjustments have focused on aspects which have come into particular focus in recent years, around arbitrator impartiality, summary disposal of issues, and emergency arbitrator procedures, with the aim of maintaining London's position as one of the most preferred seats globally for international arbitration.

Since this alert was published, the Law Commission has published a second consultation paper (on 27 March 2023) inviting further responses on three issues (see our general update of ***Arbitration News from Around the World****). The deadline for responses to this second consultation was 22 May 2023.*

AUTHORS

Peter R. Morton
Partner
+44.20.7360.8199
peter.morton@klgates.com

Louise Bond
Associate
+44.20.7360.6447
louise.bond@klgates.com

Eklavya M. Sharma
Trainee Solicitor
+44.20.7360.6544
eklavya.sharma@klgates.com

EASTERN DISTRICT OF NEW YORK RULES ON USE OF SECTION 1782 IN AID OF ICSID ARBITRATION

By Matthew J. Weldon, Thomas A. Warns (New York)

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

The United States District Court for the Eastern District of New York provided further clarity to a lingering question in the aftermath of the U.S. Supreme Court's recent decision in ZF Automotive: whether the ZF Automotive decision precluded discovery under 28 U.S.C. § 1782 (Section 1782) in aid of an arbitration conducted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). In In re Alpene, the Eastern District of New York found that a petitioner could not seek the production of documents in aid of an ICSID arbitration under Section 1782.[1]

SECTION 1782

Section 1782 was enacted by the United States Congress in order to allow parties to obtain certain documents from parties in the United States in aid of proceedings before certain foreign and international tribunals. In relevant part, Section 1782(a) states:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ….

For quite some time after it was enacted, courts grappled with whether Section 1782 permitted a district court to order the production of documents in aid of a foreign private arbitration. Earlier this year, the United States Supreme Court decisively answered that question in the negative, finding that a "foreign or international tribunal" within the meaning of Section 1782 is a tribunal "imbued with governmental authority."[2] That decision has, however, with certain exceptions, left courts to determine which foreign or international tribunals are "imbued with governmental authority."

THE *ALPENE* DECISION

In In re Alpene, Petitioner Alpene, a Hong Kong corporation, is a claimant in an investor-state treaty arbitration pending against the Republic of Malta before an ICSID tribunal. Alpene brought a Section 1782 petition to obtain discovery from McCaul, a New York resident, for use in the ICSID arbitration.

The district court initially granted the petition but stayed enforcement pending the U.S. Supreme Court's decision in the ZF Automotive case. While the Alpene court noted that district courts had granted Section 1782 petitions in aid of ICSID arbitrations prior to the ZF Automotive decision, it reexamined that precedent in light of the Supreme Court decision, which the Alpene court noted "did not set out any test or provide any guidelines for lower courts to follow" in determining whether a tribunal is "imbued with government authority." The Alpene court also noted that it had not found any post-ZF Automotive decisions that examined whether an ICSID tribunal was "imbued with governmental authority."[3]

The Alpene court noted that the Bilateral Investment Treaty (the Treaty) between Malta and China provides

[1] In re Alpene, Ltd., No. 21MC2547MKBRML, 2022 WL 15497008 (E.D.N.Y. Oct. 27, 2022).

[2] ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2087 (2022).

[3] In re Alpene, 2022 WL 15497008, at *4.

that a dispute between an investor and one of the contracting parties can be submitted at the investor's choice to: (1) a court of appropriate jurisdiction in the country that is a party to the dispute, (2) arbitration under the auspices of ICSID, or (3) ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Alpene court noted that the inclusion of domestic courts as one option under the Treaty "undercut the contention that the arbitration panel had government authority," but the Alpene court also noted that that one factor itself was not dispositive.[4]

The Alpene court next examined the ICSID arbitration option that Alpene had chosen. The court noted that ICSID is an independent, self-contained system that operates under the authority of the World Bank, an intergovernmental organization. ICSID is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between states and investors who are nationals of other states. The court also noted that similar to the tribunal in ZF Automotive, the applicable treaty did not itself create the ICSID panel, which "consists of individuals chosen by the parties and lacking any official affiliation with [the treaty nations.]"[5]

The court also noted a number of similarities between the ad hoc UNCITRAL arbitration panel in ZF Automotive and the ICSID arbitration panel. Both provided immunity to arbitrators in the absence of intentional wrongdoing, and both required the parties to pay arbitration costs and arbitrator fees. Key differences between the ad hoc UNCITRAL panel in ZF Automotive and the ICSID arbitration panel in Alpene included that ICSID had 150 member states that ratified the ICSID Convention, that member states themselves can designate individuals to serve on ICSID panels, and member states select representatives for the ICSID Administrative Council, which meets annually to adopt regulations for ICSID. ICSID, in other words, created a "permanent institution." In addition, ICSID awards have status as final judgments and are binding as a matter of law in ICSID member states, including the United States.[6]

The court also examined whether granting requests in aid of ICSID arbitration would promote international comity and reciprocal assistance. The court noted that ICSID arbitral tribunals could not order discovery in aid of U.S.-based proceedings, so there was no reason to find that interests of comity and reciprocal assistance would be served.[7]

The Alpene court last noted that Section 1782 must be interpreted narrowly in line with the United States Arbitration Act (more commonly referred to as the Federal Arbitration Act). Ultimately, the court found that there was "insufficient support" for the argument that Malta and China had "intended to imbue the ICSID arbitration panel with government authority."[8]

CONCLUSION

As the first court to examine whether an ICSID tribunal is "imbued with governmental authority" post ZF Automotive, this decision is likely to be examined closely by any other court considering this question. It is interesting to note that this decision appears to put the burden on the petitioner to show sufficient support for a finding that a foreign or international tribunal is "imbued with government authority." It is also important to note, however, that the Alpene decision will not be binding on other courts unless it is adopted by the Second Circuit Court of Appeals or the United States Supreme Court.

AUTHORS

Matthew J. Weldon
Partner
+1.212.536.4042
matthew.weldon@klgates.com

Thomas A. Warns
Associate
+1.212.536.4009
tom.warns@klgates.com

4 Id. at *2.

5 Id.

6 Id. at *3 (citations omitted).

7 Id.

8 Id. at *3–4.

NEW ARBITRATION LAW IN LUXEMBOURG – A KICK-START FOR LUXEMBOURG AS AN ARBITRATION VENUE?

By Adam M. Paschalidis (Luxembourg), Peter Morton (London)

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

On 23 March 2023, the Luxembourg Parliament voted to modernize and update the arbitration law, applicable to arbitrations seated in Luxembourg. The long-awaited new law entered into force on 25 April 2023 (the New Arbitration Law), and is the first significant modification of the Luxembourg arbitration law in many years. It is indicative that Luxembourg State Council has been calling for a reform since 1980. This reform is the fruit of the labor of several academics and arbitration practitioners joining their voices for a change via different fora such as the **Luxembourg Arbitration Association**, the Luxembourg Chamber of Commerce, and **The Think Tank for Arbitration in Luxembourg.**

Is such a reform enough to kick-start interest in arbitration in Luxembourg?

KEY FEATURES OF THE NEW ARBITRATION LAW

It goes without saying that reforming a law dating from codification in the Napoleonic era meant there was considerable ground to cover and lot of room for improvement. Now, enriched with elements from French and Belgian law as well as provisions of the UNCITRAL model law on international commercial arbitration, the New Arbitration Law can better serve any aspiration for making Luxembourg a hospitable environment for arbitration.

Amongst the newly adopted features are the following:

(1) The arbitral tribunal is entitled to decide whether it has jurisdiction ("competence-competence" principle); thus, a Luxembourg court's review of the arbitration agreement is fairly limited (i.e., non-arbitrability of the case or the agreement is manifestly void or nonapplicable);

(2) The absence of a separating line between domestic (within the meaning of continental law) and international arbitration;

(3) The formal recognition of the arbitration clause's separability and autonomy;

(4) The right of parties to apply to a state court for interim measures, provided certain conditions are met;

(5) The introduction of the notion of the "supporting judge" or "juge d'appui" to facilitate the progress of arbitration proceedings (i.e., amongst others, intervention in disputes related to the constitution of the tribunal, extension of the duration of the tribunal's mission, order for production of documents);

(6) The different treatment of awards rendered in Luxembourg by:

- Allowing for a one-off right to appeal (in front of the Court of Appeal, and on limited grounds) for the purpose of having the award set aside, hence no right of appeal against the exequatur is granted; and
- In general, making available a simplified enforcement procedure for such awards instead of the standard process applicable to those rendered outside Luxembourg.

(7) With a view to accommodate contemporary (practical/logistical) needs, it has been adopted, amongst others, that:

- in case a time limit is not specified in the arbitration agreement, the default duration of the proceedings has been set to six months following the appointment of the last arbitrator (subject to extension by agreement of the parties or by the person responsible for organizing the arbitration, if such a person has been designated by the parties, or, failing that, by the supporting judge);
- it falls on the arbitral tribunal's discretion to meet, hold hearings, examine, etc. at any place it deems appropriate; and
- the arbitration proceedings are confidential.

ARBITRATION STAKEHOLDERS IN LUXEMBOURG

Luxembourg is one of Europe's strongest financial hubs, where, amongst others, investors and fund managers from around the globe meet and make business happen. The country's elevated business activity caught the attention of various stakeholders, who have sought to promote the hosting of arbitration proceedings in Luxembourg.

Amongst the parties working towards this goal is the Luxembourg Chamber of Commerce, which is spearheading the campaign by (i) forming a separate unit (the Luxembourg Arbitration Centre or LAC) comprised of arbitration expractitioners to work on and for the promotion of arbitration, (ii) revising its **arbitration rules** to reflect contemporary practice, and (iii) securing cooperation with neighboring and more experienced fellows. With regard to the latter, on 8 September 2022, the LAC signed a cooperation agreement with the Netherlands Arbitration Institute (NAI) and the Belgian Centre for Arbitration and Mediation (known as CEPANI), while a **joint arbitration event** is scheduled to take place in Luxembourg on 20 April 2023 as a result of this cooperation.

Furthermore, Luxembourg's arbitration community is being supported by a well-knit arbitration association, namely, the Luxembourg Arbitration Association, offering a contact point for parties to choose arbitrators while frequently organizing conferences to educate its members.

REFORM FINE-TUNED WITH CURRENT MARKET?

In terms of the current arbitration market in Luxembourg, most arbitration practitioners are working on the recognition and enforcement of arbitral awards issued abroad. That is because Luxembourg is one of those jurisdictions where multinational corporations deposit their assets either for subsequent investment or for safekeeping.

With that context, it seems that Luxembourg has made a strategic choice in the New Arbitration Law. The simplified enforcement process for arbitral awards rendered in Luxembourg may bring material benefits. If there is a strong possibility for the award to need to be enforced in Luxembourg, this new feature, alongside the New Arbitration Law in general as well as the reduced costs and the modernized rules of arbitration offered by the LAC, ought to enhance the appeal of Luxembourg as a potential seat of arbitration.

Whilst it is too early to say whether these changes will be enough to facilitate a shift in Luxembourg arbitration traffic, the attempts to bring the arbitration law into line with modern international standards is to be welcomed.

AUTHORS

Adam M. Paschalidis
Associate
+352.285.652.205
adam.paschalidis@klgates.com

Peter R. Morton
Partner
+44.20.7360.8199
peter.morton@klgates.com

ENERGY PRACTITIONERS PUBLISH CHAPTER ON LNG ARBITRATION IN GLOBAL ARBITRATION REVIEW'S GUIDE TO ENERGY ARBITRATIONS, 5TH EDITION

By Ben Holland (London), Steven C. Sparling (Washington, D.C.)

Our lawyers have published an all new chapter on 'LNG Arbitrations' in the latest (5th) edition of Global Arbitration Review's (GAR) 'Guide to Energy Arbitrations,' **available here**.

The release of this publication coincided with a year of turbulence in global energy markets. The chapter addresses ways to avoid disputes and sets out common areas of dispute arising from liquefied natural gas (LNG) contracts.

As explained in the chapter, LNG is one of the great connectors of world trade. It has been commercialised for more than 50 years, and will flourish in coming decades with substantial growth in its use predicted. Many consider it the most realistic transition source of energy between the circumstances today and a future where fossil fuels are less readily utilised. LNG is also the most immediate source of relief from market disruptions brought about by conflict and other (e.g., sanctions-related) displacement.

Topical and currently relevant areas covered in the chapter include disputes relating to the failure to supply LNG. This section covers missed LNG cargos, sellers denying upwards flexibility, hardship claims by sellers, and other seller failures to deliver.

Likewise the publication covers disputes relating to the over-supply of LNG. This includes take-or-pay disputes, seller's denying downwards flexibility, hardship claims by buyers, and other buyer failures to take delivery.

A separate section addresses the challenges that can be faced when asserting a claim for force majeure under long term LNG contracts or when developing new facilities and the need for mitigation when these circumstances arise (for example, sourcing from alternative supply sources).

The final section covers disputes relating to rescheduling, diversions and destination restrictions in LNG contracts, disputes concerning reloading of LNG, and disputes relating to terminal capacity and use as well as disputes related to the price of LNG.

The energy industry has helped to nurture and shape the practice of international arbitration, and, for a host of reasons, such as: resource nationalism, oil price drops, geopolitics, climate change, sanctions, and pandemics among others, the energy sector has remained one of the discipline's biggest users.

The authors are LNG partners Ben Holland and Steven Sparling. A link to the whole publication (GAR) 'Guide to Energy Arbitrations' is **available here**.

AUTHORS

Ben Holland
Partner
+44.20.7360.6425
ben.holland@klgates.com

Steven C. Sparling
Practice Area Leader - Energy, Infrastructure, and Resources
+1.202.778.9085
+1.713.815.7300
steven.sparling@klgates.com

K&L Gates is a fully integrated global law firm with lawyers and policy professionals located across five continents. For more information about K&L Gates or its locations, practices, and registrations, visit klgates.com.

REQ1763