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Arbitration law in 2023: a review of developments in case law

By Caroline Thomas

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Caroline Thomas is a lawyer and arbitrator with a focus on cross-border matters. Based in Hong Kong, Caroline is also a consultant for Hugill & Ip. She qualified in England and Wales in 2008, in Hong Kong in 2010 and in New York in 2022.

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This article has been co-authored by a classmate of Caroline's from Columbia Law School.

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George Mallis, an Associate in the Dispute Resolution department of Appleby's Hong Kong office, very kindly reviewed the off-shore law aspects of the section on winding-up proceedings.

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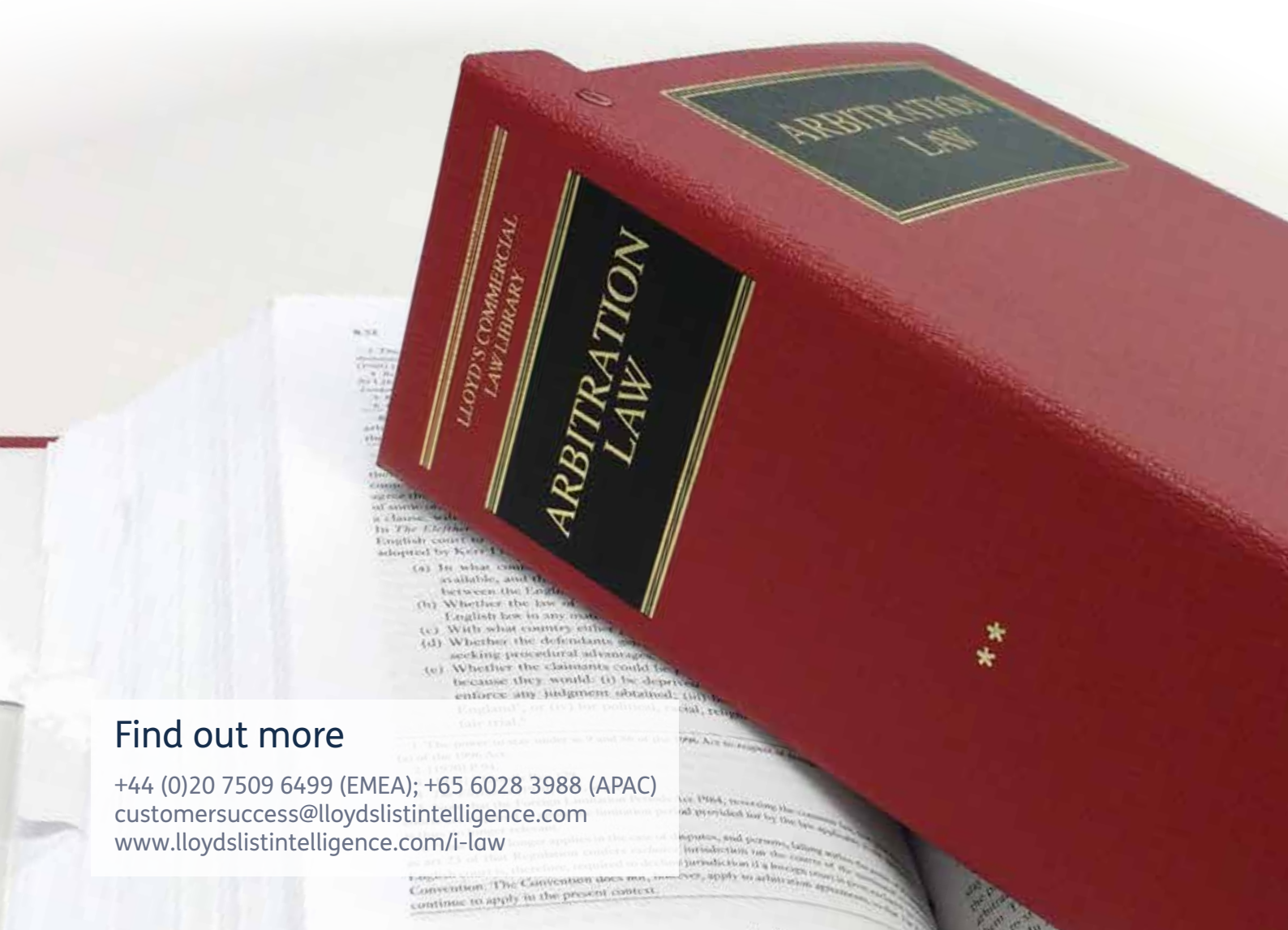

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Introduction

This review covers, without seeking to be exhaustive, the court decisions and developments in the field of arbitration in 2023 which caught the authors' attention. It covers the main cases and trends in England and Wales, as well as in other key common law arbitration seat jurisdictions including Hong Kong SAR and Singapore.

By way of structure, this review analyses cases in a sequence that mirrors the structure and chronology of a dispute resolved through arbitration – ie starting with the commencement of an arbitration and ending with the enforcement of a foreign award by a court. There is also a section on relief granted by courts in aid of arbitration.

We have also sought to cover other major developments such as the Law Commission's review of the Arbitration Act 1996, proposed amendments to major arbitral rules (notably by SIAC) and developments in relation to how arbitrations can be funded.

In a final section we seek to summarise the trends we have identified and suggest what 2024 might hold in store for arbitration.

Commencing arbitration and arbitrability

Notice of arbitration

In *G v P*[1] the Hong Kong Court of First Instance allowed the respondent borrower to set aside an enforcement order of an arbitral award by the Hong Kong Arbitration Society under sections 86(1)(c)(i) and (ii) of the Arbitration Ordinance (Cap 609), on the ground that the respondent was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings and was unable to present its arguments. According to the award the applicant moneylender served its notice of arbitration on xyz@china**t**.hk instead of xyz@china.hk (per the relevant agreement) and the claimant did not adduce other evidence "as to how, or when, Notice of Arbitration was served on the Respondent".

The court warned:[2]

> "Despite the pro-arbitration approach, an arbitral award is recognized and enforced by the Court only if the award and the arbitral process leading to the award is structurally intact and there is due and fair process. The solemnity afforded to the award by the Court's recognition and enforcement cannot be justified, if the award is shown on its own face to be irregular, and contradictory to the terms of the arbitration agreement. The Court cannot enforce any haphazard document as a judgment or order of the Court. Nor should the credibility and integrity of the arbitration process be compromised by the enforcement of an award which cannot stand on its face. Care must therefore be taken by an applicant, to ensure that the documents (including the award in question) presented to the Court in support of

1 [2023] HKCFI 2173.
2 At para 28.

an application to enforce the award are all correct, and in order, for enforcement of the award to be allowed by the Court."

This case thus illustrates the importance of correctly complying with notification requirements and process as well as ensuring that serious typos in an award are immediately corrected.

Failure to appoint an arbitrator

Section 18 of the English Arbitration Act 1996 ("Failure of appointment procedure") provides:

> "(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. ...
>
> (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.
>
> (3) Those powers are–
>
> (a) to give directions as to the making of any necessary appointments;
>
> (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
>
> (c) to revoke any appointments already made;
>
> (d) to make any necessary appointments itself."

In *Global Aerospares Ltd v Airest AS*[3] the applicant applied to the court under section 18 of the 1996 Act for the appointment of an arbitrator on the ground that, it claimed, the agreed appointment process had failed. The court refused the application, holding that failing to serve a request for arbitration under section 14(4) of the 1996 Act[4] (the court held the applicant had disregarded the agreed method of service of notices, including the notice of arbitration[5]), with the consequence that the process for the appointment of an arbitrator had not validly begun, was not considered a failure of procedure for the appointment of an arbitrator. Therefore section 18 was not engaged and the claim was dismissed. Section 18 must be read together with various default provisions within the Arbitration Act 1996 relating to the commencement of arbitration and appointment of a tribunal (eg sections 14 to 16).

Failing to serve a request for arbitration under section 14(4) of the 1996 Act, with the consequence that the process for the appointment of an arbitrator had not validly begun, was not considered a failure of procedure for the appointment of an arbitrator

Which law applies to an arbitration agreement?

The landmark English Supreme Court decision in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*[6] considered which law governs an arbitration agreement. Pending reform of the English Arbitration Act 1996 which we discuss below, *Enka* is authority that:

> "(1) If there is a choice of law, express or implied, directed to the arbitration agreement itself, then that chosen law will govern the arbitration agreement, unless that choice of law is contrary to public policy.
>
> (2) If there is no such choice, and if the arbitration agreement forms part of a matrix contract, and if there is a choice of law, express or implied, for the matrix contract, then that chosen law will also govern the arbitration agreement.
>
> However, that chosen law 'may' be displaced in the following circumstances:
>
> (a) where the law of the seat itself provides that the arbitration agreement is governed by the law of the seat;
>
> (b) where there is a serious risk that the chosen law might render the arbitration agreement invalid, or not binding on one party, or (according to the majority) of reduced scope – this is known as the 'validation principle';

[3] [2023] EWHC 1430 (Comm); [2023] 2 Lloyd's Rep 639.

[4] "Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."

[5] The court considered that clause 9 of the relevant contract was clear, and required notices to be served personally and additionally by airmail or some other similar means. The applicant had not attempted personal service.

[6] [2020] UKSC 38; [2020] 2 Lloyd's Rep 449.

(c) where the choice of a seat in England and Wales, in combination with a reference to a local association or practice, implicitly indicates the choice of the law of England and Wales as the governing law.

(3) If there is no choice of law anywhere, the arbitration agreement will be governed by the law with which it has the closest and most real connection, this being:

(a) (according to the majority) the law of the seat of the arbitration (but perhaps still subject to the validation principle);

(b) (according to the minority) the law governing the matrix contract."[7]

In *China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd*[8] the Hong Kong High Court applied the principles in *Enka* to determine the governing law of the jurisdiction clause. The plaintiff commenced court proceedings in the Hong Kong courts to recover monies under a loan whereupon the defendant sought a stay claiming that the parties were bound by a jurisdiction clause in a subsequent debt repayment agreement (with disputes to be resolved in Wuhan before an arbitration committee or the local courts). Applying *Enka*, summarised above and specifically limb (1) thereof, the court held that Hong Kong law was the governing law and duly applied Hong Kong law to determine whether the jurisdiction clause in the subsequent agreement was exclusive in nature (and thus whether proceedings should be stayed).

The court held that it was non-exclusive (because it was permissive rather than mandatory and asymmetric) as a result of which the defendant had the burden of showing that it was more appropriate for the dispute to proceed in the foreign forum (with the non-exclusive jurisdiction clause simply one factor to be placed into the discretionary mix[9]), a burden which the defendant failed to discharge. Therefore, the application for a stay of the Hong Kong court proceedings was dismissed.

Which law applies to determine validity of an arbitration agreement?

In *Mittal v Westbridge Ventures II Investment Holdings*[10] the Singapore Court of Appeal considered the decision of the High Court of Singapore[11] on whether the validity of an arbitration clause on the grounds of arbitrability was to be determined by the law of the seat or the law applicable to the arbitration clause. Here the question was relevant because the law of the seat, Singapore, recognised the issue at stake (minority shareholder oppression) as being arbitrable whereas the law applicable to the arbitration clause, India, regarded the issue as non-arbitrable.

Mittal had filed a petition before the National Company Law Tribunal in Mumbai, India, to injunct Westbridge from interfering in the management of the company on the grounds of corporate oppression. Westbridge in turn applied to the Singapore High Court for a permanent anti-suit injunction.

> The law of the seat alone would normally be applicable at the post-award stage in deciding whether the matters contained in the arbitration award were arbitrable or not

The Court of Appeal rejected the High Court's reasoning, although it reached the same ultimate conclusion on the facts of the case and upheld the injunction. It found the law of the arbitration agreement to be Singapore law (by applying the three-stage test in *BCY v BCZ*[12]) and that the dispute was therefore arbitrable.

Section 11(1) of the Singapore International Arbitration Act 1994 provides that any dispute which parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration "unless it is contrary to public policy to do so". In in its reasoning, which considered section 11, the Court of Appeal departed

7 Law Commission, "Review of the Arbitration Act 1996, Second Consultation Paper", para 2.14, published in March 2023.
8 [2023] HKCFI 132.
9 See *T & K Electronics Ltd v Tai Ping Insurance Co Ltd* [1998] 1 HKLRD 172 at page 177G.
10 [2023] SGCA 1. Examined in *Lloyd's Maritime and Commercial Law Quarterly*, [2023] LMCLQ 182 and *Arbitration Law Monthly*, November 2023, (2023) 23 ALM 10 5.
11 [2021] SGHC 244. Examined in *Arbitration Law Monthly*, May 2022, (2022) 22 ALM 5 7.
12 [2016] SGHC 249; [2016] 2 Lloyd's Rep 583.

from the approach adopted by other jurisdictions[13] and found that "In both cases, it would be contrary to public policy to permit such an arbitration to take place"[14] having applied a new two-tiered "composite approach"[15] to determine the arbitrability of a dispute at the pre-award stage. The Court of Appeal was of the view that:

> "... arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. If it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed because it would be contrary to public policy, albeit foreign public policy, to enforce such an arbitration agreement. Further, because of the operation of section 11, where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed."[16]

Thus, the law of the seat alone would normally be applicable at the post-award stage in deciding whether the matters contained in the arbitration award were arbitrable or not.

Binding effect of alternative dispute resolution mechanism clause

In *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd*[17] the English Court of Appeal considered whether an alternative dispute resolution process was binding in respect of a construction dispute. Although the parties had settled the dispute before judgment was given, the Court of Appeal proceeded to judgment given the arguments by the parties and the importance of the issue.

The respondent was tasked by an NHS Trust to construct and maintain a hospital. The respondent subcontracted the first appellant to carry out the building works, with the second appellant guaranteeing performance. The contract mandated a 12-year limit for claims post-completion and included a dispute resolution procedure requiring disputes to be submitted to a liaison committee before proceeding to court.

> Where a party has commenced proceedings in breach of contract, and a stay rather than strike out would deprive the other party of a limitation defence, both factors would be important considerations in favour of striking out rather than staying the claim

The respondent commenced court proceedings to protect time (the limitation period) to recover deductions which the NHS had made and then applied to stay proceedings as per the dispute resolution procedure. The appellants in turn applied to strike out the claim and argued that the respondent's failure to comply with the dispute resolution procedure deprived it of a limitation defence.

The judge at first instance held that the dispute resolution procedure gave rise to an unfulfilled condition precedent and considered it unenforceable

13 Jurisdictions such as Austria, Belgium, France, Holland, Italy, Switzerland, Sweden, the United Kingdom and United States have applied the lex fori. The English Supreme Court in *Enka* considered that it would be "illogical" for different systems of law to govern subject-matter arbitrability depending on the timing of the challenge to the validly of the arbitration agreement, ie whether the challenge was raised before or after an award has been made. However, the Singapore Court of Appeal considered that the other jurisdictions had not placed sufficient weight on "the importance of public policy in relation to issues of arbitrability" and interpreted section 11(1) of Singapore's International Arbitration Act to mean that "if it is contrary to local or relevant foreign public policy to determine an arbitration agreement by arbitration, that dispute cannot proceed to arbitration in Singapore".

14 [2023] SGCA 1, at para 55.

15 This term was used by the amicus curiae, Associate Professor Darius Chan who had been invited to submit on "whether the law that governs the issue of subject matter arbitrability at the pre-award stage is the law of the seat or the proper law of the arbitration agreement": see [2023] SGCA 1, para 34.

16 [2023] SGCA 1, at para 55.

17 [2023] EWCA Civ 292; [2023] BLR 271. Examined in Arbitration Law Monthly, June 2023, (2023) 23 ALM 6 1.

for vagueness. Even if enforceable, the judge would only grant a stay of proceedings under CPR 11(1)(b).[18]

The Court of Appeal dismissed the appeal, having found that the first instance judge[19] was correct to conclude that a dispute resolution process was unenforceable for uncertainty (as to how and when the process was complete) and that – even if it had been enforceable – the proper exercise of discretion under CPR 11(1)(b) would have been to stay the claim rather than strike it out. Popplewell LJ also confirmed that a stay is not the "default remedy" in cases such as this – rather, whether a stay should be granted depends upon the particular features of the case. Where a party has commenced proceedings in breach of contract, and a stay rather than strike out would deprive the other party of a limitation defence, both factors would be important considerations in favour of striking out rather than staying the claim. In this case, there were no grounds for interfering with the judge's exercise of discretion.

Who decides – the tribunal or the court?

Tiered arbitration clauses

Commercial contracts can include multi-tiered dispute resolution clauses, requiring parties to engage in certain actions before a party can submit the dispute to arbitration – such as attempting negotiations or mediation within a specified timeframe after a dispute has arisen. Opinions on whether using such clauses is a good idea vary, with a valid objection being that they can give rise to satellite disputes. Certainly the question of whether or not such clauses have been complied with often arises.

In *C v D*[20] the dispute resolution clause in a contract, between the appellant (a Hong Kong company) and the respondent (a Thai company) regarding the operation of a jointly owned broadcasting satellite, required parties to attempt to resolve the dispute through "good faith negotiations" before referring it to arbitration if the dispute could not be resolved after 60 days. The Hong Kong Court of Final Appeal confirmed[21] that arbitrators, not the courts, have the final say on whether a party has complied with tiered arbitration clauses.[22] This is because the issue relates to admissibility of claims and not the jurisdiction of the arbitral tribunal to determine them.

> Arbitrators, not the courts, have the final say on whether a party has complied with tiered arbitration clauses

It followed that the appellant could not rely on article 34(2)(a)(iii)[23] of the UNCITRAL Model Law to bring proceedings in the court to set aside the arbitral award. The court also awarded costs on an indemnity basis. Since Hong Kong adopts the UNCITRAL Model Law, this case may be followed in other UNCITRAL Model Law jurisdictions.

Who are the parties?

By contrast, in *R v A and Others*[24] the Hong Kong Court of First Instance set aside an HKIAC award under section 34 of the Arbitration Ordinance (Cap 609) (which allows the court to review the tribunal's ruling on its own jurisdiction if the tribunal decides that it has jurisdiction). The case is authority that the identity of the proper parties to an arbitration agreement is a question of jurisdiction and within the court's powers to review.

18 CPR 11(1)(b) states: "(1) A defendant who wishes to– … (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have".

19 [2022] EWHC 1595 (TCC). Examined in *Construction Industry Law Letter*, October 2022, (2022) CILL 4746.

20 [2023] HKCFA 16.

21 Citing with approval the approach adopted by the English High Court in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm); [2022] 2 Lloyd's Rep 458 which followed the Singapore case *BBA v BAZ* [2020] SGCA 53; [2020] 2 SLR 453, and cited at para 33 the renowned arbitrator Jan Paulsson's formulation: "Our lodestar takes the form of a question: is the objecting party taking aim at the tribunal or at the claim?" ("Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005), at page 616).

22 In this case the arbitrators confirmed that the clause had been complied with.

23 This provides: "(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: … (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside …".

24 [2023] HKCFI 2034.

Scope of arbitration clauses

Liability versus quantum in insurance cases

DC Bars Ltd and Another v QIC Europe Ltd[25] concerned an insurance dispute. For a long time it has been common for arbitration clauses in insurance policies to distinguish quantum disputes (to be arbitrated confidentially) and liability disputes (to go to court). The distinction may seem hair-splitting because most insurance coverage disputes revolve around whether and how much an insurer must pay. In *DC Bars v QIC* Sir Nigel Teare decided that quantum disputes are concerned purely with calculation of sums owing on the basis that there is liability. This ensures that substantive issues are resolved in public whereas only the maths is decided behind closed doors.

As regards the facts of the case, the claimants commenced proceedings pursuant to an insurance policy providing business interruption cover. QIC in turn sought a stay under section 9 of the Arbitration Act 1996 which Sir Nigel Teare refused. His starting point, based on the decision of Mance J in *Insurance Corporation of the Channel Islands Ltd v McHugh*,[26] was that a claim under an insurance policy was one against the insurers for breach of contract for failing to hold the assured harmless. Applying that principle, the court found that the real difference between the parties was one as to whether QIC was liable for the claimed business interruption losses on the second, third and fourth occasions (a claim in respect of the first occasion had been accepted by the insurer). That was not a difference as to the amounts to be paid; instead it was a dispute as to liability.

Winding-up proceedings

When pursuing a straightforward commercial debt from a recalcitrant debtor, a creditor has two main options:

(1) commencing traditional proceedings and obtaining a judgment or an arbitration award (depending on the chosen forum in the contract) and then taking steps to enforce it via the courts against the debtor's assets, or;

(2) issuing a statutory demand and then (if unpaid), petitioning to wind up the debtor.

Winding up is a collective remedy for the benefit of all creditors, and absent special circumstances,[27] it is the end of a company. When wound up, or liquidated, professional insolvency practitioners (usually specialist accountants) will take control of the company, collect in its assets, and pursue claims, as appropriate, on the company's behalf.

Ultimately, the liquidators, after deducting costs and certain statutory preferential payments, will distribute the company's assets pari passu (proportionately) among creditors according to their claims. Because of the severity of winding up, often the threat of insolvency proceedings (ie the sending of a statutory demand) can bring a recalcitrant debtor to the negotiating table quickly and cheaply.[28]

In *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd*[29] the Hong Kong Court of Final Appeal recognised this very phenomenon in the context of winding up a foreign company in Hong Kong. For the court to exercise its discretionary jurisdiction the petitioner must inter alia demonstrate a reasonable possibility of benefit to itself from the winding up. The most common and obvious benefit is that the foreign company has assets within Hong Kong that the liquidator can recover. However, Shandong Chenming went further than this, deciding that commercial pressure engendered by commencing winding-up proceedings was a sufficient benefit on its own.

Contested winding up and arbitration

Generallly speaking, the most common ground to petition to wind up a debtor is to show that a statutory demand for a liquidated sum has been duly served on it, and has not been paid within the statutory time limit. However the court will not exercise its winding-up jurisdiction if the relevant debt is disputed in good faith on substantive grounds.[30]

Traditionally, the onus is on the debtor, and the court will consider the debtor's arguments and decide the matter in a similar manner to an application for summary judgment. If there is a viable dispute, and genuine uncertainty or nuance to the dealings, the court will not proceed to wind up the company. Instead, the creditor will need to commence proceedings in the usual way and come back and petition based on its judgment or award. However if the dispute raised clearly lacks substance, then the court will proceed to wind up the debtor. In practice, a debtor may well raise every conceivable argument in order to avoid being wound up, but the court will distinguish between genuine defences and those simply designed to obfuscate matters.

25 [2023] EWHC 245 (Comm); [2023] Lloyd's Rep IR 225.
26 [1997] LRLR 94.
27 Such as a "white knight investor".
28 However, in case of a failed winding-up petition, the court may order indemnity costs and the tort of malicious prosecution may apply.
29 [2022] HKCFA 11.
30 Or at least so much of the debt that the undisputed sum does not exceed the statutory minimum.

Traditionally, the above approach would apply whether or not the parties had agreed to submit their disputes to arbitration. However, common law jurisdictions in recent years have grappled with the question of whether the court should conduct this exercise and delve into the merits of a dispute when the parties have agreed to arbitration.

New approach – deference to arbitration – onus on creditor

In *Salford Estates (No 2) Ltd v Altomart*[31] the English Court of Appeal held that that if the debt in question was subject to an arbitration agreement and was disputed (or even "not admitted") then, save for in "wholly exceptional circumstances" any winding-up petition should be stayed. The court expressed concern that to hold otherwise would encourage parties to an arbitration agreement, as a "standard tactic", to bypass the arbitration agreement (and intention of the Arbitration Act 1996) by presenting a winding-up petition to apply pressure on the alleged debtor.

Broadly the new approach could be preferred because:

- The parties have agreed to arbitration and in a pro-arbitration jurisdiction should be held to their contractual bargain. The court should not conduct a summary-judgment-like assessment instead.
- A petition is ultimately a debt-recovery tool, and should in reality be viewed as a collective action for creditors. Other creditors are free to come forward and petition (or substitute in where possible).

On the other hand, proponents of the traditional approach would argue that:

- The presentation of a winding-up petition does not come within the scope of an agreement to arbitrate (ie there is no automatic stay).
- The new approach excessively fetters the discretion of the court, curtailing the statutory right of creditors to petition. A creditor might be forced to pursue an expensive and time-consuming arbitration in order to petition based on a debt that cannot seriously be disputed. Recalcitrant debtors could, in bad faith, use the fact of their arbitration agreement as a shield to buy further time.
- Winding up is a collective process, for the benefit of all creditors.

The new approach has not been adopted wholesale across the main common law jurisdictions, with certain preferring to maintain the traditional approach. There are also some nuances as to the exact test to be applied, (and Singapore in particular takes a position closer to the "middle"[32]) but broadly the case law falls into the below categories:

	Traditional approach	New approach
England and Wales		*Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] EWHC 1797 (Ch); [2015] BCC 877 *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575 *Telnic Ltd v Knipp Medien und Kommunikation GmbH* [2020] EWHC 2075 (Ch)
Hong Kong (no Court of Appeal cases yet)	*But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311 *Re NT Pharma International Co Ltd* [2023] HKCFI 1623 *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2023] HKCFI 1443	*Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 246 *Re Shandong Chenming Paper Holdings Ltd* [2023] HKCFI 2065 *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCU 4156
Singapore Court of Appeal		*AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33; [2021] LMCLQ 6 *BWG v BWF* (SGCA) [2020] SGCA 36
Cayman Islands	*Re BPGIC Holdings Ltd* 20 November 2023, unreported	
British Virgin Islands	*Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 and BVIHCMAP2015/0003, 8 December 2015, unreported *Sian Participation Corporation v Halimeda International Ltd* BVIHCMAP2021/0017, 24 April 2023, unreported	

[31] [2014] EWCA Civ 1575.

[32] Singapore adopts an abuse of process test with some exceptions.

Here we focus below on the main cases handed down in 2023, but discuss prior jurisprudence where it is helpful for context.

Hong Kong

In Hong Kong the debate between approaches began in 2018 with the judgment of Harris J in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*.[33] Considering *Salford Estates (No 2) Ltd v Altomart Ltd*,[34] Harris J also deviated from the traditional approach, holding that the court should generally dismiss a winding-up petition if: (1) the debtor disputes the debt relied on; (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and (3) the debtor takes the steps required under the applicable dispute resolution clauses to commence the arbitration proceedings and files an affirmation demonstrating this. From a creditor's perspective the third condition tempers the potentially harsh effects of the new approach, since the debtor must take positive steps demonstrative of an intention to dispute the debt: simply asserting that intention to the court will not suffice.

Although it was influential, *Lasmos* was a first instance decision only and, as the above table (which is not exhaustive) shows, was not wholeheartedly adopted or approved.

Recently in *Re Guy Lam*[35] the Court of Final Appeal held that in the ordinary case of an exclusive jurisdiction clause (ie not an arbitration clause) – absent countervailing factors such as the risk of insolvency affecting third parties, or a dispute that borders on the frivolous or abuse of process – the petitioner and debtor ought to be held to the terms of their contract: ie, the petition should be dismissed.[36]

Since *Guy Lam* was decided, there have been conflicting cases involving arbitration clauses decided by different High Court judges: *Re Shandong Chenming Paper Holdings Ltd*[37] per Harris J; *Re NT Pharma International Co Ltd*[38] per Linda Chan J; and *Re Inversion Productions Ltd*[39] per DHCJ Le Pichon.

Re Simplicity & Vogue Retailing (HK) Co Ltd related to a guaranteed unpaid sum under bond instruments and *Re NT Pharma* related to an undisputed unpaid sum under a supply agreement. There was also a cross-claim but the agreements on which the petition debts were based contained arbitration clauses. In both cases Linda Chan J made winding-up orders. She held: "The ratio in *Guy Lam* only applies to [an exclusive jurisdiction clause], not [an] arbitration clause".

Conversely, in *Re Shandong Chenming Paper Holdings Ltd*, where a petition was presented on the ground of insolvency based on non-payment of an arbitration award, but the company issued a cross-claim through a second arbitration that related to the same agreement (in essence arguing that it had a cross-claim based on arbitration agreement in excess of the petition debt), Harris J stated that the Court of Appeal and Court of Final Appeal in *Re Guy Lam* "were of the view that the same principles and approach applied to both an [exclusive jurisdiction clause] and an arbitration clause",[40] that this principle applied also to cross-claims and declined to follow *Re Simplicity & Vogue Retailing (HK) Co Ltd*, and he stayed the proceedings to freeze the date of the petition.

Finally, in *Re Inversion Productions Ltd* a petition was based on an unpaid debt of approximately US$24 million arising out of a loan agreement which contained an arbitration agreement. DHCJ Le Pichon considered *Re Simplicity* and *Re Shandong* but did not make a ruling on which decision was correct. Instead, the court held that taking either approach, the debtor company failed to show a proper basis for staying/dismissing the petition and ordered the company to be wound up.

Leave to appeal to the Court of Appeal was granted in *Re Simplicity* and *Re Shandong*. Hopefully, 2024 will bring clarification of the law.

33 [2018] HKCFI 246.
34 [2014] EWCA Civ 1575.
35 [2023] HKCFA 9.
36 Interestingly, the English Court of Appeal currently takes a different view on the exercise of the court's discretion when an exclusive jurisdiction clause is present (as opposed to an arbitration clause) and has followed the traditional approach (see *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997, as applied in *City Gardens Ltd v DOK82 Ltd* [2023] EWHC 1149 (Ch)). As explained in *City Gardens*: "[*BST*] is binding authority for the proposition that the Companies Court, in considering the exercise of its power to wind up under section 122 of the Insolvency Act 1986, is itself charged with determining whether the petitioner is genuinely a creditor. For that purpose, it has to determine whether the alleged debt is disputed in good faith on substantial grounds. Even where the alleged debt is based upon a contract which has an [exclusive jurisdiction clause] in favour of a foreign jurisdiction, the judgment as to the exercise of the winding-up power remains that of the domestic court". Thus while it might seem logical that the same approach should be taken where the jurisdiction agreement refers to arbitration or an exclusive jurisdiction clause, it should not necessarily be taken as a "given".
37 [2023] HKCFI 2065.
38 [2023] HKCFI 1623
39 [2023] HKCFI 2400.
40 [2023] HKCFI 2065, at para 4.

Cayman Islands

On 20 September 2023 the Privy Council, on appeal from the Court of Appeal from the Cayman Islands, gave judgment in *FamilyMart China Holdings Co Ltd v Ting Chuan (Cayman Islands) Holdings Corporation*.[41] *FamilyMart* concerned the question whether matters potentially falling within the court's jurisdiction to wind up a company on a just and equitable basis (as opposed to on the basis of insolvency) were arbitral. Taking a self-described pro-arbitration approach, the Privy Council ruled that, although the relief ultimately sought by the party seeking to wind up the company were not arbitral, the underlying factual and legal matters that lay at the heart of the dispute were arbitral such that court proceedings should be stayed in favour of arbitration.

Although *FamilyMart* was expressed to (and has been widely accepted to) confirm the Cayman Islands as a pro-arbitration jurisdiction, the Grand Court of the Cayman Island's decision in *Re BPGIC Holdings Ltd*,[42] which was handed down two months after the decision in *FamilyMart*, has added some further nuance to the discussion. Unlike in *FamilyMart*, the question as to whether the traditional approach or the new approach should be followed in the Cayman Islands was squarely in issue. The case before the Grand Court in *BPGIC* concerned the question whether a winding-up petition (which was made on the basis of insolvency rather than on just and equitable grounds as was the case in *FamilyMart*) should be stayed or dismissed pending the resolution of a disputed debt by way of arbitration.

The Grand Court, agreeing with the petitioner, held that the approach of the Cayman Court is "to determine the threshold question of whether the dispute is genuine and substantial before dismissing a petition in favour of arbitration", such approach being consistent with the legislative policy of the Cayman Islands' Foreign Arbitral Awards Enforcement Act ("FAAEA"). The Chief Justice distinguished her decision from English decisions that prohibit an examination of the merits of the dispute said to be referable to arbitration on the basis that the relevant provision of the FAAEA, unlike its English equivalent, contained additional wording that permitted the court to determine whether there was in fact a genuine and substantial dispute before determining whether the matter ought to be referred to arbitration.

In making her decision, the Chief Justice expressly acknowledged that her approach "may be inconsistent with the internationalism endorsed by the Privy Council in *FamilyMart*" but seemingly endorsed the traditional approach in stating that: "it is consistent with the law with respect to stays in favour of foreign arbitration and with the long-standing approach of the courts on applications to stay or dismiss petitions on the ground that the debt is disputed".

> The "statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds [is] too firmly a part of BVI law"

British Virgin Islands

The leading decision in the BVI is the Eastern Caribbean Supreme Court of Appeal's decision in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*.[43] In this judgment the Court of Appeal firmly rejected the approach taken in cases such as *Salford Estates*, reasoning that the "statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds" is "too firmly a part of BVI law".

More recently, in an application for leave to the Privy Council, the Court of Appeal was invited to reconsider its decision in Jinpeng Group in the case of *Sian Participation Corporation v Halimeda International Ltd*.[44] On 24 April 2023 the Court of Appeal refused leave to appeal to the Privy Council on the basis that the question as to whether *Jinpeng Group* was correctly decided did not amount to a matter of greater general and public importance. However, on 30 October 2023, the Privy Council granted leave to appeal and it is scheduled to hear a substantive appeal of the matter in March 2024. In hearing the appeal the Privy Council will be called upon to determine whether the law in the BVI should take the traditional approach per *Jinpeng Group* or whether the new approach should be taken following *Salford Estates*.

41 [2023] UKPC 33; [2023] 2 Lloyd's Rep 529.
42 20 November 2023, unreported.
43 BVIHCMAP2014/0025 and BVIHCMAP2015/0003, 8 December 2015, unreported.
44 BVIHCMAP2021/0017, 24 April 2023, unreported

Replacement contracts

In *Briggs Marine Contractors Ltd v Bakkafrost Scotland Ltd*,[45] a decision of Lord Braid in the Outer House of the Court of Session, the question was whether an arbitration clause in a written contract (for "no cure no pay" recovery of a sunken barge) continued to apply to a dispute under an alleged oral replacement contract (which Briggs alleged was entered into because the original contract was frustrated) so as to justify a stay of proceedings brought on the replacement contract. Although the case was heard in Scotland, the relevant contracts were governed by English law. Lord Reid held that the matters in dispute arose out of (or were in connection with) the original contract. The dispute was stayed in favour of arbitration.

Are damages available for a breach of obligation to arbitrate by a non-party?

On 6 October 2023 Butcher J in the High Court handed down two judgments relating to pollution damage and very significant clean-up costs following the grounding and sinking of M/T *Prestige* off Spain and France in 2002: *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige)*[46] and *The French State v The London Steam-Ship Owners' Mutual Insurance Association Ltd*.[47]

While there have been many judgments in the *Prestige* saga, these two decisions flow from the Spanish Supreme Court's 2016 judgment, under a direct rights statute, that the vessel's master (ie the captain), owners P&I Club (ie the insurer) were liable for up to US$1 billion. The Club issued two ad hoc arbitration proceedings in 2019 (against France and Spain) in both cases seeking: a declaration that each state was in breach of its obligation to arbitrate; equitable compensation and contractual damages; and an injunction to restrain each state from breaching its obligation to arbitrate with damages in lieu.

In the arbitration against France, Dame Gloster granted an anti-enforcement injunction to prevent France from enforcing the Spanish judgment outside of Spain, having concluded that section 48(5) of the Arbitration Act 1996 gave her the power to do so even in the absence of any institutional rules granting such a power. However, France argued that Dame Gloster, as arbitrator, had no such power on the basis that section 48(5) granted the tribunal the same powers as a court, and the court had no power to grant an injunction against a state, absent the state's consent, by reason of section 13 of the State Immunity Act 1978.

On appeal under section 69 of the Arbitration Act 1996 Butcher J agreed. The judge also concluded, in relation to the Spain case (where Sir Peter Gross sat as arbitrator), that the arbitrator had no power to grant damages in lieu of an injunction under section 50 of the Senior Courts Act 1981 (the successor to the Lord Cairns' Act[48]). Butcher J also had to consider a separate appeal by the Club against the registration of a €855 million judgment of the Spanish Supreme Court under the Brussels I Regulation, Council Regulation (EC) No 44/2001.[49]

What is important, for the purpose of this article is that Butcher J, nonetheless, confirmed awards of compensation granted by both arbitrators for contravention by the states of an equitable obligation to arbitrate (in an equal and opposite sum to the amount of the foreign judgment, effectively neutralising the judgment). In the longer Spain decision Butcher J cited various authorities,[50] and then held:[51]

> "I have reached the same conclusion as Sir Peter Gross, for very much the same reasons. I can express them briefly:
>
> (1) This is a case of the breach by Spain of an equitable obligation which is 'equivalent', to use the word employed by Males LJ in *Airbus* [*Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805; [2019] 2 Lloyd's Rep 59] at paras 95 to 96, to the contractual obligation which the insured itself

45 [2023] CSOH 6; [2023] 2 Lloyd's Rep 119.
46 [2023] EWHC 2473 (Comm); [2023] Lloyd's Rep Plus 107.
47 [2023] EWHC 2474 (Comm); [2023] Lloyd's Rep Plus 108.
48 1858 Chancery Amendment Act.
49 The court criticised (including as ultra vires) the judgment given by the Court of Justice of the European Union in *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige)* Case C-700/20; EU:C:2022:488; [2022] 2 Lloyd's Rep 286; [2022] Lloyd's Rep IR 508.
50 For example, in *Argos Pereira España SL v Athenian Marine Ltd (The Frio Dolphin)* [2021] EWHC 554 (Comm); [2021] 2 Lloyd's Rep 387 Sir Michael Burton, sitting as a judge of the High Court, was concerned with the issue of whether an assignee of cargo claims under bills of lading could be held liable to pay equitable compensation to the carrier if, in breach of an equitable obligation to arbitrate those claims, the assignee brought proceedings in respect of those claims in a foreign court against a party other than the carrier. Submissions before the court had used the term "Derived Rights Obligation" (DRO), to mean the type of equitable obligation which arises when a party having a right derived under a contract, eg by way of assignment, subrogation or a direct rights statute, wishes to exercise that right, but is obligated to do so in accordance with the forum clause set out in the contract from which its rights are derived. Sir Michael Burton concluded at para 19: "... unless I am prevented from concluding that there should be equitable compensation for breach of a DRO ... irrespective of and additional to the remedies of injunction or declaration, I would so conclude. I am satisfied that for all the reasons [given by counsel for the owners] ... logic and equity reach the same conclusion and there is no authority which deters me from it".
51 At para 336.

would have owed. Breach of the contractual obligation would give rise to a remedy in damages. I do not see why there should not be a corresponding monetary remedy for breach of the equivalent equitable obligation.

(2) It would appear to me to be a sensible incremental development of the law to recognise the availability of equitable compensation in such a case as this. There is, by contrast, no good reason why the availability of a monetary remedy in such a situation as this should be tied to the availability of an injunction.

(3) The fact that the equivalent of Lord Cairns' Act has been re-enacted does not mean that the law as to the availability of equitable compensation must have remained the same as it was when Lord Cairns' Act was first enacted. It may be that the circumstances in which that Act is now relevant have diminished; but its re-enactment cannot have restricted the development of the law.

(4) I would only depart from the decision of Sir Michael Burton in *The Frio Dolphin* if I were convinced it is wrong. I do not consider it to be wrong. On the contrary, as Sir Peter Gross said, I consider that it reflects the way in which the tide is and should be flowing in this area of the law."

Given the amounts at stake, and fact that this is one of the first cases in which monetary remedies for breach of an equitable obligation were awarded, appeals are likely.

Lifting a stay

In *ZS Capital Fund SPC and Others v Astor Asset Management 3 Ltd and Another*,[52] a Jamaica-seated arbitral tribunal had ruled that the relief sought by the lender could only be granted by the Hong Kong courts. Consequently, the borrower applied to lift a stay of proceedings which the lender had obtained earlier from the Hong Kong court and the court duly allowed the application so that the borrower could proceed with its Hong Kong litigation, holding:[53]

> "I agree ... that the arbitration agreement is spent. The Tribunal has already ruled on all of the parties' disputes, and issued the two Awards. The Tribunal ruled that insofar as the parties seek to pursue their arguments relating to the MLO [the Hong Kong Money Lenders Ordinance (Cap 163)], these should be resolved by the Hong Kong court. There is nothing further for the Tribunal to address in the arbitration proceedings. The basis for a stay accordingly has gone."

52 [2023] HKCFI 1047.
53 At para 13.

Submission to jurisdiction of court by taking a "step in the proceedings"

In the matter of *Beltran and Another v Terraform Labs Pte Ltd and Others*[54] the General Division of the High Court of the Republic of Singapore dismissed an appeal against a decision denying a stay in favour of arbitration on the basis that the first defendant had taken "steps in the proceedings" for the purposes of section 6(1) of the International Arbitration Act 1994 (2020 Rev Ed) in the context of the Rules of Court 2021.

The first defendant (Terraform) had applied for a stay on the basis that there was an arbitration agreement between it and the claimants (who purchased algorithmic stable cryptocurrency tokens issued by Terraform), while the other defendants applied for a stay on case management grounds. The court held that:[55]

> "... in assessing whether an act constitutes a 'step in the proceedings' [the court] should consider the entirety of the circumstances surrounding the defendant's acts in a practical and commonsensical way: [*Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] SGCA 34; [2008] 4 SLR(R) 460] at [52] ... I considered Terraform's filing of the defence on the merits and the counterclaim to be a 'step in the proceedings'. This was confirmed or reinforced by its subsequent conduct in filing the Request Applications and the SAPT Summons, and the various reliefs sought therein. These plainly demonstrate that Terraform had employed court procedures to enable it to defeat or defend the Suit on the merits ([*L Capital Jones Ltd v Maniach Pte Ltd* [2017] SGCA 3; [2017] 1 SLR 312] at [77]); affirmed the correctness of the court proceedings and its willingness to go along with the court's determination ([*Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2004] SGHC 243; [2005] 1 SLR(R) 168] at [19]); and waived its right to object to the court's jurisdiction ([*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] SGCA 44; [2014] 4 SLR 500] at [43]).
>
> Terraform's multiple reservations did not alter this conclusion – they were simply at odds with the way the applications sought to advance the court proceedings and demonstrated approbation and reprobation on the part of the defendant which should not be countenanced: [*Shanghai Turbo Enterprises Ltd v Liu* [2019] SGCA 11; [2019] 1 SLR 779] at [36], citing *Carona Holdings* at [101]."

[54] [2023] SGHC 340.
[55] At paras 117 and 118.

Arbitrators and procedure

Procedure

In *Sky Power Construction Engineering Ltd v Iraero Airlines JSC*,[56] the Hong Kong High Court refused an extension of time for an application to set aside enforcement of an LCIA award in Hong Kong on the ground that the arbitral tribunal held a virtual hearing in violation of the parties' arbitration agreement and the tribunal's own procedural orders. It also awarded indemnity costs. The issue before the court was whether a "fully virtual" hearing during the Covid-19 pandemic, objected to by one of the parties, prevented it from presenting its case adequately and violated its due process rights.

The court held that it is not within the ambit of its case management powers to interfere with a tribunal's direction for a virtual hearing where it is empowered to conduct proceedings in such a manner.

Arbitrator immunity

On 31 July 2023 the Hong Kong Court of First Instance issued judgment in *Song Lihua v Lee Chee Hon* (a case we discuss later in this Review).[57] Mimmie Chan J held that arbitrators are entitled to arbitral immunity absent fraud or bad faith. In other words, arbitrators are generally immune from suit and cannot be compelled to testify as witnesses in relation to their arbitral functions.

The plaintiff had been granted leave to enforce an arbitral award issued by the Chengdu Arbitration Commission in Mainland China. The defendant applied to set aside the enforcement order on various grounds, including that it had been unable to present its case in the arbitration. To support these allegations the defendant inter alia asked the High Court to issue a letter of request to the Mainland Chinese judicial authorities to obtain statements from the arbitrator and the tribunal secretary – which was refused.

The court's decision affirms the protection afforded to arbitrators under Hong Kong law to maintain their independence and confer them with immunity similar to that enjoyed by judges. Costs were ordered against the defendant.

[56] [2023] HKCFI 1558.
[57] [2023] HKCFI 1954.

Confidentiality of arbitral deliberations

In *CZT v CZU*[58] the Singapore International Commercial Court declined to grant three summons applications for orders that the three members of an arbitration tribunal produce records of their deliberations.

This case confirms that arbitrators' deliberations are usually protected from disclosure, and provided guidance as to when an exception to this protection might be found, namely when: "the facts and circumstances are such that the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations". The court further stated that it would "take a very compelling case to overcome these policy reasons" which would "only … be found in the very rarest of cases".[59]

Confidentiality orders

In *The Republic of India v Deutsche Telekom AG*[60] the Singapore Court of Appeal refused an application for various confidentiality and sealing orders that would have directed certain Singapore proceedings be heard in private, related information and documents be concealed, files be sealed, and information relating to party identification be redacted.

In reaching this decision, the Court of Appeal noted that information relating to the arbitration was already in the public domain to such an extent that confidentiality had been "substantially lost".

Appealing awards

Counting time to appeal

When was the award made?

An appeal under section 69 of the Arbitration Act 1996 can only be made in respect of "an award", a term which is not defined (although section 52 sets out formal requirements). Thus, the question whether an order or direction from a tribunal is an "award" for the purposes of the 1996 Act comes up often, including before Butcher J in *The French State v The London Steam-Ship Owners' Mutual Insurance Association Ltd*[61] when he had to decide whether or not France required a time extension. Butcher J summarised the case law and concluded that he was in: "no doubt that the First Partial Award was an 'award' for the purposes of section 69 AA 1996".[62] He reasoned that:

> "(1) It is called an award, and it purports to be an award.
>
> (2) It complies with the formal requirements for an award in section 52 AA 1996.
>
> (3) It deals with the substantive rights and liabilities of the parties, and sets out the reasoning of the arbitrator in detail.
>
> (4) In respect of the matters on which she expressed a concluded view, I consider it clear that [the arbitrator's] authority in the arbitration was at an end … she could not, having issued the First Partial Award, have revisited the issues which she had decided and reached a different conclusion on them. …
>
> (5) The arbitrator left limited issues for later determination, including the terms of the relief and some other, comparatively minor, issues, including costs. This however meant only that it was, as indeed its title indicated it was, a partial award under section 47 AA 1996.
>
> (6) .. a reasonable recipient of the First Partial Award would have regarded it as an award. Indeed, … the French State … sought to appeal the First Partial Award and an extension of time in which to do so.
>
> 20. That the First Partial Award did not have a 'dispositive section' which set out the relief to be granted does not, in my judgment, mean that it was not an award. …

58 [2023] SGHC(I) 11. Examined in *Lloyd's Maritime and Commercial Law Quarterly*, [2024] LMCLQ 12.
59 At paras 52 and 53.
60 [2023] SGCA(I) 4.
61 [2023] EWHC 2474 (Comm); [2023] Lloyd's Rep Plus 108.
62 At para 19.

> 21. Nor, in my view, can it be said that the First Partial Award was uncertain. ...
>
> 22. ... If, as is assumed for the purposes of this argument, the First Partial Award was an award, and was not appealed, then that award was final and binding, and gave rise to an issue estoppel between the parties, as set out above. On that basis, the issues decided in the First Partial Award could not be contested on an appeal in relation to the Second Partial Award."

Time extensions

Having considered all the circumstances of the case, and in particular the factors identified in *AOOT Kalmneft v Glencore International AG*[63] and further elaborated in *Terna Bahrain Holding Company WLL v Al Shamsi*,[64] Butcher J in *The French State v The London Steam-Ship Owners' Mutual Insurance Association Ltd*[65] (discussed above) granted an extension of time for the French State to bring its section 69 application in respect of two of its four grounds for leave to appeal on a question of law (as being points of general public importance where the arbitrator's conclusion is at least open to serious doubt).

In *Lord and Others v Kinsella and Others*[66] the question before Miles J was also whether time to appeal should be extended. As in the case discussed above, this required determining the date on which the award was made and also the strength of the claimants' allegations of serious irregularity and error of law. He also applied *Terna Bahrain* and *AOOT* Kalmneft, commenting:[67]

> "*Kalmneft* does not pretend to be anything more than a helpful checklist of the most relevant considerations and is to be read as a statute. There can be little doubt that in many cases the first three *Kalmneft* factors are likely to be of significant weight. And Popplewell J does not suggest they were decisive. But in the end I agree with the claimants that it is better to avoid any a priori weighting of the factors. Each case turns on its facts."

Is permission to appeal needed?

The appeal in *National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another*[68] related to when there can be an appeal without the permission of the trial judge. The Court of Appeal dismissed National Iranian Oil Co's appeal in respect of the summary dismissal by Butcher J[69] of its section 67 jurisdictional challenge to an arbitral award awarding Crescent Petroleum billions of US dollars in damages.

Butcher J had granted National Iranian Oil Co permission to appeal against the summary dismissal of its section 67 claim; however, Crescent Petroleum did not seek permission to appeal against his determination of the preliminary issue concerning section 73 – thus the first question was whether the Court of Appeal had jurisdiction to grant that permission, and the answer was no.

Challenging the award: substantive jurisdiction (section 67)

Section 67(1) of the English Arbitration Act 1996 reads:

> "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –
>
> (a) challenging any award of the arbitral tribunal as to its *substantive jurisdiction*; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have *substantive jurisdiction*.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

Jurisdiction or merits

In *Port de Djibouti SA v DP World Djibouti FZCO*[70] Henshaw J considered a jurisdictional challenge brought by Port de Djibouti under section 67 of the Arbitration Act 1996, in respect of certain determinations made by Professor Dr Maxi Scherer in a final partial LCIA award. The Port alleged that the tribunal did not have jurisdiction over claims

63 [2002] 1 Lloyd's Rep 128.
64 [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86.
65 [2023] EWHC 2474 (Comm); [2023] Lloyd's Rep Plus 108.
66 [2023] EWHC 2748 (Ch); [2023] 2 Lloyd's Rep 677.
67 At para 42.
68 [2023] EWCA Civ 826; [2023] 2 Lloyd's Rep 279.
69 *National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another* [2022] EWHC 2641 (Comm); [2023] 1 Lloyd's Rep 475.
70 [2023] EWHC 1189 (Comm); [2023] 2 Lloyd's Rep 149.

arising after it ceased to be a shareholder. DP World resisted the challenge arguing it fell outside the scope of section 67, because it did not concern an issue going to the arbitrator's "substantive jurisdiction" (as defined in the Act); rather the challenge related to the relief that the arbitrator awarded in respect of DP World's claims. In other words, the question boiled down to whether the arbitrator's determinations were on jurisdiction or on the merits of the claim.

The court concluded "that the arbitrator had jurisdiction over all the matters she determined, and that the claim must therefore be dismissed",[71] having also decided in the alternative that it did not in any event agree that the Port had ceased to be a shareholder. Obiter the court also found[72] that the Port had "in any event, lost the right to object to the arbitrator's jurisdiction in respect of the whole of the Share Transfer Claim, including the question of whether PDSA remained a Shareholder after the Presidential Ordinance" under section 73 of the 1996 Act.

Jurisdiction – whether there is a binding arbitration agreement

Emirates Shipping Line DMCEST v Gold Star Line Ltd[73] relates to a memorandum of understanding creating a liner consortium with vessel-providing partners including slot purchases among the consortium members. A typhoon resulted in claims in respect of cargo loaded by Emirates Shipping Line on Gold Star's vessel. The dispute that followed was one concerning the question of who should handle the cargo claims; and additionally what information was required to defend the claim and prove indemnification: the bills of lading issued by Gold Star Lines; or the memorandum of understanding which contained an arbitration clause?

Emirates sought an indemnity for cargo claims from Gold Star in arbitration, and Gold Star in turn denied that Emirates was a party to the arbitration clause in the memorandum of understanding. The tribunal agreed that it had no jurisdiction over the dispute on the basis that Emirates had not established that it was a party to the memorandum of understanding. Emirates appealed, asserting an express agreement or an agreement implied by conduct, or that Gold Star was estopped from denying that there was an agreement. The court upheld the tribunal's conclusion that it had no jurisdiction.

[71] At para 148.
[72] At para 146.
[73] [2023] EWHC 880 (Comm); [2023] 2 Lloyd's Rep 359.

Challenging the award: serious irregularity (section 68)

Section 68(2) of the Arbitration Act 1996 reads:

> "Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant–
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

In *LMH v EGK*[74] Foxton J considered a series of five serious irregularity challenges to an ICC arbitration award under section 68 of the Arbitration Act 1996 by far the most significant of which related to errors in computation.[75] The court confirmed that the list of serious irregularities in section 68 is "a closed list" and that there is no remedy under section 68 for an error in analysis. The court was practical in its analysis:

[74] [2023] EWHC 1832 (Comm); [2023] 2 Lloyd's Rep 495.
[75] "Ground 5: the Tribunal carried out its own discounted cash flow (DCF) calculation in the absence of the underlying spreadsheets and without giving the parties any or any adequate opportunity to comment on its proposed methodology for calculating the DCF."

> "It has been noted that it is a rare litigant who succeeds on every point, and it is, perhaps, a rarer arbitration claimant who succeeds in recovering the entire amount it claims. An arbitral tribunal will very often be faced with a complex calculation of the claimant's case presented in its most optimistic form, and a response which either simply critiques that approach, or offers an assessment of loss from the polar perspective. While there are arbitrations in which an arbitral tribunal's options are limited to choosing from one or other end of the spectrum (eg, under the MLB salary arbitration rules), the general position is that arbitral tribunals can and frequently do calculate their own measure of loss, lying somewhere between the extremes presented to them."[76]

Foxton J held that section 33 does not require the tribunal to give parties an opportunity to make submissions on the tribunal's methodology or calculation – it suffices that the issues relied on by the tribunal are "in play" or "in the arena" (the origin of which test we discuss further below).

> It is a rare litigant who succeeds on every point, and it is, perhaps, a rarer arbitration claimant who succeeds in recovering the entire amount it claims

The court considered what the position would be if the error were computational only. It noted that under article 36 of the ICC Rules or, by way of default, section 57 of the Arbitration Act 1996, computational errors can be corrected. However, it also found[77] that:

> "LMH's failure to seek recourse under article 36(2) of the ICC Rules is a bar to its section 68 application. Section 70(2)(b) of the 1996 Act provides that 'an application … may not be brought if the application has not first exhausted … any available recourse under section 57', which would include, under section 57(1), resort to any equivalent power on the tribunal's part arising by the agreement of the parties."

[76] At para 29.
[77] At para 39.

Failure by the tribunal to comply with section 33 (general duty of tribunal) (section 68(2)(a))

Non-disclosure by an arbitrator

In *Africa Sourcing Cameroun Ltd v LMBS Société par Actions Simplifiée*[78] Sir Ross Cranston, sitting as a High Court judge, considered whether the chairman of a Board of Appeal owed a duty to disclose that he may have acquired knowledge of a dispute in a way that influenced a decision by the Board not to extend a limitation period to which the claimants were subject.

The judgment makes it clear that apparent bias will not necessarily be found where the arbitration takes place in the context of a trade association where the pool of arbitrators is relatively limited. The claimants had appealed against the award under section 68(2)(a) of the Arbitration Act 1996, namely that the Board of Appeal had failed to act fairly and impartially as between the parties. The claimants also sought the removal of an arbitrator under section 24 of the 1996 Act.

Failure by the tribunal to deal with all the issues put to it

In *Cipla Ltd v Salix Pharmaceuticals Inc*,[79] in which Cipla claimed royalties based on a patent licence in respect of a compound allegedly used by Salix in a drug, Cipla asserted that the tribunal (Lord Neuberger) had excluded new evidence at a late stage on the wrongful ground that the issue between the parties was not live. Dame Clare Moulder dismissed Cipla's challenge under section 68(2)(a) of the 1996 Act, holding that the reason the evidence was excluded was because it had been introduced too late (Lord Neuberger had not ruled on which issues were live).

The judgment contains helpful observations on allegations that evidence has been overlooked by the tribunal – there is a fine line between a ruling on admissibility of evidence and a ruling on the issues in dispute. In such cases it may be helpful to seek clarification from the tribunal.

[78] [2023] EWHC 150 (Comm); [2023] 1 Lloyd's Rep 627.
[79] [2023] EWHC 910 (Comm).

Various section 68 grounds

In *BPY v MXV*[80] the applicant raised procedural objections to an LCIA award, and related costs award. The award had concluded that there had been dishonesty in the making of three purchase and sale agreements (that they were sham transactions). The applicant's allegations were raised under section 68(2)(a) (that the case had not been properly put to the witnesses accused of the sham; and that there was a real possibility of arbitrator bias); section 68(2)(b) (the findings were inconsistent with a preliminary issue award; being functus officio); and section 68(2)(d) and (g) (there was a failure to deal with the issue of some of the evidence allegedly having been illegally obtained as a matter of foreign law).

Butcher J dismissed BPY's application. Neither considered individually nor together did the objections demonstrate serious irregularity for the purpose of section 68.

Decision not based on arguments

In *Sui Northern Gas Pipelines Ltd v National Power Parks Management Co (Pvt) Ltd*[81] it was contended, invoking sections 68(2)(a), (b) and (d) but primarily under (a), that the identical tribunals in two related LCIA references had reached a decision on the basis of a case that neither party had put forward. Bright J found no substance in the argument. To reach that conclusion he had summarised and applied the case law and the relevance, in the context of section 33, of a point being "in play" or "in the arena" (per Popplewell J in *Reliance Industries Ltd v The Union of India*[82] as approved by the Privy Council in *RAV Bahamas Ltd v Therapy Beach Club Inc (Bahamas)*[83]).

In *Palmat NV v Bluequest Resources AG*[84] the English Commercial Court set aside part of an LCIA award under section 68 of the 1996 Act. The part of the award which was set aside was the award of interest to Bluequest on its arbitration and legal costs, despite Bluequest not having claimed interest on these sums. (The court dismissed all Palmat's other challenges under section 68.) The court found:[85]

> "In one limited respect the claimant has legitimate grounds for seeking challenge to what has been awarded. The claimant's challenge breaks down to two points being (1) that interest was awarded on arbitration and legal costs when the defendant had not sought interest on either; and (2) the defendant had claimed interest in the sum of US$718,620.11 on the sums claimed but the tribunal awarded interest in the sum of US$764,544.08.
>
> So far as (1) is concerned, in the end it was I think common ground that interest on arbitration and legal costs was not in play in the relevant sense at the final hearing."

The moral of the story is that parties must plead or claim any desired interest so that interest is "in play" in the arbitration, giving the opposing party an opportunity to be heard on the point.

Fraud and public policy

In *Federal Republic of Nigeria v Process & Industrial Developments Ltd*[86] there was an appeal by Nigeria under section 68(2)(b) of the 1996 Act, the allegation being that awards against Nigeria had been obtained by means of fraud or in a manner contrary to public policy. Much of the lengthy judgment is concerned with the court's assessment of the evidence of dishonesty, but there are important points of principle contained in it. In earlier proceedings between the parties[87] Sir Ross Cranston, sitting as a judge of the High Court, had granted Nigeria an extension of the 28-day period for an appeal based on its allegations of fraud. The question in the present case was whether fraud had actually been established.

The court agreed with the statement of Sir Ross Cranston in *Africa Sourcing Cameroun Ltd v LMBS Société par Actions Simplifiée*[88] that "there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity". That was easily proved: it was obvious to the court that:

> "the Arbitration would have been completely different, and in ways strongly favourable to Nigeria, had the fact of bribery of [GT] when the [agreement] was being made been before the

80 [2023] EWHC 82 (Comm); [2023] Lloyd's Rep Plus 85.
81 [2023] EWHC 316 (Comm). Examined in *Arbitration Law Monthly*, December 2023, (2023) 24 ALM 1 4.
82 [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562.
83 [2021] UKPC 8; [2021] 2 Lloyd's Rep 188.
84 [2023] EWHC 2940 (Comm).
85 At paras 59 and 60.
86 [2023] EWHC 2638 (Comm); [2024] 1 Lloyd's Rep 1.
87 Federal Republic of Nigeria v Process & Industrial Developments Ltd [2020] EWHC 2379 (Comm); [2021] 1 Lloyd's Rep 121.
88 [2023] EWHC 150 (Comm); [2023] 1 Lloyd's Rep 627.

> Tribunal. It would have brought in the issue whether the [agreement] was procured by fraud, and as a result voidable. Discovery of the concealment would have completely altered the Tribunal's approach to the rest of [MQ]'s evidence."[89]

That aside, retention of Nigeria's documents by P&ID meant that "Nigeria's right to confidential access to legal advice was utterly compromised throughout all or most of the Arbitration. It was effectively denied an important part of the process of arbitration".[90]

> The ruling in the case of P&ID and Nigeria is significant as it highlights the dangers of corruption and the importance of upholding public policy. It reinforces the importance of transparency and fairness in arbitration proceedings and the need to hold those who abuse the system accountable

Knowles J's remarks highlight the shocking extent to which some individuals will go for financial gain, even if it means engaging in corrupt practices that cause harm to others. It was found that P&ID had obtained the awards through severe abuses of the arbitral process, which included paying bribes and lying about it in the arbitration evidence. Not only that, but P&ID continued to pay bribes during the arbitration and obtained access to privileged documents, which allowed them to track Nigeria's internal considerations of merits, strategy, and settlement.[91]

The ruling in *Federal Republic of Nigeria* is significant as it highlights the dangers of corruption and the importance of upholding public policy. It reinforces the importance of transparency and fairness in arbitration proceedings and the need to hold those who abuse the system accountable.

89 At para 510.
90 At para 512.
91 At para 217.

Appeal on point of law (section 69)

In *Pan Ocean Co Ltd v Daelim Corporation*[92] the claimant charterers entered into a time charterparty early in 2017 for the carriage of urea in bulk. By clause 45 all disputes were to be resolved by arbitration in London under LMAA Terms. The charterers applied for permission to appeal against an award for error of law under section 69 of the Arbitration Act 1996, arguing that the tribunal had applied the wrong test for the implication of a term, and that the only term that should have been implied was a duty to exercise reasonable diligence to cooperate with a re-inspection of the cargo holds. Had that test been applied to the facts as found by the tribunal, there was no delay for which the charterers were responsible.

Andrew Baker J granted permission to appeal on one point of law, namely:

> "... whether there was an implied term of the subject time charter having the effect that where the vessel was off hire under clause 69 after a failed holds inspection and the Master advised that hold cleaning had been completed and called for a reinspection, the charterer was obliged 'to have the vessel re-inspected without delay'."

Sir Ross Cranston remitted the award to the tribunal for reconsideration. The threshold point to be determined was whether the appeal was barred by section 70(2) of the 1996 Act (ie failure to exhaust any other available recourse, discussed above) due to section 57 and/or article 27 of the LMAA Terms.

Sir Ross Cranston agreed with Andrew Baker J that neither provision applied. He accepted that the terms used were wide and, as regards the LMAA, there was a clear intention that wherever possible issues arising out of an award should be dealt with by the tribunal. That was also the statutory intention, as set out in *Torch Offshore LLC v Cable Shipping Inc*,[93] *Sinclair v Woods of Winchester Ltd*[94] and *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)*.[95] However that did not extend to overturning a decision that the tribunal intended to reach. Here, the tribunal's findings on the implied term were considered and deliberate. Section 57 could not be used to enable a tribunal to change its mind on any matter decided in an award: see *Al Hadha Trading Co v Tradigrain SA*[96] and *Torch Offshore*.

92 [2023] EWHC 391 (Comm); [2023] 1 Lloyd's Rep 548.
93 [2004] EWHC 787 (Comm); [2004] 2 Lloyd's Rep 446.
94 [2005] EWHC 1631 (QB).
95 [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533.
96 [2002] 2 Lloyd's Rep 512.

Another procedural question was discussed, although it did not arise on the facts given agreement on the threshold question, namely whether Sir Ross Cranston was free to take a different view from that of Andrew Baker J in granting permission to appeal: did a ruling in the grant of permission to appeal that there was no statutory bar under section 70(2) have a preclusionary effect in the hearing of the appeal itself? It was said by Cockerill J in *CVLC Three Carrier Corporation v Arab Maritime Petroleum Transport Co (The Anbar and The Hillah)*,[97] applying *Agile Holdings Corporation v Essar Shipping Ltd (The Maria)*,[98] that:

> "... the permission stage is intended to be a qualifying hurdle which is not revisited and that, while it may not be impossible to revisit the various component parts of the permission decision, there will have to be highly unusual circumstances justifying this course."[99]

Sir Ross Cranston held that this principle had been laid down in relation to the qualifying requirements in section 69 and did not apply to issues arising under section 70(2). The court cited *Bunge SA v Kyla Shipping Co Ltd (The Kyla)*[100] as authority for the proposition that section 70(2) was a free-standing hurdle applicable to all appeals and applications for permission to appeal, and thus was open to reassessment in a section 69 case.

Finally, the court had to apply the implied term to the facts of the case. What was required was for the charterers to have exercised reasonable diligence in having the vessel re-inspected without undue delay. The parties agreed that the tribunal had erred in law in deciding that the vessel was immediately back on hire on 19 February 2017, given clause 69 of the charterparty provided that hire recommenced at the point of successful re-inspection. The appropriate remedy was to remit the award under section 69(7) of the 1996 Act. It was for the tribunal to decide what could and should have been done by the parties regarding re-inspection, whether either party was in breach in this regard, the relevant timescale for re-inspection and the financial consequences of any breach.

New points of law

In *Mitsui & Co (USA) Inc v Asia-Potash International Investment (Guangzhou) Co Ltd*[101] Picken J considered an unusual application in an appeal for error of law under section 69 of the 1996 Act (there had also been an application under section 68 but this was dropped before the hearing).

The dispute arose out of a contract for the sale of soybeans. The damage occurred because the vessel carrying the soybeans (which had been nominated by the defendant) broke free from its moorings, and damaged the port's ship-loaders. At issue was whether the damage/indemnity claimed was too remote – and whether the tribunal applied the correct legal test of remoteness.

Picken J allowed the appeal and remitted the award to the tribunal for it to apply the correct legal basis of remoteness (which he described in his judgment). However, Picken J held that the court had no jurisdiction to allow the respondent to re-amend its notice to add an issue that had not been raised in the original arbitration for remission to the tribunal.

Hong Kong appeals

Appeals of arbitral awards are more difficult to bring in Hong Kong than in England. This is because appeals on merits and points of law are not permitted in Hong Kong unless the parties have expressly, eg in their arbitration clauses, opted in to the regime in their contracts (opt-ins are rare except in construction).

In an unusual case decided in the last days of 2023, the Hong Kong Court of First Instance in *G v N*[102] suspended set-aside proceedings in respect of two HKIAC partial awards on liability and quantum, and remitted the matter to the arbitrator on grounds of public policy. The context was that, just days before the award on liability was issued, Hong Kong law on illegality changed significantly in that the Hong Kong Court of Appeal in *Monat Investment Ltd v All Person(s) in Occupation of Part of the Remaining Portion of Lot No 591 in Mui Wo D.D. 4 No 16 Ma Po Tsuen, Mui Wo, Lantau Island and Another*[103] followed the UK Supreme Court decision in *Patel v Mirza*.[104]

97 [2021] EWHC 551 (Comm); [2021] 2 Lloyd's Rep 397.
98 [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79.
99 *CVLC Three Carrier Corporation v Arab Maritime Petroleum Transport Co (The Anbar and The Hillah)* [2021] EWHC 551 (Comm); [2021] 2 Lloyd's Rep 397, at para 34.
100 [2013] EWCA Civ 734; [2013] 2 Lloyd's Rep 463.
101 [2023] EWHC 1119 (Comm). Examined in *Lloyd's Maritime Law Newsletter*, June 2023, (2023) 1136 LMLN 1.
102 [2023] HKCFI 3366.
103 [2023] HKCA 479.
104 [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2016] Lloyd's Rep FC 435.

Mimmie Chan J cited the Privy Council decision in *Betamax Ltd v State Trading Corporation (Mauritius)*[105] as authority that question of public policy is for determination by the courts on the basis that:

> "Betamax is a decision of the Privy Council on the meaning of 'public policy' in the context of the Model Law, and is highly persuasive as an authority. Section 39(2)(b)(ii) of the Act considered is the equivalent of section 81 of the Ordinance, and Article 34(2)(b)(ii) of the Model Law."[106]

> An arbitral tribunal is not obliged to elaborate on its reasoning for each and every argument raised by the parties so long as the "essential building blocks" of the tribunal's reasoning are made out, and the plaintiff is afforded a reasonable opportunity to present its case

Conversely, in *AI and Others v LG II and Another*[107] the Hong Kong High Court confirmed that a high threshold must be met before an arbitral award may be set aside in Hong Kong. The plaintiff had commenced CIETAC arbitration seated in Hong Kong, claiming that agreements for the sale and purchase of investments in trade finance funds were void for illegality, common mistake and misrepresentation. However, after the CIETAC tribunal found for the defendant, the plaintiff applied to set aside the award on the basis that the tribunal provided insufficient or inadequate reasoning for its findings, misapplied the law and violated its due process rights.

The court dismissed the plaintiff's application and ordered indemnity costs. The court made it clear that an arbitral tribunal is not obliged to elaborate on its reasoning for each and every argument raised by the parties so long as the "essential building blocks" of the tribunal's reasoning are made out, and the plaintiff is afforded a reasonable opportunity to present its case. The case underlines that Hong Kong courts are not permitted to review the merits of an award, as this would undermine the arbitral process.

Effect of remission of an award to a tribunal

In *G v X and Others*[108] the Hong Kong Court of First Instance upheld enforcement of a CIETAC award following the re-arbitration by a new tribunal of a limited evidential issue which did not affect the result.

In reaching this decision, Mimmie Chan J relied on *Carter v Harold Simpson Associates (Architects) Ltd*[109] as authority that an "award itself remains valid and binding despite having been remitted to the arbitrator" and "continues to operate so as to make the arbitrator functus officio, unable to alter his award, on those matters which were not remitted".

She also quoted[110] Lord Sumption in *Sans Souci Ltd v VRL Services Ltd*,[111] saying:

> "An arbitration award is prima facie conclusive. The court has only limited powers of intervention. It exercises them on well-established grounds such as (to take the case arising here) the arbitrator's' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act."

Loss of right to object (section 73)

Section 73(1) of the Arbitration Act 1996 reads:

> "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part,[112] any objection–
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

105 [2021] UKPC 14; [2021] 2 Lloyd's Rep 559.
106 [2023] HKCFI 3366, at para 35.
107 [2023] HKCFI 1183.
108 [2023] HKCFI 3316.
109 [2004] UKPC 29; [2004] 2 Lloyd's Rep 512.
110 At para 34.
111 [2012] UKPC 6.
112 Part I, "Arbitration pursuant to an arbitration agreement", runs from sections 1 to 84 of the Arbitration Act 1996.

> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

In other words, this section removes – by waiver – the right of a party to appeal against an award on the grounds of serious irregularity if that party was or should have been aware of the problem but continued the arbitration proceedings without raising that objection. Section 73 was discussed tangentially, as we have discussed above, in *Port de Djibouti SA v DP World Djibouti FZCO*.[113]

Radisson Hotels APS Danmark v Hayat Otel Işletmeciliği Turizm Yatirim ve Ticaret Anonim Şirketi[114] raised important questions on the proper interpretation of section 73(1) in circumstances where the right to object to a partial award did not become known until later in an arbitration. Radisson sought to challenge a partial award (relating to a hotel mismanagement claim brought by Hayat) based on ex parte communications with an arbitrator. The problem was that Radisson continued to take part in the proceedings for a period of two weeks after becoming aware of improper conduct by one of the arbitrators. Radisson lost its right to challenge as a result of the delay. This case serves as a warning to parties facing similar circumstances that they must promptly challenge the effectiveness of the proceedings as soon as they become aware of the serious irregularity.

Security

In *Czech Republic v Diag Human SE and Another*[115] Bright J discussed the circumstances in which a party appealing against an arbitration award is required (under section 70(6) and (7) of the 1996 Act) to respectively provide security for costs and for the amount of the award itself. He dismissed the application for security and refused permission to appeal.

Bright J accepted, in regard to section 70(6) "that it is relevant not only to consider what assets the claimant has, but also whether they are readily available".[116] Section 70(7) reads: "The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with". Bright J summarised the relevant test in respect of section 70(7) as follows:[117]

> "First, the applicant must persuade the court that the challenge appears weak on the merits, specifically that it is 'flimsy or otherwise lacks substance' (this formulation having emerged in *A v B* [2011] 1 Lloyd's Rep 363, per Flaux J at para 32). This is because the award is not presumed to be valid, in the context of a section 67 challenge, ie the court proceeds on the basis that the challenge may succeed, unless the applicant can show that its prospects are flimsy.
>
> Secondly, the applicant must show that the challenge in some way prejudices his ability to enforce the award (or diminishes the other party's ability to honour the award). This is generally done by showing a risk of dissipation, as required for a freezing injunction: *A v B* at para 47."

113 [2023] EWHC 1189 (Comm); [2023] 2 Lloyd's Rep 149.
114 [2023] EWHC 892 (Comm); [2023] 1 Lloyd's Rep 642.
115 [2023] EWHC 1691 (Comm); [2023] 2 Lloyd's Rep 475.
116 At para 33. Attempts at enforcement of arbitral awards had failed in several jurisdictions. The main reason Bright J did not award security for costs appears to have been an undertaking provided by the claimant.
117 At paras 60 and 61.

The judge found himself unable "to form any real view as to the substance or flimsiness of the claimant's case".[118]

Having been refused permission to appeal from Bright J, the respondents sought permission to appeal from the Court of Appeal, arguing that Bright J erred in his approach to the power to order security contained in section 70(7). In late 2023 Males LJ found[119] that, unlike the court of first instance, the Court of Appeal did not have jurisdiction to grant leave to appeal from a decision under section 70(7). This was because he found that: "Section 70 is ancillary or supplementary to an application under sections 67, 68 or 69, and has no application independent of those sections".[120] However Males LJ also added a lengthy obiter section which he prefaced with:

> "The circumstances in which the court should exercise its power under section 70(7) ... have not been considered at appellate level, and the question whether or to what extent it is relevant to form any view as to the merits of a section 67/68 challenge warrants consideration by this court."[121]

> An award is not presumed to be valid in the context of a section 67 challenge, ie the court proceeds on the basis that the challenge may succeed, unless the applicant can show that its prospects are flimsy

Court assistance and intervention

Anti-suit injunctions

Arbitrations with a foreign seat

The English courts will grant anti-suit relief (under the Senior Courts Act 1981) to restrain a party to an arbitration clause specifying England as the seat from commencing or pursuing proceedings in the courts of another jurisdiction. A previously unanswered question was whether the English courts will intervene where the seat of the arbitration is outside England. The matter has now been considered – inconsistently – in three first instance cases, one of which was heard by the Court of Appeal in 2023. Further appeals will be heard in 2024.

The cases arose out of the same events – payments in respect of an engineering, construction and procurement (EPC) contract with Linde for an LNG plant in Russia complicated by sanctions – although two different claimants and banks were involved (Deutsche Bank, UniCredit and Commerzbank – who had issued English law on-demand bonds and guarantees). In all cases, despite arbitration agreements providing for Paris-seated ICC arbitration, RusChem commenced proceedings in Russia. The cases were: *SQD v QYP*,[122] a decision of Bright J dated 21 August 2023, and the appeal against the decision of Bright J: *Deutsche Bank AG v RusChemAlliance LLC*;[123] *Commerzbank AG v RusChemAlliance LLC*,[124] a decision of Bryan J dated 31 August 2023; and *UniCredit v RusChemAlliance*[125] (a case formerly known as *G v R*).

In *SQD v QYP* Bright J considered whether the English courts should exercise their power to grant anti-suit relief in favour of an arbitration agreement with Paris as the seat. He concluded that relief should be refused even though the arbitration agreement was governed by English law. While he accepted that had it been an English-seated arbitration, he would likely grant an anti-suit injunction, he was unsure if it was appropriate to grant an injunction here given the Paris seat. Based on limited French law evidence, Bright J thought there was a risk that a French court would not enforce an English interim anti-suit injunction.

118 At para 69.
119 *Czech Republic v Diag Human SE and Another* [2023] EWCA Civ 1518.
120 At para 38.
121 At para 43.

122 [2023] EWHC 2145 (Comm); [2023] BLR 520.
123 [2023] EWCA Civ 1144; [2023] 2 Lloyd's Rep 600.
124 [2023] EWHC 2510 (Comm); [2023] 2 Lloyd's Rep 587.
125 [2023] EWHC 2365 (Comm).

On appeal, although it agreed English law applied, the Court of Appeal[126] took the opposite view (with a leading judgment given by Nugee LJ) on the basis of more detailed French law evidence. The Court of Appeal applied *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)*[127] and held that because an anti-suit injunction was not available in France, the English court could grant one. The evidence before the Court of Appeal was that although a French court did not have the ability to grant an anti-suit injunction, it would recognise the grant of an anti-suit injunction by another court. There was therefore no perceived conflict. The Court of Appeal granted an anti-suit injunction as well as an anti-enforcement injunction.

In the *Commerzbank* case, a different High Court (Bryan J) granted the requested anti-suit injunction distinguishing Bright J's decision on the basis that he had more French law evidence before him, on the basis of which evidence he concluded that there was no clash or conflict with the law of the seat that could justify refusing the injunction. Bryan J went on to opine[128] that the seat of arbitration is of "very limited relevance" in the granting of an anti-suit injunction under section 37 of the Senior Courts Act.

On the other hand, in the *UniCredit* cases, Knowles J granted an interim anti-suit injunction a couple of days after Bright J's decision referred to above.[129] While he considered the approach of French courts with respect to anti-suit injunctions as a "factor in the exercise" of its discretion, he found that it could not "deprive the court of all jurisdiction". However, a couple of months later a different judge, Teare J, refused a final anti-suit injunction on the basis that he found he did not have jurisdiction. Teare J adopted a different approach – he held that the French substantive rules on international arbitration governed the dispute – not English law – and applying *The Spiliada* he found that the English courts did not have jurisdiction. He also considered that the availability of anti-suit injunctions in English courts, but not in French courts, was not a sufficient reason to intervene. Unsurprisingly, given the inconsistency of his approach with the two others, this decision is being appealed.

The Hong Kong approach

In a related case, *Linde GmbH and Another v RusChemAlliance LLC*,[130] the Hong Kong High Court issued an anti-suit injunction aimed at staying Russian court proceedings in favour of HKIAC arbitration. While the contract contained an HKIAC arbitration clause, the defendant obtained a freezing injunction from a Russian court over the plaintiff's assets in Russia. The plaintiff in turn obtained an anti-suit injunction from the Hong Kong High Court to restrain the defendant's breach of the HKIAC arbitration agreement which the defendant sought to discharge, arguing that they would not receive a fair trial in an HKIAC arbitration, and that the HKIAC award would be unenforceable outside of Russia as a result of EU sanctions.

The court dismissed the application and stated that the defendant's arguments were "grossly exaggerated, if not totally based on false premises".[131] Hong Kong generally only adopts UN sanctions and EU sanctions have no legal effect in Hong Kong. The court found there was no reason why the defendant would face any challenges in gaining access to justice and a fair trial through arbitrating in the jurisdiction. The court also did not consider that the sanctions would have any negative impact on the ability of the parties to enforce the award, as the plaintiff was part of a global group with assets outside of the European Union.

In an unrelated case, *Eton Properties v Xiamen Xinjingdi Group*,[132] Mimmie Chan J, granted an anti-arbitration injunction, restraining a new Mainland PRC-seated CIETAC arbitration that sought to revisit issues falling outside the scope of the arbitration agreement. The specific matters injuncted had already been determined by a Hong Kong court, such that the CIETAC arbitration on those issues would amount to a "collateral attack"[133] on the Hong Kong ruling. However, the injunction was more limited in scope than demanded by the applicants.

126 [2023] EWCA Civ 1144; [2023] 2 Lloyd's Rep 600.
127 [1987] 1 Lloyd's Rep 1.
128 At para 66.
129 24 August 2023, unreported.
130 [2023] HKCFI 2409.
131 At para 55.
132 [2023] HKCFI 1327.
133 At para 48.

Restraining foreign challenges to awards

In *Nigerian Agip Exploration Ltd v GEC Petroleum Development Co Ltd*[134] Andrew Baker J confirmed that it was appropriate for the English curial court to grant an anti-suit injunction to restrain renewed proceedings in Nigeria (there had been several previous injunctions), to challenge the validity of a London-seated ICC final award (the tribunal dismissed the claimant's primary claim but awarded damages for breach of contract). Baker J also awarded indemnity costs:

> "This is and has been, to the extent this court has had to be involved, the clearest of cases of a defendant breaching in blatant and repeated fashion its acknowledged obligations to arbitrate, without any colourable pretence of an excuse for doing so. Indemnity costs are plainly, in those circumstances, justified."[135]

[134] [2023] EWHC 414 (Comm); [2023] 1 Lloyd's Rep 341.
[135] At para 32.

Intervention in third-party proceedings

In *LLC Eurochem North-West-2 v Tecnimont SpA and Another*[136] there were two main questions for the Court of Appeal: did the terms of an anti-suit injunction preclude Tecnimont from intervening in third-party proceedings indirectly relevant to the arbitration; and was there a breach of the arbitration clause itself by such intervention? The Court of Appeal decided yes; although Nugee LJ dissented.

The case concerned the asset-freezing sanctions regime and banks' refusal to pay bonds as a result. Tecnimont referred to and relied on a decree of the Italian Treasury Ministry of Economy and Finance dated 27 September 2022 whereby the Italian authorities concluded that EuroChem Agro was ultimately owned or controlled by Mrs Melnichenkom (a "Designated Person" under the sanctions regime) through EuroChem AG and others, as a result of which EuroChem Agro was subject to an asset freeze.

On 9 August 2022 Eurochem obtained an anti-suit injunction premised on a concern that its opponents would commence proceedings abroad (in breach of contract) in order to restrain payment of bonds. On

[136] [2023] EWCA Civ 688; [2023] 2 Lloyd's Rep 259.

28 October 2022 EuroChem Agro commenced Italian proceedings seeking, among other things, annulment of the decree. The issue giving rise to the decision arose on 14 February 2023 when Tecnimont applied by way of a "Deed of Participation Ad Opponendum" to intervene, arguing that it had an interest. Lewison LJ held:[137]

> "... there is no real doubt that its purpose in so doing was to improve its position in the Arbitration Proceedings and thus to impair (ie make more difficult) payment under the Bonds."

Section 44 of the Arbitration Act 1996

Section 44 confers on English courts various powers of interim assistance/measures in circumstances where the tribunal itself is unable to act (eg with regard to evidence and property as well as interim injunctions). Section 44(3) allows the court to preserve assets if the matter is one of urgency. Court of Appeal authority has determined that assets can include contractual rights, but later cases have recognised that judicial intervention should be exercised with extreme caution if an interim award of the court would in practical terms be determinative of the dispute.

> Judicial intervention should be exercised with extreme caution if an interim award of the court would in practical terms be determinative of the dispute

Foxton J's decision in *JOL and Another v JPM*,[138] a case relating to a maritime arbitration in which the injunctions sought from Foxton J would have required two vessels to be re-delivered (and so been determinative of several issues), confirms that a party to an arbitration agreement seeking interim relief from the English court will have to meet a high bar to satisfy the court that the case is one of urgency – as required by section 44(3). However, Foxton J (who refused relief on the basis that there was not sufficient urgency) also hinted that he might have granted the relief had the tribunal consented to it:

> "I would not regard the fact that the LMAA tribunal does not itself have the power to grant interim injunctive relief as precluding it, to the extent it thought appropriate, from expressing its views on the merits of such an application when ruling on an application by one party for permission to apply to the court for section 44 relief. If, as the tribunal charged with granting final relief, the arbitral tribunal thought that the prospects of a final award for specific performance were slim, they might well conclude that it would not be appropriate to consent to an application to court in those circumstances."[139]

Sovereign immunity – appointment of a receiver

In *Deutsche Bank AG, London Branch v Central Bank of Venezuela*[140] Bright J discussed whether (and agreed that) the Maduro Board (of the respondent) had waived sovereign immunity (under the State Immunity Act 1978) so as to lose the right to contest the appointment of a receiver pending the determination of the dispute in arbitration. The matter is tangential to a dispute in relation to gold bullion swaps (subjected to LCIA arbitration) entered into in 2015 between Deutsche Bank AG London Branch and the Central Bank of Venezuela, terminated as a result of 2019 US sanctions, with physical gold held by the Bank of England. Section 9 of the 1978 Act provides:

> "Arbitrations.
>
> (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."

Upon a review of the language of the swap agreement, Bright J held:[141]

> "... the express language of the first part of the first sentence of subpara 10(ii) seems to me clear. BCV has waived immunity from execution or enforcement in respect of any order, judgment or other relief arising out of or in relation to the LCIA arbitration."

137 At para 126.
138 [2023] EWHC 2486 (Comm); [2023] 2 Lloyd's Rep 556.
139 At para 36.
140 [2023] EWHC 1942 (Comm); [2023] 2 Lloyd's Rep 486.
141 At para 56.

2019 Mainland-Hong Kong Interim Measures Arrangement

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region applies to arbitrations commenced before or after 1 October 2019. Uniquely, it allows parties to seek interim court assistance in Mainland China in aid of Hong Kong-seated arbitrations, and vice versa if the arbitration is administered by a "qualified arbitral institution" (eg HKIAC, ICC, HKMAG[142]).

The Arrangement has already been extremely successful. According to the HKIAC as of 13 October 2023:

> "Since the Arrangement entered into force, HKIAC has issued Letters of Acceptance in respect of 100 applications. 94 applications were made for the preservation of assets, two were for the preservation of evidence, and four were for the preservation of conduct. All applications were made in arbitrations that had already been commenced.
>
> The total value of assets requested to be preserved amounted to RMB25.1 billion or approximately US$3.6 billion.
>
> HKIAC is aware of 69 decisions issued by Mainland Courts. Of these 69 decisions, 65 granted the applications for preservation of assets upon the applicant's provision of security and four rejected such an application. The total value of assets preserved by the 65 decisions amounted to RMB15.8 billion or approximately US$2.3 billion."[143]

[142] For a full list see: info.gov.hk/gia/general/202303/31/P2023033100302.htm
[143] hkiac.org/news/hkiac-receives-100th-application-under-prc-hk-interim-measures-arrangement, accessed 22 February 2024.

Enforcement of awards

Effect of Consumer Rights Act 2015

In the English Commercial Court Bright J, in two decisions handed down at the end of July 2023, discussed at length the operation of the provisions of the Consumer Rights Act 2015 on consumer arbitrations, and in particular the extent to which arbitration agreements are enforceable against consumers. In *Payward Inc and Others v Chechetkin*[144] the agreement was held to be invalid, whereas in *Eternity Sky Investments Ltd v Zhang*[145] the agreement was held to be valid.

In *Payward Inc v Chechetkin* Bright J refused to enforce an arbitral award made in a JAMS[146] arbitration seated in California on the basis that it would be contrary to public policy under section 103(3) of the Arbitration Act 1996, as enforcement would breach English consumer protection legislation and financial regulation. It has been suggested that the case represents "a rare example of the English courts refusing to enforce a foreign award on public policy grounds, and may become a leading case on the interaction between consumer protection mechanisms and standard form dispute resolution provisions" and "may have particularly significant ramifications for international business to consumer companies."[147]

Mr Chechetkin, a British citizen, incurred losses trading cryptocurrency on "Kraken" a global digital online crypto asset exchange managed by Payward. He sought to recover losses by suing Payward in the English courts, on the basis that Payward engaged in regulated activity without the requisite authorisation (under the Financial Services and Markets Act 2000). However, Payward's terms of service provided (at clause 23) for mandatory JAMS Rules arbitration in San Francisco (with Californian courts having exclusive jurisdiction over appeals) and Payward duly commenced and obtained an award in a JAMS arbitration in order to prohibit Mr Chechetkin from bringing a claim before the English courts.

Bright J held:[148]

> "Enforcement of the Final Award would be contrary to the specific public policy embodied in section 74 of the Consumer Rights Act 2015.

[144] [2023] EWHC 1780 (Comm); [2023] 2 Lloyd's Rep 507.
[145] [2023] EWHC 1964 (Comm); [2023] 2 Lloyd's Rep 419.
[146] Judicial Arbitration and Mediation Services.
[147] mayerbrown.com/en/insights/publications/2023/08/english-court-refuses-to-enforce-arbitral-award-on-public-policy-grounds-linked-to-english-consumer-protection
[148] At paras 126, 128 and 130.

> This is that where a consumer contract has a close connection with the UK, the consumer rights issues that fall under the scope of the Consumer Rights Act 2015 should be dealt with under that UK statute rather than any foreign law.
>
> ...
>
> The Final Award applies only the laws of California. The arbitrator took no account of the Consumer Rights Act 2015 or any other element of English/ UK law. She applied the choice of law set out in clause 23, which section 74 would have disapplied. Enforcement of the Final Award therefore would be contrary to the public policy objective of section 74.
>
> ... the UK Parliament has decided that the protection of consumers domiciled in the UK should be governed by the Consumer Rights Act 2015, not by foreign laws or standards."

Bright J also found:[149]

> "the stifling of Mr Chechetkin's claim under the Financial Services and Markets Act 2000 would also be contrary to the public policy considerations underlying the Financial Services and Markets Act 2000. From Mr Chechetkin's point of view, the most important such considerations are those relating to section 26: that contracts concluded in contravention of the general prohibition in section 19 should be unenforceable and that the customer should be entitled to recover his money."

Conversely, in *Eternity Sky Investments Ltd v Zhang*, the same judge came to the opposite conclusion when considering the Consumer Right Act 2015 – which illustrates how similar cases will turn on their facts. In *Eternity Sky* a HKIAC arbitration clause in a personal guarantee was deemed to be enforceable because the personal guarantee did not have a "close connection with the United Kingdom", as required by section 74 of the 2015 Act (cited above), and therefore the 2015 Act did not need to be considered. Bright J also held that the arbitration clause was not unfair under the 2015 Act. *Eternity Sky* is being appealed.

Enforcement in Hong Kong

In an unusual case which we have already discussed in the context of arbitrator immunity, *Song Lihua v Lee Chee Hon*,[150] the Hong Kong High Court refused to enforce a Chengdu Arbitration Commission award on grounds of public policy although the award had already been enforced in Mainland China, where similar complaints had been raised. The court found the conduct of one of the arbitrators was seriously irregular and violated due process rights. There was video evidence that one of the arbitrators was not physically present at one of the hearings, watching the hearing remotely on his mobile phone in public, periodically disconnecting from the hearing (so that he could not have heard what was said) and even travelling in a vehicle.

The court drew out the relevant principles and statutory provisions including: "It is clear from the authorities that where public policy is relied upon as a ground to resist enforcement of an award, it is the domestic public policy of the relevant court of enforcement which is relevant".[151] As regards Hong Kong the court summarised that: "audi alteram partem is a fundamental principle of natural justice which is recognized and enforced. This means that no person shall be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against it, and to be heard on its case".[152]

Mimmie Chan J cautioned: "The application of the above principles and statutory provisions means that not only must these rules be applied, but they must be seen by the objective reasonable observer to have been applied. The established and well-known rule is that not only must justice be done, but it must also be seen to be done".[153] She also found that: "Whereas an award may be recognized in one jurisdiction, its enforcement may be refused if it would be contrary to the public policy of another jurisdiction to enforce it".[154] As mentioned above, this was relevant because the Mainland Court had ruled that the award was valid and dismissed a set aside application (based on similar grounds).

In a second unusual case, in *Canudilo International Co Ltd v Wu Chi Keung and Others*,[155] Mimmie Chan J found it appropriate to grant an extension of time to set aside enforcement of an award. In that case, a second arbitrator (in bifurcated proceedings) wrongly considered himself and the guarantors to be bound by an interim award and failed to independently decide the dispute between Canudilo and Wu, which violated the basic notions of justice and requirements for a fair hearing.

149 At para 155.
150 [2023] HKCFI 2540.
151 At para 13.
152 At para 15.
153 At para 17.
154 At para 13.
155 [2023] HKCFI 700.

Recognition and enforcement of ICSID awards in the UK post-*Achmea*[156]

In the case of *Infrastructure Services Luxembourg Sàrl and Another v Kingdom of Spain*[157] the claimants sought to enforce an ICSID award granted in *Infrastructure Services Luxembourg S.à.r.l. (formerly Antin Infrastructure Services Luxembourg S.à.r.l.) v Kingdom of Spain*,[158] where the claimants were awarded damages for approximately €120 million. The ICSID tribunal in *Antin* found Spain guilty of violating article 10 of the EU's Energy Charter Treaty (ECT), which provides for the fair and equitable treatment of investors.[159]

The claimants applied to register the award in England and Wales. Under the Arbitration (International Investment Disputes) Act 1966, a person seeking recognition or enforcement of an ICSID Convention award is entitled to have the award registered in the High Court.[160] The ICSID Convention significantly restricts the bases upon which domestic courts may refuse recognition and enforcement of an authenticated ICSID award. The UK Supreme Court in *Micula and Others v Romania*[161] confirmed that the English courts could not refuse to recognise an ICSID award on the grounds of public policy or that the ICSID tribunal did not have jurisdiction.[162]

The *Antin* award was registered in June 2021. Spain applied to set aside the order granting registration, claiming entitlement to immunity from the jurisdiction of the English courts.[163] Spain argued that the Court of Justice of the European Union had held that the ECT violated the law of the EU. Therefore, despite Spain's status as a state party to the ECT and the ICSID Convention, Spain could not consent to arbitrate intra-EU disputes. In this case, the investors were Dutch and Luxembourg companies. Therefore, Spain argued that the ICSID tribunal did not have jurisdiction.[164]

The claimants disagreed and argued that Spain had submitted to the jurisdiction of the English courts based on a prior written agreement waiving immunity pursuant to section 2(2) of the State Immunity Act 1978. In the alternative, Spain had given its written consent to arbitrate disputes between the claimants and Spain, thus waiving immunity pursuant to section 9 of the 1978 Act.[165]

Fraser J rejected Spain's immunity defence and ruled that Spain's intra-EU objection did not override or dilute the United Kingdom's international treaty obligations under the ICSID Convention, including the obligations to recognise and enforce international arbitration awards.[166] Fraser J agreed with the claimants that article 54 of the ICSID Convention and article 26 of the ECT constituted a "prior written agreement" of Spain's submission to the English jurisdiction for the purposes of section 2 of the State Immunity Act. Therefore, Spain had waived its state immunity.[167]

This decision highlights the importance of honouring international treaty obligations. It also reinforces the English courts' limited scope for refusing recognition and enforcement of ICSID awards. The ruling is likely to have implications for other ECT cases where intra-EU objections are raised, and it will be interesting to see how other courts will interpret the decision.

156 *Slovak Republic v Achmea BV* (CJEU) Case C-284/16; EU:C:2018:158.
157 [2023] EWHC 1226 (Comm); [2023] 2 Lloyd's Rep 299.
158 ICSID Case No ARB/13/31.
159 ICSID Case No ARB/13/31, Decision on Annulment, 30 July 2021, para 5.
160 Section 1(2).
161 [2020] UKSC 5; [2020] 1 WLR 1033.
162 *Infrastructure Services v Spain* [2023] EWHC 1226 (Comm); [2023] 2 Lloyd's Rep 299, paras 72 and 124.
163 Ibid, paras 2 and 4.
164 Ibid, paras 57 to 67.
165 Ibid, para 92.
166 Ibid, para 86.
167 Ibid, paras 95 and 102.

Law reform: reviewing the Arbitration Act 1996

London is one of the most popular seats of international arbitration. In terms of its governing framework, the 1996 Act is the principal legislation governing arbitrations in England, Wales and Northern Ireland and, per its recital, was designed "to restate and improve the law relating to arbitration". Although at the time the 1996 Act was drafted the UNCITRAL Model Law was deliberately not adopted wholesale (because it was considered to have gaps, be untested and lead to an undesirable bifurcation in domestic and international arbitration regimes) the 1996 Act was aligned with the UNCITRAL Model Law as far as practicable. Now the 1996 Act is over 25 years old.

In March 2021 the Ministry of Justice asked the Law Commission to review the 1996 Act. The review was intended, according to its Terms of Reference, to "determine whether there are any amendments which could and should be made to the current legal framework to ensure that it is fit for purpose and that it continues to promote the UK as a leading destination for commercial arbitrations". It began in January 2022 with the Law Commission receiving written submissions from, and having discussions with, a wide range of stakeholders from which it identified a shortlist of topics on which to publicly consult (deciding initially not to review the law in light of *Enka* – a decision which as we will see was later reversed).

In September 2022 the Law Commission published its first consultation paper ("First Consultation Paper") which focused on the following shortlist:

(1) privacy and confidentiality of arbitration;

(2) independence of arbitrators and disclosure;

(3) discriminatory criteria in the appointment of arbitrators;

(4) immunity of arbitrators;

(5) express power to allow summary disposal of issues which lack merit;

(6) interim measures ordered by the court in support of arbitral proceedings (section 44 of the 1996 Act);

(7) jurisdictional challenges against arbitral awards (section 67 of the 1996 Act) and whether there should be a rehearing or just an appeal;

(8) appeals on a point of law (whether section 69 of the 1996 Act needs reforming);

(9) minor amendments to various provisions of the 1996 Act; and

(10) an invitation to raise other topics not included in the First Consultation Paper.

Largely, responses to the First Consultation Paper focused on the shortlisted topics. However, a number of consultees to the First Consultation Paper also took the opportunity to raise concerns relating to the decision in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*.[168]

On 6 September 2023 the Law Commission released its Final Report. Several reforms were proposed, including codifying an arbitrator's duty of disclosure, introducing a new rule regarding the governing law of the arbitration agreement, and introducing a power of summary disposal for decisions on issues that have no real prospect of success. It declined to make proposals on topics such as confidentiality, discrimination and appeals on a point of law.

On 7 November 2023 the King's Speech[169] was published and very clearly foreshadowed what the Arbitration Bill will do:

> "The Arbitration Bill implements recommendations from the Law Commission's review of the Arbitration Act 1996. It will support arbitration in England, Wales, and Northern Ireland by:
>
> *Empowering arbitrators to expedite decisions on issues that have no real prospect of success*. This will make arbitrations more efficient and aligns with summary judgments available in court proceedings.
>
> *Introducing a statutory duty on arbitrators to disclose circumstances which might give rise to justifiable doubts about their impartiality*. This will codify the common law and align English law with international best practice to promote trust in arbitration.
>
> *Extending arbitrator immunity against liability for resignations, unless shown to be unreasonable, and the costs of the application to court for their removal, unless they have acted in bad faith*. This will support arbitrators to make robust and impartial decisions without fear of being sued by a disappointed party.

168 [2020] UKSC 38; [2020] 2 Lloyd's Rep 449.

169 https://assets.publishing.service.gov.uk/media/654a21952f045e001214dcd7/The_King_s_Speech_background_briefing_notes.pdf

Clarifying the law governing arbitration agreements, providing that the law applicable will be those of the legal location chosen for arbitration unless parties expressly agree otherwise. This will ensure that, where arbitration is seated in England and Wales or Northern Ireland, it will be fully supported by our arbitration law which is among the most supportive of arbitration globally.

Simplifying the procedure for challenging arbitral awards on substantive jurisdiction by providing for rules of court that would mean these applications should contain no new evidence or new arguments. This will avoid challenges based on jurisdiction becoming a full rehearing, reducing the delay and costs involved in court hearings repeating what has already been argued before the tribunal.

Empowering the court to make orders supporting those of emergency arbitrators. This will give emergency arbitrators the same pathways to enforce their orders as other arbitrators and enhance their effectiveness.

Providing that the court can make orders in support of arbitral proceedings against third parties. This will resolve conflicting decisions in the case law and aligns with the approach in court proceedings."

The draft Bill was put before Parliament with a first reading in the House of Lords on 21 November 2023, and a second reading on 19 December 2023. A special procedure has been invoked which may mean that the new legislation could receive royal assent between Easter and summer 2024.

Governing law of the arbitration agreement

One of the significant changes proposed was to resolve the issues concerning the governing law of the arbitration agreement. The amendment would change the current position of law following the UK Supreme Court decision in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*.[170]

Enka involved a fire incident at a power plant in Russia. Chubb, the subrogated insurer, brought proceedings in Russia against Enka, the subcontractor, to recover.[171] The construction contract in that case provided that all disputes would be resolved in London through arbitration.[172] Enka then applied for an anti-suit injunction from the courts in the UK to halt the Russian proceedings on the ground that the initiation of the Russian proceedings violated the arbitration agreement. The main issue in *Enka* centred around whether the arbitration agreement is governed by the law of the main contract or the law of the seat. The Commercial Court[173] refused to grant the injunction. However, the Court of Appeal[174] overturned the decision and issued the injunction.

> The Law Commission proposes amending the Arbitration Act 1996 to clarify the position so that the governing law of the arbitration agreement is either the law that the parties expressly agree applies to the arbitration agreement or, in the absence of any express agreement, the law of the seat of arbitration

The Supreme Court upheld the injunction and outlined its approach in identifying the law governing an arbitration agreement (which is set out above).

Some stakeholders, however, found the principles in *Enka* problematic. For instance, the rules may easily lead to the application of foreign law to an arbitration agreement, even though the parties have agreed to England and Wales as the seat of arbitration. Moreover the satellite litigation would be costly and lengthy.[175]

Thus the Law Commission proposed amending the Arbitration Act 1996 to clarify the position so that the governing law of the arbitration agreement is either the law that the parties expressly agree applies to the arbitration agreement or, in the absence of any express agreement, the law of the seat of arbitration.[176]

170 [2020] UKSC 38; [2020] 2 Lloyd's Rep 449. For more on the *Enka* test, please see the earlier section in this review titles "Which law applies to an arbitration agreement?"
171 Ibid, paras 7 to 8.
172 Ibid, para 10.
173 [2019] EWHC 3568 (Comm); [2020] 1 Lloyd's Rep 71.
174 [2020] EWCA Civ 574; [2020] 2 Lloyd's Rep 389.
175 See also C Thomas, K Duggal, A Lee, "Reform of arbitration law: the Law Commission's consultation on Enka", *Arbitration Law Monthly*, 15 May 2023, (2023) 23 ALM 5 1.
176 Law Commission, "Review of the Arbitration Act 1996: Final Report", paras 12.77 to 12.78.

Challenging the award based on the lack of substantive jurisdiction

During the consultation process, one of the issues that sparked debate was whether to reform the rules in section 67 of the Arbitration Act 1996 on challenging a tribunal's jurisdiction to make an award. Currently, any challenge under section 67 takes place through a full rehearing, even if a full hearing has already been held before the tribunal. The Law Commission proposed amending the Act to provide that any challenge should be by way of an appeal rather than a full rehearing, which was supported by most consultees.[177] However, there were also objections, arguing that parties may not have consented to the tribunal's jurisdiction.

The Law Commission's solution is to implement procedural rules to limit new grounds of objection or evidence in section 67 challenges and to only re-hear evidence heard by the tribunal if necessary in the interests of justice.[178] The Arbitration Bill also contains a minor amendment clarifying that the tribunal has the power to award costs in situations where it lacks substantive jurisdiction.[179]

Summary disposal

The Law Commission has suggested changes to give arbitrators the express power to make an award on a summary basis. Although arbitrators have an implicit power to use summary disposal, arbitrators are hesitant to use them due to the possibility of awards being challenged or enforcement being resisted on the grounds that a party did not have a reasonable chance to present their case.[180] The proposed reform is intended to ease these concerns and promote the use of summary procedures in suitable cases, resulting in greater efficiency and less opportunity for parties to use delaying tactics.

According to the proposed changes, the test will be whether the concerned party has a "real prospect of succeeding" on the claim, issue, or defence, which test is already familiar to the English courts. Additionally, the rule will be non-mandatory, and parties could agree to opt out of the rule or specify an alternative test.[181] The proposed standard is lower than the "manifestly without merit" test provided in most arbitral institutional rules.[182]

Court power in support of arbitral proceedings

As we have seen above, section 44 of the Act gives the court the authority to aid in arbitration proceedings by conserving evidence or granting an interim injunction. The Arbitration Bill, however, intends to modify this section by expressly stating that such orders can be issued against non-parties. This amendment proposes that the rules and case law governing similar orders against non-parties in civil litigation should extend to arbitral proceedings.[183]

Furthermore, another proposed amendment to section 44 could allow non-parties to have full rights of appeal against orders made under section 44. As things currently stand, appeals can only be made with the permission of the court that granted the order – whether by a party or non-party to the arbitration. However, the amendment would remove this restriction for non-parties, whereas parties to the arbitration would still be subject to the current position.[184]

177 Ibid, paras 9.14 and 9.20.
178 Ibid, paras 9.96 and 9.97.
179 Law Commission, "Review of the Arbitration Act", Arbitration Bill, clause 6.
180 Law Commission, "Review of the Arbitration Act 1996: Final Report", paras 6.5 and 6.6.
181 Ibid, paras 6.51 and 6.52.
182 See eg LCIA Arbitration Rules 2020, article 22.1(viii); ICSID Convention Arbitration Rules 2022, article 41; ICC Rules of Arbitration, article 22 and Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, section C.
183 Law Commission, "Review of the Arbitration Act 1996: Final Report", para 7.27.
184 Ibid, para 7.40.

Arbitrator's duty of disclosure

Under the proposed amendment, arbitrators would be required to disclose circumstances that "might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings, concerned".[185] This codifies the common law rules set out in *Halliburton Co v Chubb Bermuda Insurance Ltd*.[186]

Halliburton v Chubb is a significant decision that clarified how English courts assess apparent bias in arbitrator conflicts, making it a leading case on the subject. The case arose out of the *Deepwater Horizon* incident, where an explosion and fire on the drilling rig caused damage.[187] On the duty of disclosure the Supreme Court confirmed that arbitrators have a legal duty to disclose any facts or circumstances that may reasonably give rise to the appearance of bias. Compliance with this duty should be assessed in light of the circumstances at the time of disclosure. The failure to disclose may be considered as a factor in determining whether there was a real possibility of bias.[188] Further, the arbitrator's duty to disclose and the duty of impartiality are interconnected and must be assessed at different stages of the arbitration process.[189]

In line with this case, the Law Commission suggested that the criteria for determining what an arbitrator should reasonably be aware of will differ from case to case. The Law Commission has suggested that it will not always be necessary for arbitrators to investigate actively whether there are circumstances that should be disclosed; instead, this will vary depending on the case. For instance, in many cases arbitrators will need to disclose overlapping appointments. However, in some sectors, such as maritime, sports, commodity, and reinsurance, established custom and practice may mean that overlapping appointments do not need to be disclosed.[190]

Updates to other arbitration laws

Nigeria

On 26 May 2023 Nigeria's Arbitration and Conciliation Act 1988 was replaced by the Arbitration and Mediation Act 2023. The new Nigerian Act is based on the revised UNCITRAL Model Law adopted in 2006 and strengthens Nigeria's position as a leading arbitration destination in Africa. It introduces provisions for third-party funding, emergency arbitrators, and award review tribunals. It also requires the tribunal's fees to be reasonable and fixed in the award.[191]

Japan

On 21 April 2023 the Japanese National Diet[192] approved the Amended Arbitration Act and the Mediation Act (the "Japanese Amended Act"), which will become effective within one year from the day of promulgation on 28 April 2024. The Japanese Amended Act contains key changes, including the enforcement of tribunal-ordered interim measures and allowing arbitration agreements to meet the writing requirement even if they are not in writing. The Mediation Act sets out a mechanism for the enforcement of international settlement agreements.[193]

Luxembourg

In March 2023 a long-awaited law was brought in to modernise arbitration in Luxembourg. It entered into force the following month and amended the New Civil Procedure Code. It is based on the UNCITRAL Model Law and French arbitration law. Consumer and employment disputes are excluded from arbitration. The hope is that Luxembourg is now a much more competitive seat.

Germany

Also in April 2023 a planned reform of German arbitration law (after 25 years) was announced aiming also to strengthen the attractiveness of Germany as a seat. Again the UNCITRAL Model Law was used as a precedent. The possibility of English language arbitrations and related court proceedings was also provided for.[194]

185 Law Commission, "Review of the Arbitration Act", Arbitration Bill, clause 2.
186 [2020] UKSC 48; [2021] 1 Lloyd's Rep 1.
187 See *Halliburton v Chubb*, paras 2 and 4.
188 Ibid, paras 81, 120 and 136.
189 Ibid, paras 70, 78, 119 to 120 and 156.
190 Law Commission, "Review of the Arbitration Act 1996: Final Report", paras 3.68 to 3.73.

191 For more see www.lawyard.org/wp-content/uploads/2023/05/Arbitration-and-Mediation-Act.pdf
192 The national legislature of Japan.
193 www.moj.go.jp/EN/MINJI/m_minji07_00006.html
194 For more see www.bmj.de/SharedDocs/Pressemitteilungen/DE/2023/0418_Modernisierung_Schiedsverfahrensrecht.html

Updates to arbitration rules

Singapore International Arbitration Centre (SIAC)

On 22 August 2023 the SIAC started a public consultation on the draft 7th Edition of the SIAC Rules (the "Consultation Draft"), which builds on the SIAC Rules 2016 that have been used to administer international arbitration cases. The Consultation Draft contains several key improvements. To summarise, a cheaper streamlined procedure is available if the amount in dispute is under S$1 million or the parties agree.[195] The expedited procedure's limit has been raised to S$10 million.[196]

Further, spine stiffening provisions have been added to give arbitrators more confidence. Draft Rule 46[197] allows parties to apply for a preliminary determination of any issue in the arbitration. Draft Rule 17[198] provides for coordinated arbitration proceedings where the same tribunal is constituted in two or more arbitrations. Draft Rule 38[199] requires parties to disclose third-party funding arrangements which is in line with evolving best practices. Controversially, draft Rule 60[200] proposes to reverse the presumption that awards may not be made public absent consent from the parties and the tribunal.

Draft Rule 19.5 reads:

> "In appointing an arbitrator under these Rules, the President shall take into account any agreed qualifications and such considerations that are relevant to the impartiality or independence of the arbitrator and bearing in mind, as appropriate, principles of diversity and inclusion. The SIAC Rules consultation closed on 21 November 2023."[201]

Lastly, two grounds of challenge have been added under draft Rule 26.1 if the arbitrators are: (a) unable to perform their functions; and (b) fail to act or perform their functions according to the SIAC Rules or "within the prescribed time limits".

Hong Kong International Arbitration Centre (HKIAC)

On 23 January 2024 the HKIAC announced a public consultation for proposed amendments to the current 2018 Administered Arbitration Rules. These amendments aim to improve the arbitration process by including, but are not limited to, provisions on diversity in appointing arbitrators, mode of communication, and data protection.[202]

One of the proposed changes is the inclusion of a draft article 10, which encourages parties and co-arbitrators to consider diversity when selecting an arbitrator. The HKIAC will also take diversity into account when appointing arbitrators. While the HKIAC does not provide specific guidance, the inclusion of this article demonstrates its commitment to diversity and inclusion.

Another amendment allows parties and arbitrators to communicate through any mutually agreed electronic communication method.[203] Additionally, draft article 47 is dedicated to information security and emphasises the importance of data protection. Parties can agree on measures to protect information, and the arbitral tribunal may give directions to parties on ensuring information security.[204] The proposed data protection measures are similar to those in the LCIA Rules, which allow the arbitral tribunal to adopt specific measures to protect shared data and issue cyber security directions.[205]

The proposed amendments also allow claims arising from multiple contracts to proceed under a single arbitration. Parties will be considered to have waived their right to select an arbitrator, and the HKIAC will appoint the arbitral tribunal.[206]

195 SIAC Rules 7th Edition, Consultation Draft, Rule 13: "Streamlined Procedure". See https://siac.org.sg/wp-content/uploads/2023/08/Draft-7-Edition-of-the-SIAC-Rules-Consultation-Draft.pdf
196 SIAC Rules 7th Edition, Consultation Draft, Rule 14: "Expedited Procedure".
197 Entitled "Preliminary Determination".
198 Entitled "Coordinated Proceedings".
199 Entitled "Third-Party Funding".
200 Entitled "Publication".
201 https://siac.org.sg/wp-content/uploads/2023/08/Registrars-Report-Public-Consultation-on-the-Draft-7th-Edition-of-the-SIAC-Rules.pdf

202 "Public Consultation on Proposed Amendments to the 2018 HKIAC Administered Arbitration Rules", Press Release, 23 January 2024, available at https://www.hkiac.org/news/public-consultation-proposed-amendments-2018-hkiac-administered-arbitration-rules; Draft 2024 HKIAC Rules.
203 Draft 2024 HKIAC Rules, article 3.1(f).
204 Draft 2024 HKIAC Rules, article 47.
205 LCIA Arbitration Rules 2020, article 30A. See lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx
206 Draft 2024 HKIAC Rules, articles 20.5 and 30.

Developments in relation to how arbitrations can be funded[207]

England and Wales: *PACCAR*

The Courts and Legal Services Act ("CLSA") dates back to 1990. In 2009 the Coroners and Justice Act inserted section 58AA into the CLSA which provides that damages-based arrangements will be unenforceable unless certain conditions are complied with. The 2013 Damages-Based Agreements ("DBA") Regulations prescribe the strict requirements (including a 50 per cent threshold) with which a DBA must comply to be enforceable under section 58AA of the CLSA.

On 26 July 2023, in a leapfrog appeal decision that caused ripples, the English Supreme Court held in *R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and Others*[208] that litigation funding arrangements based on a share of damages/recovery are DBAs for the purposes of section 58AA of the CLSA because litigation funders provide "claims management services", defined, under section 58AA(7), by reference to earlier legislation, being the Compensation Act 2006 until 1 April 2019 and the Financial Services and Markets Act 2000 thereafter.

PACCAR has thus clarified that funding arrangements must comply with the DBA regulatory regime, failing which they are unenforceable. This had not been thought to be the case before. As such, it has given rise to disputes between claimants and funders as to whether a funder can enforce some elements of a funding agreement even though any provision for payment of a percentage of damages is unenforceable in light of *PACCAR*.

For example, in *Therium Litigation Funding A IC v Bugsby Property LLC*[209] the High Court held that there is a "serious issue to be tried" that the element of a litigation funding agreement which provides for the funder to receive a multiple of funding remains enforceable, even though the aspect which provides for a percentage of damages is unenforceable in light of *PACCAR*. The issue will go to a tribunal since there was an arbitration clause in the funding agreement.

Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd[210] was the first certification decision since *PACCAR*. In that case the Competition Appeal Tribunal ("CAT") held that a litigation funding agreement revised in light of *PACCAR* to be calculated as a multiple of the funding obligation was not a DBA and was therefore enforceable for the purposes of opt-out collective proceedings before the CAT. In addition, the CAT found it permissible to include an alternative higher renumeration clause whereby the funder would be paid a percentage of awarded damages "only to the extent enforceable and permitted by applicable law". The CAT held:[211]

> "The clauses operate with a contingency, such that they have no legal effect until the contingency (legislation by Parliament to reverse the effect of *PACCAR*) eventuates. There is therefore no logical possibility that section 58AA could be engaged to make the provisions unenforceable. As a matter of freedom of contract, it is open to the PCR [Proposed Class Representative] and the funder to agree on such a provision, and we see no reason of public policy or otherwise to make that objectionable. The drafting expressly recognises that the use of a percentage to calculate the Funder's Fee will not be employed unless it is made legally enforceable by a change in the law, which appears to us to be an entirely proper position to take."

PACCAR has clarified that funding arrangements must comply with the damages-based agreements regulatory regime, failing which they are unenforceable. This had not been thought to be the case before

Since *PACCAR* legislation has indeed been proposed to permit funder DBAs in certain contexts (but not yet arbitration). Notably, on 15 November 2023 an amendment to the Digital Markets, Competition and Consumers Bill was tabled which would remove the words "claims management services" from section 47(c) of the Competition Act 1998. Lord Bellamy explained that the purpose of the Bill was: "to mitigate the impact of [*PACCAR*] on litigation funding agreements for opt-out collective proceedings in the [CAT]". The government has hinted that it might reverse *PACCAR* entirely (and so amend the Regulations) at the first opportunity.

207 On this topic see also hugillandip.com/wp-content/uploads/2023/11/Paying-for-Arbitration-15-November-2023-Caroline-Thomas-LR.pdf
208 [2023] UKSC 28.
209 [2023] EWHC 2627 (Comm).
210 [2023] CAT 73.
211 At para 148.

There is a debate whether the *PACCAR* decision has consequences for arbitration funding because of how the CLSA and its definitions are worded. Moreover, arbitration by its nature is considerably more flexible than litigation. However, the conservative view is that it does apply at least to English seated arbitration not least because in *Diag Human SE and Another v Volterra Fietta*[212] it was held that the conditional fee arrangement charged by lawyers in an investor-state dispute settlement (ISDS) arbitration did not comply with the CLSA (and in that case could not be severed prompting a review of severance clauses in DBAs).

Hong Kong: *BB v KO*

To maintain Hong Kong's competitiveness and strengthen its position as a centre for international legal and dispute resolution services, in 2022 legislation and rules were introduced that permitted outcome-related fee structures for arbitration and arbitration-related court proceedings (within the parameters of the rules). Similar laws have been introduced in Singapore. However, the said relaxation does not apply to litigation where the common law doctrines of champerty, maintenance and barratry still apply (which can be contrasted with the position in England).

Nonetheless, in *BB v KO*,[213] the Hong Kong High Court refused to set aside an enforcement order for an arbitral award on the ground of it being contrary to public policy as a result of a contingency fee/success fee arrangement. The underlying dispute related to an agreement for BB (a US law firm) to represent KO (a businessman) in court proceedings in Nevada, USA, which included a "success bonus" and for BB to "provide strategic advice". On the other hand, and this proved important, BB did not act as lead counsel in KO's Hong Kong litigation.

After the Nevada proceedings successfully concluded, KO refused to pay the success fee. BB brought and won an arbitration and was granted leave to enforce against KO's assets in Hong Kong. KO argued that it would be contrary to public policy to enforce an award which gives effect to a contingency fee agreement partially related to litigation in Hong Kong. The court dismissed KO's application and awarded BB indemnity costs. It was not persuaded that the Hong Kong litigation was sufficiently connected and impacted by the Nevada litigation which formed the basis of the contingency fee agreement. As such, the court could not determine that a genuine risk to the integrity of the Hong Kong court proceedings arose through enforcement of the award.

212 [2022] EWHC 2054 (QB).
213 [2023] HKCFI 2661.

Trends in 2023, and what 2024 might hold in store for arbitration

2023 proved to be an interesting year in arbitration case law and legal developments, and 2024 already looks promising in terms of appeals and reform.

In summary, the analysis in this article has revealed the following trends:

Procedure really matters to parties

The Hong Kong case *G v P*[214] illustrates the importance of parties properly serving (and having proof of proper service) of notices of arbitration. It also serves as a reminder that parties should check and, if necessary, seek corrections of an award promptly (often applicable rules contain procedures and a time limit).

In the *Radisson* case,[215] although ex parte communications (a serious irregularity) appear to have taken place between the parties and an arbitrator, the respondent nonetheless lost the right to bring a challenge. This underlines that parties must act quickly.

Procedure matters less if tribunals get it wrong

The cases discussed in this Review show that challenges and appeals often fail.

The "Commercial Court Report 2021-2022"[216] confirms that in 2020-2021, of the 26 challenge applications under section 68 only one succeeded (15 were dismissed, two were discontinued, another two were withdrawn, one was stayed, two were transferred out and three were pending).[217] Therefore, in 2020-2021, only 4 per cent of applications were successful. In part this is because of the second limb of section 68 which requires "substantial injustice" to be shown.

According to the same report, section 67 applications were only slightly more successful. Of 17 applications under section 67 in the year 2020-2021 only

214 [2023] HKCFI 2173.
215 *Radisson Hotels APS Danmark v Hayat Otel Işletmeciliği Turizm Yatirim ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm); [2023] 1 Lloyd's Rep 642.
216 "Business and Property Courts: The Commercial Court Report 2021-2022 (including the Admiralty Court Report)", March 2023, judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf
217 See para 3.1.3 of the 2021-2022 Report. This can be compared with figures shown from 2021-2022, where of 40 challenge applications under section 68 in that period (a 54 per cent increase compared to the 26 in the previous year), five were dismissed without a hearing, one was dismissed at hearing, two were discontinued and one was transferred out.

one succeeded (nine were dismissed, three were discontinued, one was transferred out and three were pending). This means only 6 per cent of applications have been successful.[218]

Similarly, only 5 per cent of section 69 appeals in the year 2020-2021 were successful – of 37 only two succeeded. 19 had permission refused, four were discontinued, five were dismissed, one was settled, one was transferred out and five were pending).[219]

Common law courts support arbitration – except for consumer disputes

The trend is that damages are available for breach of arbitration agreements (even for breaches by third parties), as demonstrated by *The Prestige*.[220]

Courts in England and Singapore, and some courts in Hong Kong, will hold parties to their agreement to arbitrate and stay or dismiss winding-up proceedings.

Some courts in Hong Kong and the courts in the Cayman Islands are outliers. In Hong Kong, following *Guy Lam*, it is now clear that where there is an exclusive jurisdiction clause in the underlying agreement providing for a foreign jurisdiction, the court will generally hold parties to their bargain and stay or dismiss a creditor's bankruptcy/winding-up petition if the debt is disputed. However, it is uncertain whether the same approach applies to underlying agreements with arbitration clauses. 2024 likely will bring certainty in Hong Kong as appeals in *Re Simplicity & Vogue Retailing (HK) Co Ltd*[221] and *Re Shandong Chenming Paper Holdings Ltd*[222] will be heard. We may see the increased use of unilateral arbitration clauses (where valid) to try to avoid application of the new approach.

In addition, Privy Council decisions may bring offshore jurisdictions in line with England.

Consumer disputes also seem to be an outlier as the two cases before Bright J confirm.[223] Mandatory arbitration is not per se unfair but drafters of arbitration clauses should consider the applicable laws and regulations – which generally ask what a reasonable consumer would agree to. In some countries there is more consumer (and employee protection) than in others – thus as we have seen Luxembourg excludes such disputes from arbitration whereas in the United States employment disputes are frequently arbitrated (eg in JAMS arbitration). Crypto disputes may give rise to further test cases as frequently platform terms include arbitration clauses.

The decision in *PACCAR* continues to cause problems for arbitration finance in England

Legislation is starting to be proposed that would negate *PACCAR*.[224] However, those amendments appear to relate only to a discrete area of law, whereas the *PACCAR* decision has wider ramifications.

Case law confirms that funders have started to amend their agreements, including to decouple remuneration from damages and beef up severance clauses.

Attracting arbitration is competitive – laws and arbitral rules will keep being updated

The Arbitration Act 1996 is being tweaked. The annual Commercial Court Report 2021-2022[225] notes that "Matters arising from arbitration still make up a significant proportion of the claims issued in the Court (around 25 per cent) reflecting London's continued status as an important centre for international arbitration"[226] including: section 67 and 68 challenges, appeals on points of law under section 69 and section 44 applications (such as injunctions).

As we have seen, Nigeria, Japan, Luxembourg, Germany and Israel are also updating their arbitration laws. This trend is set to continue. For example in February 2024, the Knesset[227] approved the International Commercial Arbitration Law 2024 which again closely follows the UNCITRAL Model Law. Again, the new law is expected "to encourage use of arbitration situated in Israel as a solution for resolving international commercial disputes".[228]

218 See para 3.1.4 of the 2021-2022 Report. By comparison, in 2021-2022, 27 jurisdiction applications were filed under section 67 (a 59 per cent increase from the 17 in the previous year), where five were dismissed on the papers, one was unsuccessful, one was discontinued and 20 remain pending.

219 See para 3.1.1 of the 2021-2022 Report. By comparison, in 2021-2022, 40 section 69 applications were received. Of these, 13 had been granted permission to appeal, with a final decision pending, 12 had permission refused, two were dismissed on paper, one was discontinued, one was transferred out and 11 were awaiting a permission decision.

220 [2023] EWHC 2473 (Comm); [2023] Lloyd's Rep Plus 107.

221 [2023] HKCFI 1443.

222 [2023] HKCFI 2065.

223 *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm); [2023] 2 Lloyd's Rep 507 and Eternity Sky Investments Ltd v Zhang [2023] EWHC 1964 (Comm); [2023] 2 Lloyd's Rep 419.

224 *R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and Others* [2023] UKSC 28.

225 "Business and Property Courts: The Commercial Court Report 2021-2022 (including the Admiralty Court Report", March 2023, judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf

226 At para 3.1.

227 Israel's house of representatives (the parliament)

228 https://main.knesset.gov.il/en/news/pressreleases/pages/press132234t.aspx

SIAC, HKIAC and various other institutions are updating their rules (as they periodically do) with many making similar changes. In the author's view there is a fine balance to be struck in the sense that while it is important to ensure that laws and rules reflect best practices, users also value certainty and continuity and rules need to align with laws (both of the seat and ideally of the main jurisdictions of enforcement, the UNCITRAL Model Law being a popular blueprint) which in turn should align with the New York Convention.

Amendments to the Arbitration Act 1996 are expected within the first half of 2024. It will be interesting to see how they play out

To some extent the amendments will simply confirm the law. It will be interesting to see whether spelling out powers of the tribunal, for example the court's power to conserve evidence or grant an interim injunction against a third party, will help overcome "process paranoia".

One of the amendments will "fix *Enka*"[229] – a new section 6A will set a default law of arbitration agreement as being the seat of the arbitration. We will be following how the law develops in jurisdictions that have followed *Enka*[230] (like Hong Kong, as discussed above).

Trends in ISDS

During the first seven months of 2023 claimants brought at least 35 known investor-state dispute settlement (ISDS) cases pursuant to international investment agreements.[231] This compares to 56 arbitrations initiated according to UNCTAD in 2022 and 79 in 2021, which suggested a downwards trend.[232]

This is unsurprising given the *Achmea*[233] decision followed by the termination of intra-EU bilateral investment treaties and the EU's step back from the Energy Charter Treaty.

However, according to the 2024 ICSID caseload statistics, the number of cases registered under ICSID rules increased, with 57 new cases registered – 16 more than in 2022. Additionally, an extra 20 cases were registered under non-ICSID rules, with UNCITRAL administering 14 of the new cases.[234]

Furthermore, the number of investment treaty cases related to climate change and decarbonisation measures seems to be increasing, which might have to do with the states' decisions to phase out certain energy sources and reject projects on climate change grounds. An example is Zeph Investments which initiated two arbitrations against Australia in 2023, one based on the rejection of coal mining licences.[235]

The war in Ukraine and resulting sanctions by the US, EU and other states against Russia will likely give rise to further cases

English courts have been extending their reach by granting anti-suit injunctions in two cases (*Deutsche Bank AG v RusChemAlliance LLC*[236] and *Commerzbank AG v RusChemAlliance LLC*)[237] where the arbitral seat was Paris, not England. The appeal in the third case, *UniCredit v RusChemAlliance* (formerly known as *G v R*),[238] where a similar injunction was not granted, was heard in January 2024.

It will be interesting to see what effect new section 6A of the Arbitration Act 1996 will have. This new section will provide a default position (applying with immediate effect) that where the law of an arbitration agreement is not specified, it will be the law of the seat. In future, will the English courts be able to issue anti-suit injunctions in aid of the court of the seat if the court of the seat cannot do so (like France)? Will the availability of anti-suit injunctions be a more important consideration when specifying a seat?

As long as the Russian sanctions continue (and countervailing steps are taken by the Russian courts) we will likely see more anti-suit injunctions and related cases.

229 For more, see hugillandip.com/2023/09/legal-update-the-law-commission-proposes-to-fix-enka/

230 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* (SC) [2020] UKSC 38; [2020] 2 Lloyd's Rep 449.

231 https://investmentpolicy.unctad.org/news/hub/1737/20240108-known-investment-treaty-cases-climb-to-over-1-300

232 https://investmentpolicy.unctad.org/investment-dispute-settlement

233 *Slovak Republic v Achmea BV* (CJEU) Case C-284/16; EU:C:2018:158.

234 https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf

235 See www.iisd.org/itn/en/2024/01/13/billionaire-clive-palmer-files-another-arbitration-against-australia/#:~:text=The%20Singapore%20company%20Zeph%20Investments,mine%20investment%20project%20in%20Queensland. See also https://climatecasechart.com/non-us-case/rockhopper-v-italy and https://climatecasechart.com/non-us-case/rwe-and-uniper-v-state-of-the-netherlands-ministry-of-climate-and-energy.

236 [2023] EWCA Civ 1144; [2023] 2 Lloyd's Rep 600.

237 [2023] EWHC 2510 (Comm); [2023] 2 Lloyd's Rep 587.

238 [2023] EWHC 2365 (Comm).

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2023 judgments analysed

Africa Sourcing Cameroun Ltd v LMBS Société par Actions Simplifiée (KBD (Comm Ct)) [2023] EWHC 150 (Comm); [2023] 1 Lloyd's Rep 627

AI and Others v LG II and Another (HKCFI) [2023] HKCFI 1183

Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd (CAT) [2023] CAT 73

Beltran and Another v Terraform Labs Pte Ltd and Others (SGHC) [2023] SGHC 340

BPGIC Holdings Ltd, Re (GC Cayman) 20 November 2023, unreported

BPY v MXV (KBD (Comm Ct)) [2023] EWHC 82 (Comm); [2023] Lloyd's Rep Plus 85

Briggs Marine Contractors Ltd v Bakkafrost Scotland Ltd (CSOH) [2023] CSOH 6; [2023] 2 Lloyd's Rep 119

C v D (HKCFA) [2023] HKCFA 16

Canudilo International Co Ltd v Wu Chi Keung and Others (HKCFI) [2023] HKCFI 700

China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd (HKCFI) [2023] HKCFI 132

Cipla Ltd v Salix Pharmaceuticals Inc (KBD (Comm Ct)) [2023] EWHC 910 (Comm)

City Gardens Ltd v DOK82 Ltd (Ch D) [2023] EWHC 1149 (Ch)

Commerzbank AG v RusChemAlliance LLC (KBD (Comm Ct)) [2023] EWHC 2510 (Comm); [2023] 2 Lloyd's Rep 587

Czech Republic v Diag Human SE and Another (KBD (Comm Ct)) [2023] EWHC 1691 (Comm); [2023] 2 Lloyd's Rep 475; (CA) [2023] EWCA Civ 1518

CZT v CZU (SGHC) [2023] SGHC(I) 11; [2024] LMCLQ 12

DC Bars Ltd and Another v QIC Europe Ltd (KBD (Comm Ct)) [2023] EWHC 245 (Comm); [2023] Lloyd's Rep IR 225

Deutsche Bank AG v RusChemAlliance LLC (CA) [2023] EWCA Civ 1144; [2023] 2 Lloyd's Rep 600

Deutsche Bank AG, London Branch v Central Bank of Venezuela (KBD (Comm Ct)) [2023] EWHC 1942 (Comm); [2023] 2 Lloyd's Rep 486

Emirates Shipping Line DMCEST v Gold Star Line Ltd (KBD (Comm Ct)) [2023] EWHC 880 (Comm); [2023] 2 Lloyd's Rep 359

Eternity Sky Investments Ltd v Zhang (KBD (Comm Ct)) [2023] EWHC 1964 (Comm); [2023] 2 Lloyd's Rep 419

Eton Properties v Xiamen Xinjingdi Group (HKCFI) [2023] HKCFI 1327

FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation (PC) [2023] UKPC 33; [2023] 2 Lloyd's Rep 529

Federal Republic of Nigeria v Process & Industrial Developments Ltd (KBD (Comm Ct)) [2023] EWHC 2638 (Comm); [2024] 1 Lloyd's Rep 1

French State, The v The London Steam-Ship Owners' Mutual Insurance Association Ltd (KBD (Comm Ct)) [2023] EWHC 2474 (Comm); [2023] Lloyd's Rep Plus 108

G v N (HKCFI) [2023] HKCFI 3366

G v P (HKCFI) [2023] HKCFI 2173

G v X and Others (HKCFI) [2023] HKCFI 3316

Global Aerospares Ltd v Airest AS (KBD (Comm Ct)) [2023] EWHC 1430 (Comm); [2023] 2 Lloyd's Rep 639

Guy Lam, Re (HKCFA) [2023] HKCFA 9

Infrastructure Services Luxembourg Sàrl and Another v Kingdom of Spain (KBD (Comm Ct)) [2023] EWHC 1226 (Comm); [2023] 2 Lloyd's Rep 299

Inversion Productions Ltd, Re (HKCFI) [2023] HKCFI 2400

JOL and Another v JPM (KBD (Comm Ct)) [2023] EWHC 2486 (Comm); [2023] 2 Lloyd's Rep 556

Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd (CA) [2023] EWCA Civ 292; [2023] BLR 271; (2023) 23 ALM 6 1

Linde GmbH and Another v RusChemAlliance LLC (HKCFI) [2023] HKCFI 2409

LLC Eurochem North-West-2 v Tecnimont SpA and Another (CA) [2023] EWCA Civ 688; [2023] 2 Lloyd's Rep 259

LMH v EGK (KBD (Comm Ct)) [2023] EWHC 1832 (Comm); [2023] 2 Lloyd's Rep 495

London Steam-Ship Owners' Mutual Insurance Association Ltd, The v The Kingdom of Spain (KBD (Comm Ct)) [2023] EWHC 2473 (Comm); [2023] Lloyd's Rep Plus 107

Lord and Others v Kinsella and Others (Ch D) [2023] EWHC 2748 (Ch); [2023] 2 Lloyd's Rep 677

Mitsui & Co (USA) Inc v Asia-Potash International Investment (Guangzhou) Co Ltd (KBD (Comm Ct)) [2023] EWHC 1119 (Comm); (2023) 1136 LMLN 1

Mittal v Westbridge Ventures II Investment Holdings (SGCA) [2023] SGCA 1; [2023] LMCLQ 182; (2023) 23 ALM 10 5

Monat Investment Ltd v All Person(s) in Occupation of Part of the Remaining Portion of Lot No 591 in Mui Wo D.D. 4 No 16 Ma Po Tsuen, Mui Wo, Lantau Island and Another (HKCA) [2023] HKCA 479

National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another (CA) [2023] EWCA Civ 826; [2023] 2 Lloyd's Rep 279

Nigerian Agip Exploration Ltd v GEC Petroleum Development Co Ltd (KBD (Comm Ct)) [2023] EWHC 414 (Comm); [2023] 1 Lloyd's Rep 341

NT Pharma International Co Ltd, Re (HKCFI) [2023] HKCFI 1623

Palmat NV v Bluequest Resources AG (KBD (Comm Ct)) [2023] EWHC 2940 (Comm)

Pan Ocean Co Ltd v Daelim Corporation (KBD (Comm Ct)) [2023] EWHC 391 (Comm); [2023] 1 Lloyd's Rep 548

Payward Inc and Others v Chechetkin (KBD (Comm Ct)) [2023] EWHC 1780 (Comm); [2023] 2 Lloyd's Rep 507

Port de Djibouti SA v DP World Djibouti FZCO (KBD (Comm Ct)) [2023] EWHC 1189 (Comm); [2023] 2 Lloyd's Rep 149

R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and Others (SC) [2023] UKSC 28

R v A and Others (HKCFI) [2023] HKCFI 2034

Radisson Hotels APS Danmark v Hayat Otel Işletmeciliği Turizm Yatirim ve Ticaret Anonim Şirketi (KBD (Comm Ct)) [2023] EWHC 892 (Comm); [2023] 1 Lloyd's Rep 642

Republic of India, The v Deutsche Telekom AG (SGCA) [2023] SGCA(I) 4

Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) (SC) [2023] UKSC 32; [2023] 2 Lloyd's Rep 564

Shandong Chenming Paper Holdings Ltd, Re (HKCFI) [2023] HKCFI 2065

Sian Participation Corporation v Halimeda International Ltd BVIHCMAP2021/0017, 24 April 2023, unreported

Simplicity & Vogue Retailing (HK) Co Ltd, Re (HKCFI) [2023] HKCFI 1443

Sky Power Construction Engineering Ltd v Iraero Airlines JSC (HKCFI) [2023] HKCFI 1558

Song Lihua v Lee Chee Hon (HKCFI) [2023] HKCFI 2540

SQD v QYP (KBD (Comm Ct)) [2023] EWHC 2145 (Comm); [2023] BLR 520

Sui Northern Gas Pipelines Ltd v National Power Parks Management Co (Pvt) Ltd (KBD (Comm Ct)) [2023] EWHC 316 (Comm); (2023) 24 ALM 1 4

Therium Litigation Funding A IC v Bugsby Property LLC (KBD (Comm Ct)) [2023] EWHC 2627 (Comm)

UniCredit v RusChemAlliance (formerly known as G v R) (KBD (Comm Ct)) [2023] EWHC 2365 (Comm)

ZS Capital Fund SPC and Others v Astor Asset Management 3 Ltd and Another (HKCFI) [2023] HKCFI 1047

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Agile Holdings Corporation v Essar Shipping Ltd (The Maria) (QBD (Comm Ct)) [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79

Al Hadha Trading Co v Tradigrain SA (QBD) [2002] 2 Lloyd's Rep 512

AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) (SGCA) [2020] SGCA 33; [2021] LMCLQ 6

AOOT Kalmneft v Glencore International AG (QBD (Comm Ct)) [2002] 1 Lloyd's Rep 128

Argos Pereira España SL v Athenian Marine Ltd (The Frio Dolphin) (QBD (Comm Ct)) [2021] EWHC 554 (Comm); [2021] 2 Lloyd's Rep 387

BBA v BAZ (SGCA) [2020] SGCA 53; [2020] 2 SLR 453

BCY v BCZ (SGHC) [2016] SGHC 249; [2016] 2 Lloyd's Rep 583

BWG v BWF (SGCA) [2020] SGCA 36

Betamax Ltd v State Trading Corporation (Mauritius) (PC) [2021] UKPC 14; [2021] 2 Lloyd's Rep 559

BST Properties Ltd v Reorg-Apport Penzugyi RT (CA) [2001] EWCA Civ 1997

Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C) (QBD (Comm Ct)) [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533

Bunge SA v Kyla Shipping Co Ltd (The Kyla) (CA) [2013] EWCA Civ 734; [2013] 2 Lloyd's Rep 463

But Ka Chon v Interactive Brokers LLC (HKCA) [2019] HKCA 873

Carter v Harold Simpson Associates (Architects) Ltd (PC) [2004] UKPC 29; [2004] 2 Lloyd's Rep 512

Children's Ark Partnership Ltd v Kajima Construction Europe (UK) Ltd [2022] EWHC 1595 (TCC); (2022) CILL 4746

CVLC Three Carrier Corporation v Arab Maritime Petroleum Transport Co (The Anbar and The Hillah) (QBD (Comm Ct)) [2021] EWHC 551 (Comm); [2021] 2 Lloyd's Rep 397

Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd (HKCFI) [2020] HKCFI 311

Diag Human SE and Another v Volterra Fietta (QBD) [2022] EWHC 2054 (QB)

Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd (Ch D) [2015] EWHC 1797 (Ch); [2015] BCC 877

Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" (QBD (Comm Ct)) [2019] EWHC 3568 (Comm); [2020] 1 Lloyd's Rep 71; (CA) [2020] EWCA Civ 574; [2020] 2 Lloyd's Rep 389; (SC) [2020] UKSC 38; [2020] 2 Lloyd's Rep 449

Federal Republic of Nigeria v Process & Industrial Developments Ltd (QBD (Comm Ct)) [2020] EWHC 2379 (Comm); [2021] 1 Lloyd's Rep 121

Halliburton Co v Chubb Bermuda Insurance Ltd (SC) [2020] UKSC 48; [2021] 1 Lloyd's Rep 1

Infrastructure Services Luxembourg S.à.r.l. (formerly Antin Infrastructure Services Luxembourg S.à.r.l.) v Kingdom of Spain ICSID Case No ARB/13/31

Insurance Corporation of the Channel Islands Ltd v McHugh (QBD (Comm Ct)) [1997] LRLR 94

Jinpeng Group Ltd v Peak Hotels and Resorts Ltd (E Carib CA) BVIHCMAP2014/0025 and BVIHCMAP2015/0003, 8 December 2015, unreported

Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd (HKCFI) [2018] HKCFI 246

London Steam-Ship Owners' Mutual Insurance Association Ltd, The v The Kingdom of Spain (The Prestige) (CJEU) Case C-700/20; EU:C:2022:488; [2022] 2 Lloyd's Rep 286; [2022] Lloyd's Rep IR 508

Micula and Others v Romania (SC) [2020] UKSC 5; [2020] 1 WLR 1033

National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another (KBD (Comm Ct)) [2022] EWHC 2641 (Comm); [2023] 1 Lloyd's Rep 475

Patel v Mirza (SC) [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2016] Lloyd's Rep FC 435

RAV Bahamas Ltd v Therapy Beach Club Inc (Bahamas) (PC) [2021] UKPC 8; [2021] 2 Lloyd's Rep 188

Reliance Industries Ltd v The Union of India (QBD (Comm Ct)) [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562

Republic of Sierra Leone v SL Mining Ltd (QBD (Comm Ct)) [2021] EWHC 286 (Comm); [2022] 2 Lloyd's Rep 458

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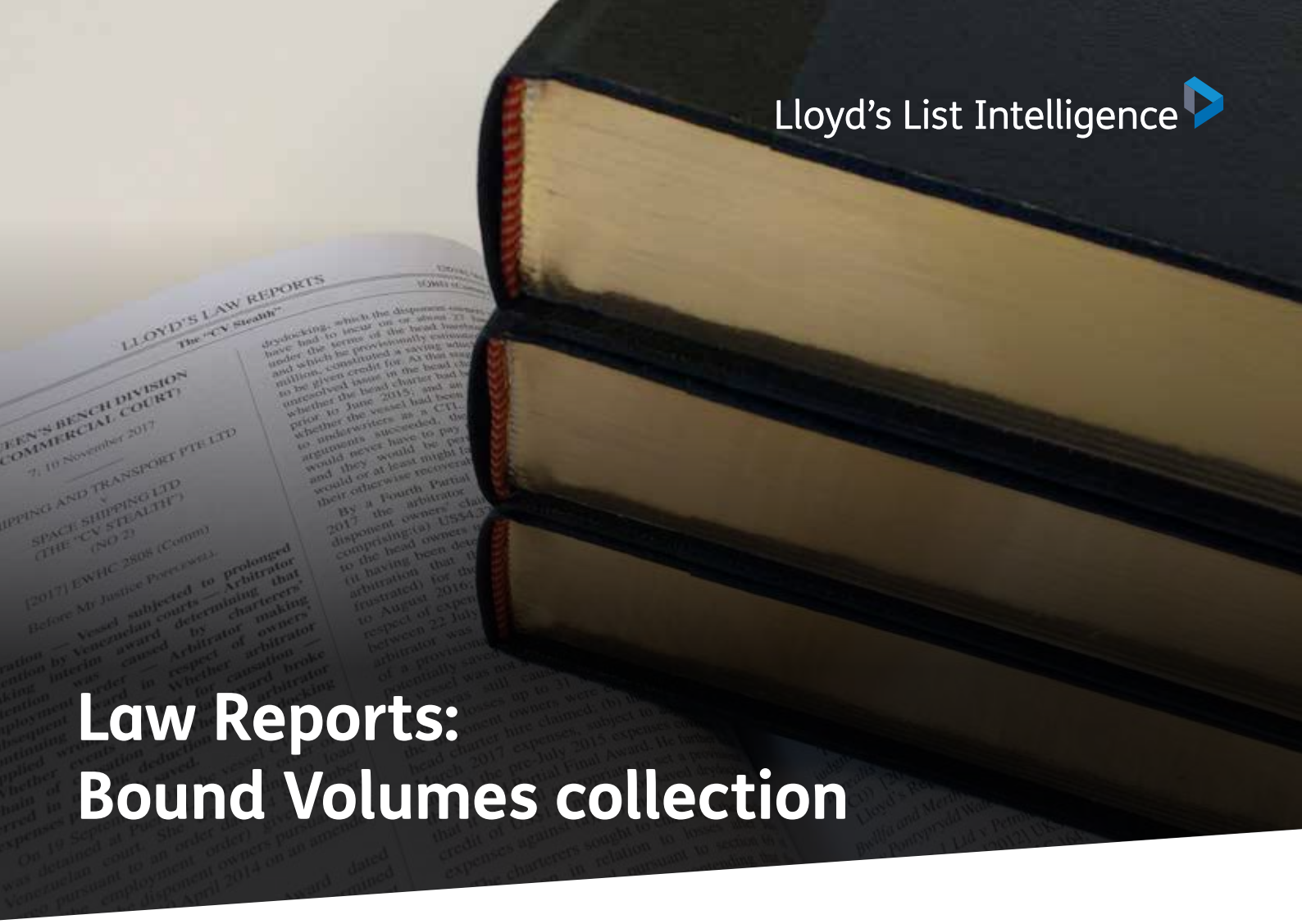

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