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INTERNATIONAL ARBITRATION QUARTERLY | EDITION Q2/2024

Welcome to the new edition of the HFW International Arbitration Quarterly, which features articles from colleagues across our network of global offices.

We begin with an article by our recently promoted partner and co-editor, Peter Sadler, on the high profile Australian case Clive Palmer v the Commonwealth of Australia, concerned with investment treaty mining claim against Australia. Followed by two articles looking at obtaining subpoenas against third parties to support Australian and also English arbitration proceedings. Next follows a roundup of arbitration related developments in Hong Kong. Jurisdictional challenges and SIAC arbitrations: the Singapore International Commercial Court's latest ruling are the subject of our next article, and we end by looking at the proposed new English Arbitration Act, due to come into force in Q2. Lastly, you can find out where to meet us next.

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"There is also an open question as to whether Mineralogy's corporate restructure renders the arbitration an abuse of process."

CLIVE PALMER V THE COMMONWEALTH OF AUSTRALIA

Clive Palmer is a prominent mining magnate and self-described "proud Australian". He is the leader of an Australian political party, the United Australia Party. He was also a senator in the Australian parliament between 2013 and 2016. How then is his company pursuing an arbitration against Australia for violation of an investment treaty?

When the proponent of a major project seeks to exploit a natural resource in Western Australia, they will look to agree the terms and conditions on which that resource will be developed with the State Government in a State Agreement. State Agreements are then usually ratified in Parliament as a State Agreement Act. This well-trodden path was followed by Mineralogy Pty Ltd (**Mineralogy**), a company controlled by Clive Palmer, in respect of the proposed Balmoral South iron ore project in the Pilbara region of Western Australia.

The State Agreement between Mineralogy and the State Government concerned the mining and processing of iron ore in the Pilbara, the transportation of that ore from mine to new port facilities, and the shipment of the processed ore. It was ratified and authorised in Parliament by the Iron Ore *Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).*

The Mineralogy State Agreement contained an agreement to arbitrate. In 2012, a dispute arose between the parties as to whether the State Government had properly dealt with Mineralogy's application to develop the Balmoral South iron ore project under the State Agreement. Mineralogy alleged that the State had breached that agreement. The dispute was referred to arbitration and the former High Court justice, the Hon Michael McHugh AC QC, was appointed as sole arbitrator. In a 2014 award, Mr McHugh found in Mineralogy's favour and held that the State had not properly dealt with Mineralogy's proposal.

Around the time of that award, the State Government purported to deal with Mineralogy's application, and in doing so, imposed 46 conditions to the approval of the project.

In late 2018, the parties referred a second dispute to arbitration concerning Mr McHugh's 2014 award; in particular, whether the award precluded Mineralogy from pursuing a claim for damages. The parties also referred a dispute about whether Mineralogy was entitled to pursue a claim for breach of the State Agreement and damages based on the 46 conditions imposed by the State Government, which Mineralogy said were unreasonable. In a 2019 award, Mr McHugh found in Mineralogy's favour and held that it was not precluded from pursuing either claim.

These two awards paved the way for a third arbitration in which Mineralogy's sizable claim for damages arising from the State's breaches of the State Agreement would be assessed. That arbitration was set down for hearing in November 2020. The State Government said that Mineralogy's claim for damages was for approximately $30 billion which, if successful, would *"pose a credible threat to the financial wellbeing of West Australian taxpayers".*

Before the hearing, in August 2020, the State Government enacted the Iron Ore Processing *(Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA).* The amending act terminated the arbitrations, nullified Mr McHugh's prior awards, and quashed Mineralogy's ability to agitate the claims in relation to the Mineralogy's application under the State Agreement. The unilateral actions of the State Government in amending the State Agreement were obviously of concern to proponents of other major projects in Western Australia; however, the State Government quickly sought to reassure these proponents and the wider business community that this was a one off situation which was necessary because Clive Palmer was looking to bankrupt Western Australia.

Mineralogy challenged the validity of the amending act in Australia's highest court. In a judgment handed

down on 13 October 2021, the High Court upheld the validity and operability of the act. The court was alive to the wider implications of the amending act, with Justice Edelman stating *"The decision to enact [certain sections of the amending act] may reverberate with sovereign risk consequences. But those consequences are political, not legal."*

So far, these disputes have all been domestic affairs. That changed in January 2019, when Zeph Investments Pte Ltd (**Zeph**), a company incorporated in Singapore and reportedly owned by Clive Palmer, acquired all the shares in Mineralogy. It is reported that the corporate restructure occurred before the date of the amending act. No definitive reason has been published by Mr Palmer or Mineralogy for the restructure.

In early 2023, Zeph commenced a treaty arbitration against Australia under the *ASEAN-Australia-New Zealand Free Trade Area* (**AANZFTA**) agreement. The AANZFTA is a free trade agreement between the Member States of the Association of Southeast Asian Nations (which includes Singapore), Australia, and New Zealand. In chapter 11, the AANZFTA sets out the protections for investors, including most favoured nation treatment (article 4), fair and equitable treatment (article 6), full protection and security (article 6).

The AANZFTA includes a denial of benefits provision (chapter 11, article 11). That provision denies the benefit of the protections under the treaty to investors who technically meet the definition of "investor" but have no real connection with their home state. Whether that provision operates to preclude Zeph from invoking treaty protection remains an open question in the arbitration.

There is also an open question as to whether Mineralogy's corporate restructure renders the arbitration an abuse of process. That same question was central to the prominent *Philip Morris Group v Australia* (Tobacco plain packaging) case, in which the tribunal confirmed that it should be slow to afford protection to an investor in blatant cases of treaty shopping. When considering whether an arbitration is an abuse of process, the tribunal will take into consideration matters such as the investor's knowledge at the time of the restructure and the cogency or persuasiveness of the investor's rationale for the restructure. It is notable that two of the arbitrators that decided the *Philip Morris* case (Gabrielle Kaufmann-Kohler and Donald McRae) are also appointed to the tribunal in Zeph's arbitration.

Finally, it is worth mentioning that in August 2023, Zeph filed an application in the arbitration for interim measures. The application was heard in October 2023 and the tribunal provided its ruling on November 2023. Zeph sought a number of protective measures, including asking the tribunal to order that Australia *"refrain from interfering in any way with the Claimant's witnesses, representatives or counsel including... by attempting to access the Microsoft or other accounts of the Claimant's Representative or those assisting the Representative"*. To support the measures, Zeph pointed to Australia's alleged nefarious conduct in the Timor-Leste case (in which it was claimed Australia spied on Timor-Leste in a maritime boundary dispute) and the fact numerous members of Zeph's legal team received attempted login notifications to their Microsoft accounts at exactly the same time. The Tribunal refused to make orders for interim measures; however, it was nevertheless "concerned" and reminded *"the Parties that they have a duty to arbitrate in good faith, which includes the obligation to refrain from conduct that may undermine the fairness and integrity of the proceedings"*.

The hearing in this intriguing case is currently set down for three days in September 2024 and will no doubt provide some further content for future editions of this bulletin.

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OBTAINING SUBPOENAS AGAINST THIRD PARTIES IN AID OF ARBITRATION IN AUSTRALIA

In Australia, applications for the production of documents or the provision of evidence by third parties to an arbitration are usually decided *ex parte* and on the papers. While any person with a sufficient interest may apply to set such a subpoena aside, there is no practical or legal requirement to give such parties an opportunity to oppose the issue of the subpoena.

In a succinct but illuminating judgment, Croft J distilled the legal principles applicable to obtaining a subpoena to third parties for the production of evidence in the course of domestic arbitration. In *Bonacci Infrastructure Pty Ltd v John Holland Pty Ltd* [2023] VSC 740, his Honour looked to the *Commercial Arbitration* Act 2011 (Vic) (**CAA**) and the Supreme Court (*Miscellaneous Civil Proceedings) Rules 2018* (Vic) (**Rules**) to define two gates to the issue of subpoenas to third parties in the course of domestic arbitration pursuant to the CAA.

First, section 27A of the CAA requires the tribunal to authorise a party to apply for the issue of a subpoena by the courts. That subpoena may require attendance at a hearing, the production of documents, or both. The tribunal's decision permitting a party to apply for a subpoena should clearly specify the terms of the inquiry as against any third party, such as the limits to the disclosure to be ordered. In practice, this is often achieved by asking the tribunal to review and approve a draft form of the subpoenas, and then recording that approval in a direction or order.

Second, r 9.14 of the Rules require the applicant to specify (by way of affidavit) the terms upon which the tribunal has authorised a subpoena. While its job is not to 'rubber stamp' the issue of a subpoena authorised by a tribunal, the court will have regard to the reasonableness of the issue and terms of any subpoena requested by a party to the arbitration and authorised by the tribunal. While exercising such discretion, the court should consider whether the tribunal has properly determined that the evidence sought is relevant to the issues in the proceeding, and if the subpoena is being issued for a legitimate forensic purpose, with consideration of the evidence of the reasonable grounds upon which the application is founded. In the early stages of an arbitration, it can be difficult to identify with precision the issues in dispute. This is particularly the case when the parties adopt a memorials approach to presenting evidence and submissions. An agreed list of issues often provides the scaffolding for the tribunal to be satisfied that the subpoena is sought for a relevant purpose (and then the court to be satisfied the tribunal has properly determined that matter).

If compliance with the Rules and s 27A of the CAA has been demonstrated, it will likely be reasonable for the court to issue a subpoena on the terms sought.

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"section 27A of the CAA requires the tribunal to authorise a party to apply for the issue of a subpoena by the courts. That subpoena may require attendance at a hearing, the production of documents, or both."

OBTAINING SUBPOENAS AGAINST THIRD PARTIES IN AID OF ARBITRATION IN ENGLAND

The English courts have a long history of supporting arbitration proceedings, including in securing attendance of witnesses and production of witness evidence both from parties and non-parties to the arbitration.

Under Sections 43 and 44 of the *Arbitration Act 1996*, the English courts can compel the attendance of witnesses and production of witness evidence. In this article, we discuss the extent and circumstances in which the English courts can use these powers.

Attendance of witnesses

Section 43 enables a party in English arbitrations to avail itself of the same court powers available in English litigation in respect of compelling the attendance of witnesses and production of their evidence. Those court powers are provided for by Civil Procedure Rule Part 34.

Key points to note in relation to this power are that:

- it only applies to attendance of witnesses and the production of documents/evidence before the relevant arbitral Tribunal (Section 43(1)), and so is not relevant to a pre-hearing deposition;
- it is only permitted if the Tribunal gives permission, or the parties to the arbitration agree to it (Section 43(2)), which the court will require to be confirmed in writing. The Tribunal is likely to give permission for a party to apply for a summons from the court if it considers the witness likely to be important to fairly deciding the outcome of the arbitration (the court will then make a final decision on this when deciding whether to grant the witness summons);
- the relevant witness must be in the UK (Section 43(2)(a)); and
- section 43 is a mandatory section of the Arbitration Act 1996, so the parties cannot agree to exclude it.

Taking of witness evidence

Section 44(2)(a) enables the court to order the taking of witness evidence, and section 44(2)(b) enables the court to make orders as to the preservation of evidence.

Unlike section 43, section 44(2)(a) can extend to foreign-based witnesses. It may also allow parties to a foreign arbitration to obtain witness evidence from a witness based in England.

Key points to note in relation to these powers are as follows[1]:

- Section 44 is not a mandatory provision of the *Arbitration Act 1996*, so parties can agree to exclude it (either expressly or impliedly);
- the power in section 44(2)(a) extends to third parties (i.e., it can require non-parties to the arbitration to give evidence). The current position, based on recent case law, is that the power of preservation of evidence is unlikely to extend to third parties. However, the recent Law Commission Review of the *Arbitration Act 1996* proposes that all powers under section 44 should extend to third parties; this point is likely to be incorporated in the new Arbitration Act, when passed;
- these powers can extend to foreign arbitrations, where the relevant witnesses or the relevant evidence are in England;
- section 44(3) empowers the court to make an order, provided that there is an urgent need to do so, for the preservation of evidence directly upon an application to it from a party to the arbitration, i.e. without the permission of the Tribunal. However, if the need for the power is not urgent, or it relates to the taking of witness evidence, then the Tribunal's permission or the other party's agreement is needed; and
- the powers under section 44 will only be available if the relevant Tribunal or arbitral institution does not already have the power to itself grant the relief sought.

Given the above, it is clear that the English courts will support arbitration proceedings by acting to secure non-party evidence and witness attendance. However, there are also important restrictions and points to be considered regarding the use and availability of these powers.

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Footnote

1 Note that Section 44 is one of the more complex sections of the Arbitration Act 1996, and so a more detailed consideration of this section is advised where a party contemplates its use

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"Landmark arbitration – related judgments were also handed down by the Hong Kong Courts"

HONG KONG ARBITRATION: 2024 – AN EXCITING YEAR AHEAD

Hong Kong had a busy 2023 of arbitration and is looking forward to an exciting 2024 ahead.

2023: A Busy Year of Arbitration

2023 has been an exciting year of arbitration in Hong Kong. Important arbitration events were back in full swing following the lifting of all COVID measures, facilitating lively exchanges between delegates at events including the 2023 Hong Kong Summit on Commercial Dispute Resolution and the 2023 Hong Kong Arbitration Week, both of which took place in October 2023. Consultation sessions on proposed amendments to the HKIAC's 2018 Administered Arbitration Rules (the **HKIAC's Rules**) (which will be further discussed below) also took place in late 2023.

Also in October 2023[1], the HKIAC announced receipt of the 100th application under *The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region* (which came into force on 1 October 2019) (the **Arrangement**). Under the Arrangement, parties to Hong Kong-seated arbitrations can seek interim relief directly from mainland courts with acceptance letters issued by the HKIAC. Among the 100 applications with acceptance letters issued, 69 decisions were issued by mainland courts which had granted interim relief in 65 applications preserving assets totalling RMB 15.8 billion.

Landmark arbitration-related judgments were also handed down by the Hong Kong courts in 2023, including:

- *C v D* [2023] HKCFA 16: the Court of Final Appeal (the **CFA**) confirmed that in absence of a contrary agreement, compliance with pre-arbitration conditions is a matter of admissibility of a particular claim to arbitration which is not amendable to review by the court, limiting judicial intervention in the arbitral process[2];
- *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9: the CFA made its landmark decision that the court should not exercise its jurisdiction in a bankruptcy petition if the underlying disputed debt is subject to an exclusive jurisdiction clause (**Guy Lam Approach**), paving the way for the extended application of arbitration clauses in winding-up proceedings (which will be further discussed below);
- *Song Lihua v Lee Chee Hon* [2023] HKCFI 1954: the Court of First Instance (the **CFI**) confirmed that an arbitrator will not be compelled to give evidence in proceedings which challenge his or her awards, upholding the independence and immunity of arbitrators; and
- *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558: the CFI upheld the case management power of arbitral tribunals to hold fully virtual arbitration hearings.

Looking ahead to 2024

A number of important events have already taken place so far in 2024, with more to come:

1. on 3 May 2024, the HKIAC announced its new Rules which come into effect on 1 June 2024. Major amendments and their implications are discussed below;
2. Joanne Lau, an experienced arbitration specialist, joined the HKIAC as Secretary-General with effect from 26 February 2024;
3. the HKIAC released its Hong Kong arbitration statistics for 2023 on 6 March 2024;
4. more interim measures in aid of Hong Kong arbitral proceedings will likely be granted by mainland courts;
5. the application of the Guy Lam Approach in winding-up proceedings involving arbitration clauses was clarified by the Court of Appeal on 23 April 2024 (see below); and
6. more landmark international arbitration events were held in Hong Kong including the Congress of International Council for Commercial Arbitration (**ICCA**)

from 5 to 8 May 2024, further emphasising the importance of Hong Kong as an international arbitration centre.

Amendments to the HKIAC's Rules

Major amendments include:

- additional provisions which encourage diversity when appointing arbitrators;
- enhancement of the HKIAC's role and powers to preserve the efficiency and integrity of arbitrations;
- additional provisions addressing information security and environmental considerations in arbitrations;
- clarification of arbitral tribunals' case management powers to make preliminary determinations on issues that it considers would dispose of all or part of the case and adopt efficient procedures;
- strengthened mechanism to proceed with a single arbitration under multiple contracts; and
- revised provisions to include additional factors to consider when determining costs of arbitration in awards.

With the proposed adoption of factors including outcome related fee arrangements (**ORFA**) in costs consideration under the HKAIC's Rules, the number of arbitrations under flexible fee arrangements in Hong Kong will likely continue its rising trend in 2024, maintaining Hong Kong arbitration's competitiveness with other jurisdictions where ORFA arrangements are highly popular.

More interim measures in aid of Hong Kong arbitral proceedings

As of 26 January 2024, HKIAC has issued acceptance letters for 106 applications where assets with total value of RMB 27 billion were requested to be preserved. Among the 106 applications, 80.7% of the applicants were from foreign applicants and 71 decisions were issued by mainland courts, granting interim relief in 67 applications, preserving assets totalling RMB 16.3 billion.

With the rising trend of applications and the high success rate of obtaining interim relief in mainland courts, we anticipate that the number of applications for interim relief measures under the Arrangement will continue to increase in 2024. The effective mechanism of the Arrangement may also attract more foreign parties to choose Hong Kong as their preferred seat of arbitration and commence their arbitration in Hong Kong for disputes involving parties which hold substantial mainland assets.

Further clarification of the application of Guy Lam Approach

Despite the CFA's decision on the Guy Lam Approach, whether the approach would extend to general arbitration clauses in winding-up proceedings was uncertain with inconsistent CFI decisions in second half of 2023.

In Re Simplicity & Vogue Retailing (HK) Co., Ltd [2023] HKCFI 1443, Linda Chan J held that the Guy Lam Approach would not apply to general arbitration clauses in winding-up proceedings and made a winding-up order against the company on basis of failing to pay security in time despite the existence of an arbitration clause in the underlying bond and guarantee documents. However, subsequently in *Re Shandong Chenming Paper Holdings Limited [2023]* HKCFI 2065 (**Re Shandong Chenming**), Harris J took a different view and held that the Guy Lam Approach would equally apply to an arbitration clause in a winding-up petition.

The Court of Appeal's judgments of 23 April 2024 will be the subject of seperate article. However, in summary the court held that the Guy Lam Approach could be applied to cases concerning arbitration agreements and that the approach to be taken by the court should be 'multi-factorial'.

Conclusion

2024 is anticipated to be another important and exciting year of arbitration in Hong Kong. The number of international arbitrations taking place in Hong Kong will likely increase and Hong Kong will remain a leading choice of seat for international arbitration.

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Footnotes:

1. HKIAC receives 100th application under PRC-HK Interim Measures Arrangement
2. Highest Court in Hong Kong Clarifies the Limits of Judicial Intervention in the Arbitral Process, HFW International Arbitration, October 2023

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"the SICC brought further clarity to a frequently disputed, and occasionally difficult area of arbitration law, namely, the relationship between a dispute on the validity of the substantive contract and an arbitration agreement in the underlying contract."

RELIANCE INFRASTRUCTURE LTD V SHANGHAI ELECTRIC GROUP

Jurisdictional challenges and SIAC arbitrations: the Singapore International Commercial Court's latest ruling.

In the case of *Reliance Infrastructure Limited v Shanghai Electric Group Co Ltd* 2024 SGHC (I) 3, which involved an application to set aside a Singapore-seated SIAC arbitration award, the Singapore International Commercial Court (**SICC**) considered several issues in relation to the waiver of jurisdictional objections on the grounds of fraud and/or the want of authority. In dismissing the setting aside application, the court has emphasised the importance of raising jurisdictional objections in a timely and unambiguous manner and, in the process, made further clarifications on the principle of separability in relation to challenges to the validity of an arbitration agreement and the underlying contract.

Summary of the facts and procedural history

The dispute involved a Singapore-seated arbitration award arising out of a guarantee letter between Reliance Infrastructure Ltd (**RIL**) and Shanghai Electric Group (**SEG**) under which RIL had purportedly guaranteed the performance of another Reliance entity's payment obligations under a contract where SEG was to procure equipment and services for a power plant in India (**Guarantee Letter**). RIL sought to set aside the award on the grounds that the Tribunal lacked jurisdiction due to the invalidity of the arbitration agreement in the Guarantee Letter. The two principal grounds of RIL's application were: (i) the Guarantee Letter and, by extension, the arbitration agreement in it, was a forgery (**Forgery Objection**); and/or (ii) the person who signed the Guarantee Letter on behalf of RIL (**Mr Agrawal**) did not have the authority to do so (**Authority Objection**). Neither of these objections was specifically raised as an objection to the Tribunal's jurisdiction during the arbitration proceedings.

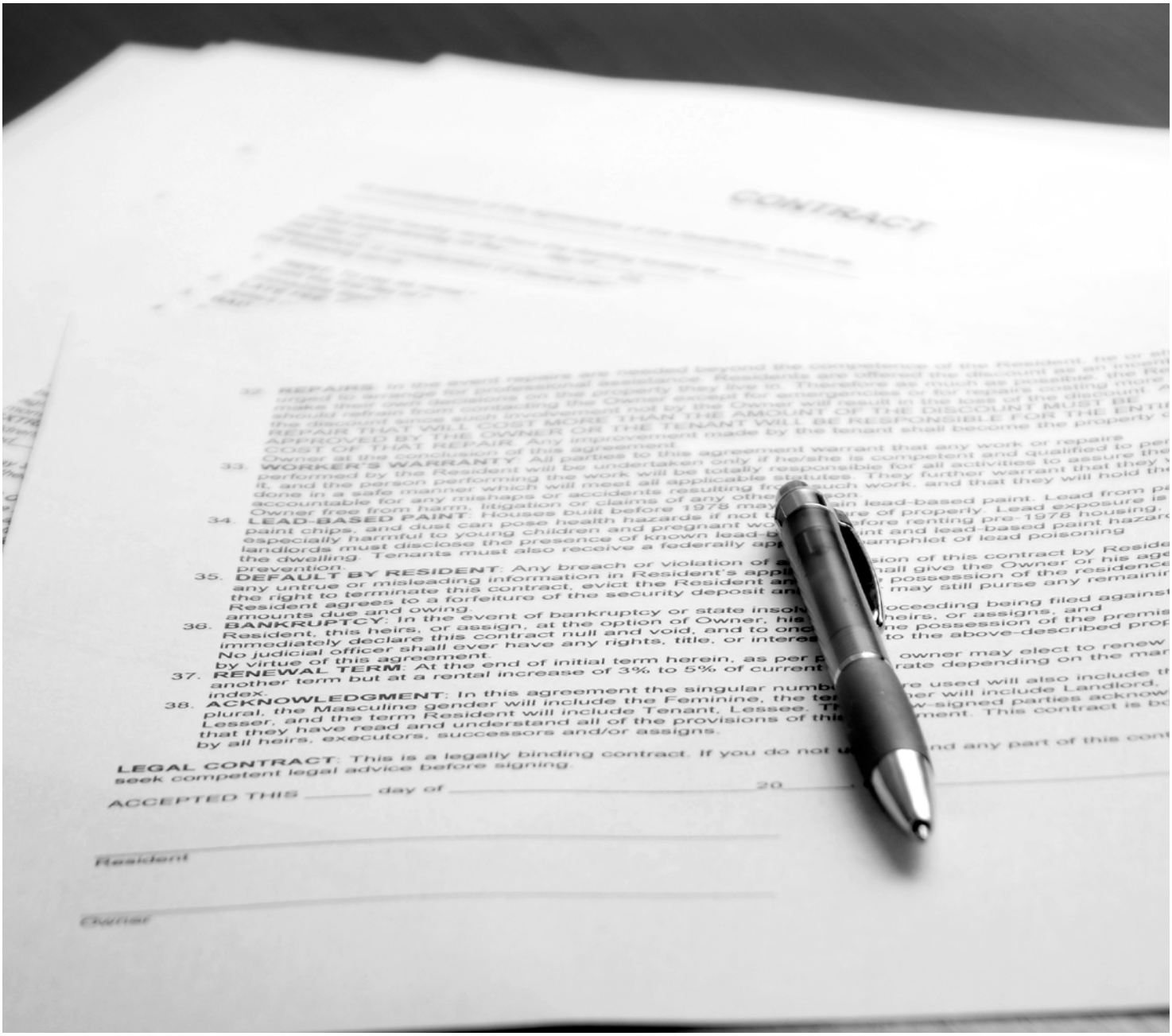
Summary of the Court's findings

The SICC disposed of RIL's application on the grounds that RIL had waived its right to challenge the tribunal's jurisdiction on the above two grounds. The Court observed that the RIL was aware of the facts and matters relating to the Forgery Objection even before the commencement of the arbitration, and this became more evident as the arbitration progressed. After reviewing RIL's conduct during the arbitration proceedings, the SICC concluded that RIL *"had made a conscious choice not to pursue its [Forgery Objection] because it was very confident that [...] its other challenges to the validity of the Guarantee Letter would prevail"* and that it was only reviving this objection *"because the outcome differed from its expectation"* (see paragraph 83).

As for the Authority Objection, the SICC noted that whilst RIL had *"put in issue"* Mr Agrawal's purported lack of authority to enter into the Guarantee Agreement during the arbitration proceedings, it *"did not at any time seek a ruling from the Tribunal that it had no jurisdiction to rule on the Parties' dispute, based on* [the Authority Objection]." It concluded that as RIL had failed to, *"so it is precluded by waiver from raising that objection now."*

In arriving at this conclusion, the SICC brought further clarity to a frequently disputed, and occasionally difficult area of arbitration law, namely, the relationship between a dispute on the validity of the substantive contract and an arbitration agreement in the underlying contract. The SICC rejected RIL's attempts to conflate its objection to the validity of the Guarantee Agreement and the arbitration agreement in the Guarantee Agreement.

The Court observed that the relevant question was whether RIL *"did not pursue its jurisdictional objection, on the grounds of Mr Agrawal's want of authority to make an arbitration agreement, during the arbitral process itself"* (paragraph 94). This was *"conceptually separate"* to whether Mr Agrawal had the



authority to enter into the Guarantee Agreement (paragraph 92). Whilst the SICC recognised that, in certain circumstances, an allegation that a contract was entered into without authority *"'may well be an attack' on the arbitration agreement* [in that contract]", a situation contemplated in the Singapore Court of Appeal case of *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGCA 40 which observed that *"[t]he principle of separability cannot guarantee the survival of the arbitration clause in all circumstances"*, the SICC cautioned that the applicability of these observations is fact specific. Whilst the facts and evidence used to invalidate both agreements could be identical in certain circumstances, an arbitration agreement and the underlying contract *"remain distinct agreements"* (paragraph 93). The SICC concluded that, on the facts, Mr Agarwal did have the requisite authority to enter into arbitration agreements on behalf of RIL generally because he entered into another contract (unchallenged) contract with SEG that contained an arbitration agreement (paragraph 91).

Key takeaways

The SICC's findings in this case have reinforced the "pro-arbitration" attitudes of the Singapore Courts. The SICC was unimpressed at RIL's attempts to, in the case of the Forgery Objection, revive an argument that it had initially not pursued for tactical reasons and, in the case of the Authority Objection, belatedly *"recast its merits defence as a jurisdictional objection for which it seeks de novo review."*

These observations underscore the importance of making timely and precisely framed jurisdictional objections in Singapore-seated arbitration proceedings, and to carefully consider the tactical and legal implications of not choosing to pursue certain claims/objections. The outcome of this case has emphasised the limited scope of doing so at subsequent stages of the arbitration proceedings and/or during the enforcement of the final award.

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REFORM OF THE 1996 ENGLISH ARBITRATION ACT – THE SIX KEY PROPOSED AMENDMENTS

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"section 27A of the CAA requires the tribunal to authorise a party to apply for the issue of a subpoena by the courts. That subpoena may require attendance at a hearing, the production of documents, or both."

The Law Commission's (the Commission) Review of the 1996 English Arbitration Act (AA1996) is intended to modernise arbitration laws in England and Wales and to ensure that arbitration remains fit for purpose, and continues to support England and Wales as a leading forum for commercial arbitration.

The Commission carried out a widescale review and consulted with arbitration practitioners and the wider arbitration community before compiling its recommendations and Bill in 2023, which is now working its way through Parliament and is expected to become law in the first half of 2024.

In the Bill, the main reforms to the AA1996, are as follows:

Arbitrators' Statutory Duty of Disclosure

The AA1996 provides that arbitrators must be impartial (section 33). Under English law, arbitrators have a continuing duty to disclose "any relevant circumstances", which might reasonably give rise to justifiable doubts as to their impartiality, as established by the Supreme Court in *Halliburton v Chubb* [2020] UKSC 48.

The Bill provides that the duty will impact sooner than the Supreme Court held in the case in Halliburton. Under the Bill, the duty will commence from the time the arbitrator is approached to act. In addition, the new duty of disclosure is objective i.e. based on what the arbitrator ought reasonably to be aware (rather than, subjectively i.e. based on actual knowledge).

The proposed reforms go beyond the requirements of some of the Institutional Rules e.g. the LCIA 2020 Rules, but will be welcomed by most practitioners as assisting with transparency, and are reflective of the feedback to the Commission's consultation.

Enhanced Arbitrator Immunity

Although the AA1996 already provides wide immunity for arbitrators in the discharge of their duties, the Bill seeks to extend protection to arbitrator resignations (unless unreasonable) and arbitrator costs liabilities relating to applications for their removal (again, unless refusal was unreasonable).

These reforms will support and encourage those wishing to act as arbitrators, and so are likely to be welcomed by the arbitration community.

Summary Disposal

The AA1996 does not contain express provision for summary disposal in arbitration.

The Bill gives arbitrators a default power of summary disposal, exercisable on application by a party, and subject to a test of there being *"no real prospect of success"* on the relevant issue.

The reforms will help resolve certain disputes more efficiently and places arbitration on a similar footing to English litigation in this regard.

Refining Challenges to Awards Under Section 67

The so-called "second bite of the cherry" under section 67 AA1996 arises when a party unsuccessfully challenges the tribunal's jurisdiction to hear the arbitration or part of it during the arbitration, and later challenges the award in court claiming that the tribunal lacked jurisdiction to determine the arbitration or part of it.

The Bill provides that a challenging party can only make new objections or present new evidence relating to jurisdiction if it can demonstrate that such objections could not have been raised on the earlier challenge.

In a departure from the Supreme Court judgment in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC, the Bill provides that there should be no rehearing of oral evidence, unless the court determines this to be in the interests of justice. This is aimed at preventing parties from making a

tactical appeal in the hope of causing delays as the court would effectively hold a re-hearing of the issues.

Clarity on the Governing Law of an Arbitration Agreement

The issue of governing law arises when the applicable law of the parties' main contract differs from the seat of arbitration (e.g., Swiss law contract, English seat of arbitration), or is silent on that choice of governing law. Despite the decision of the Supreme Court in *Enka v Chubb* [2020] UKSC 38, there remains scope for uncertainty.

The Bill proposes a new rule that, in the absence of express choice, the applicable law of the arbitration agreement will be the law of the seat. From a party's perspective, such a simple and consistent rule makes commercial sense and will be welcomed by many.

Empowering Courts to Support Arbitration:

The Commission recommended extending the courts' supporting powers to extend to peremptory orders made by emergency arbitrators and orders against third parties.

The Commission did not support the codification of a duty of confidentiality, reasoning that to attempt to do this would not be sufficiently comprehensive, nuanced, or future-proof. Neither would a statutory duty of arbitrator independence be practical (or even possible), given the limited number of suitable arbitrators in certain sectors.

In essence, the Bill aims to enhance clarity, certainty, and efficiency, catering to the evolving needs of business and ensuring smoother resolution of disputes by arbitration, thus maintaining England & Wales as a leading forum for commercial disputes.

The Bill is currently passing through the UK's legislative process and is expected to pass as drafted and come into force by the Summer. We will provide an update when the Bill becomes law.

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Andrew Bandurka co-authored this article whilst he was a consultant at HFW.

HFW EVENTS

Upcoming

We are hosting an Arbitration Webinar Series throughout 2024. The series aims to provide valuable insights and practical knowledge on various aspects of arbitration, covering the following topics: drafting arbitration agreements, jurisdictional challenges, effective case management, persuasive case presentation, effective expert advice, enforcement of arbitral awards. If you would like more information about this event, please email events@hfw.com.

We are pleased to share that we'll be co-hosting an International Arbitration panel event and reception with Thought Leaders 4, if you would like more information about this event, please email events@hfw.com.

Our Dubai office will be co-hosting an arbitration day in Kuala Lumpur in late June, together with local firm, Chooi & Co. along with the Asian International Arbitration Centre (AIAC) based in Kuala Lumpur. If you would like more information about this event, please email events@hfw.com.

On 6 June we will jointly host an arbitration conference in Shenzhen, China with the SCIA. The focus of the conference will be on jurisdiction and enforcement in international arbitration.

For more information on upcoming HFW events, click here.

Past

Nicola Gare from our HFW LITIGATION practice spoke on the panel on 'AI's Impact on Litigation' at the Future Lawyer UK Conference, on 18 April.

Geneva Partner, Michael Buisset was honoured to participate as a panellist in the London Court of International Arbitration (LCIA) International Arbitration and Commodities Seminar, held in Geneva on 25 March.

We are proud sponsors of Riyadh International Disputes Week. Members of our team including Abdulrahman Al-Ohaly, Mohammed Alkhliwi, Justin Whelan, Robert Lawrence, James Plant, and Nick Braganza recently attended the disputes week which took place on 3rd to 7th March.

Dan Perera attended the International Arbitration week in California on 11th to 15th March. The week focussed on AI legal proceedings as well as AI in the wider legal profession. Dan had the opportunity to meet senior personnel from Silicon Valley Arbitration & Mediation Centre (SVAMC, founder, Gary Benton); SIAC (Head of SIAC Americas, Adriana Uson); JAMS (Sherman Humphrey, Senior Global Practice Manager) and many others.

On 5-8 May, HFW partners Damian Honey, Nick Longley, Peter Murphy, Jo Delaney, Kevin Warburton, and Edward Beeley, from our global network attended the flagship ICCA congress in Hong Kong, together with over 1,500 other arbitration delegates.

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HFW has over 700 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our International Arbitration capabilities, please visit www.hfw.com/international-arbitration.

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