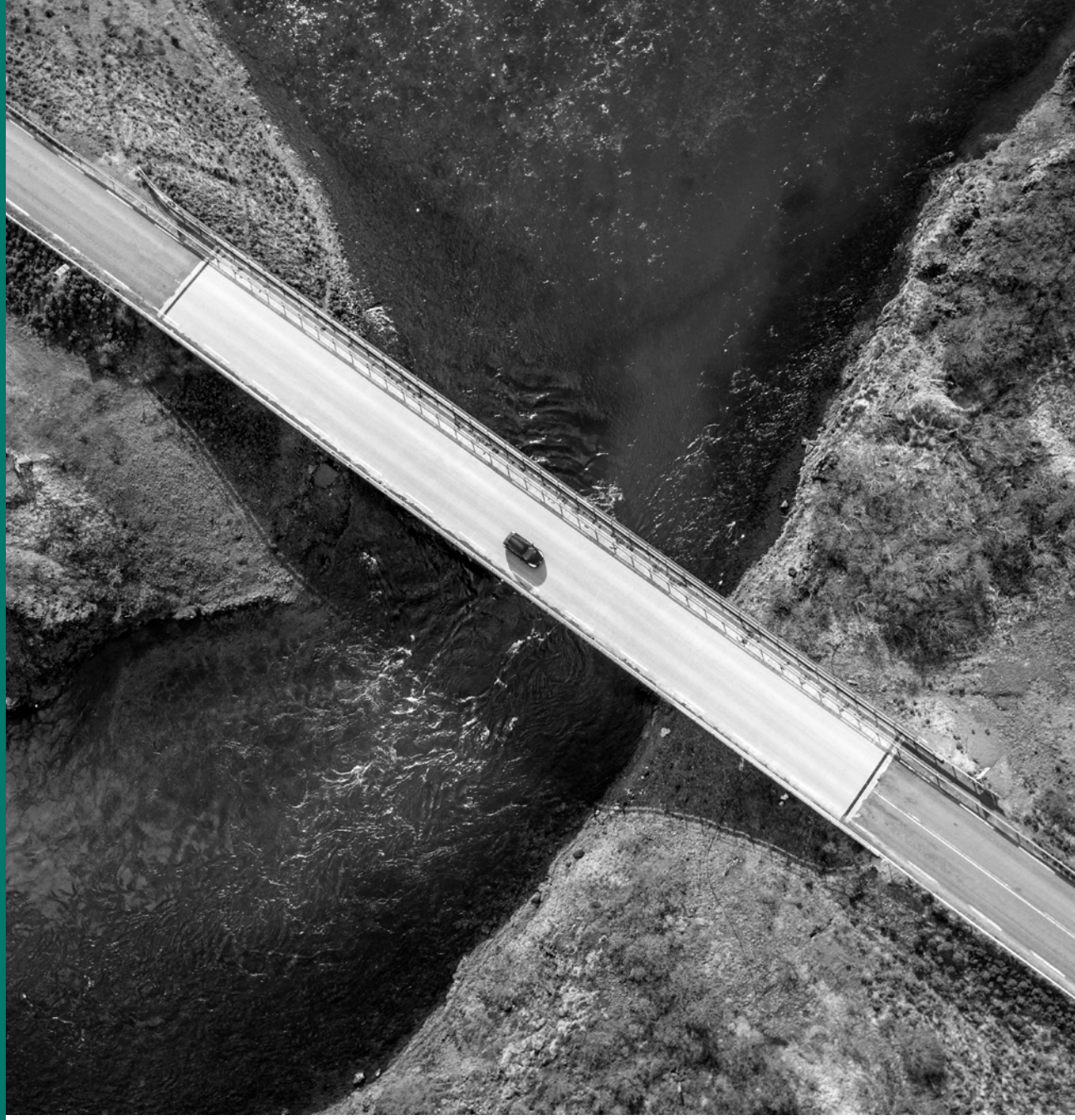
INTERNATIONAL ARBITRATION QUARTERLY | EDITION Q3/2024



Welcome to the Q3 edition of the HFW International Arbitration Quarterly, which features articles from colleagues across our network of global offices.

We start with an article from William Hold in HFW's Geneva office discussing a recent Swiss Supreme Court decision concerning the validity of intra-EU investment disputes.

That is followed by an article from Nick Braganza and Nicole Leahy in HFW's Dubai office discussing the recent successes of the DIAC.

Next, we have an article from Edward Beeley and James Henson in HFW's Hong Kong office discussing insolvency and arbitration under the laws of England, BVI, Hong Kong, and Singapore.

Following which, Nicola Gare in HFW's London office updates on reforms to the English Arbitration Act.

We then have an update on bias challenges and developments from the ICC arbitration by Julien Fouret, Gaëlle Le Quillec, Camille Dupuy, and Joy Harb in HFW's Paris office.

Finally, Suzanne Meiklejohn, Sadhvi Mohindru, and Aaron Tan Kai Ran in HFW's Singapore office discuss a Singapore Appeal judgment on early case dismissal.

We hope you enjoy this quarter's update.

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"An EU-based investor may now have to seek redress for its claims in the State Courts of the member state where the investment was made, which is an inherently uncomfortable position for investors in large projects."

SWISS SUPREME COURT UPHOLDS AN ARBITRATION AGREEMENT AND UNEQUIVOCALLY REJECTS ACHMEA AND KOMSTROY DOCTRINE

In a carefully reasoned judgment[1] (Judgment) handed down in April this year, the Swiss Supreme Court upheld an arbitration clause entered into between a company and a member state of the European Union by resoundingly rejecting the application of the 2018 *Achmea*[2] and 2023 *Komstroy*[3] decisions to a Swiss-seated arbitration.

In those two cases, the Court of Justice of the European Union (**CJEU**) held that arbitration clauses found in Bilateral Investment Treaties, respectively in the Energy Charter Treaty (**ECT**), were not compatible with EU law and that arbitral tribunals lack the substantive jurisdiction to hear such disputes when one of the parties was an EU entity and the other was a EU member state.

The reasoning which led to these decisions was effectively that the CJEU considers that, under the Treaty of the European Union (**TEU**), the member states have a duty to ensure that any issue which may potentially involve an interpretation of EU law must be decided by EU courts (and if necessary, by the CJEU) to ensure that EU law is interpreted and applied uniformly throughout the union. As arbitral tribunals are not part of the court systems of the EU member states, the risk exists that they might interpret and apply EU law differently. This, combined with the limited recourse which usually exists against arbitral awards, lead the CJEU to conclude that the concept of an arbitral tribunal being able to hand down such decisions was incompatible with the TEU, such that they were illegal.

These two judgments have had dramatic repercussions on legal certainty around arbitration clauses provided for in BITs or to other treaties to which EU member states are a party.

When member states are pursued in arbitration by entities based in the EU, they now often rely on the *Achmea* and *Komstroy* decisions to argue that the tribunal does not have the jurisdiction to hear the matter.

The practical effect of these decisions is that an EU investor may no longer rely on an arbitration clause against a member state of the EU found in a BIT or another treaty if that clause provides for an arbitration seated within the EU. Furthermore, an award which has been obtained by an EU-based investor against a member state under such a treaty will be unenforceable in the EU.

An EU-based investor may now have to seek redress for its claims in the State Courts of the member state where the investment was made, which is an inherently uncomfortable position for investors in large projects. EU investors now have to carefully structure their investments in order to be able to arbitrate against EU member states.

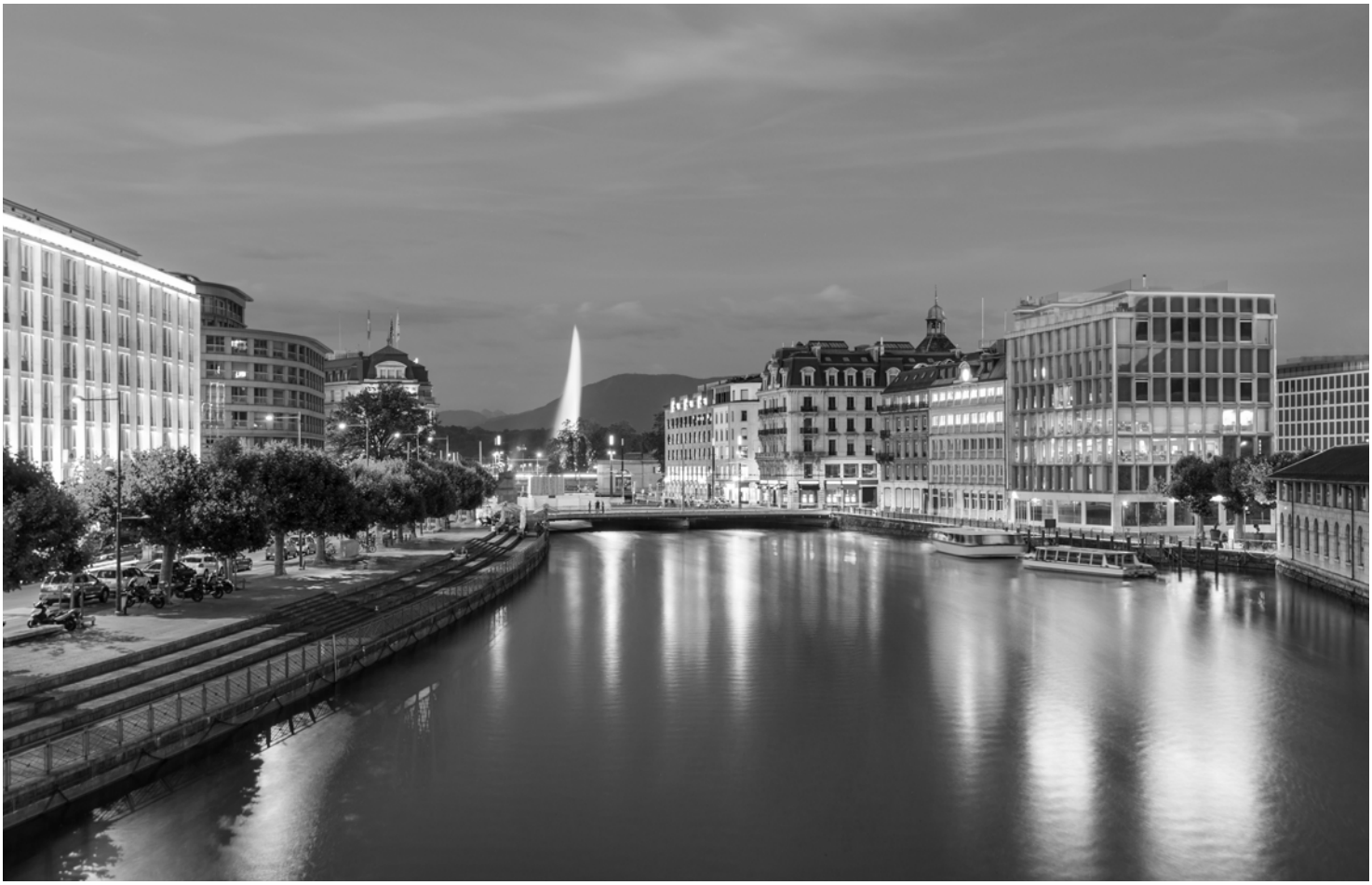
The EU has since renounced the ECT and its member states are currently renouncing a number of other treaties as a result of this doctrine.

The situation may however be very different if the arbitration clause provides for arbitrations to be seated outside the EU: a number of courts in non-EU countries, such as the United States, have declined to apply the *Achmea* and *Komstroy* judgments when arbitral tribunals or awards were challenged in front of them.

The Swiss Supreme Court has now joined that number.

The case referred to the Swiss Supreme Court concerned a French company (**Claimant**) who had made substantial investments in photovoltaic energy installations in the Kingdom of Spain (**Spain**) under a legal framework which provided

1 Decision 4A_244/2023, handed down on 3 April 2024
2 EUR-Lex - 62016CJ0284 - EN - EUR-Lex (europa.eu)
3 EUR-Lex - 62019CJ0741 - EN - EUR-Lex (europa.eu)



that tariffs levied by Spain would be maintained at advantageous levels for 25 years.

The tariffs were changed to the claimant's disadvantage before that and the claimant started arbitration against Spain under the ECT, which is a multilateral treaty that was signed by Spain and the EU, among others. The arbitration was seated in Switzerland and the arbitral tribunal found in favour of the Claimant.

Spain tried to have the award overturned on several grounds. One of them was a purported lack of jurisdiction of the tribunal to hear the dispute because, according to Spain, as a result of the Komstroy decision and the primacy of European law over the law of the member states, only the CJEU had the jurisdiction to interpret the ECT with respect to disputes between EU entities and member states.

In a carefully-reasoned decision, the Swiss Supreme Court, which directly hears appeals against Swiss awards, firmly rejected the proposition.

First, the court noted that the European Union had undertaken what it termed a *"crusade against international investment arbitration"* for several years.

Next, it considered that non-EU courts (such as Swiss courts) have no obligation to apply EU law as decided by the CJEU. Consequently, it was not bound by the *Achmea* and *Komstroy* decisions.

The court did note that while it would usually follow the decisions of a foreign apex court when interpreting the law of the jurisdiction of that court, it did not think that it was appropriate to do so where that court was deciding whether its law took precedence over an international treaty, because of the risk that the court could be tempted to unduly find in its own favour.

The Swiss Supreme Court then interpreted the ECT as it would any other treaty and came to the conclusion that Spain had unreservedly agreed to arbitration for disputes which arose out of that treaty.

It further noted that it was not convinced by the reasoning in the *Komstroy* judgment because the reason for the decision was mainly the preservation of the EU law, and it did not take into account international law, or generally-applied rules on the interpretation of international treaties.

Spain's challenge to the award was therefore dismissed.

This is a welcome decision in that it provides abundant clarity on the Swiss position on the topic.

Arbitration clauses and arbitral awards between an EU member state and a European entity will therefore continue to be upheld for Swiss-seated arbitrations. This will presumably also hold true for the enforcement of awards.

In many respects, the Judgment is not especially surprising. Switzerland's legal order is very arbitration-friendly and has been for a long time. The Swiss Supreme Court will almost invariably uphold agreements, whether they are agreements to arbitrate or international treaties. The Judgment further cements Switzerland's long-established position as one of the premier jurisdictions for international arbitration.

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"It has been almost 3 years since this seismic decision, and we are pleased to report that arbitration in the UAE is thriving. Any fears that this might create a long-term negative impact on Dubai as an arbitration centre have not materialised."

THE CHANGING LANDSCAPE OF DUBAI ARBITRATION

Dubai has seen some key developments in recent years that have had a positive impact on arbitration in the region. In this article we look at the development of the Dubai International Arbitration Centre and the impact of Decree No. 34.

The Dubai International Arbitration Centre

On 14 September 2021 the Dubai Government issued Decree No. 34 of 2021 (**Decree No. 34**), abolishing the DIFC-LCIA Arbitration Centre and the Emirates Maritime Arbitration Centre; the former was probably the most pre-eminent arbitration centre in the region. The law took effect only a few days later, leaving the region's burgeoning arbitration scene in turmoil. All pending cases from both centres were intended to be transferred to the Dubai International Arbitration Centre (**DIAC**).

It has been almost 3 years since this seismic decision, and we are pleased to report that arbitration in the UAE is thriving. Any fears that this might create a long-term negative impact on Dubai as an arbitration centre have not materialised.

Much of this has been down to the rejuvenation and sterling work of the DIAC, which has assumed a leading role with new Rules, a new Registrar, new administration and a new DIAC Court. This has enabled the DIAC to meet international standards and provide high quality alternative dispute resolution options.

DIAC has been providing dispute resolution services to parties doing business in, or through, the Middle East, Africa, and South Asia since 1994 and is the region's largest alternative dispute resolution centre. Parties to DIAC arbitrations in 2023 originated from 49 countries, including Saudi Arabia, the United Kingdom, India, Qatar and the USA.

There has been a clear increase in cases over recent years. A total of 355 cases were registered in 2023, a 4.4% increase since 2022. Of these 355 cases, 323 cases represent administered arbitrations, an increase of 11% since 2022. Almost two thirds of all DIAC arbitrations in 2023 were brought on the basis of a DIAC arbitration agreement.[1]

In recent years there has been a boom in the construction and real estate industries in the UAE. The global economic slowdown in the years after Covid-19 had no significant impact on this boom. As a consequence, it is no surprise that data provided by DIAC notes that construction and real estate cases took up 60% of DIAC's caseload in 2023 and construction contracts were the most common contract type, accounting for 40% of all underlying contracts. Interestingly, DIAC arbitrations in the banking and finance sector represented almost 10% of its caseload in 2023, suggesting that other industries are now using DIAC to resolve disputes.

On 21 March 2022 DIAC introduced new rules of arbitration (**2022 DIAC Rules**).

The 2022 DIAC Rules provided some much needed clarity and comfort when the transition period under Decree No. 34 came to an end. The 2022 DIAC Rules put in place a framework for parties to arbitrate, in line with global standards, and have ensured that DIAC remains an attractive proposition.

The 2022 DIAC Rules provide for expedited proceedings in certain circumstances, including in matters where the sums claimed are valued at AED 1 million or less (exclusive of interest and legal costs). Additional amendments include provisions for the recovery of legal costs, clarifying the use of third party funding, improved procedures for constituting tribunals, joinder and consolidation.

Furthermore, DIAC launched the DIAC Mediation Rules on 1 October 2023 increasing the options for businesses in the region.

DIAC is now known for internationally recognised rules and standards, and an efficient and reputable processes, which is successfully

1 We are grateful to DIAC for sharing some statistics with us during the course of the preparation of this article.

promoting business and commerce in the region and strengthening the market in Dubai.

Enforcement of arbitral awards

Developments aimed at making enforcement more straightforward via changes to the Civil Procedure Code and Federal Arbitration Law in the onshore courts have cemented the UAE's position as an unquestionably pro-arbitration jurisdiction.

The ability to successfully enforce and recognise both domestic and foreign arbitral awards in the UAE is illustrative of the UAE's ongoing commitment to be a hub for international arbitration. The UAE has been party to the New York Convention 1958 since 2006.

However, we have now seen how the courts both within the UAE and outside the UAE have viewed Decree No. 34 in the context of the enforcement of arbitration awards. Questions have arisen as to whether awards, which were issued by DIAC are enforceable when the underlying arbitration agreement stipulated that the parties should arbitrate under the DIFC-LCIA Rules.

This question has been addressed by international courts in the following cases:

- in November 2023, when the US District Court in Louisiana[2] refused to enforce a DIAC award where the parties had agreed to DIFC-LCIA arbitration in the dispute resolution clause. The court held that the arbitration agreement was unenforceable because the forum was no longer available and neither the US Courts nor the Dubai government had the power to rewrite an arbitration agreement.
- in March 2024, the Singapore Courts[3] did enforce a DIAC award where the parties had agreed to DIFC-LCIA arbitration, but only because the respondent had waived its right to challenge the arbitral tribunal's jurisdiction by participating in the proceedings without raising a jurisdiction challenge before the tribunal. Had the respondent raised jurisdiction challenges, the Singapore Court indicated that it may well have declined to enforce.

The UAE courts have taken a different approach.

In July 2024, the Abu Dhabi Court of Appeal[4] concluded that a DIAC award should be enforced, notwithstanding the underlying DIFC-LCIA arbitration agreement. The Abu Dhabi courts agreed with the defendant, declining jurisdiction and finding that the Decree provided for the DIAC to act as successor for future claims arising out of DIFC-LCIA arbitration agreements.

Finally in August 2024, the Courts of the Dubai International Financial Centre (the **DIFC Courts**) rejected an application[5] to set aside the enforcement of an arbitration award on jurisdictional grounds, where the parties had agreed to DIFC-LCIA arbitration, but where the arbitration award was issued by the London Court of International Arbitration (**LCIA**). The LCIA was appointed to manage the transition and administer DIFC-LCIA arbitrations in the period after Decree No. 34 was passed.

Commentary

Overall, we have seen the landscape of arbitration in the UAE go from strength to strength in recent years offering parties in the region a developed arbitration centre in the form of the DIAC, updated arbitration laws that meet global standards, and efficient enforcement and recognition mechanisms providing creditors with the opportunity to recover debts owed.

Ongoing questions regarding the enforceability of DIAC awards with underlying DIFC-LCIA arbitration agreements remain, but will likely subside over time.

Given these developments, the position of the UAE as an arbitration friendly jurisdiction can only increase.

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2 In the Louisiana Eastern District Court (2:23-cv-01396-GGG-KWR)

3 Application no. 882 of 2022

4 Judgment was issued in Case No. 449/2024, upholding a decision of the Court of First Instance (Case No. 1046/2023)

5 ARB 020/2022 Novak v Newland

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"This is a departure from the previous position under English law, whereby a winding up petition based on a debt would only be dismissed or stayed if the debtor could show that it disputed the debt "bona fide and on substantial grounds."

LANDMARK DECISION ON THE TENSION BETWEEN ARBITRATION AND INSOLVENCY EXTENDS BVI LAW TO ENGLAND & WALES

The Judicial Committee of the Privy Council (the JCPC) recently handed down a landmark decision dealing with a tension, which courts across common law jurisdictions have struggled to reconcile, namely: when deciding whether to stay a winding-up petition in favour of arbitration, to what extent should the court examine the merits on which the debt is disputed?

The significant case of *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd* (**Sian**),[1] means that the English courts will no longer stay or dismiss a winding-up petition where the underlying debt is subject to a generally-worded arbitration agreement, unless the debt is genuinely disputed on substantial grounds.

Whilst *Sian* arose from an earlier decision of the Eastern Caribbean Court of Appeal (the **ECCA**) on appeal from a finding of the BVI High Court, and as such would not automatically be binding on the English courts – the JCPC gave a direction pursuant to *Willers v Joyce*[2] that the approach adopted and subsequently followed by the English courts since the 2014 case of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[3] (**Salford Estates**) should no longer be followed.[4] This means that the current practice of the English courts in exercising their discretion to stay a creditors' winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds, will cease.

As to the impact of *Sian* on other jurisdictions, perhaps unsurprisingly (given it was bound by the Court of Appeal's decision in *Re Simplicity & Vogue Retailing (HK) Co Ltd*[5] (**Re Simplicity**) the Hong Kong Court of First Instance in *Re Mega Gold and Man Chun Sing Matthew v New Deal Trading Limited* (**Mega Gold**) declined to follow the decision in *Sian*. It will be interesting to see whether this remains the case when the issue inevitably comes before the Hong Kong Court of Appeal.

Jurisdictional comparison: England & Wales, Hong Kong, Singapore, and the BVI

In *Salford Estates* the English Court of Appeal held that the English courts should, unless there are exceptional circumstances, exercise their discretion in favour of a stay when the debt underlying a winding-up petition is subject to an arbitration agreement, even if the debt is not shown to be genuinely disputed.

This is a departure from the previous position under English law, whereby a winding up petition based on a debt would only be dismissed or stayed if the debtor could show that it disputed the debt "bona fide and on substantial grounds".

Salford Estates has been followed by the English courts, who have adopted a wide definition of what amounts to a dispute about a debt. If the debt is simply not admitted by the debtor, and in the absence of genuine and substantial grounds for doing so, the winding-up petition will be dismissed or stayed on the basis that the dispute is covered by the parties' agreement to arbitrate. That position could only be displaced by "wholly exceptional" circumstances.

The *Salford Estates* "exceptional circumstances" approach had a significant impact on other common law jurisdictions, and a similar approach is followed in Hong Kong and Singapore:

Hong Kong

Historically the courts in Hong Kong required the party seeking to stay the winding-up petition to bear the burden of evidencing a bona fide dispute on substantial

1 [2024] UKPC 16.
2 [2016] UKSC 44.
3 [2014] EWCA Civ 1575.
4 [124]-[126].
5 [2024] HKCA 299.

grounds, despite the presence of an arbitration clause.

However, in 2018 Hong Kong adopted the Salford Estates approach in the first instance decision of *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd,* (**Lasmos**)[6] but tweaked that approach to require that the debtor must have taken steps to commence arbitration under the agreement. The court did however comment that in exceptional circumstances it might be necessary for action to wind-up the debtor to be taken immediately (e.g. where the petitioner can show a risk of a dissipation of the company's assets).[7]

Following this decision the Court of Appeal confirmed the approach in in *Re Simplicity* that the parties' arbitration agreement should be respected and upheld. However, it also noted that the court has the discretion to assume jurisdiction over the dispute based on a "multi-factorial" approach, but the court will generally only do so where there are "strong reasons", such as where the dispute is frivolous or an abuse of process, or possibly where there are supporting creditors, or where there is evidence of a creditor community at risk.[8]

More recently the Court of First Instance had the opportunity in *Mega Gold* to consider whether to depart from the approach taken in *Lasmos* and *Re Simplicity* in light of the more recent decision in *Sian*. However, it declined to do so on the basis that it was bound by those decisions as a matter of precedent. In its judgment, the court confirmed that there is a high threshold to overcome in order to establish instances which are "frivolous" or amount to "an abuse of process", and noted that the usual approach of the Hong Kong courts is to require the petitioner to show that the company's defence/claim is bound to fail and hence does not warrant being investigated at trial.

Singapore

In Singapore, the *Salford Estates* approach was first adopted in *BDG v BDH*.[9] The court in BDG held that, where a petition concerns a debt subject to an arbitration agreement, it will be stayed if the debtor can show that the debt is disputed and that it has complied with the relevant arbitration agreement.

More recently the Court of Appeal in *AnAn Group (Singapore) LTE Ltd v VTB Bank*[10] held that winding-up proceedings will be stayed or dismissed where there is a valid arbitration agreement between the parties and there is a dispute that falls within the scope of the arbitration agreement.

In this case, the court expressed reluctance to examine the merits of the dispute because to do so would require an examination of the evidence in contravention of the parties' choice of arbitration for resolving their disputes. The court did however recognise a very limited exception to this approach namely, in circumstances where the dispute raised by the debtor amounted to an abuse of process.

The BVI

Conversely the decisions emerging from the BVI courts favour a test which requires the debt to be *genuinely disputed on substantial grounds* before a creditor's application will be dismissed or stayed on the basis of an arbitration agreement covering the dispute.

In particular, the ECCA in *Jinpeng Group Limited v Peak Hotels and Resorts Limited*[11] (**Jinpeng**) considered and chose not to follow the same approach as the English courts in *Salford Estates*, and held that the existence of an arbitration agreement was just one of the factors that the court would take into account when deciding whether to exercise its discretion to make a winding-up order.

Commenting on the decision in *Salford Estates*, the ECCA in *Jinpeng* held that the principle that a company may be wound-up 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 entrenched in BVI law to now require a creditor exercising its statutory right to wind-up the company to also prove that exceptional circumstances justify the winding-up.[12]

Sian has confirmed the position under BVI law: the correct test for the court to apply to the exercise of its discretion whether to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed is whether the debt is disputed on genuine and substantial grounds.

Commentary

The position under English law has fundamentally changed and is now similar to that in the BVI. However:

- stays in favour of arbitration will still be available if it can be shown that there was a genuine dispute as to the underlying debt on substantial grounds; and
- different considerations may arise if the arbitration agreement applied expressly to creditors' winding-up petitions.

Given the Privy Council's helpful review of a wide range of decisions in other common law jurisdictions, it will be interesting to see how the laws of those jurisdictions, which follow a similar approach to that set out in *Salford Estates* (e.g. Hong Kong, Singapore) develop in light of this decision.

HFW has offices in (and are able to advise on the laws of) all of the jurisdictions mentioned in this article. We have particular expertise in relation to insolvency related matters.

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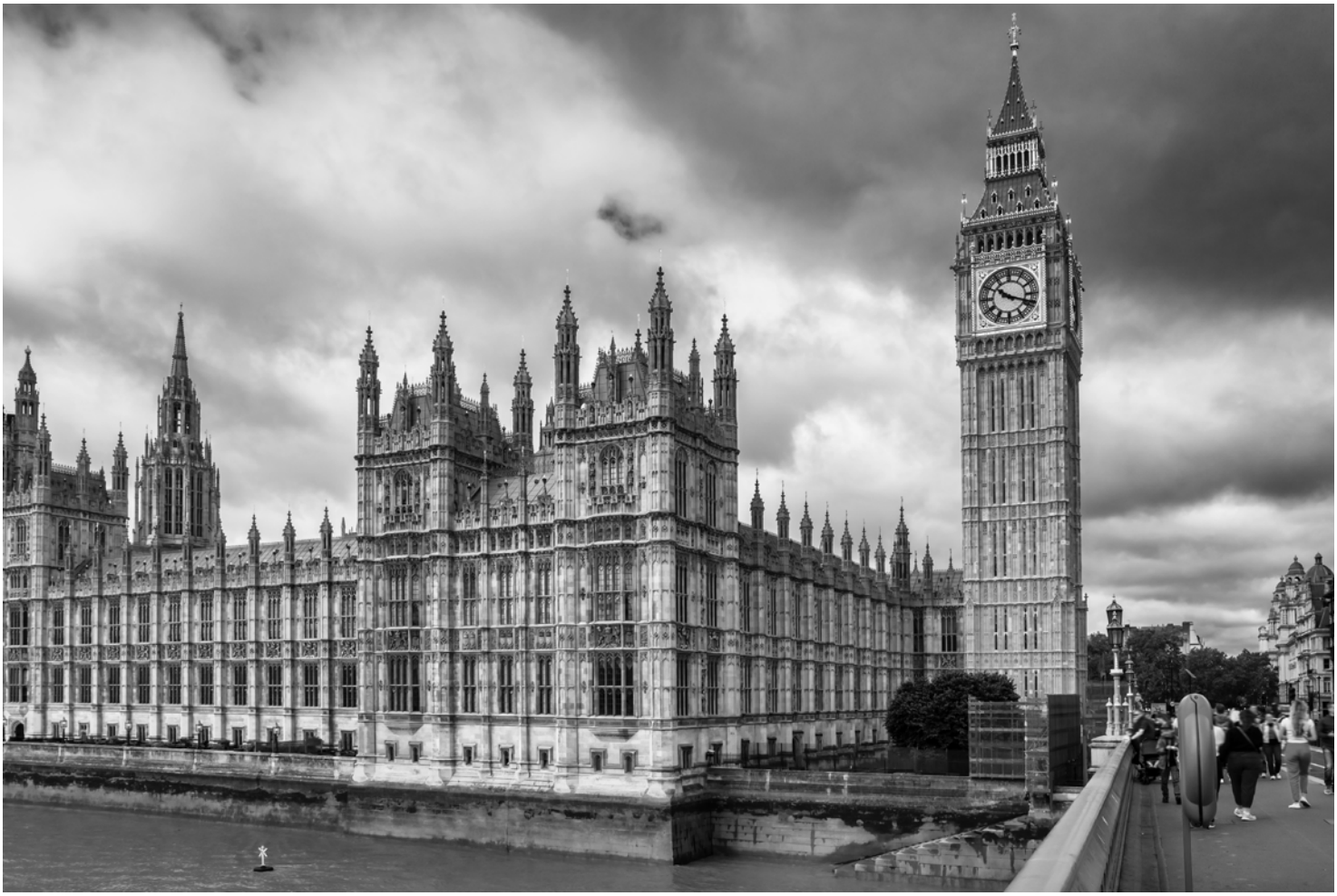
6 [2018] 2 HKLRD 449
7 [29]-[30].
8 [39].
9 [2016] 5 SLR 977
10 [2020] SGCA 33)
11 [BVIHCMAP2014/0025]
12 [47].



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"It is hoped that the Bill will be passed and that a new English Arbitration Act will come into place if not in 2024, then early in 2025."

ENGLISH ARBITRATION ACT UPDATE

In the Q2 edition of HFW's International Arbitration Quarterly[1] we wrote about the 'Reform of the 1996 English Arbitration Act– The Six Key Proposed Amendments'[2], which reforms were identified by the Law Commission's 2022-2023 Review, and became the subject of the Arbitration Bill put before parliament by the previous UK government in 2023.

The passage of the Arbitration Bill through parliament was ended by the change in the UK government over the summer, but was re-introduced to parliament by the new government in July; a clear indication of the desire to reform arbitration in England and Wales and recognition of the value arbitration brings to the UK economy[3].

The re-introduced Arbitration Bill is reflective of the earlier Bill in most aspects, but has made clear that whilst the law of the seat of the arbitration will apply to arbitration agreements that do not expressly reference the applicable law, it will not apply to a specific category of agreements, for example investment treaty arbitration agreements and similar, which are better governed by international law or foreign domestic law.

It is hoped that the Bill will be passed and that a new English Arbitration Act will come into place if not in 2024, then early in 2025. We will continue to monitor the progress of the Bill and provide further updates when required.

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1 International Arbitration Quarterly | Edition Q2/2024 - HFW

2 005902-International-Arbitration-Q2-2024-1.pdf (hfw.com)

3 The Bill's Explanatory Memo notes that there "are at least 5,000 domestic and international arbitrations each year in England and Wales, worth £2.5 billion to the British economy in arbitration and legal fees alone."

A BUSY YEAR FOR ARBITRATION IN PARIS: KEY DEVELOPMENTS IN THE FIRST HALF OF 2024

2024 has been an important year for arbitration in Paris, marked by a landmark court decision concerned with bias, an award from the Court of Arbitration for Sports emanating from the Olympics, and the creation of new arbitration venues. In this article we discuss all of these key developments.

French Court Sets Aside ICC Award Over Arbitrator Bias

The increasing interactions between arbitrators, counsel, and parties have led to a rise in post-award challenges based on claims of bias due to undisclosed relationships. This issue came to a head in a landmark decision by the Paris Court of Appeal, upheld by the French Court of Cassation on June 19, 2024.

The case involved an ICC arbitration between Douala International Terminal (DIT) and Douala Port Authority (DPA). Following a eulogy, published by the president of the arbitral tribunal, Prof. Thomas Clay, to the late Prof. Emmanuel Gaillard, who was counsel for DIT, DPA raised a challenge based on passages in the eulogy revealing a close personal relationship, which Clay had failed to disclose.

DPA first challenged the tribunal's constitution before the ICC. The ICC dismissed DPA's challenge, prompting an appeal to the Paris Court of Appeal. In its defence, DIT argued that the tribute paid by Clay to Gaillard, which was publicly available, must be seen in its proper context, taking into account Professor Gaillard's role as a leading figure in the world of international arbitration, and its eulogistic and exaggerated nature. DIT accepted that there was a financial or business relationship between Clay and Gaillard or Gaillard's firm, Shearman & Sterling.

The Court of Appeal set aside the award, ruling that the friendship between Clay and Gaillard, evidenced by remarks in the eulogy, including the comment that Clay consulted Gaillard *"before making any important choices"*, indicated a relationship beyond mere academic or professional interaction. The Court of Appeal also found that the eulogy established a connection between their personal relationship and the arbitration proceedings, as evidenced by Clay's anticipation of Gaillard's *"formidable, razor-sharp pleadings again, where precision and insight were far more seductive than any rhetorical flourish"*. The Court of Appeal emphasized that under Article 1456-2 of the French Code of Civil Procedure (**CPP**) and Article 11 of the ICC Rules, arbitrators are required to disclose any circumstances that may affect their independence or impartiality. The ICC's Note to Parties and Arbitral Tribunals further mandates the disclosure of close personal relationships between arbitrators and counsel.

The French Court of Cassation upheld the Court of Appeal's findings, agreeing that while certain passages of the eulogy should be interpreted solely as a tribute to a respected figure in the arbitration world, others clearly revealed a personal relationship between Clay and Gaillard. These revelations, the court concluded, were sufficient to raise reasonable doubts about Clay's independence and impartiality in the proceedings, and consequently agreed that the ICC award should be set-aside.

Court of Arbitration for Sports' Award denies gymnast her bronze

An article on developments on Paris arbitration would not be complete without including an arbitration from the 2024 Paris Olympics. Here the Court of Arbitration for Sports' Ad Hoc Division published a controversial award on 14 August 2024, rendered by a tribunal chaired by Hamid Gharavi, including Philippe Sands KC and Lu Song. This award led to US gymnast Jordan Chiles being stripped of her Olympic bronze medal, as the on-floor inquiry from the US team had been filed too late.

The decision sparked a media backlash against both CAS and the tribunal, with several media outlets focusing on Gharavi's work as counsel

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in arbitrations for Romania, whose gymnastics federation brought the case. However, the tribunal specified in its award that Gharavi disclosed his ongoing representation of Romania in two pending ICSID claims, this disclosure was brought to the parties' attention on 7 August 2024, and no objections were made at that time to Gharavi's appointment.

Expansion of Paris' Arbitration Venue Capacity

In response to a previous shortage of available hearing venues since the closure of the ICC venue in 2020, two new hearing centres are planned opened in Paris in 2024, which will support Paris-seated arbitrations being heard in Paris, and restore its status as a premier arbitration seat.

Delos New Hearing Centre[1] : Earlier this year, Delos Dispute Resolution opened the Paris Arbitration Centre. This new facility, located in the heart of the city, includes four hearing rooms and twelve breakout rooms. The centre is equipped to handle a variety of dispute resolution needs, providing state-of-the-art facilities for both arbitrators and parties involved.

New ICC Hearing Centre[2]: After closing its first hearing centre during the pandemic in 2020, the ICC International Court of Arbitration announced it will open a new hearing centre in autumn 2024. The new premises will offer two sets of hearing and breakout rooms, designed to accommodate in-person, hybrid, and virtual hearings, and will be situated in the heart of Paris.

Conclusion

The significant developments in arbitration in Paris throughout the first half of 2024 highlight the city's central role in the global arbitration landscape. The landmark court decision of the French Court of Cassation highlights the enhanced importance of transparency and impartiality in arbitration proceedings. The opening of new arbitration venues demonstrates Paris' dynamism and commitment to provide top-tier arbitration services.

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1 Paris Arbitration Centre | By Delos | International Arbitration Hearing Centre in Paris (hearings.paris)

2 ICC Hearing facilities - ICC - International Chamber of Commerce (iccwbo.org)

SINGAPORE COURTS DECIDE RARE APPEAL AGAINST SUCCESSFUL EARLY DISMISSAL UNDER THE SIAC RULES

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A recent decision by the Singapore Court of Appeal offers rare insight into how a successful early dismissal application may be treated by the courts in Singapore

The Singapore International Arbitration Centre Rules, 2016 (**SIAC Rules**) allow parties to apply for the 'early dismissal' of claims under Rule 29. The provision is a powerful tool that can cut short a party's case in the early stages of an arbitration by way of a simple application claiming either that the claim or defence is 'manifestly without legal merit'; or that a claim or defence is manifestly outside the jurisdiction of the tribunal.

In reality, the standard of scrutiny for such applications is high and the success rate is low. As a result, despite the rule having been in force for about 8 years, applications for early dismissal are few, and there have been almost no opportunities for the courts to examine the contours of the procedure. This is probably because since the introduction of Rule 29 in 2016, 65 applications for early dismissal were filed before SIAC, of which 33 were allowed to proceed, and only 12 were granted in whole or in part[1].

The recent decision of *DBO and others v DBP and others*[2] (the **Judgment**) is therefore a welcome decision in so far as it is the first case where the Singapore Court of Appeal (**SGCA**) has decided an appeal in respect of a tribunal's decision under Rule 29 and sheds some light on how parties can expect such appeals to be treated going forward.

Background facts and the tribunal's decision

By a Facility Agreement (the **Agreement**) dated 26 February 2020, DBR, DBT, and DBV (the **Lenders/ Respondents**) granted a loan facility to DBO and DBQ (the **Borrowers/ Appellants**) for the development of a project (Project). As a result of the Covid-19 pandemic, the sale of the units in the Project and the rental income for the Borrowers was adversely affected, and they were unable to repay the loan.

The Borrowers commenced a SIAC arbitration and contended that the Agreement had been discharged by frustration, on account of the Covid-19 pandemic. In response, the Lenders applied for early dismissal of the Borrower's claims under Rule 29.1 of the SIAC Rules (the **Application**) claiming that the Borrower's contention that the Agreement had been discharged by frustration was manifestly without legal merit.

At the hearing of the Application, the Borrowers sought to raise a new argument that was not part of its pleaded case – that there was an oral collateral contract between the parties to the effect that the funds for repaying the sums due under the Agreement would come from the sales of units in the Project and the income from the Project. The point being made was that since the Covid-19 pandemic had affected the sales, it was not possible to make the loan repayments and therefore the Agreement was frustrated.

The tribunal issued a partial award (the **Award**) finding that the facts argued by the Borrowers could not be interpreted to conclude that the parties had entered into a collateral agreement providing that only the income from the Project would be used to repay the loans. As a result (and in light of the fact that such a collateral agreement did not exist), the tribunal found that the Borrowers' argument that the Agreement had been discharged by frustration was manifestly without legal merit. In so doing, the tribunal brought the Borrowers' arbitration to an early end.

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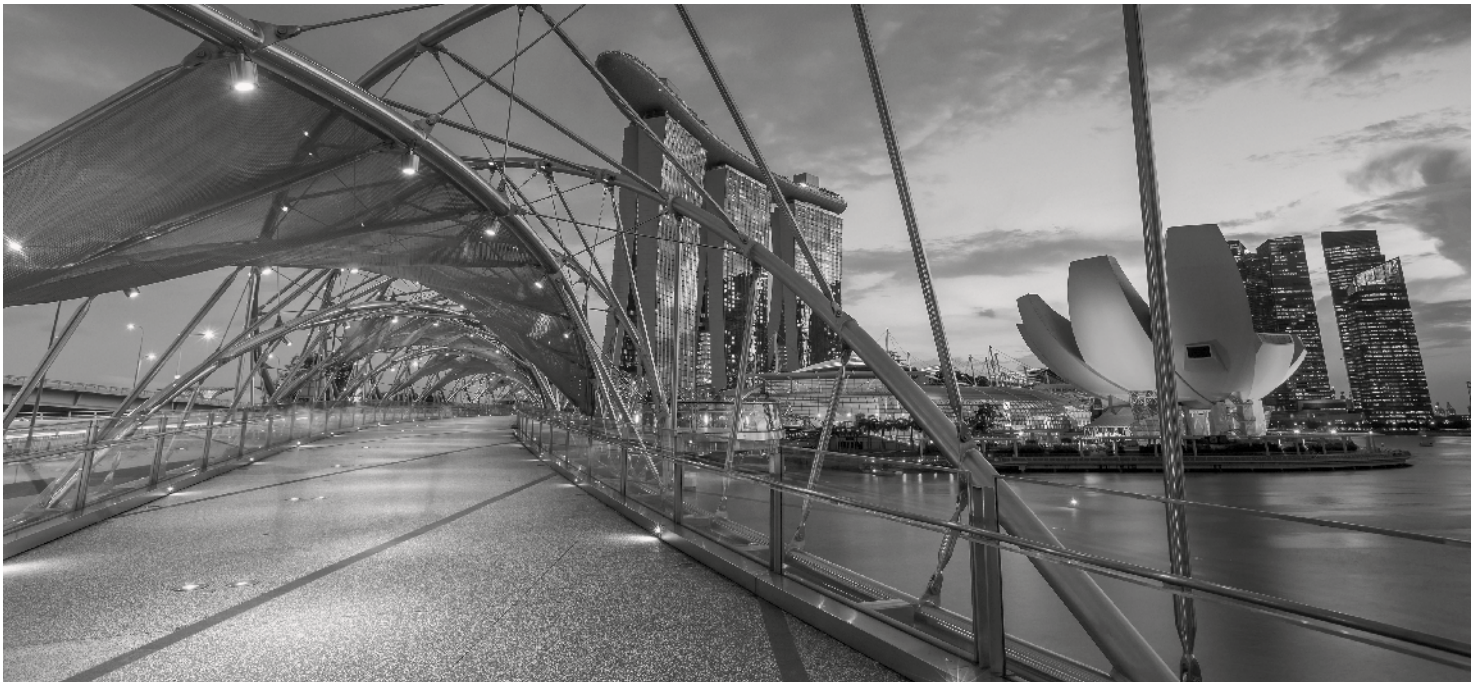
1 SIAC_AR2023.pdf.
2 [2024] SGCA(I) 4



The SICC's decision

The Borrowers applied to set aside the Award on the basis that the tribunal had failed to assume the existence of the collateral contract when dealing with the application for early dismissal thereby exceeding its jurisdiction.

The Singapore International Commercial Court (**SICC**) found that the tribunal only had to assume the facts alleged in support of the existence of a collateral contract. The tribunal did assume the existence of those facts and found that a collateral contract providing repayment only from a specific source did not exist based on those facts. The SICC also observed that the tribunal's decision was not dependent on any disputed underlying facts nor had the tribunal acted in breach of natural justice or in excess of its jurisdiction. On these grounds, the SICC dismissed the Borrowers' application.

The SGCA's decision

On appeal, the SGCA held that the tribunal was correct to conclude that the argument in respect of the collateral contract would not enable the Borrowers to defeat the early dismissal application.

The SGCA agreed with the tribunal and the lower court that the collateral contract was not an agreement to the effect that the loan would be repaid and serviced only from the proceeds of the Project and rents from the mall. As a result, the SGCA agreed with the tribunal that the amendment to the Borrowers' case and the collateral contract did not enable the Borrowers to defeat the early dismissal application.

Commentary

Having a clear and cogent case is key to a successful application: A key reason for the early dismissal of the Borrowers' case was the haphazard manner in which they argued the existence of the collateral agreement. The argument was brought at a late stage, it was not put down in writing and was unclearly pleaded. From the transcript of the arbitration hearing, it appeared that the argument made was that the proceeds from the Project would be used to repay the loans and not that the proceeds would be the only source for repayment. This critical difference led to the success of the application for early dismissal. It is for this reason that the Court of Appeal also commented that the tribunal should have required that the terms of the alleged oral collateral contract be committed to writing. Indeed, doing so would have lent much needed clarity to the Borrowers' case and may even have allowed them to properly substantiate and flesh out their case.

Chances of success in an appeal: Where a tribunal's decision to dismiss a case under Rule 29 of the SIAC Rules is made in the form of an award, it will likely be difficult to overturn as it would have to be set aside by the court of the seat of the arbitration. In jurisdictions like Singapore in particular, there are limited grounds to set aside an award. Parties faced with an application for early dismissal against their claims must remain cognisant of this fact.

What amounts to *"manifestly without legal merit"*?: Interestingly, the SGCA focussed its decision on the peculiar facts of this particular case and did not spend much time exploring the standards that a tribunal may employ to determine whether a claim is 'manifestly' without legal merit. The decision does note that the tribunal *"accepted that it was only where a claim or defence was undoubtedly legally unsustainable that Rule 29.1 could be properly invoked"*, which the SGCA did not appear to disagree with. Hopefully, this is the first of more cases to come, wherein the Singapore courts have the opportunity to further explore the contours of Rule 29.

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Aaron Tan, Trainee Solictor assisted in the preparation of this article.

HFW EVENTS AND DEVELOPMENTS

Upcoming

Our International Arbitration webinar series continues. 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 these events, please email events@hfw.com.

For more information on upcoming HFW events, click here.

Past

HFW's Edward Beeley recently joined a panel hosted by the HKIAC to discuss his journey as a young arbitration partner and his experiences across ten years as a commercial disputes lawyer in Asia, see here for more information.

On 7 September, HFW's Sadhvi Mohindru participated in the panel discussion on 'Reforms to the Indian Arbitration Act – Challenges, Prospects and Expectations' panel at the Singapore International Arbitration Centre's Annual India Conference, details are here. HFW was a proud sponsor at this year's event.

HFW's London office was again delighted to host a table at the International Arbitration Ball, which this year raised over £456k (and counting) in aid of Save the Children UK.

Developments

Congratulations to Lee Helen Hyunkyung , partner in our Singapore office, who has been re-elected as a member for South Korea to the International Chamber of Commerce Commission on Arbitration and ADR for her second three-year term. The role presents an incredible opportunity to contribute to ICC Dispute Resolution Services, Helen will be at the forefront of thought leadership, providing guidance on practical and legal issues in arbitration and ADR.

HFW partners Jo Delaney and Julien Fouret have been ranked Thought Leaders in Lexology's Who's Who Legal 2024 Arbitration Guide. Jo is based in HFW's Sydney office and was Australia's alternate member to the ICC Court of Arbitration from 2018 to 2024, and is a member of the Australian Centre for International Commercial Arbitration (ACICA)'s Professional Advisory Board, the ILA (Australia Branch) Management Committee and Co-Chair of The Pledge APAC Steering Committee. She has also been a director of ArbitralWomen and Councillor of the Chartered Institute of Arbitrators (CIArb) (Australia Branch).

Julien, is based in our Paris office and specialises in international commercial arbitration and investment treaty and was recently appointed as a member of the ICC Court for the 2024-2027 term. He is also the Secretary General of the International Academy for Arbitration Law, is a former Vice-Chair of the IBA Arbitration Committee, a former co-chair of the ASA below 40, the CFA 40 and of the IBA Arb40 subcommittee.

HFW is pleased to support the LCIA's EDI initiative, via Nicola Gare, Disputes Knowledge Counsel, who has joined the LCIA's Arbitrator Education & Training Workstream aimed at enhancing competencies and cultivating mindsets that mitigate bias and foster sound decision-making.

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