



INTERNATIONAL ARBITRATION QUARTERLY



Welcome to the February edition of our International Arbitration Quarterly Bulletin

In the first article Wole Olufunwa, from our Singapore office, discusses enforcing foreign arbitration awards in Thailand and Vietnam, giving practical guidance on how to overcome the issues that we often see arising there. Wole is also the co-author of our second article which focuses on mediation. He gives a summary of recent developments, and looks at how mediation fits into international arbitration.

Next, Andrew Johnstone and Fergus Saurin, from our Hong Kong office, analyse the recent High Court decision in *Pencil Hill v US Citta Di Palermo SpA*, which concerns the enforceability of a Swiss arbitration award that included an amount payable under a penalty clause, previously considered to be unenforceable under English law.

Andrew Williams reviews arbitration in Dubai in the context of arbitration tribunal immunity following the recent Dubai court judgment in *Meydan Group v WCT Holdings*.

Damian Honey and Nicola Gare discuss the recent Privy Council decision in *Anzen Limited v Hermes One Limited*, concerned with optional arbitration clauses and the extent to which they are truly optional.

We include a note about the current SIAC consultations on their proposed new draft Rules, and the new Investment Arbitration Rules. In either case, Chanaka Kumarasinghe, from our Singapore office, will be happy to discuss the proposals and submit your comments to SIAC.

Lastly, and with great pleasure, we announce three new associations in the Middle East - Riyadh, Beirut and Kuwait City - all of which reinforce our presence and capability in the area.

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hfw Now what? Enforcing Foreign Arbitral Awards in Thailand and Vietnam

Wole Olufunwa considers how to navigate the procedural and practical difficulties of enforcement in Thailand and Vietnam, and convert paper victories into Bhat (฿) or Dong (₫).



The New York Convention

Along with 154 other states, Thailand¹ and Vietnam are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The New York Convention provides that its members must recognise and enforce arbitration awards issued in other contracting states, subject only to certain limited exceptions.

The provisions of the New York Convention serve as the foundation for recognition and enforcement proceedings in both Thailand and Vietnam. However, the application of these same provisions differ between the two jurisdictions.

Thailand: Establishing Conventions

The New York Convention and the Geneva Convention 1927 will only assist so far in enforcing a foreign arbitral award in Thailand.

The Thai courts adopt a conservative approach to the recognition and enforcement of foreign arbitral awards, placing the onus on the applicant to establish and prove that one of the conventions applies. Enforcement is not merely an administrative rubber stamp or an automatic process, but is in fact a full and separate court proceeding, which may potentially

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delve into the substantive issues already raised and determined in arbitration. It is often due to the time and costs involved in the process which result in many applications for enforcement of foreign arbitral awards in Thailand failing or being discontinued.

Applying to the Thai courts for recognition and enforcement

The process for enforcement begins with filing a petition to the relevant Thai court for a judgment recognising and enforcing the award, along with copies of the arbitral award and arbitration agreement, and certified translations of each. The court will then review the petition to ensure that all necessary requirements are fulfilled.

Once the petition has been filed, the defendant has the right to file an

objection to the petition. Thereafter, a hearing for the petition will be scheduled and conducted. Should the court give judgment in the applicant's favour, the applicant may enforce the foreign arbitral award as a Thai judgment, with the assistance of the Thai Legal Execution Department.

Resisting an application

However, the defendant in enforcement proceedings is entitled under Thai law to challenge the award on the grounds below, found in ss 42, 43(1)-(6) and 44 of the Arbitration Act 2002 (AA). These provisions are based on the terms of the New York Convention:

- **Limitation period:** The petition for enforcement must be filed no later than three years from the date the award first became enforceable. (S42 AA)
- **Legal incapacity:** A party to the arbitration agreement who does not have capacity will render the arbitration agreement voidable. (S43 (1) AA)
- **Status of arbitration agreement:** Where the arbitration agreement is not binding under the governing law of the country agreed to by parties. (S43(2) AA)
- **Notification of proceedings:** Where parties were not properly notified of the appointment of the arbitrators and the arbitration proceedings. (S43(3) AA)
- **Ultra vires award:** Where the tribunal acted beyond the scope of the arbitration agreement. (S43(4) AA). Care should be taken by the parties when drafting these clauses.
- **Conduct of arbitration:** Where the composition of the arbitral tribunal and/or the arbitral proceedings were not in accordance with the arbitration agreement, or agreed to by parties. (S43(5) AA)

¹ Thailand is also a member of the earlier the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, with 34 other states.



- **Status of award:** Where the award has been set aside or suspended by the court of the issuing state. (S43(6) AA)
- **(i) Lack of arbitrability and (ii) public policy:** Where the award relates to a dispute that cannot be resolved by arbitration; and the recognition or enforcement of the award is contrary to public order and good morals. (S44 AA)

As seen above, in coming to its decision, the Thai court will have regard to whether there has been procedural irregularity, a breach of natural justice, or whether the award is against public policy. It is common for defendants to delay the enforcement proceedings by defending on multiple fronts, and utilising as many grounds of refusal as they are able. As a result, enforcement proceedings may be prolonged for 10-18 months.

Appealing the Thai court's judgment

Thai law permits the defendant to appeal the judgment. Such appeals may be made to either the Supreme (Dika) Court or to the Supreme Administrative Court, depending on the court that rendered the judgment.

In this regard, it should be noted that the grounds for appeal in many ways mirror the grounds for refusing enforcement at first instance. Specifically, an appeal may be lodged on one or more of the following grounds:

- Recognition or enforcement of the award would be contrary to public order or good morals.
 - The order or judgment is contrary to public order.
 - The judgment is not in accordance with the arbitral award.
 - One of the judges hearing the case issued a dissenting opinion in the earlier judgment.
- The court order under review concerns only provisional measures taken to protect a party's interest before or during arbitration proceedings.
- The appeals process in Thailand effectively gives a defendant seeking to resist enforcement a second bite of the cherry. Considering that these appeals can typically take up to two years, the time and costs of enforcing a foreign award in Thailand may end up being disproportionate to the amount in dispute. Given this, it is likely that unscrupulous defendants will take advantage of these conditions in an attempt to avoid enforcement or to buy time to "re-arrange" their assets or business operations.

Vietnam: Practicing enforcement

As in Thailand, recognition and enforcement proceedings in Vietnam are inextricably linked to the provisions of the New York Convention. Also as with Thailand, the onus is typically placed on the applicant to prove that their foreign arbitration award should be enforced².

Unlike Thailand however, Vietnam's membership of the Convention is subject to certain reservations.

- **The commercial reservation:** Vietnam will only enforce arbitration awards related to 'commercial transactions'.
- **The reciprocity reservation:** Vietnam will only enforce foreign arbitration awards to the same extent to which the awarding state grants enforcement.

The effect of these reservations is to afford local Vietnamese courts a wide discretion as to how and when the provisions of the New York Convention are applied.

The pre-submission process

The first obstacle for recognition and enforcement in Vietnam is a rigid pre-submission process. Vietnamese law requires every foreign document provided in court to be an original or a notarised and legalised copy consularised by the relevant Vietnamese Embassy. Such documents will include the award, the underlying agreements, and even accounting and corporate regulatory authority search results from the applicants. This can be a costly and time-consuming process.

An application must be made to the Ministry of Justice by a Vietnamese agent acting under a power of attorney. The applicant must also arrange for all the supporting documents, such as relevant treaties, the award, arbitration agreement, to be translated into Vietnamese. Only once the Ministry of Justice has formally approved the application will the matter be referred to a competent court.

There is also the risk of being timebarred from applying for the recognition and enforcement of a foreign arbitral award. Whilst there is no statutory limitation, in a 2014 decision³ the People's Court of Long An refused to consider an application for recognition and enforcement of an award on the ground that the application had been filed with the Ministry of Justice over one year from the date the award was issued.

Court procedure

As with Thailand, Vietnamese court proceedings are procedural minefields. In one particular comedy of errors, an arbitral institution's rules had been copied, translated, and certified during the pre-submission process. These rules had been updated by the time of

² *Ecom v Hatexco* (2013), Decision 08/2013/VKDTM of the People's Court of Hanoi.

³ *Cargill v Dong Quang* (2014), Decision No. 01/2014/QDST-KDTM



hearing, 16 months later. This created a vicious circle wherein further foreign documents – in this case, several letters from the arbitral institution had to be issued, copied, translated, and certified merely to confirm the contents of the expired documents.

Applicable tests

Vietnamese courts have jurisdiction to decide whether to recognise and enforce foreign arbitral awards in accordance with article 370 of Vietnam's Civil Procedure Code (CPC)⁴, which mirrors article V of the New York Convention.

A significant difference between the CPC and the New York Convention, however, is the introduction of a ground for refusing enforcement on the basis that enforcement would breach the *'fundamental principles'* of Vietnamese law. Uncertainty as to the meaning of *'fundamental principles'* has proven to be a significant issue in the enforcement of foreign arbitral awards in Vietnam.

In a 2014 decision, this phrase was construed by the Hanoi provincial court so as to extend to virtually all principles under Vietnamese law⁵. In its decision, enforcement of an arbitral award was refused on the basis that it had relied on a foreign law which was inconsistent with Vietnamese law.

In the period 2005-2014, 24 out of a total of 52 applications for recognition and enforcement in Vietnam were dismissed, with the majority of these refusals taking place at a provincial or local level.

Recent efforts by the Vietnamese National Assembly⁶ and People's Supreme Court of Vietnam⁷ have sought to increase the number of foreign arbitral awards by creating standardised procedures and criteria for dealing with these applications. Whether these efforts will be successful, however, remains to be seen.

HFw perspective

The recognition and enforcement of foreign awards in Thailand can be a costly and time-consuming process, which should be borne in mind from an early stage for example, when serving notice of arbitration against an entity with assets in Thailand. That said, Thailand is a jurisdiction where persistence is rewarded.

The difficulties of enforcement in Vietnam extend further than just the onerous and time consuming court procedure. There are multiple procedural barriers open to defendants who wish to challenge an arbitral award after the fact. To mitigate this risk, those seeking to enforce in Vietnam are well advised to appoint local bailiffs or lawyers early on, and to take meticulous care in satisfying the administrative formalities at each stage of proceedings.

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hfw Offers to Mediate – The New Calderbank?

'Litigants who wish to have their day in court may have to pay for it' according to several recent English High Court decisions.

The conventional wisdom that the successful party to litigation or arbitration is entitled to their recoverable costs is less than certain. In recent years, greater emphasis has been placed on the parties' conduct in proceedings when allocating costs.

Since the 1999 Civil Procedure Rules were introduced, and with them the express endorsement of non-contentious ADR, the English courts have increasingly been willing to penalise successful parties to litigation on costs who 'unreasonably' refuse an offer to mediate the dispute - typically resulting in a reduced cost award. As with a Calderbank offer, a well-timed offer to mediate may be used strategically to pressure a counterparty into early settlement.

What is an 'unreasonable' refusal to mediate?

The reasonableness or otherwise of a decision to reject a Calderbank offer typically comes down to whether or not the amount on offer exceeds the amount ultimately awarded. However, offers to mediate do not attract a similar quantum-based analysis.

What constitutes an 'unreasonable' refusal to mediate was discussed in *Halsey v Milton Keynes General NHS Trust*¹. There, the Court of Appeal took the view that imposing an obligation on unwilling parties to refer a dispute to mediation would:

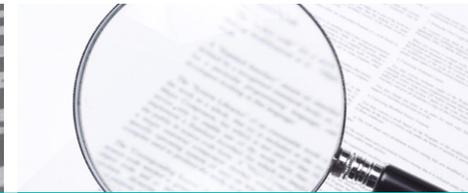
4 Chapter XXIX-Part VI, Civil Procedure Code No. 24/2004/QH11, amended in 2011.

5 *Strategic Think Tank LLC and 260 Architects v Sudico (2014)*, Decision No. 07/2014/QDST_KDTM of the People's Court of Hanoi.

6 Law on Commercial Arbitration No 54/2010/QH12

7 People's Supreme Court Practice Note 246

1 [2004] EWCA Civ 576



- Be an unacceptable obstruction of their right to access the court.
- Achieve little except to add to the costs and possibly postpone determination of the dispute.

Deciding that the burden should be on the unsuccessful party to show the other party acted unreasonably, the court held the following factors ought to be taken into account namely the:

- Nature of the dispute.
- Merits of the case.
- Existence and extent of other settlement methods attempted.
- Costs of mediation and delays it might cause.
- Prospects of mediation being successful.

Application of ‘unreasonableness’

While *Halsey* remains good law, subsequent cases have shown some departure from this original position. In a High Court decision², it was held that a party’s refusal to mediate a dispute involving large sums and raising numerous issues was unreasonable, given the significant litigation risk for both parties. In 2008, a mere delay in consenting to mediation was held to justify a considerable reduction of the successful party’s recoverable costs³.

Most tribunals in international arbitration are afforded wide discretion on how to allocate costs. Unlike the courts however, arbitrators typically do not have any express power or mandate to order a stay of proceedings in favour of mediation. However, this is becoming more common place, see for example with



At some point one must ask whether expecting parties to refer disputes to more than one form of ADR might just be going too far?

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the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) who offer an ‘arbitration/mediation/arbitration’ procedure (the AMA Protocol), under which disputes are referred to arbitration at the SIAC, but after the respondent files its Response to the Notice of Arbitration, the arbitration will be stayed for a period of eight weeks and referred to mediation with a separate mediator appointed from the SIMC’s panel.

Without express provision in the arbitration agreement, or the parties subsequent agreement, it is still unclear whether the arbitrators who have the power to stay arbitrations do so, and whether an order would be inconsistent with the tribunal’s duty to proceed to an award⁴.

HFW perspective

Given the growing popularity of multi-tiered dispute resolution and Arb-Med-Arb clauses, there is clearly demand for more commercial flexibility in resolving disputes outside of the uni-modal

arbitration process. What is telling and perhaps a sign of things to come is the new Rule 41 of the updated⁵ Singapore Chamber of Maritime Arbitration (SCMA) terms, which expressly provides that an ‘unreasonable refusal’ to mediate can be taken into account when allocating costs.

That said, arbitration is already a voluntary process, with many of the advantages of mediation. At some point one must ask whether expecting parties to refer disputes to more than one form of ADR might just be going too far?

We are monitoring events in this developing area, and we will report further as it evolves.

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Research conducted by Kiran Rao, Paralegal.

2 *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2924 (TCC).

3 *Nigel Witham Ltd v Smith and another (No 2)* [2008] EWHC 12 (TCC).

4 *Hussman (Europe) Ltd v Pharaon* (2003) EWCA Civ 266.

5 3rd Edition



hfw **Pencil Hill Ltd v US Citta Di Palermo SpA¹: The High Court enforces arbitration award even though sum awarded was under a penalty clause**



The High Court in London has recently enforced a Swiss seated arbitration award made by the Court of Arbitration for Sport (CAS) which included a sum of €1,680,000 awarded pursuant to a penalty clause despite the general unenforceability of penalty clauses under English law.

Background

By a contract dated 27 April 2012, US Citta Di Palermo SpA (Palermo) agreed to pay Pencil Hill Ltd (Pencil Hill) a total of €6,720,000 in two installments of €3,360,000 on fixed dates for certain financial rights deriving from the 'registration rights' of Argentinian international and current Juventus FC footballer Paulo Dybala. Clause 4 of the contract provided:

"In the case [Palermo] fails to pay any of the installment agreed, then, all the remaining amounts shall become due and as penalty [Palermo] will have to pay an amount equal to the amount pending IE [Palermo] will pay the double of the pending amount at the moment of the fail on payment."

Palermo did not pay the €6,720,000 and on 4 July 2013, Pencil Hill filed an arbitration request at CAS claiming, amongst other things, €6,720,000 pursuant to the contractual penalty clause. The arbitration proceeded and on 26 August 2014, CAS published its award and directed Palermo to pay

The judgment in *Pencil Hill Ltd v US Citta Di Palermo SpA* is undoubtedly pro arbitration. It also suggests that penalty clauses which are determined to be unobjectionable under the law of the contract, are unlikely to result in the non-enforcement of Awards by the English Courts under the New York Convention.

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to Pencil Hill €9,400,000 plus interest including €1,680,000 pursuant to the penalty clause. In reducing the amount of the penalty, the Arbitral Panel referred to Article 163.3 of the Swiss Code of Obligations which provides that *"the judge must reduce a contractual penalty considered excessive"*.

On 3 November 2014, Palermo appealed the Award to the Tribunal Federal in Lausanne, the Swiss court with supervisory jurisdiction over the arbitration. The Tribunal Federal upheld the reduced penalty and thereafter Pencil Hill sought to enforce the award in England.

Palermo argued before His Honour Judge Bird in the High Court that he should refuse to allow the enforcement of €1,680,000 of the award on the basis that to do so would be contrary to the English public policy against enforcing penalty clauses². Pencil

Hill, on the other hand, argued that the granting of permission to enforce an award under the New York convention involves a balance between the desirability of finality in international arbitration and public policy considerations concerning penalties. Pencil Hill went on to argue that there is a hierarchy of public policy considerations and the public policy represented by the English law imperative to refuse to enforce penalty provisions was not sufficient to tip the balance against enforcement.

The judgment

In concluding that the award should be enforced in its entirety, His Honour Judge Bird made the following observations:

- There is a strong leaning towards the enforcement of foreign arbitral awards and the circumstances in which enforcement may be refused are narrow.

1 2016 WL 212897, Case No: BA40MA109

2 For a comprehensive analysis of the origins and nature of the public policy, see the recent case of *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2013] EWCA Civ 1539



- The public policy against enforcement of penalty clauses does not protect a 'universal principle of morality', such as against the enforcement of contracts for terrorism, drug trafficking, prostitution or paedophilia and enforcement would not be so clearly 'injurious to the public good' that enforcement should not, without more, be refused.
- The parties chose a governing law which empowers its courts to interfere with a penalty by reducing it. The governing law applied by the CAS and the Tribunal Federal recognised the payment obligation as a penalty. CAS exercised its power to reduce and vary the payment obligation so that it was no longer considered 'excessive'. The Tribunal Federal upheld the CAS' decision and the altered obligation was no longer regarded by the governing law as objectionable.
- In the eyes of Swiss law, the variation of the payment obligation changed the nature of the obligation. What had been a penalty, an excessive payment, was changed into a non penalty, by a non excessive payment. The position then was not that Swiss law upheld a penalty, rather it was that Swiss law removed a penalty and replaced it with an obligation to pay a sum it regarded as neither exorbitant nor unconscionable.

HFW perspective

The judgment in *Pencil Hill Ltd v US Citta Di Palermo SpA* is undoubtedly pro arbitration. It also suggests that penalty clauses which are determined to be unobjectionable under the law of the contract, are unlikely to result in the non-enforcement of awards by the English Courts under the New York

Convention. However, the judgment does not establish a general principle that the English public policy against the enforcement of penalty clauses can never provide sufficient grounds to refuse to enforce an award under the New York Convention.

Indeed, the balancing exercise performed by His Honour Judge Bird, coupled with the weight he afforded to the fact that the CAS reduced the amount of the penalty so as to ensure that it was neither exorbitant nor unconscionable, suggests that a sufficiently egregious or punitive penalty, or perhaps even one that had not been properly considered by the Tribunal in question, could result in the refusal to enforce an award under the New York Convention. As such, parties remain well advised to carefully consider the nature, scope and extent of liquidated damages clauses when drafting their contracts. This is especially true where there is a reasonable prospect that in the event of a dispute, any award would have to be enforced in England and Wales or other common law jurisdictions which have similar public policy prohibitions on the enforcement of penalty clauses, such as Hong Kong.

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hfw Dubai court judgment refuses to find arbitrators liable and further supports Dubai as a centre for international arbitration

A recent decision by the Dubai Court of Cassation (Dubai's final appellate court) has bolstered Dubai's position as one of the world's leading international arbitration centres.

One of the challenges for the UAE and Dubai has been attracting parties who are willing to settle disputes under its institutions¹, rather than in the more established institutions based in more traditional arbitration centres such as London. Arguably, it has been a slow burn since the UAE's decision in 2006 to ratify the New York Convention which signified a readiness to endorse international arbitration, re-enforced in May 2015² when the Dubai Court of Appeal, in a landmark judgment, recognised and enforced a London arbitration award. The recent case of *Meydan Group v WCT Holdings*, will give further encouragement to parties, and also to those invited to form a tribunal, that Dubai is supportive of arbitration and that, whilst still a concern, the courts will not always find the tribunal personally liable.

Background

The initial arbitration concerned the construction of the Nad-Al-Sheba racecourse in Dubai, which was intended to be completed in time for

1 Dubai now has two international arbitration centres: the Dubai International Arbitration Centre (DIAC), and the Dubai International Financial Centre – London Court of International Arbitration (DIFC-LCIA). Abu Dhabi has the Commercial Conciliation and Arbitration Centre (ADCCAC).

2 As reported in the <http://www.hfw.com/Shipping-Bulletin-September-2015>.



the 2010 World Cup. In September 2007, WCT Holdings (WCT) won a contract to build the racecourse in a joint venture with Arabtec Construction LLC on a 50/50 basis on behalf of the Meydan Group (Meydan). However, just over a year later, Meydan cancelled the contract citing a ‘considerable delay of implementation’, although the timing of the cancellation, at the height of the global financial crisis, may have also suggested that economics played their part too.

Soon after the cancellation of the contract WCT brought an arbitration claim against Meydan in the DIAC for breach of contract and sought damages for the work completed, estimated to be approximately 65% of the project, repayment of the performance bond, and loss of profits.

In early 2010, during the arbitration proceedings, the tribunal ordered a stay in the arbitration for settlement negotiations to take place, which were ordered to be confidential and



These decisions further demonstrate that Dubai is growing as an arbitration friendly jurisdiction and that the courts can be increasingly relied upon to promote and support arbitration.

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not to be revealed to the tribunal, should they fail and the arbitration proceed. However, following the failure of the settlement negotiations, the tribunal gave an order granting itself jurisdiction to analyse the negotiations and convened a hearing to consider the parties’ submissions. Meydan refused to attend the meeting citing it as a breach of, and contradictory to, the tribunal’s prior order. In addition, it commenced legal proceedings against the members of the tribunal in the amount of US\$16.3 million, and attempted to disqualify the three arbitrators on the grounds that by reviewing the settlement negotiations they had failed in their duty to be impartial and independent.

Legal proceedings

This case is unusual in that at the same time that Meydan was bringing legal proceedings against the members of the tribunal in the Dubai courts to disqualify them on the basis that they were not impartial, having been privy to the settlement negotiations, the same tribunal was considering the main dispute.

The Dubai Court of first instance dismissed the claim against the tribunal, a decision upheld on appeal some six months later in June 2015. In the arbitration proceedings, the tribunal ordered Meydan to pay WCT damages amounting to US\$313 million. In December 2015, the Court of Cassation upheld the lower courts’ decisions and dismissed Meydan’s claim for damages against the three arbitrators.

The case has similar themes to an earlier DIAC arbitration, also involving Meydan, who in 2014 attempted to sue a sole arbitrator for US\$191,000 claiming losses suffered as a result of a delay in publication of an arbitration award, as well as attempting, unsuccessfully, to challenge his appointment. In this case

the Court of Cassation noted that under DIAC rules, arbitrators could not be responsible for “any unintentional error while carrying out any duties regarding the settlement of any dispute through DIAC”, and that an error would need to be a “major error”. It would appear that neither of the courts in *Meydan Group v WCT*, or the 2014 case considered the respective actions of the arbitrators to be sufficient to amount to a “major error”.

HFW perspective

These decisions further demonstrate that Dubai is growing as an arbitration friendly jurisdiction and that the courts can be increasingly relied upon to promote and support arbitration. Historically, arbitration in Dubai has faced some criticism, notably that arbitration awards must be ratified by the Dubai courts, leading to delays, and also potentially undermining their authority. It is however, worth noting that there remains the issue in Dubai, as in Hong Kong, that arbitrators do not benefit from immunity as they do in many other jurisdictions and are consequently at risk of being sued personally. Therefore, judgments such as those discussed above go a long way to allay the fears of arbitrators, and are a victory for arbitration in Dubai, a location in which HFW has a considerable amount of experience.

Moreover, an increasing awareness of the immunity issue, as highlighted by these cases, will perhaps trigger legislative action in this area, affording greater protection to arbitrators and further establish Dubai as a centre for international arbitration.

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hfw Privy Council takes the option out of optional arbitration clauses

In the recent case of *Anzen Limited anors v Hermes One Limited*¹ the Privy Council confirmed that optional arbitration clauses become binding when one of the parties submits a request to arbitrate, or applies for a stay of the litigation proceedings.

The background

The issue before the Privy Council arose in the context of a shareholders' agreement setting up a BVI company creating software enabling airline fare searches. The shareholders' agreement contained an arbitration agreement which provided: *"If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration."*

Following an issue between the parties over the management of the company, Hermes One Limited (HOL) issued court proceedings in the BVI against Anzen Limited anors. (Anzen). Anzen applied, under section 6(2) Arbitration Ordinance 1976, similar to section 9 Arbitration Act 1996, unsuccessfully at first instance, and also subsequently on appeal, to stay the proceedings in favour of arbitration as provided for by the arbitration clause.

The decision

Anzen then appealed to the Privy Council. The Judicial Committee hearing the case comprised Lords Mance, Clarke, Sumption, Carnwath, and Hodge. The question for the court



As a judgment of the Privy Council, this is not a binding decision on English courts, but is persuasive and will no doubt be of interest to those who had previously viewed this type of clause as non-exclusive.

DAMIAN HONEY, PARTNER

to decide was whether the word "may" meant that the choice to arbitrate was optional, allowing the parties to, at their option, elect to litigate in the alternative. The Privy Council identified three possible analyses, namely:

- The parties may arbitrate if they wish (option 1).
- If litigation is commenced by one party, the other is still entitled to arbitrate:
 - by commencing arbitration proceedings (option 2); or
 - by seeking a stay, or making an unequivocal request to that effect (option 3).

The Board rejected option 1 on the basis that the use of the word "may", rather than "shall", was not sufficiently clear to prevent the parties from litigating. Option 2 was rejected on the basis that if litigation was commenced, it might leave the other party in the unusual position of having to issue arbitration proceedings where it might not be seeking an outcome other than to prevent the litigation and put itself at risk of costs in the arbitration by so doing. Option 3 being left, was

preferred as it reflected the parties intentions that arbitration was not exclusive and that unless a party objected, the other might litigate.

HFw perspective

Whilst it could be argued that by adopting option 3, the court has effectively punished the party commencing the litigation, this is more desirable than the consequences under either of the other two options, and applying 'commercial sense' avoids the potentially unhelpful outcome of incompatible decisions from a court and arbitration tribunal.

As a judgment of the Privy Council, this is not a binding decision on English courts, but is persuasive and will no doubt be of interest to those who had previously viewed this type of clause as non-exclusive.

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1 [2016] UKPC 1



hfw Singapore International Arbitration Centre consultations: revised draft 2016 Rules, and new Investment Arbitration Rules 2016

The Singapore International Arbitration Centre (SIAC) has launched two public consultations, one concerned with its revised 2016 Rules, and the other on their new draft Investment Arbitration Rules (IA Rules) 2016.

Draft updated 2016 Rules¹

The updated Rules include new provisions on joinder and consolidation, and amendments to the emergency arbitrators and expedited procedure provisions, together with a new provision allowing for a single arbitration to determine disputes arising out of multiple contracts, introduction of a formalised case management conference procedure, revised time limits for closure of proceedings, and publication of the award only with the consent of the parties.

The consultation period closes on 29 February 2016, with the Rules due to come into force on 1 June 2016.

Draft Investment Arbitration Rules 2016²

SIAC has released its draft Investment Arbitration (IA) Rules 2016 for public consultation. The proposed IA rules are intended to be an alternative to those under ICSID or UNCITRAL, and further help establish SIAC as a financial arbitration centre.



The consultation period closes on 29 February 2016, with the IA Rules due to come into force on 27 May 2016.

CHANAKA KUMARASINGHE, PARTNER

The draft IA Rules provide that the proceedings will be confidential, give the tribunal the power to order early dismissal of unmeritorious claims, require the parties to disclose the existence and details of any third party funding arrangements, and take funding arrangements into account when making costs orders. The tribunal also has jurisdiction to allow parties who are not represented in the arbitration, but are parties to the contract to make submissions in the arbitration.

The consultation period closes on 29 February 2016, with the IA Rules due to come into force on 27 May 2016.

We would be happy to forward your comments to SIAC if you prefer to submit these through us, rather than directly.

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hfw HFW cements Middle East presence with launch of three new Associations

We have expanded our specialist Middle East legal offering with the launch of three new Associations in Riyadh, Beirut and Kuwait City. The move significantly extends our geographical footprint across the Middle East region, with offices in Dubai, Riyadh, Beirut, Kuwait and Abu Dhabi, and further strengthens and diversifies the capabilities of the existing team, taking the total number of lawyers working across the region to 40.

Operating through associations with established local law practices Al-Enezee in Riyadh and El-Khoury & Partners (EKP) in Beirut, both of which have well recognised practices and a strong portfolio of regional business, we will continue to represent local businesses and government entities as well as multinational companies, financial institutions and private investors throughout the MENA region. The combined Saudi and Beirut-based team of 15 lawyers, led by Ziad El-Khoury alongside Khulaif Al-Enezee (Riyadh), Wissam Hachem (Riyadh) and Hadi Melki (Beirut) has more than 15 years 'on the ground' experience.

In Kuwait, we will operate through an association with Rula Dajani Law Office, headed by the firm's Middle East Managing Partner Rula Dajani Abuljebain, to provide a range of onshore legal services across the firm's core industry sectors, and including local litigation. Rula will split her time between Dubai and Kuwait.

Offering clients a unique blend of local market insight, industry expertise and commercial pragmatism, our Middle East team is ideally positioned to support local, regional and international clients with the full range

1 The draft Rules are available: at <http://siac.org.sg/images/stories/articles/rules/2016Rulesclean-website.pdf>
 2 The draft Investment Arbitration Rules are available at: [http://www.siac.org.sg/images/stories/articles/rules/IA Rules \(rev 20160115\).pdf](http://www.siac.org.sg/images/stories/articles/rules/IA Rules (rev 20160115).pdf)



“We recognise the importance of the Middle East region to world trade and as such, it has become an increasingly important part of our growth strategy,”

RICHARD CRUMP, SENIOR PARTNER

of transactional, regulatory and dispute resolution legal services.

“We recognise the importance of the Middle East region to world trade and as such, it has become an increasingly important part of our growth strategy,” says Senior Partner, Richard Crump.

“The addition of these Associations rapidly moves HFW into the top tier of firms operating in the region in terms of geographical footprint and size of team, which in turn enhances our experience and language capability and, importantly, provides greater cultural understanding to better serve our full client base across the region.”

For more information, please contact [Tania Phayre](#), Head of Marketing & Business Development, on +44 (0)20 7264 8546 or email tania.phayre@hfw.com, or your usual contact at HFW.

hfw Conferences and events

2nd Annual Qatar International Arbitration Summit

Qatar

18 May 2016

Presenting: Damian Honey.

HFW will be sponsoring this event.

SIAC Congress 2016

Singapore

27 May 2016

Presenting: Chanaka Kumarasinghe

Lawyers for international commerce

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