Thomson Geer

Lawyers

Advice | Transactions | Disputes

Arbitration review

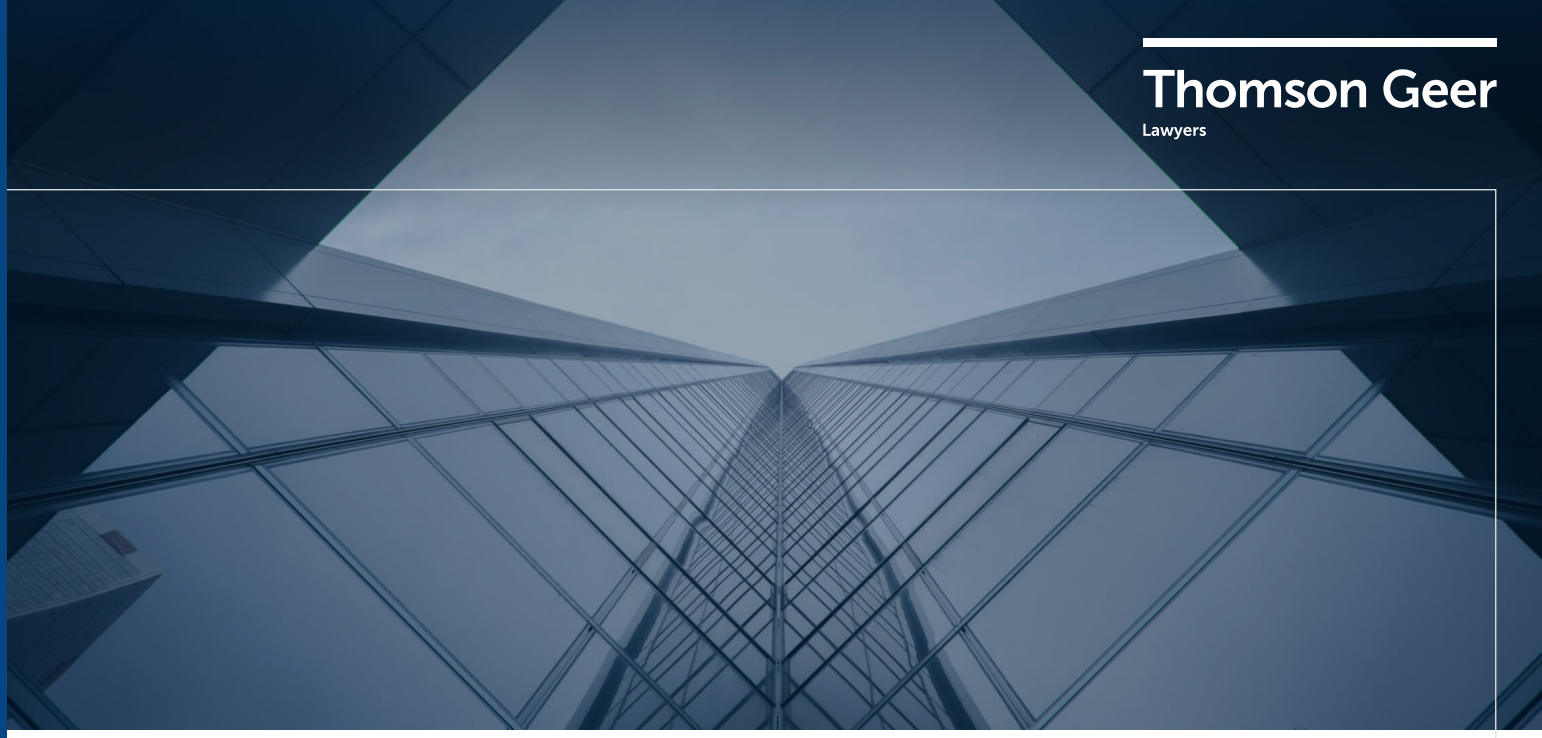
February 2024

Welcome to the first 2024 Thomson Geer arbitration update.

The arbitration team publishes its update twice a year reporting on key developments in arbitration practice and procedure and recent arbitration cases (in both Australia and regionally) and offering our insights on arbitration.[1]

Table of contents

1 The contents of this update are provided for informational purposes only and do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.



Thomson Geer
Lawyers

1. Key developments in practice and procedure – Australia

1.1 Enforcement of foreign arbitral awards

Stonex Financial Inc v Ambrose [2023] FCA 1568

In the decision of ***Stonex Financial Inc v Ambrose*** [2023] FCA 1568, the Federal Court was asked to make orders recognising and enforcing a foreign arbitral award which the Court inferred was made in the United States of America.

The application was made *ex parte*, with the Court observing that:

> *It was not necessary for the applicant to serve its application for enforcement on the respondents for the purpose of the first, preliminary, hearing. That is because r 28.44(3) of the [Federal Court Rules] provides that an application to enforce a foreign award under s 8(3) of the [International Arbitration Act 1974 (Cth)] "may be made without notice to any person". The apparent purpose of that rule is to facilitate an expeditious two-stage process for the enforcement of arbitral awards in appropriate cases. If the Court is satisfied on a preliminary basis that an application to enforce a foreign award meets the statutory requirements, on the next occasion the Court may enforce the award without requiring formal service of the application provided that notice has been given to the award debtor...*[2]

The applicant satisfied the procedural requirements under the *International Arbitration Act 1974* (Cth) (**IAA**), having produced to the Court a certified copy of the award and the arbitration agreement. The Court found that at the time of the preliminary hearing there were no grounds for refusing enforcement and the award must be enforced.

In this case, the Court was not satisfied, having considered the evidence before it, that notice to the respondents at the addresses nominated by the applicant would come to the respondents' attention. Orders were made by the Court that notice of the Court's orders (and its intended orders entering judgment in favour of the applicant in the terms of the foreign arbitral award) be given to the respondents and that any application opposing the enforcement be filed and served within 28 days. Absent an application and on the applicant satisfying the Court that notice of the orders had been given, orders would be made declaring the applicant's entitlement to have the award enforced as a judgment of the Court and entering judgment in the applicant's favour. The order records the known addresses of the respondents, but adds that service should also be *effected '[a]t such further address and in such further manner as the applicant submits is likely to bring the proceeding to the respondents' notice'*.[3]

2 *Stonex Financial Inc v Ambrose* [2023] FCA 1568, [21] (Stewart J) ('*Stonex*').
3 Orders of Stewart J in Stonex (n 2).

1.2 Garnishee orders following enforcement of foreign arbitral awards

Siemens WLL v BIC Contracting LLC [2023] FCA 1664

In ***Siemens WLL v BIC Contracting LLC*** [2023] FCA 1664, the Federal Court considered whether it was beyond the territorial jurisdiction of the Court or the reach of the relevant statutory provision to make garnishee orders following judgment enforcing two foreign arbitral awards.[4]

The garnishee order (made on an ex parte application) was sought after the award creditor identified funds owed by the garnishee (an Australian company) to BIC Contracting LLC (**BICC**) (the award debtor) with further payments accruing. The garnishee applied to set aside the order on four grounds:

> 28. *First, the garnishee contends that the garnished debt is situated in England, not Australia, and is therefore beyond the reach of this Court. Reformulated, the contention is in effect that the debts […] that can be garnished do not include debts that are located outside the territorial jurisdiction of the Court.*
>
> 29. *Secondly, the garnishee contends that the garnishee order presents a risk of harm to the garnishee and other third parties […].*
>
> 30. *Thirdly, the garnishee contends that a secured lender to BICC, namely Emirates National Bank of Dubai, has an interest in the garnished debt. That interest is said to be by way of assignment of all then current and future "accounts receivables" as security for certain banking facilities.*
>
> 31. *Fourthly, the garnishee contends that there are pending foreign bankruptcy proceedings against BICC in the UAE which is a powerful discretionary reason to set aside the garnishee order as being "inappropriate".*[5]

Our observations are limited to the first ground, it being dispositive of the application.

Having considered the powers of the Court to make the garnishee order, his Honour then turned to Lord Hoffman's explanation of a garnishee order in *Societe Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 AC 260 at [54]:

> *The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries.*

The Court noted that this statement is not controversial and observed, inter alia, that *'if the debts identified in the garnishee orders are not situated in Australia, they are not "debts" referred to in CPA s 117(1) and cannot properly be subject to the garnishee order, which must then be set aside'*.[6]

His Honour then examined relevant Australian and English case law, noting that, consistent with the English decision of ***Hardy Exploration*** *& Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm):

> *… the authors of Dicey, Morris & Collins: The Conflict of Laws (16th ed, Sweet & Maxwell, 2022) at [23.026] state that:*
>
> > *[A]n exclusive jurisdiction or arbitration agreement is likely to establish that the debt is located at the place of the chosen court or agreed seat of the tribunal, as that replaces the debtor's residence as the normal place of enforcement – enforcement for these purposes has been understood to mean the place where a judgment may be obtained against the debtor, not the place or places where the debtor's assets are located.*[7]

4 See *Siemens WLL v BIC Contracting LLC* [2022] FCA 1029 for the enforcement of arbitral awards made in London (pursuant to LCIA Rules) and Dubai (under ICC Rules)
5 *Siemens WLL v BIC Contracting LLC* [2023] FCA 1664, [28]-[31] (Stewart J).
6 Ibid [37].
7 Ibid [41].

concluding that:

> *Given its apparent acceptance in England, there being no Australian authority against it, and its consistency with the principle that a chose in action is situated where it is properly recoverable, I adopt the Hardy Exploration analysis as being applicable in Australia. The result is that the garnished debt is located in England. It is beyond the territorial reach of CPA s 117(1) and the garnishee order should be set aside.*[8]

His Honour noted that there was an alternative approach available:

> *…which is with reference to the exception to the general rule with regard to the territorial limitation on the execution of judgments identified in Taunus Petroleum and cited at [34] above. That is, if payment under the garnishee order would be recognised in English law, being the law of the place where the debt is situated, as discharging the debt then this Court would have the jurisdiction (in the sense of power) to make the order. See Societe Eram at [26] and Dicey, Morris & Collins at [25-090].*
>
> *Discharge of the debt is governed by its proper law […]. In this case that is English law. There is no choice of law rule in English law whereby CPA s 123(4) would be applied so that payment by the garnishee under the garnishee order to Siemens would have the effect of discharging the garnishee's debt to BICC; BICC or SALD could still pursue the debt by way of London arbitration and payment under the garnishee order would not be an available defence under the applicable law.*[9]

His Honour concluded that even on that alternative approach the garnishee order must be set aside. His Honour also rejected the submission by Siemens that the relevant debt should be regarded as being situated where physical copies of the deeds under which the debt was created were located.

1.3 Enforcement in investor-State disputes and foreign State immunity

CCDM Holdings LLC v Republic of India (No 3) [2023] FCA 1266

In the recent decision of the Federal Court of Australia in ***CCDM Holdings LLC v Republic of India (No 3)*** [2023] FCA 1266, India claimed foreign State immunity under the *Foreign States Immunity Act* 1985 (Cth) (**FSIA**) in proceedings for enforcement of a foreign arbitral award. The conduct of India which was the subject of the underlying dispute was an alleged breach of obligations under a bilateral investment treaty (including a decision to annul an agreement which was alleged to give rise to the applicant to rights for compensation against India – referred to in the judgment as the Annulment).

It was not in contention that India was a foreign State for the purposes of the FSIA and therefore prima facie immune from the proceeding. The question was whether exceptions to the immunity applied to the proceeding.

India's application came before the Court as an interlocutory application to set aside the originating application to recognise and enforce a foreign arbitral award of the Permanent Court of Arbitration (**PCA**).

Relevantly, as found by the Court:

(a) In 1998 India and Mauritius had signed a bilateral investment treaty known as the Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments (**BIT**);

(b) The BIT contained a regime of international arbitration for breaches of the BIT, including an option for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**) or binding arbitration under the UNCITRAL Arbitration Rules;

(c) Arbitral proceedings to be conducted pursuant to the UNCITRAL Rules were commenced by the applicants against the Republic of India and were administered by the PCA;

8 Ibid [44].
9 Ibid [46]-[47].

(d) The notice of arbitration states, inter alia, that the place of arbitration was The Hague, Netherlands and the applicants (as claimants) sought an award declaring India liable to make reparation and also declarations of breach of the BIT; and

(e) India challenged jurisdiction and the tribunal made an award on jurisdiction and merits on 25 July 2016 and an award on quantum on 13 October 2020 (the latter of which was the subject of the interlocutory application).

His Honour's observations provide background to the investor-State dispute:

> *The "investments" (using the quotation marks to indicate neutrality on my part as to the Claimants' allegations) which the Original Applicants claimed in the arbitral proceedings to be qualifying investments for the purposes of the BIT comprised their respective shareholdings in an Indian company, Devas Multimedia Private Limited (**Devas India**), and through that shareholding, an indirect interest in an agreement made between Devas India and Antrix Corporation Limited (**Antrix**), a corporation wholly owned by India under the administrative control of the Department of Space (the **Devas/Antrix Agreement**).*
>
> *That agreement with Antrix (to which India itself was not a party) was in respect of the lease of space segment capacity in the S-band electromagnetic spectrum on two Indian satellites yet to be built, launched and operated by the Indian Space Research Organisation.*
>
> *The conduct of India impugned by the Original Applicants in the arbitration was alleged to include the conduct of "various emanations of the Indian state". These were alleged to include: the Prime Minister of India and his office; the Union Cabinet (described in the Statement of Claim as "a core decision-making body of the Indian government that is comprised of 35 ministers"); the Indian Cabinet Committee on Security (**CCS**) comprised of the Prime Minister, Minister of Home Affairs, Minister of External Affairs, Minister of Finance and the Minister of Defence; the Indian Space Commission; the Department of Space; the Indian Space Research Organisation; Antrix; and the Additional Solicitor-General, one of the law officers of India. Relevantly for the present application, on 17 February 2011, the CCS decided to annul the Devas/Antrix Agreement, referring to "an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements" and to the Government not being "able to provide orbit slot in S band to Antrix for commercial activities" (the **Annulment**). I return to the Annulment in more detail below.*[10]

Having identified the general immunity provision and exceptions to immunity in the FSIA, his Honour referred specifically to section 17 relating to arbitration:

> *(1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding:*
>
> *(a) by way of a case stated for the opinion of a court;*
>
> *(b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or*
>
> *(c) to set aside the award.*
>
> *(2) Where:*
>
> *(a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and*
>
> *(b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;*
>
> *(c) then, subject to any inconsistent provision in the agreement, the foreign*

10 *CCDM Holdings LLC v Republic of India (No 3)* [2023] FCA 1266, [10]-[11] (Jackman J).

> *State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made. […]*[11]

The applicants' contentions in this matter were that India had submitted to the jurisdiction of the Court by its agreement to arbitrate (which fell within the 'submission to jurisdiction' exception in s 10 of the FSIA) and that because of the nature of the dispute, immunity was not available because of the application of the 'commercial transaction' exception in s 11 of the FSIA.

As to the submission to jurisdiction, his Honour addressed the following two questions:

(a) *'what are the principles which are relevantly applicable to determine whether a submission by agreement has been made for the purposes of s 10(2)';*[12] *and*

(b) *'did India, by signing the New York Convention, submit within the meaning of s 10(1) and (2) to the jurisdiction of this Court in relation to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the Applicants tender a copy of the award together with what appears on its face to be an agreement to arbitrate the underlying dispute'.*[13]

As to the 'commercial transaction' exception, the following questions were articulated:

(a) can the commercial transaction exception supply a freestanding exception to immunity in relation to proceedings to recognise and enforce a foreign arbitral award?[14]

(b) If so, what is the construction and application of ss 11(1) and (3)?[15]

His Honour observed that the High Court had recently considered the principles applicable to determine whether a submission by agreement had been made for the purpose of s 10(1) of the FSIA in the context of the ICSID Convention (in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11. His Honour discussed the High Court's reasoning, but concluded that absent '*the kind of detailed analysis of the text, context and purpose of the New York Convention which the High Court undertook in relation to the ICSID Convention, it is reading far too much into the reasoning [of the High Court] to suppose that the High Court intended to express any conclusion in relation to the New York Convention, and the reasoning […] therefore does not represent considered dicta that the signing of the New York Convention constitutes a submission to jurisdiction under s 10(2) of the FSI Act'*.[16]

His Honour undertook that *'detailed analysis of the text, context and purpose of the New York Convention'*,[17] including the preparatory work of the treaty (permitted by the Vienna Convention) and commentary of learned academics and lawyers. His Honour found, in conclusion, *'clear and unmistakeable submission by agreement within the meaning of s 10(2) of the FSIA on the part of India to the recognition and enforcement by this Court of the [award]'*,[18] holding that:

> *…India is not immune from the jurisdiction of this Court in these proceedings…*[19]

On the question of whether the 'commercial transaction' exception provided a 'freestanding exception' in relation to proceedings to recognise and enforce a foreign arbitral award, his Honour accepted the applicants' submission that's *11 can operate independently of s 17, and it is not necessary that the elements of s 17(2) be established in order for s 11 to apply'*.[20]

On the question of the scope of the commercial transaction exception, the Court's analysis focussed on the context of enforcement of judgments/awards where the underlying issues were commercial. The case endorses a broad interpretation of the term 'commercial transaction' focussing on 'the source of the rights in issue', so that a proceeding for

11 Ibid [20].
12 Ibid [31].
13 Ibid.
14 Ibid [33(1)].
15 Ibid [33(2)].
16 Ibid [40].
17 Ibid.
18 Ibid [103].
19 Ibid.
20 Ibid [107].

enforcement of a judgment for a money sum owing under a commercial transaction would constitute a proceeding which 'concerns' a commercial transaction. The judgment includes a discussion of the earlier decisions of *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 (enforcement proceedings) and *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2012] HCA 33 (suit by the Australian Competition and Consumer Commission).

At the end of the day, however, the Court was not satisfied that the applicants had demonstrated that the commercial transaction exception applied. Amongst other things, the Court observed that:

> *... the Annulment was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy. Such an act of State cannot be characterised as a "like activity" to a "commercial, trading, business, professional or industrial or like transaction" within the meaning of s 11(3). It certainly bears no resemblance to any of the non-exhaustive list of commercial transactions in s 11(3). There is no evidence that the Annulment satisfied the definition of "commercial transaction" in s 11(3), let alone sufficient evidence for the Applicants to have discharged their onus of proof.*[21]

The applicants' interlocutory application, that the originating application be set aside, was dismissed.

Shortly after the publication of judgment in this matter, India applied to the Court for leave to appeal. The Court granted leave to appeal, describing the matter, *inter alia*, as *'of sufficient contestability and importance to justify the grant of leave to appeal'*.[22]

1.4 Costs following stay of proceedings in favour of arbitration

Zheng v Australian International Aviation College Pty Ltd [2023] NSWSC 1165

Zheng v Australian International Aviation College Pty Ltd [2023] NSWSC 1165 concerned an application for costs consequent upon an earlier order of the Court staying a cross-claim in aide of arbitration. The defendant accepted that it must pay the costs; Hainan Airlines Co Ltd (**Hainan**), against which the defendant has cross-claimed sought costs on an indemnity basis and a gross sum costs order.

It is apparent from the judgment that until shortly before the hearing of the application to stay, in spite of the existence of an arbitration agreement in the relevant contract between the Australian International Aviation College Pty Ltd (**AIAC**) and Hainan (pursuant to which Hainan claimed an indemnity against claims made by Zheng), AIAC had resisted orders to that effect. It is also apparent that there was some debate between AIAC and Hainan as to whether the stay was properly sought under the domestic arbitration legislation or under the IAA. Orders were eventually made under s 7(2) of the IAA.

On the question of costs, the Court observed that *'[i]t is appropriate to make an order for indemnity costs against a party who has acted unreasonably in persisting with a claim or defence that it should have know had no real prospect of success'*[23] *and that '[t]he same circumstances may also justify a gross sum costs order...'*.[24] In finding that it was appropriate to make a gross sum costs order for indemnity costs, the Court observed further that:

> *AIAC was aware that the contract contained an arbitration clause which was in broad terms. At least by 13 June 2023, it was aware of the general nature of the dispute in relation to the indemnity clause and that Hainan wished to exercise its contractual right to have that dispute referred to arbitration in accordance with the Training Agreement. It is plain that the Court was required to refer the matter to arbitration in those circumstances. Most of the costs claimed by Hainan were incurred after that date. AIAC maintains that it was entitled to "get to the bottom*

21 Ibid [120].
22 *CCDM Holdings LLC v Republic of India (No 4)* [2023] FCA 1400, [3] (Jackman J).
23 *Zheng v Australian International Aviation College Pty Ltd* [2023] NSWSC 1165, [13] (Ball J).
24 Ibid [14].

> *of" the indemnity before agreeing to a stay. But why that is so is unclear. The meaning and effect of the indemnity clause is a matter for the arbitration.*[25]
>
> This case is consistent with the strong support of the Australian courts for arbitration, including international arbitration.

1.5 Subpoena in support of arbitration

we-do-IT Pty Ltd v we-do-IT-Inc [Delaware] [2023] VSC 611

In ***we-do-IT Pty Ltd v we-do-IT-Inc [Delaware]*** [2023] VSC 611, the Supreme Court of Victoria granted leave to the plaintiff to issue subpoenas against a number of individuals and corporate entities for the purpose of arbitral proceedings seated in Melbourne. The application was made pursuant to s 23(3) of the IAA. This section provides that a party may apply to the Court for the issue of a subpoena, but only with the permission of the arbitral tribunal conducting the arbitral proceedings. The Court can only issue a subpoena where it is satisfied that '*it is reasonable in all the circumstances to issue it*'.[26]

The plaintiff's application was supported by an affidavit which exhibited the arbitrator's ruling giving permission to the applicant to make the application.

The Court cited Croft J's explanation of the proper approach to applications of this nature in *Aurecon Australasia Pty Ltd v BMD Constructions Pty Ltd* (2017) 52 VR 267, observing, *inter alia*, the Court's citation in that decision of the observations of Croft J in *ASADA v 34 Players and One Support Person* [2014] VSC 635 (at [63]), including having regard to the 'international provenance of the Act' and the provisions of the Model Law.

His Honour observed, in summary, that:

> *... in determining an application under s 23(3) of the IAA, the Court must be satisfied of compliance with the relevant section and rule, and that it is reasonable for the subpoena to be issued. It does not merely 'rubber stamp' the application. However, the Court will attribute a degree of deference to the fact that permission has been given by the arbitral tribunal and will not usually 'second guess' the tribunal's ruling that:*
>
> 1. *the documents the subject of a proposed subpoena are relevant to the issues in the proceeding; and*
> 2. *the subpoena is being issued for a legitimate forensic purpose.*[27]

25 Ibid [16].
26 *International Arbitration Act 1974* (Cth) s 23(5); *we-do-IT Pty Ltd v we-do-IT-Inc [Delaware]* [2023] VSC 611, [10] (Croft J) ('*we-do-IT*').
27 we-do-IT (n 26) [16].

2. A snapshot of important developments – international

2.1 Hong Kong

China Evergrande Group v Triumph ROC International Ltd [2023] HKCFI 2432

In September 2023 the High Court of the Hong Kong Special Administrative Region made orders staying arbitration proceedings pending the resolution of winding up proceedings in the decision of ***China Evergrande Group v Triumph ROC International Ltd*** [2023] HKCFI 2432.

China Evergrande Group (**CEG**) (the plaintiff in the litigation) was the subject of a winding up petition commenced in June 2022. The judgment notes that the winding up petition had been adjourned on several occasions to enable CEG to pursue debt restructuring and remained adjourned until 30 October 2023.

CEG was also the respondent in arbitration commenced by Triumph ROC International Ltd (**Triumph**) under the HKIAC Rules. At the time the matter came before the High Court, Triumph had unsuccessfully sought emergency relief from an emergency arbitrator, with the Court noting that absent restraint by the Court, 'the Arbitration Proceedings are set to continue'. CEG applied to the Court for orders restraining the arbitration; Triumph applied at the same time for security for costs of the application. Both applications were heard together.

CEG's application was made under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)* which provided, relevantly, that a company may apply after the presentation of a winding up provision, for a stay or for orders restraining any pending action or proceeding. There was no dispute between the parties that the mechanism was available. The relief available was subject to the Court's discretion.

His Honour adopted the *'stated general principle and approach [in] the Court of Appeal's judgment in Attlee Investments Limited v Lee Chuen t/a Lee Chuen Furniture Co [1983] 1 HKC 186, [4]'*.[28] As to the fact that in this case a stay or restraint was sought in respect of arbitration (rather than litigation), the Court observed that *'the Court of Appeal in Attlee did not suggest that some fundamentally different approach or threshold should apply where section 181 is invoked against arbitral proceedings'*.[29]

His Honour identified a number of factors relevant to the exercise of the Court's discretion, commencing with the *'primary concern of orderly administration and preservation of CEG's assets for the purpose of fair treatment between all creditors as a class'*.[30] His Honour was not persuaded by Triumph's submission that because the arbitration

28 *China Evergrande Group v Triumph ROC International Ltd* [2023] HKCFI 2432, [34] ('CEG').
29 Ibid [42].
30 Ibid [49].

concerned liability rather than enforcement, the arbitral proceedings would not jeopardise the rights of other creditors, observing that:

> *In my view, as a separate and substantial set of legal mechanisms and processes the Arbitration Proceedings unless restrained do clearly threaten to disrupt and undermine the orderly and equitable progression of the usual claims and distribution process.*[31]

and:

> *Triumph's reliance on its purportedly clear and simple entitlement to judgment in the Arbitration Proceedings does not assist it. If the matter really were so simple, that is all the more reason why it can and should be dealt with in the ordinary way along with all other creditor claims, rather than as the subject of separate legal proceedings. This is particularly pertinent given the absence of any mechanism for summary determination in the Arbitration Proceedings.*[32]

His Honour also rejected Triumph's submission that it would be wrong in principle to ignore Triumph's contractual entitlement to have its disputes resolved by way of arbitration, finding that *'Triumph's right to seek arbitration is a relevant factor before me. But I do not think that this right is in itself a weighty factor in the present case and context…'*.[33]

The Court made the orders sought by CEG.

Song Lihua v Lee Chee Hon [2023] HKCFI 1954

In ***Song Lihua v Lee Chee Hon*** [2023] HKCFI 1954, the High Court had before it an application for a letter of request under the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR. Mr Lee, the applicant in this application (but the respondent in the proceeding), was the award debtor and the application was made for the purposes of a set aside application, including on grounds that the award was contrary to public policy (**Setting Aside Application**). The applicant sought oral testimony from, and an order for examination of, one of the tribunal members as to his attendance at the hearing (and testimony from the tribunal secretary).

The High Court had earlier granted leave to the award creditor to enforce the award in Hong Kong.

The Court observed that:

> *On the facts of this case, the evidence sought under the Request and the matters relied upon as to the conduct of QF are relevant as to whether the procedures of the Arbitration were in accordance with the parties' arbitration agreement, or in accordance with the procedural law governing the Arbitration, and whether it would be contrary to the public policy of Hong Kong to enforce the Award by reason of any serious irregularity or lack of due process in the conduct of the Arbitration. The parties' underlying contract for the acquisition of shares is governed by PRC law, which may also govern the parties' arbitration agreement and the procedure of the Arbitration itself. However, the hearing of the Setting Aside Application is governed by Hong Kong law so far as it relates to procedure and the admissibility of evidence. […]*[34]

The key question before the Court was whether an arbitrator could be compelled to give evidence in the Setting Aside Application and the Court noted that *'[c]ounsel for Lee has not cited any authority to support the proposition that an arbitrator can be compelled to give evidence in proceedings to challenge his award'*.[35]

Having observed that older authorities suggested that an arbitrator could be called as a witness on certain matters, the Court stated that:

> *It is accordingly widely recognised that arbitrators perform and exercise a judicial or quasi-judicial function, and that arbitrators' decision-making and judgments are comparable in nature and process to those of judges, such that there is a need to*

31 Ibid [51].
32 Ibid [53].
33 Ibid [55].
34 *Song Lihua v Lee Chee Hon* [2023] HKCFI 1954, [15].
35 Ibid [23].

> *protect the course of their independent judgment from threats of suit as well as from collateral attacks.*[36]

The Court concluded that:

> *In this overall context, my judgment is that arbitrators should be entitled to the same immunity available to judges in respect of their decision-making in the process of arbitration, absent fraud or bad faith. The purpose and rationale for such immunity is the protection of the discretionary and independent decision-making process of the arbitrator who performs a judicial function. It is also in line with the public policy and the Court's interest in encouraging private dispute arbitration and to protect the autonomy of the arbitral process. Such arbitral immunity and autonomy will be illusory if the Court is to compel, or enable the parties to compel, an arbitrator to give evidence as to his decision-making, which includes the arbitrator's exercise of his powers and discretion in the arbitral process, or to explain and justify the manner of exercise of such powers and discretion.*[37]

The Court declined to make the order for the request for the evidence of the tribunal member. As to the tribunal secretary, the Court found, having observed that the award debtor could likely give similar evidence to that sought from the secretary, that '*it would be totally disproportionate to issue the Request for the limited evidence which Y may provide*'.[38]

The Setting Aside Application was heard in August 2023 (***Song Lihua v Lee Chee Hon (former name: Que Wenbin***) [2023] HKCFI 2540 with the Court starting with first principles:

> *The Hong Kong courts adopt a pro-arbitration and pro-enforcement approach, endeavouring to uphold parties' agreement to submit their disputes to arbitration, recognize and enforce awards, and interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.*[39]

The award was made in an arbitration conducted on Mainland China by the Chengdu Arbitration Commission. The judgment notes that the award creditor relied, *inter alia*, on the fact that the Mainland Court had already ruled that the award was valid and dismissed an application to set aside at the seat, with the Court observing that '*there is nothing in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the jurisdiction in which it was made, as a condition of opposing enforcement elsewhere*'.[40].

The award debtor challenged the award on six grounds: (a) he was not given proper notice of the hearing; (b) he was not properly served with the notice of arbitration; (c) he was deprived of the right to nominate an arbitrator; (d) he was deprived of the opportunity to present his case and to a fair hearing; (f) he was not given a copy of supplemental submissions so as to address matters raised therein; and (g) the underlying contract and arbitration agreement are invalid and unenforceable under Mainland law.

The Court noted that the Chengdu Intermediate People's Court had earlier found that there was no illegality in the underlying contract and that one tribunal member's conduct had '*caused a defect in the procedure*',[41] but it had not had any actual impact on the hearing. The notice of arbitration and documents in the arbitration had been found to be validly served.

As to the procedural issues raised in the application:

> *It can also be said that Lee had waived any irregularity concerning the service of the notice and documents of the Arbitration, and any irregularity in the constitution of the tribunal. He had knowledge of the composition of the tribunal by the time of the 2nd Hearing, at the latest, but no objection had been raised on Lee's behalf. In this context, [...] Lee's lawyer had, at the request of the tribunal, confirmed that there was no objection to any procedural defect in the Arbitration. I accept that the nomination and empaneling [sic] of the tribunal is a procedural matter, which can be and was waived by Lee.*[42]

36 Ibid [29].
37 Ibid [31].
38 Ibid [42].
39 *Song Lihua v Lee Chee Hon (former name: Que Wenbin)* [2023] HKCFI 2540, [7].
40 Ibid [9].
41 Ibid [22].
42 Ibid [31].

The Court observed that the complaint concerning the arbitrator's conduct was the '*most serious complaint made*'.[43] The grounds for the complaint included observations from a video of the second hearing and the Court noted that '*[t]here is no dispute that whereas the parties' lawyers, and two of the three arbitrators, had attended the 2nd hearing in person, the third arbitrator Q had attended by video conferencing facilities'*.[44] The 'gist' of the complaint was described as follows:

> *... Q had not meaningfully participated in the 2nd Hearing of the Arbitration. For at least the second half of the hearing, Q was moving from one location to another, indoors and outdoors, and had eventually left his premises, and travelled in a car, without giving his undivided attention to the hearing. He was off-line for periods of time from the second half, and obviously could not hear what was being said by the parties' lawyers or by the other members of the tribunal.*[45]

In light of the relevant authorities, the Court observed that:

> *The above authorities all highlight that it is not only important for there to be justice and fairness in the process of a trial or a hearing, but that it is just as, if not more, essential that an objective and reasonable third-party observer should see that there was fairness and impartiality in the process. Only then can there be confidence in and respect for the system whereby a party and his case is judged.*[46]

Against this observation, the Court found that *'there is no apparent justice and fairness, when a member of the decision-making tribunal was not hearing and focused on hearing the parties in the course of the trial'*,[47] concluding on the evidence that '*enforcement of the Award in Hong Kong would violate the most basic notions of justice in our forum and should be refused [...]'*.[48]

The Court also considered the ground relating to the supplementary submissions. The Court noted that having found that enforcement should be refused, it was not necessary to make further findings. It observed, however, that:

> *Suffices [sic] it to say that the manner of the conduct of the 2nd Hearing is sufficiently egregious to warrant the Enforcement Order to be set aside, on the ground of public policy'*.[49]

G v X & Ors [2023] HKCFI 3316

In ***G v X & Ors*** [2023] HKCFI 3316 the High Court made orders enforcing a foreign arbitral award made on Mainland China in a CIETAC arbitration.

The award was issued in April 2021 and an application to set aside was made to the Mainland Court the following month. G applied for leave to enforce the award in July 2021. X opposed enforcement for the following reasons:

> *... firstly, he was unable to present his case on G's additional or revised relief sought in the arbitration by way of amendment of his claim, and on a formula which the tribunal had come up on its own for the calculation of the damages payable. Secondly, X claimed that the Award had dealt with a difference or disputes which did not fall within the terms of the submission to arbitration, and/or contained decisions on matters beyond the scope of the submission, by virtue of the tribunal allowing the consolidation of the disputes under 8 agreements into a consolidated arbitration and dealing with the disputes arising out of the 8 agreements. It was claimed that the procedure of the Arbitration was not in accordance with the parties' agreement, and further, that enforcement of the Award would be contrary to public policy for that reason.*[50]

The judgment discloses that in July 2021 the Mainland Court stayed enforcement proceedings on the Mainland pending determination of the setting aside application and that in April 2022, X applied to the Hong Kong Court to stay the enforcement proceedings

43 Ibid [32].
44 Ibid [36].
45 Ibid [38].
46 Ibid [49].
47 Ibid [52].
48 Ibid [57].
49 Ibid [61].
50 *G v X & Ors* [2023] HKCFI 3316, [5].

in Hong Kong. In June 2022 the Hong Kong Court determined G's application for enforcement of the award in Hong Kong and X's application for a stay of the enforcement proceedings. In its decision, the Court dismissed a claim based on oppression and stated:

> *...it was found (at page 27 of the June Decision) that there are reasonably arguable grounds to be made in the Mainland Setting Aside Application as to the scope of the submission to arbitration, and as the Mainland Court was in the best position to decide on the scope and operation of Article 14 of the CIETAC Arbitration Rules and Mainland law, it would be prudent to stay enforcement of the Award in Hong Kong until the decision of the supervisory Mainland Court is known on this issue.*[51]

In the interim, there were developments in the Mainland Setting Aside Application because '*the Mainland Court issued a notice ("Notice"), notifying CIETAC that the tribunal in the Arbitration has collected evidence on its own without the parties' examination, which was not in accordance with the relevant CIETAC rules*'[52] and '*[t]he Mainland Court had directed a re-arbitration to be held pursuant to Article 61 of the Arbitration Law of the PRC*'.[53] Subsequently CIETAC did re-arbitrate and notified its decision to the parties. The Mainland Court then terminated the Mainland Setting Aside Application.

An award was issued following the re-arbitration in November 2023. The award did not make any adjustments to the findings made by the original tribunal.

The Court accepted expert evidence that the '*re-arbitration only concerns correction of defects or mistakes in an arbitral award and is not a separate award*',[54] adding that:

> *...the Mainland Court only ordered re-arbitration on the Evidence Issue, and the New Award only replaces the original award on this defined issue, and to the extent that the New Award is in any way different on this issue. In this case, the New Award made in the re-arbitration is the same as the original Award on the question of damages. Any replacement makes no difference in outcome and effect.*[55]

The Court concluded that: [56]

> *... it is also patently clear that the re-arbitration ordered in September 2022 had no effect on the Award. In the re-arbitration and the New Award, the tribunal has confirmed that, having given the opportunity to X to consider the evidence collected by the original tribunal, and having considered the submissions made by X on such evidence, the award of damages remains unaltered.*

... [T]here is absolutely no ground for this Court to refuse enforcement of the award.

2.2 Singapore

Unsurprisingly, the courts of all regional jurisdictions are increasingly seeing disputes between parties arising out of cryptocurrency transactions.

Beltran, Julian Moreno and Anor v Terraform Labs Pte Ltd [2023] SGHC 34

The case of ***Beltran, Julian Moreno and Anor v Terraform Labs Pte Ltd*** [2023] SGHC 340 concerned disputes between individuals who had purchased algorithmic stable cryptocurrency tokens called TerraUSD and the issuer of those tokens, Terraform Labs Pte Ltd (**Terraform**). The proceeding was a representative action for misrepresentation filed on behalf of the claimants and other individuals.

The judgment notes that it was not in dispute that Terraform's website (**Terra Website**) contained terms and conditions which were accessible via a hyperlink and that the terms and conditions contained an arbitration clause referring disputes to arbitration in Singapore under the SIAC Rules. Specifically, the clause states that '*[y]ou understand and agree that by entering into these terms, you are waiving the right to trial by jury or to participate in a class action*'.[57] There were similar terms and conditions on a related website with a similar arbitration clause (absent the waiver statement). The judgment also notes that the

51 Ibid [9].
52 Ibid [12].
53 Ibid.
54 Ibid [35].
55 Ibid [37].
56 Ibid [40]-[41].
57 *Beltran, Julian Moreno and Anor v Terraform Labs Pte Ltd* [2023] SGHC 340, [15].

parties agreed that the arbitration clauses were sufficiently wide to encompass the claims prosecuted in the representative proceeding.

Terraform challenged jurisdiction. At the same time as it filed its defence on jurisdiction, it filed a defence on the merits of the claim, including in the defence a reservation that it was filed 'without prejudice' to its contention that the Court had no jurisdiction. One of the defendants (**Platias**) filed a defence limited to the issue of jurisdiction and shortly after it asked for a case management stay on the basis, *inter alia*, of the existence of a valid arbitration agreement. Other defendants later applied for a stay, with some seeking 'omnibus' orders including an application for a stay or strike out order.

Terraform's application for a stay was dismissed with the Assistant Registrar holding that Terraform had '*failed to make out a prima facie case that a valid arbitration agreement existed…*'.[58] Specifically, the Assistant Registrar found, inter alia, that the relevant hyperlink for the terms and conditions had been 'tucked away' on the website, and 'a reasonably prudent user would not have had notice thereof'.[59] The Assistant Registrar found a similar issue on the related party's website.

The Assistant Registrar found alternatively that even if a valid arbitration agreement existed, Terraform had taken steps in the proceeding and submitted to the Court's jurisdiction. The other defendants' applications were also dismissed.

The defendants appealed. There were two issues for the Court's determination: first, whether steps had been taken in the proceedings (so as to constitute a submission to jurisdiction); and, secondly, whether Terraform had demonstrated prima facie the existence of a valid arbitration agreement.

The question of whether the defendants had taken a step in the proceeding was a question to be determined under Singapore law by reference to the Rules of Court 2021. The Court found that Terraform had taken steps, including by the filing of a summons and counterclaim.

On the question of evidence of the arbitration agreement, the Court took a 'fact-centric' approach endorsed by the Singapore jurisprudence. The Court found further that the determination of all of the issues relevant to the question of whether there was a valid arbitration agreement:

> *… would require "the court to descend into a protracted examination of the evidence to make a finding on the merits that an arbitration agreement exists [or does not exist] on a balance of probabilities at the stay stage" […] This would be inconsistent with a prima facie ascertainment of the existence of an arbitration agreement. […].*[60]

concluding that Terraform had made out a prima facie case.

The Court's determination that steps had been taken in the proceeding disposed of the application. As such, the finding as to the prima facie case did not impact on the outcome.

CZT v CZU [2023] SGHC(I) 11

CZT v CZU [2023] SGHC(I) 11 concerned an application to the Singapore International Commercial Court by an unsuccessful party for the production by the tribunal members of their records of deliberations. The application was brought in parallel with an application by the same party to set aside the arbitral award. The judgment notes that '*[t]he minority issued a dissenting opinion in which he made several serious allegations against the majority*'.[61]

The arbitration was conducted in Singapore under the ICC Rules of Arbitration 2017 (**ICC Rules**). The final award was issued on 20 September 2021. The majority tribunal members had signed the award; the minority tribunal member had, according to a statement on the

58 Ibid [30].
59 Ibid [32]
60 Ibid [147].
61 *CZT v CZU* [2023] SGHC(I) 11, [1].

final award, '*declined to do so in the light of his disagreement with the conclusions and reasoning of the other two arbitrators*'.[62]

The application to set aside the award was filed in the High Court of Singapore in December. The applicant contended that the majority tribunal had acted in breach of natural justice, that the majority tribunal had exceeded the terms or scope of the submission to arbitration, that the arbitral procedure was not in accordance with the agreement of the parties and that the award was in conflict with the public policy of Singapore (by reference, as applicable, to the *International Arbitration Act 1994* (Singapore) and the Model Law).

A request for the full deliberations of the tribunal was made to the ICC Secretariat in October 2021. In response, two of the tribunal members (including one majority member) agreed to preserve their records. In response to a further request, one arbitrator made no further comment, one declined because the record was confidential and the third stated that he would disclose only pursuant to court order. The ICC Secretariat's position was that the work of the ICC Court is confidential and the Secretariat also would not disclose other than pursuant to the order of a competent court in Paris.

In considering the application for production of documents, the Court noted that '*in the present case, it is common ground that the default position is that arbitrators' records of deliberations are confidential and are therefore protected against production orders*'.[63] The Court observed that:

> *... the confidentiality of deliberations, like the confidentiality of arbitration proceedings, exists as an implied obligation in law. There are well-recognised policy reasons for the protection of confidentiality of arbitrators' deliberations.*[64]

adding that:

> *[i]t is also common ground that the protection of the confidentiality of deliberations is not absolute but is subject to exceptions.*[65]

After considering the basis upon which the application was made and observing, at least in relation to some of the requests, '*that production of documents will not be ordered to support what is nothing more than a fishing expedition*',[66] the Court concluded that:

> *For the reasons stated above, we dismiss [the summonses]. The Dissent simply fails to provide compelling reasons as to why the interests of justice in ordering production of the records of deliberations outweigh the policy reasons for the protection of the confidentiality of deliberations. The plaintiff will have to proceed with its setting aside application on the basis of the arbitration record, without the records of deliberations.*[67]

62 Ibid [17].
63 Ibid [43].
64 Ibid [44].
65 Ibid [45].
66 Ibid [67].
67 Ibid [80].

3. News from arbitral institutions

3.1 Australian Centre for International Commercial Arbitration (ACICA)

Sustainability Taskforce[68]

In September 2023 ACICA launched its Sustainability Taskforce representing 'ACICA's ongoing commitment to sustainability'. ACICA reports that the mandate of the Taskforce is to 'consider ways to reduce greenhouse gas emissions throughout the arbitral process', to support the Campaign for Greener Arbitrations Green Pledge and to 'identify ways to educate users on how to accomplish these goals in this rapidly evolving area'.

2023 Evidence in International Arbitration Report

Also in September 2023, ACICA and FTI Consulting published the 2023 Evidence in International Arbitration Report.

The report, which built on the earlier Australian Arbitration Report published in 2020, explored '*the varying evidentiary experiences of those practicing across a variety of industries, with differing dispute values and with different types of expert witnesses*'.[69]

Interestingly, at a more general level, the report notes that:

> *... it was found that there is a strong appetite for greater tribunal intervention in the proceedings [which is] consistent with the findings in the 2020 Australian Arbitration Report [where] practitioners [...] cited a preference for more robust case management and expressed a view that the flexibility afforded by the arbitration process was not always utilised to best effect.*[70]

3.2 Asian International Arbitration Centre (AIAC)

The AIAC published a new suite of arbitration rules in the second half of 2023. These included: (a) AIAC Arbitration Rules 2023 (**2023 Rules**); (b) AIAC i-Arbitration Rules 2023; and (c) AIAC Mediation Rules 2023.

A key change between the 2023 Rules and the earlier AIAC Arbitration Rules 2021 was the division in the 2023 Rules between the AIAC Arbitration Rules (Part I) and the UNCITRAL Arbitration Rules (Part II).

The 2023 Rules also include a new schedule 3 (Emergency Arbitration) and a new schedule 4 (AIAC Fast Track Procedure).

In the earlier rules the fast track procedure was incorporated within the rules themselves. Schedule

68 Australian Centre for International Commercial Arbitration, 'ACICA Announces Sustainability Taskforce' (Press Release, 21 September 2023).

69 Australian Centre for International Commercial Arbitration and FTI Consulting, *2023 Evidence in International Arbitration Report*, 6 September 2023,

70 Ibid.

4 now sets out the procedure to apply where the parties have chosen in their agreement to have disputes resolved under the AIAC Fast track Procedure of the AIAC Arbitration Rules. The criteria for fast track arbitration are either the agreement of the parties or a dispute value of less than USD 300,000 (for international arbitration) or RM 1,000,000 (for domestic arbitration). Each of the tribunal and the parties have an obligation to act expeditiously and the tribunal 'may utilize any technological means as it considers appropriate to conduct the proceedings' (Clause 3.3). Disputes which are determined under the fast track procedures are determined by one arbitrator. There is no automatic hearing – the tribunal may, after consulting with the parties and in the absence of a request for a hearing, 'decide that hearings shall not be held' (clause 10). The default position is written statements of evidence, with the tribunal having the right to decide whether witness will give testimony (if a hearing is held). Awards must be made within six months of the date of the constitution of the tribunal.

The 2023 Rules will apply to all arbitration proceedings commenced after the date of publication of the 2023 Rules, unless the parties have agreed otherwise.

Rule 1 of the 2023 Rules is new; it explains the purpose of Parts I and II and confirms that if there is a conflict between those Parts, Part I prevails. Rule 1.4 provides that:

> *In all matters not expressly provided for in the AIAC Arbitration Rules, the AIAC, the Arbitral Tribunal, and the Parties shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award.*

In addition to the matters identified above, there are a number of changes between the earlier rules and the 2023 Rules, including:

(a) Provision in the 2023 Rules for hearings to be held virtually (Rule 7), meaning (Rule 3) via:

> *... the use of technology to remotely participate in the arbitral proceedings, including attending or appearing at meetings, conferences, deliberations or hearings including the taking of testimony of witnesses and experts by using a video conferencing platform, telephone or any other appropriate means.;*

(a) A requirement for a party who is funded in the arbitration to disclose the existence of the funding and the identity of the funder (Rule 12.1);

(a) Express permission for a tribunal, with the agreement of the parties, to take steps to facilitate settlement (with the parties' agreement operating as a waiver of any right to challenge the arbitrator's impartiality) (Rule 14);

(a) Deemed consent by the parties and the tribunal to AIAC 'disclosing, producing or publishing the award by any means as the AIAC deems fit after 2 years from the release of the Award to the Parties' (Rule 21); and

(a) For investor-State disputes, the incorporation into the 2023 Rules of the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration (Article 1, Section 1).

Asian Sports Arbitration Rules

The Asian Sports Arbitration Rules (**ASA Rules**) were published in October 2023.

In launching the ASA Rules, the AIAC observed that:

> *The AIAC recognises the need for a neutral and independent venue where athletes, teams, federations, agents, and other members of the sports community can come together to manage conflicts. In this regard, the AIAC is honoured to continue serving the Asian community by providing a comprehensive framework for the resolution of all sports-related disputes.*
>
> *The Sports Rules were drafted to address the specific nuances and challenges that often arise in the world of sports. To this end, we have sought the expertise of professionals from various jurisdictions worldwide, in an attempt to leave no stone unturned.*[71]

71 Asian International Arbitration Centre, 'The Asian Sports Arbitration Rules' (Press Statement, 6 October 2023).

3.3 Saudi Centre for Commercial Arbitration (SCCA)

The SCCA published Internal Rules of the SCCA Court in October 2023. These Rules came into effect on 1 July 2023.

The Rules govern the creation and operations of the SCCA Court, including its authority and its decision making processes. Announcing the publication of the Rules, the SCCA observed that the publication was made '*[i]n an effort to further promote transparency*'.[72]

The functions of the SCCA Court include consolidation of arbitrations, determination of disputes as to the number of arbitrators, appointment of arbitrators (including emergency arbitrators), determination of arbitrator challenges, determination of the place of arbitration and review of awards.

3.4 Singapore International Arbitration Centre (SIAC)

The SIAC introduced a public consultation draft of the 7th Edition of the SIAC Rules in August 2023 with Kevin Nash, Registrar, describing the draft as demonstrating '*SIAC's continued commitment towards advancing the conduct and practice of international arbitrations*'.[73]

Amongst other procedural changes, the Consultation Draft introduces the SIAC Gateway, a case management system hosted by SIAC. The draft rules provide that a party may commence arbitration by filing the Notice of Arbitration through this system (rule 6.1) and that the Registrar may direct parties who have commenced arbitration to upload all written communications to this system (rule 4.2). Documents uploaded at the direction of the Registrar are deemed to have been received.

The draft rules introduce a requirement on the party commencing arbitration to include in the Notice of Arbitration 'a statement on the existence of any third-party funding relationship and the identity and contact details of the third-party funder' (rule 6.3(h)). The same obligation applies to a respondent in relation to its Response to the Notice of Arbitration (rule 7.1(g)) and a party seeking consolidation or joinder (rules 16.2(e) and 18.2(f)). A general disclosure obligation is set out in Rule 38, including a requirement that the funded party notify the tribunal, parties and Registrar of any changes in the funding arrangements. Importantly, 'after the constitution of the Tribunal, a party shall not enter into a third-party funding agreement which may give rise to a conflict of interest with any member of the Tribunal' (rule 38.4). Whilst a party to an arbitration proceeding would ordinarily secure its funding before commencing the arbitration, there are some circumstances where funding is negotiated after the proceedings are commenced. For example, a respondent party may seek funding to prosecute a significant counterclaim. The new rules would require the respondent to clear conflicts with the tribunal before entering into a funding agreement.

Rule 19 of the draft rules (Rules on Appointment) provides for a new 'list' procedure for the appointment of tribunal members. In short, the President will provide to each party a list of the names of five potential arbitrators and parties will return the list 'ranking' the names in order of preference. The President will then make the appointment having regard to the parties' preferences. Also new, inter alia, is rule 19.11 which provides that:

> *If, under an appointment procedure agreed by the parties, there is the risk of unequal treatment that may affect the enforceability of the award, the President may, after considering the views of the parties, take any necessary measure to constitute an independent and impartial Tribunal. […]*

All tribunal members now also have an express obligation to conduct themselves in accordance with SIAC's *Code of Ethics*.

72 Saudi Centre for Commercial Arbitration, 'SCCA publishes the Internal Rules of the SCCA Court' (Web Page, 30 October 2023) <https://sadr.org/news-details/258?lang=en>.

73 Kevin Nash, Singapore International Arbitration Centre, 'Public Consultation | Draft 7th Edition of the SIAC Rules' (Registrar's Report, 20 August 2023).

The 6th Edition of the SIAC Rules expressly defines the tribunal's 'Additional Powers'. Section VIII of the draft rules prescribes more expansively the tribunal's powers. It covers interim relief, preliminary determination, early dismissal of claims and defences, security for costs, security for claims and additional powers.

Finally, amongst other things, the draft rules introduce in Schedule 2 the 'Streamlined Procedure'.

A party may apply (prior to the constitution of the tribunal) to have their arbitration conducted under the Streamlined Procedure where: (a) the parties have agreed to do so; (b) the amount in dispute does not exceed S$1,000,000; or (c) 'the circumstances of the case warrant the application of the Streamlined Procedure' (rule 13.1). The President will determine the application.

Under the Streamlined Procedure, the dispute will be determined by a sole arbitrator, with a case management conference required within 3 days of the constitution of the tribunal. The tribunal may conduct the proceeding as he or she considers appropriate, but, unless the tribunal determines otherwise, the arbitration shall be decided on the papers, with no entitlement to disclosure and no entitlement to file fact or expert witness evidence. The award must be made within 3 months from the date of the tribunal's constitution.

4. Our Insights

International arbitration continues to gain momentum as the preferred means of resolving cross border disputes, with courts in the Asia Pacific region actively supporting arbitration through robust enforcement of arbitration agreements and arbitral awards.

The challenge to ensure that the arbitral process is responsive to business needs also continues. Arbitral institutions around the world regularly review and update their rules, focussing on efficiency, enforceability of the award and, increasingly, environmental concerns. Since 2023 the rules of the Scottish Arbitration Centre have expressly provided that parties, counsel, the tribunal and the SAC must be 'mindful of the environmental impact of the arbitration' and must, at the commencement of the arbitration proceedings, consider the application of the Green Protocols (developed by The Campaign for Greener Arbitration). Whilst no institution in the Asia Pacific region has yet followed suit, the establishment by ACICA of its Sustainability Taskforce is a move in the right direction.

The role of the tribunal in case management remains a focus. The *2023 Evidence in International Arbitration Report* highlighted the desirability of strong case management techniques to meet user expectations. In an article published in the ACICA Review in December 2023, Bronwyn Lincoln shared her views on the future of Procedural Order No 1, concluding that the door is open to move away from the template order where the efficient resolution of the dispute calls for a more lateral approach.[74]

In May 2024 international arbitrators, practitioners and academics will meet at the XXVIth ICCA Congress in Hong Kong to explore arbitration practice and procedure under the banner of International Arbitration: A Human Endeavour, the theme juxtaposed against the growing application of artificial intelligence in all aspects of our lives. Our July Arbitration Review will include a short report on the Congress.

74 Bronwyn Lincoln, '*The Future of Procedural Order No 1: Scope and Timing*' (The ACICA Review, Australian Centre for International Commercial Arbitration, December 2023), 28-30, <https://acica.org.au/wp-content/uploads/2023/12/ACICA-Review-December-2023.pdf>.

Our Team

Bronwyn Lincoln
Partner
T: +61 3 8080 3565
M: +61 418 645 639
E: blincoln@tglaw.com.au

Geoff Brennan
Partner
T: +61 8 8236 1301
M: +61 403 334 310
E: GBrennan@tglaw.com.au

Scott Castledine
Partner
T: +61 2 8248 3413
M: +61 410 300 018
E: scastledine@tglaw.com.au

Sylvia Fernandez
Partner
T: +61 2 8248 3499
E: sfernandez@tglaw.com.au

Josh Marchant
Partner
T: +61 3 9641 8863
M: +61 418 573 398
E: JMarchant@tglaw.com.au

Adam Spitz
Special Counsel
T: +61 8 9404 9131
M: +61 401 274 754
E: ASpitz@tglaw.com.au

Chloe Robinson
Special Counsel

Rozelle Macalincag
Senior Associate

Michael Marigliani
Senior Associate

Jessie Nygh
Associate

Edward Morcombe
Associate

Julia Nguyen
Lawyer

Daniel Kalkopf
Lawyer

Thomson Geer

Lawyers

Advice | Transactions | Disputes

Sydney Level 14, 60 Martin Place | Sydney NSW 2000
T +61 2 8248 5800 | F +61 2 8248 5899

Melbourne Level 23, Rialto South Tower, 525 Collins Street | Melbourne VIC 3000
T +61 3 8080 3500 | F +61 3 8080 3599

Brisbane Level 28, One Eagle - Waterfront Brisbane, 1 Eagle Street | Brisbane QLD 4000
T +61 7 3338 7500 | F +61 7 3338 7599

Perth Level 29, Central Park Tower, 152-158 St Georges Terrace | Perth WA 6000
T +61 8 9404 9100 | F +61 8 9300 1338

Adelaide Level 7, 19 Gouger Street | Adelaide SA 5000
T +61 8 8236 1300 | F +61 8 8232 1961

Canberra Level 8, Central Village, 5 Constitution Avenue | Canberra ACT 2601
T +61 2 8248 5800