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Arbitration: A Commonwealth View of the Landscape of Judicial Support

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Introduction

Arbitration of commercial disputes plays an increasingly vital role in the functioning of domestic economies and the international financial landscape.[3] Arbitration presents individuals, corporations, and even states, with a private form of alternative dispute resolution. Parties have the ability to choose both the substantive law governing a dispute, as well as the legal system governing the arbitral proceedings.[4] Arbitrations can be *ad hoc*, or subject to one of the multitude of institutional rules regimes available worldwide, such as (to name but a few) those developed by the International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LIAC"), Singapore International Arbitration Centre ("SIAC"), or Hong Kong International Arbitration Centre ("HKIAC").

Given its nature as a private dispute resolution mechanism, an oft-discussed subject amongst commentators and practitioners is the relationship between arbitration and the court system, particularly the proper extent of judicial involvement in arbitration. Commentators note that international commercial arbitration has (and should have) a considerable degree of independence from domestic courts, having distanced itself from the risk of "domestic judicial parochialism."[5] Nevertheless, as noted by Professor Ralf Michaels, arbitration has "never been truly autonomous from the state"; the arbitral process and state laws have always been intertwined.[6] A similar observation was made by Professor Julian Lew, who opined that:

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[3] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, Student Version, 6th ed (Oxford: Oxford University Press, 2015) at 1; The Honourable Judith Prakash, "The Critical Role of the Court in Arbitral Disputes: Conceptualizing the Relationship between the Courts and Arbitration", (2023) 19:2 Asian Intl Arbitration J 103 at 104.
[4] Gary F Bell, *The Cambridge Companion to International Arbitration*, ed by CL Lim (Cambridge: Cambridge University Press, 2021) at 62.
[5] Blackaby at 416.
[6] Ralf Michaels, *The Cambridge Companion to International Arbitration*, ed by CL Lim (Cambridge: Cambridge University Press, 2021) at 125. See also Blackaby at 415.

> "[...] [J]ust as no man or woman is an island, so no system of dispute resolution can exist in a vacuum. Without prejudice to autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness" [emphasis added].[7]

Despite being a private system of justice, a certain threshold of judicial authority is nevertheless appropriate. The oversight role of courts ensures that the arbitral process meets "minimum standards of fairness" and is not plagued by corruption, impartiality, or other harms that prejudice either party or the entire process.[8] Courts also support the proper functioning of arbitration through interim relief and enforcing arbitral awards, or refusing to do so where necessary.[9] Although arbitration is rooted in the choice of parties, the involvement of courts continues to maintain the legitimacy of the arbitration process.[10] To quote Justice Judith Prakash of the Singapore Court of Appeal, "[t]here can be little dispute that courts are vital to the functioning and workability of arbitration."[11]

As this paper will discuss, recent cases from several Commonwealth and common law jurisdictions – including prominent and emerging centres of international commercial arbitration – demonstrate that courts tend to exercise their interventionist powers cautiously, while continuing to be vigilant in situations where the legitimacy of the arbitral process may be compromised if the courts do not step in.

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[7] Julian DM Lew, "Does National Court Involvement Undermine the International Arbitration Processes?", (2009) 24:3 Am U Intl L Rev 489 at 492.
[8] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 92.
[9] Prakash at 104, 109-110.
[10] Prakash at 104, citing Chief Justice Sundaresh Menon, "Standards in Need of Bearers: Encouraging Reform from Within" (Paper presented at the Chartered Instituted of Arbitrators, Singapore Centenary Conference, 3 September 2015); Lew at 492-3.
[11] Prakash at 104.

Theme 1: Courts Enforcing or Ordering Interim Relief to Facilitate Arbitral Proceedings

Principle/Law:

Arbitration laws based on, or influenced by, the *UNCITRAL* "*Model Law*"[12] have been adopted in 93 countries,[13] including many Commonwealth jurisdictions – such as Malta. Article 17 of the *Model Law* allows arbitral tribunals to order interim measures and preliminary orders in the course of a proceeding. Articles 17 H and 17 J respectively address the recognition and enforcement of provisional awards, and the power of courts to order interim measures. Non-*Model Law* jurisdictions have their own legislative regimes in place for the authority of their domestic courts to recognise and enforce tribunal measures, or order their own. Of note, the English *Arbitration Act 2025*[14] received Royal Assent on 24 February 2025, amending several provisions of the *Arbitration Act 1996*[15] ("*1996 Act*"). Its provisions on "Extent", "Commencement and transitional provision" and "Short title" came into effect immediately. The remainder of its provisions will come into force on a date selected by the Secretary of State by regulation(s).

1. ***CXG v CXI*, [2023] SGHC 244 (Singapore)**

In *CXG v CXI*,[16] the Singapore High Court ("SGHC") was faced with the issue of whether the court should decline to exercise its jurisdiction to hear an application to enforce a tribunal-ordered interim measure in a domestic arbitration on the basis of *forum non conveniens*.

The claimants were founders and minority shareholders of a Singaporean financial technology company ("CXK") that offered an "e-wallet open-loop payment method."[17] The

[12] *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* [*Model Law*].
[13] United Nations Commission On International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (last accessed 31 March 2025).
[14] 2025 c 4.
[15] 1996 c 23, s 9 [*1996 Act*].
[16] [2023] SGHC 244 [*CXG*].
[17] *CXG* at para 4.

defendants consisted of three parties, including CXK. The claimants commenced arbitration of a minority oppression claim. They applied to the arbitral tribunal for interim relief, seeking to restrain the respondents from operating and offering an allegedly competitive e-wallet product ("PXH") as part of an app that was owned and operated by one of the respondents' subsidiaries.[18] The PXH feature was only available to users of the app in Malaysia. While the tribunal did not grant the sought after relief, it did order the defendants to complete seven directions (the "Commitments") within 90 days of the order.

The claimants subsequently applied to the court for permission to have judgment entered in terms of the interim order.[19] The leave application was brought under section 12(6) of the *International Arbitration Act 1994*[20] ("*SIAA*"), which grants courts the power to enforce interim orders or directions from Singapore-seated tribunals, or to have judgment entered in the terms of those orders or directions.[21] Section 12(6) was introduced to address a gap in the *Model Law*, which did not expressly allow for an interim measure to be enforced as an award.[22] In response, the defendants brought applications to stay the claimants' leave applications, arguing that the court should refrain from exercising its jurisdiction to hear the leave application in consideration of the principles of *forum non conveniens*.[23] The defendants maintained that Malaysia would be the more appropriate forum in which to enforce the tribunal's interim award.

The SGHC dismissed the defendants' stay applications. In considering the nature and purposes of *forum non conveniens* and how it connected to the enforcement of domestic interim measures under section 12(6), the Court found *forum non conveniens* principles were not

[18] *CXG* at paras 7-8.
[19] *CXG* at para 3.
[20] 2020 Revised Edition [*SIAA*].
[21] *CXG* at paras 30, 33.
[22] *CXG* at para 40.
[23] *CXG* at paras 4, 14.

applicable.[24] While *forum non conveniens* principles are concerned with substantive disputes, the enforcement of domestic interim awards does not require engagement with the substance of the arbitral dispute or the interim measure.[25] Thus, courts do not concern themselves with the "typical connecting factors" considered under the *forum non conveniens* doctrine.[26]

Similarly, the SGHC held that *forum non conveniens* principles are "antithetical" to the question of whether it is appropriate for the reviewing court to exercise its enforcement jurisdiction, given that parties in international arbitrations often choose seats with little or no connection to themselves or their dispute.[27] The lack of connecting factors may be the reason why the parties chose to arbitrate there in the first place.[28] As such, applying *forum non conveniens* principles to enforcing interim orders would "be contrary to party autonomy and the [parties'] expectations".[29]

Lastly, the Court affirmed that seeking enforcement of an interim award in the arbitral seat may have legitimate reasons and practical benefits.[30] For example, parties may have elected to proceed in a given jurisdiction because of confidence in its process of enforcing awards.[31] In addition, the potential for any future challenges to an interim award on procedural grounds is ousted when the court grants enforcement.[32]

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[24] *CXG* at para 58.
[25] *CXG* at para 62.
[26] *CXG* at para 62.
[27] *CXG* at paras 64-65.
[28] *CXG* at para 65.
[29] *CXG* at para 65.
[30] *CXG* at para 67.
[31] *CXG* at para 67.
[32] *CXG* at para 68.

2. ***DFM v DFL*, [2024] SGCA 41 (Singapore)**

In *DFM v DFL*,[33] the Singapore Court of Appeal ("SGCA") upheld the SGHC's decision to provide one party an interim freezing order against the other party's assets.

In *DFM*, the appellant was an Indian national who was a business partner of the respondent, the chairman of a Qatari company. The parties had decided to end their business relationship by entering into a settlement agreement, where the respondent would sell his 50% share in a company to the appellant, who then planned to use the shares to effect a merger between the company and a third-party buyer. The settlement agreement required the appellant to pay around US$114 million to the respondent in three payments. The agreement's arbitration clause provided that any dispute would be referred to arbitration under Dubai International Financial Centre ("DIFC") and LCIA ("DIFC-LCIA") Rules, with the arbitration being seated in London and governed by English law. The agreement also noted that any of its provisions that became "illegal, invalid or unenforceable" were to be severed and replaced with a lawful provision where possible ("clause 16").[34]

The appellant made the first payment around 17 January 2019. However, the other two were not completed and US$90 million was still owed to the respondent. Notably, in September 2021, it was announced that the DIFC would be replaced by the Dubai International Arbitration Centre ("DIAC"). The respondent commenced arbitration in the DIAC in April 2022. On 3 August 2022, the respondent brought an application for various forms of interim relief, including a freezing order. The tribunal granted the respondent the interim relief in November 2022, before the tribunal had determined the appellant's jurisdictional objection in respect of the arbitration.[35]

[33] [2024] SGCA 41 [*DFM Appeal*].
[34] *DFM Appeal* at para 8.
[35] *DFM Appeal* at para 2.

The respondent sought to enforce the interim awards in Singapore, the Cayman Islands, and Dubai, as well as other jurisdictions. In each jurisdiction, the appellant relied on different grounds to resist enforcement. The appellant eventually brought an application to set aside the respondent's leave order under section 31(2)(e) of the *SIAA*, which allows a court to refuse enforcement of a foreign award where the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, or the law of the arbitral seat.

This application was dismissed in February 2024.[36] The SGHC held that: (a) the arbitration agreement could not be saved by clause 16; (b) the appellant demonstrated "an unequivocal, clear and consistent intention to submit to the [t]ribunal's jurisdiction" for the interim relief application; and (c) enforcement should not be refused on the basis that the jurisdiction issue was pending.[37]

The appellant challenged the SGHC's decision. The issue on appeal was whether the appellant had submitted to the tribunal's jurisdiction for the interim measures application, despite raising objections to the tribunal's jurisdiction to hear the arbitration proceeding.[38]

The SGCA determined that – where the interim relief application requires consideration of issues that may engage the merits of the claims – a party could accept a tribunal's jurisdiction to decide an application for interim relief, while objecting to the same tribunal's jurisdiction for the remainder of the proceedings.[39] The SGCA emphasised that the standard an applicant must meet usually differs between an interim relief application and the substantive dispute.[40] For the former, the tribunal only has to be satisfied on a *prima facie* standard that the claim might succeed on its

[36] See *DFL v DFM*, [2024] SGHC 71 for the SGHC's full decision.
[37] *DFM Appeal* at paras 26-28.
[38] *DFM Appeal* at para 35.
[39] *DFM Appeal* at paras 2, 39.
[40] *DFM Appeal* at para 39.

merits.[41] As the SGCA confirmed, findings made on a *prima facie* basis are not meant to be final and determinative, but are (typically) provisional and may be revised after a full hearing.[42]

Furthermore, the SGCA found the appellant had submitted to the tribunal's jurisdiction and waived his ability to employ section 31(2)(e) to prevent enforcement.[43] The Court confirmed that parties can waive their rights to rely on grounds for resisting enforcement by virtue of their conduct, even if such a ground is otherwise established.[44] In determining whether a party has waived this right, courts must conduct the inquiry in a "practical and commonsensical way" and consider the context of the seat's law and the parties' chosen arbitral rules.[45]

The SGCA found the appellant was satisfied to deliberate the interim relief hearing without objecting to the tribunal's jurisdiction over that application. The SGCA made three key findings: (a) the appellant proceeded with the interim relief hearing without raising jurisdictional objections; (b) the tribunal demonstrated its understanding that the jurisdiction issue would be determined at a later time; and (c) the appellant raised no jurisdictional objections after the interim relief award.[46]

3. ***Company A and another v Company C*, [2024] HKCFI 3505 (Hong Kong)**

This case arose from an arbitral proceeding involving Companies A and B, as claimants, and the defendant, Company C, together with its wholly owned subsidiary, SZ, concerning the alleged breach of a settlement agreement under which Company C had reaffirmed its commitment to support the initial public offering of Company B's shares.

[41] *DFM Appeal* at para 39.
[42] *DFM Appeal* at para 40.
[43] *DFM Appeal* at paras 37, 62.
[44] *DFM Appeal* at para 43, citing *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 at para 156.
[45] *DFM Appeal* at paras 44, 47.
[46] *DFM Appeal* at paras 58-61.

On 13 April 2024, while the arbitration was ongoing, SZ issued an announcement on the Shanghai Stock Exchange of its intention to dispose of its 51% equity interest in Company C, which held a 44% interest in Company B.[47] The proposed transaction would include the transfer or disposal of Company C's existing business operations and assets to SZ and/or other companies connected to SZ, which the claimants believed would render Company C judgment-proof.[48]

On 3 May 2024, the claimants applied to the arbitration panel for emergency relief restraining Company C from completing the transfer of assets to SZ and requiring that Company C deposit security in an escrow account in the amount of USD$55,506,138.62.

The tribunal directed the parties to file submissions in the application, but did not order any interim stop-gap measure. However, the tribunal agreed that the claimants could seek emergency interim relief from the courts to stop the transfer whilst it considered the matter further.

On 24 May 2024, Justice Keith Yeung granted the plaintiffs injunctions on an *ex parte* (on notice) basis, which closely resembled the relief sought from the tribunal. Meanwhile, on 28 May, the tribunal indicated that it was prepared to grant the claimants a preliminary injunction. The tribunal invited the claimants to submit a draft order, and Company C to submit objections.

On 27 May, the claimants applied to the Hong Kong Court of First Instance ("HKCFI") under section 45 of Hong Kong's Arbitration Ordinance[49] (the "Ordinance") for essentially the same relief they had sought from the tribunal. On 31 May 2024, Company C offered undertakings not to, *inter alia*, (1) transfer assets to SZ or any associated entity; or (2) remove from Hong Kong any of its assets up USD$55,506,138.62, pending the tribunal's decision on the injunctive relief.[50]

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[47] [2024] HKCFI 3505 [*Company A*] at para 6.
[48] *Company A* at para 6.
[49] Cap 609 [Ordinance].
[50] *Company A* at para 15.

Some five months after the tribunal indicated its intention to grant injunctive relief, the parties were still in disagreement over the terms of the escrow relief that would form part of the tribunal's order. In the meantime, the claimants' application to the court came on for hearing before Justice Mimmie Chan of the HKCFI.

Since the tribunal already heard the claimants' emergency relief application, Chan J. had to consider whether it was more appropriate for the tribunal to deal with the application or if it should be addressed by the Court, pending the arbitral award.[51] While Hong Kong case law has affirmed that the minimal curial intervention policy demands that the court's jurisdiction to grant interim measures should be used "sparingly" and for "special reasons", the Court found that its power to grant interim measures to facilitate a tribunal's process outside of Hong Kong warranted making the orders in this case.[52]

The Court noted the emergency relief application had been characterised by procrastination and frustration, citing the tribunal's considerable number of procedural orders between June and October.[53] Chan J. also found that, while the tribunal had clearly envisioned the escrow agreement being executed by the parties, Company C had not complied with its directions and delayed the process.[54] Chan J. could not condone Company C's behaviour, considering that the goal of the Ordinance is for courts to facilitate "the fair and speedy resolution of disputes by arbitration without unnecessary expense".[55]

The HKCFI found it was "appropriate, just and convenient" to grant the claimants' injunction orders to "preserve the status quo" until the tribunal's decision on the emergency relief

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[51] *Company A* at para 22.
[52] *Company A* at para 23, citing *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347; *A v B* [2022] HKCFI 3620.
[53] *Company A* at para 25. See the full list of procedural orders from paras 26-34.
[54] *Company A* at paras 37-40.
[55] *Company A* at para 40. See Ordinance, s 3(1).

application and the final award.[56] Chan J. also considered it appropriate and just to grant leave to enforce orders already made by the tribunal, as permitted by section 61 of the Ordinance.[57]

Theme 2: Courts Staying Legal Proceedings in Favour of the Arbitral Process

Principle/Law:

State parties to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[58] (better known as the "*New York Convention*") undertake to give effect to an agreement to arbitrate, and to recognise and enforce awards made in other States. There are 172 Contracting States.[59] Both the *New York Convention* and the *Model Law* provide for courts to refer parties to arbitration in certain situations where proceedings are brought on subject matter the parties have agreed to arbitrate. Article II(3) of the *New York Convention* states that:

> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This principle also finds expression in Article 8(1) of the *Model Law*. Article 8(2) adds that arbitral proceedings can be commenced or continued, and final awards can be made, where an

[56] *Company A* at paras 41, 43.
[57] *Company A* at para 42.
[58] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958) [*New York Convention*].
[59] New York Convention, "Contracting States" (last accessed 31 March 2025).

action described in Article 8(1) is still before a court. Similarly, many domestic arbitration schemes grant courts the authority to stay proceedings in favour of arbitration in specific circumstances.[60]

1. *The Republic of Mozambique v Privinvest Shipbuilding SAL and others*, [2023] UKSC 32 (United Kingdom)

In *Republic of Mozambique v Privinvest Shipbuilding SAL and others*,[61] the UK Supreme Court ("UKSC") considered what constituted a "matter" under section 9 of the *1996 Act*, which allows parties to bring stay applications and mirrors Articles II(3) and 8(1) of the *Model Law*.

The dispute in question stemmed from the Republic of Mozambique's borrowing of money from several London-based banks (including Credit Suisse) through three "special purpose vehicles" ("SPVs") in 2013 and 2014.[62] These financial facilities were purportedly to finance Mozambique's purchase of equipment and services from three supply companies (the "Privinvest supply companies").[63] The three supply contracts were governed by Swiss law, with each including an arbitration agreement. Two of the agreements provided that "all disputes arising" from the project were to be settled by ICC arbitration in Switzerland.[64] The third provided that "[a]ny dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof," was to be resolved by arbitration in accordance with the Swiss Rules of International Arbitration.[65] Mozambique also provided sovereign guarantees in the borrowing process to each of the financial institutions, each containing choice of law clauses granting jurisdiction to the courts of England and Wales.

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[60] See, for example, Australia's *International Arbitration Act 1974*, No 136, 1974 (Cth), s 7 [*AU IAA*]; the *1996 Act*, s 9; Ontario's *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5, s 9.
[61] [2023] UKSC 32 [*Mozambique*].
[62] *Mozambique* at para 3.
[63] *Mozambique* at para 3.
[64] *Mozambique* at paras 14-16.
[65] *Mozambique* at paras 17-18.

Mozambique eventually commenced legal proceedings in London in February 2019. Mozambique claimed that several of the defendants had paid bribes to corrupt Mozambique officials and Credit Suisse employees, exposing the country to potential liabilities of US$2 billion under the guarantees. In response, Privinvest applied in the English courts for a stay of proceedings under section 9. Privinvest had also begun arbitration in Switzerland against the SPVs and Mozambique in 2019, which had not yet resulted in a final award.

The High Court dismissed the initial section 9 application, finding the disputes in Mozambique's claims were not sufficiently connected with the supply contracts.[66] This decision was overturned by the Court of Appeal,[67] which considered the characteristics of a "matter" under section 9 and concluded that all of Mozambique's claims were captured by the arbitration agreements.[68]

Mozambique's appeal before the UKSC was solely on the scope of the arbitration agreements and section 9. The UKSC ultimately found in favour of Mozambique.

At the outset, the UKSC confirmed that English law takes a pro-arbitral approach, which might in turn produce "a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved".[69] This "liberal interpretation" is part of the context in which a court must interpret section 9.[70] As section 9 gives effect to Article II(3), the Court reviewed domestic and international decisions from leading

[66] *Mozambique* at paras 27-32. See [2020] EWHC 2012 (Comm) for full decision.
[67] See [2021] EWCA Civ 329 for the full decision.
[68] *Mozambique* at paras 35-38.
[69] *Mozambique* at para 46.
[70] *Mozambique* at para 47.

arbitral jurisdictions that are signatories to the *New York Convention*[71] and found an international consensus among these jurisdictions on determining what constitutes "matters".[72]

First, there is a two-step test in considering these matters, whereby the court must: (a) identify the matter(s) in respect of which the legal proceedings are brought; and (b) ascertain whether the matter(s) fall within the scope of the arbitration agreement on its true construction.[73] Second, the "matter" does not need to capture the entirety of the parties' dispute, as section 9 has expressly provided for a stay *pro tanto*.[74] Third, a "matter" is a substantial issue that is legally relevant to a claim or a (foreseeable) defence in a legal proceeding, which is susceptible to be determined by an arbitrator as a discrete dispute.[75] If the issue or subject is not an essential element of, or legally relevant to, a claim or defence, then it is not a "matter".[76] Fourth, the court's evaluation of the substance and relevance of the matter is a matter of common sense, rather than a "mechanistic exercise".[77] Courts must consider whether the issue is reasonably substantial and relevant to the outcome of the legal proceedings a party is seeking a stay of.[78]

The UKSC also found a fifth point that was supported by existing case law and common sense, namely that, when considering the second branch of the two-step test, the court must consider the true nature of the matter and the context in which it arises in the legal proceedings.[79]

In considering the first stage of the analysis, the substance of the dispute was deemed to be whether the transactions (including the supply contracts and guarantees) were obtained through

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[71] See, for example, *Sodzawiczny v Ruhan & Ors*, [2018] EWHC 1908 (Comm); *Tomolugen Holdings Ltd v Silica Investors Ltd*, [2015] SGCA 57, which in turn provided an overview of other international authorities; *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*, [2016] FCA 1164.
[72] *Mozambique* at para 71.
[73] *Mozambique* at para 48.
[74] *Mozambique* at para 74.
[75] *Mozambique* at para 75.
[76] *Mozambique* at para 75.
[77] *Mozambique* at para 77.
[78] *Mozambique* at para 77.
[79] *Mozambique* at para 78.

bribery and whether the defendants had knowledge at the relevant time of the alleged illegality of the guarantees.[80] The Court found that the validity of the supply contracts did not constitute a matter under section 9, as it would not be relevant to the defendant's liability.[81] While the UKSC found that the extent of a claimant's loss and damage may be a substantial matter in a dispute, it was not necessary to determine that question given its analysis at the second stage.[82]

The Court affirmed that determining the scope of arbitration agreements in the second stage is a question of construction, which in this case was a question of Swiss law. In assessing the scope, the UKSC stated that courts must consider what rational businesspeople would contemplate.[83] The UKSC agreed with the High Court that Mozambique's claims did not fall within the arbitration agreements. Similarly, on the issue of the partial defence on the quantum for Mozambique's losses, the Court declined to find that there should be a partial stay regarding this factual dispute. Applying "common sense", the UKSC found that rational businesspeople would not arbitrate such a subordinate issue of fact that arises in a legal proceeding.[84]

This dispute proceeded to trial in 2023. In July 2024, Mr. Justice Knowles of the High Court found that the Privinvest and its recently deceased owner – Iskandar Safa – were required to provide Mozambique around US$825 million in payment and an indemnity of around US$1.5 billion for the funds Mozambique owed to banks and bondholders.[85]

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[80] *Mozambique* at para 93.
[81] *Mozambique* at paras 86-88, 94.
[82] *Mozambique* at paras 95, 98.
[83] *Mozambique* at para 105.
[84] *Mozambique* at para 107.
[85] See *The Republic of Mozambique (acting through its Attorney General) v Credit Suisse International and others*, [2024] EWHC 1957 (Comm) at paras 570-576, leave to appeal dismissed *Republic of Mozambique v Credit Suisse International & Ors (No 13: Application by Privinvest Companies for Permission to Appeal)*, [2024] EWHC 3188 (Comm).

2. *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GMBH & Co KG & Anor*, [2024] HCA 4 (Australia)

In *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GMBH & Co KG & Anor*,[86] a unanimous bench of the Australian High Court ("HCA") upheld the Full Court of the Federal Court of Australia ("Full Court")'s decision to stay a proceeding in favour of arbitration in London.

Carmichael was a shipper who contracted with OneSteel, one of the respondents, to produce and supply steel rails. OneSteel was to ship the rails by sea from South Australia to Queensland. On the day the goods were shipped, the carrier and the other respondent ("BBC") issued a bill of landing to Carmichael's agent that contained: (a) an exclusion of liability clause and (b) a law and jurisdiction clause, the latter providing for any dispute to be referred to arbitration in London. The rails were damaged en route by a collapse of stowed goods and were eventually sold as scrap. After BBC commenced arbitration in London, Carmichael brought a proceeding in the Full Court seeking damages, in which they sought an interlocutory application to restrain the arbitration. In response, BBC filed an interlocutory application to stay the Full Court proceeding.

The Full Court granted BBC's stay application under section 7(2) of the *International Arbitration Act 1974* ("*AU IAA*"), which provides that courts "shall" stay proceedings if the parties are those in arbitration agreement and the proceeding involves the determination of a matter that, in pursuance of the agreement, is capable of being settled by arbitration.[87] The Full Court based their decision on BBC's undertaking to admit the Australian Hague rules (the "*Hague Rules*"), incorporated into Australian law by the *Carriage of Goods by Sea Act 1991* (Cth), as applicable to the bill of landing (with the Full Court making a declaration to that effect).

[86] [2024] HCA 4 [*Carmichael*].
[87] *Carmichael* at para 24.

Carmichael was granted special leave to appeal to the HCA, claiming that the Full Court erred in finding the law and jurisdiction clause in the bill of landing valid, where it should have been deemed void under Article 3(8) of the *Hague Rules*. In particular, Carmichael argued that BBC's liability might be "relieved or lessened" on the basis of three risks:

(a) The London tribunal may find themselves bound to interpret Article 3(2) of the *Hague Rules* in line with English law (which creates a delegable responsibility on BBC), as opposed to Australian law (which creates a non-delegable responsibility);

(b) The London tribunal might construe the exclusion clause (the "clause paramount") as only incorporating Articles 1 through 8 of the *Hague Rules*; and

(c) Carmichael may be required to face more challenges and expenses if it pursued its claim against BBC through arbitration.[88]

The HCA dismissed Carmichael's appeal. In considering the text, context, and purpose of Article 3(8) of the *Hague Rules*, the HCA rejected Carmichael's construction of the provision.[89] The Court did not find the provision produced a lower standard than a balance of probabilities, such as "a mere possibility, a real risk, a reasonably arguable case, or a *prima facie* case".[90]

The Court also found that Article 3(8) is to be applied in "the circumstances at the time the court decides their application", which included BBC's undertaking and the FCA's declaration.[91] The terms of BBC's undertaking and declaration meant that the *Hague Rules* as applied and interpreted in Australian law were applicable in the arbitration, contrary to Carmichael's submission. The HCA concluded that Carmichael had failed to prove on a balance of probabilities

[88] *Carmichael* at para 6.
[89] *Carmichael* at para 54.
[90] *Carmichael* at paras 8, 27.
[91] *Carmichael* at paras 8, 59.

that the law and jurisdiction clause relieved or lessened BBC's liability under Article 3(8).[92] In specifically considering Carmichael's three alleged "risks", the HCA held the following:

(a) The proper interpretation of Article 3(2) is undecided in Australian law, such that the risk to Carmichael was no different at arbitration than in the courts;

(b) It cannot be said that the arbitrators would either construe the exclusion clause as applying only to Articles 1 through 8, or construe the exclusion clause in line with English law; and

(c) Article 3(8) is not directed at enforcing *Hague Rules* or costs incurred in seeking enforcement, and no meaningful criteria exist to determine that a higher cost would relieve or lessen BBC's liability "otherwise than in accordance with the [*Hague Rules*]."[93]

Theme 3: Courts Continue to Recognise and Enforce Awards, Refusing to Do So Only in Limited Circumstances

Principle/Law:

Guiding principles on the recognition and enforcement of arbitral awards are found in the *New York Convention*. Article III maintains that signatory states must recognise arbitral awards and enforce them in line with the procedural rules of the jurisdiction "where the award is relied upon".[94] Furthermore, Article IV provides the requirements for a party seeking to apply for recognition or enforcement of an arbitral award, while Article V outlines grounds upon which awards might be refused recognition or enforcement. Lastly, Article VI provides that an enforcement court may adjourn its decision to enforce an arbitral award if a set aside application has been brought to a competent court of the jurisdiction where the award was rendered.

[92] *Carmichael* at para 8.
[93] *Carmichael* at paras 62-69.
[94] *New York Convention*, Article III.

Similar principles are outlined in the *Model Law*. Article 35 affirms that arbitral awards will be recognised as binding, regardless of the jurisdiction in which it was rendered, and will be enforced by a court upon an application "in writing".[95] However, Article 36 outlines the grounds upon which courts should refuse to recognise or enforce a final award, echoing Article V. These include principles of natural justice (Article 36(1)(a)(ii)); that the award has been set aside by a court of the country where, or under the law of which, the award was made (Article 36(1)(a)(v)); or that recognising or enforcing the award would be contrary to public policy (Article 36(1)(b)(ii)).

1. *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (Australia)

In *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.*,[96] the HCA dismissed the Kingdom of Spain ("Spain")'s appeal from an FCA decision enforcing two arbitral awards against it. This decision offers an interesting look at state immunity and its relation to the recognition and enforcement of investment arbitral awards.

Infrastructure Services Luxembourg S.à.r.l. ("ISL") had commenced arbitration against Spain under the *ICSID Convention* after a dispute arose.[97] ISL was successful at arbitration and an award was rendered in its favour for €101 million. ISL brought an application to the Australian Federal Court ("FCA") seeking to enforce the arbitral award under section 35(4) of the *AU IAA*, which allows the FCA to enforce an award as if it were a court judgment or order.[98]

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[95] *Model Law*, Article 35.
[96] [2023] HCA 11 [*Spain*].
[97] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), 575 UNTS 159 [*ICSID Convention*].
[98] *Spain* at para 2.

In Australia, the *ICSID Convention* is given effect through the *AU IAA*, specifically sections 32 through 35.[99] The *ICSID Convention* includes the following three articles related to recognising and enforcing awards, which Spain agreed to:

(a) Article 53 affirms that arbitral awards are binding;

(b) Article 54 outlines that a recognised award is binding on a contracting state and the enforcement of an award within a contracting state is treated as if the award is a court judgment in that State, amongst other provisions; and

(c) Article 55 provides that Article 54 is not to be construed as derogating from the Contract States' law relating to foreign state immunity.[100]

Australia's *Foreign States Immunities Act*[101] ("*Immunities Act*") grants foreign states immunity from the jurisdiction of Australian courts.[102] However, the *Act* also provides that the general and specific state immunities can be waived, as outlined in sections 10(2) and 31(1).[103]

The initial application at the FCA was granted, with Justice Stewart holding that Spain's agreement to the ICSID Articles constituted a waiver of immunity from the award's recognition and enforcement, although not its execution, by a court. On appeal, the Full Court also determined that Spain's immunity from recognition had been waived. However, it found that immunity from execution, and "possibly" from enforcement, had not been waived.[104] The Full Court issued new orders, including one recognising the award as binding, while noting that nothing in that order

[99] *Spain* at para 37.
[100] *Spain* at para 4.
[101] No 196, 1985 (Cth) [*Immunities Act*].
[102] *Spain* at paras 11-12.
[103] *Spain* at paras 13-14.
[104] *Spain* at para 6

"shall be construed as derogating from the effect of any law relating to [Spain's] immunity […] from execution".[105]

On appeal before the HCA, Spain argued that section 10 of the *Immunities Act* only grants Australian courts the ability to recognise a waiver of immunity through a treaty if the treaty's language provides an "express" waiver, not an "implied" one.[106]

The HCA found that section 10(2) aligned with the United States' approach to waiver of immunity, where: (a) the general immunity of a foreign state does not apply if it waived immunity "either explicitly or by implication"; (b) language providing for an implied waiver should be narrowly construed; and (c) waiver "is rarely accomplished by implication" and arises only when "unmistakeable".[107] As the HCA noted, the section 10(2) waiver is "unmistakable."[108]

In considering the background, purpose, and function of the *ICSID Convention*, the HCA found that "recognition", "enforcement", and "execution" in Articles 53-55 of the English text have separate and distinct meanings, whereas these terms had been used in "vague, overlapping and even interchangeable senses" in other international arbitration contexts.[109]

The Court affirmed that "recognition" is an obligation recognised as binding in respect of an award rendered under the *ICSID Convention*, whereas "enforcement" obliges the contracting state to enforce only the "pecuniary obligations" of the award as if it were a court order.[110] Similarly, the HCA found that Article 54(3), which stipulates that execution is to be governed by

[105] *Spain* at para 6, citing the Full Court's decision at *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl. [No 3]*, [2021] FCAFC 112.
[106] *Spain* at para 17.
[107] *Spain* at para 29.
[108] *Spain* at para 28.
[109] *Spain* at paras 42-43. See paras 30-37 for the Full Court's overview of the *ICSID Convention*.
[110] *Spain* at paras 43.

the contracting state's law, indicates that execution is a determination left under the countries' domestic law of foreign state immunity.[111]

The Court noted that the equally authoritative French and Spanish versions of the *ICSID Convention* use different words for "enforcement" and "execution", such that a literal interpretation might find these terms to have similar meanings.[112] However, the HCA found that the preferable approach to resolving a potential conflict between the English text and the French and Spanish texts was to proceed on the basis that there is no difference in meaning between the texts that requires reconciliation.[113] Under this approach, there was no real difference in the linguistic variations relating to the three terms.[114]

Ultimately, the HCA dismissed Spain's appeal, affirming that the Full Court's orders in relation to recognising and enforcing the award should not be disturbed.[115] Similarly, the Court reiterated that this had no bearing on Spain's immunity from the award's execution, as Spain's agreement to the applicable Articles did not constitute a waiver of this specific immunity.

2. ***Aastar Trading Pte Ltd v Olam Global Agri Pte Ltd*, [2025] SGHC 5 (Singapore)**

In *Aastar Trading Pte Ltd v Olam Global Agri Pte Ltd*,[116] the SGHC adjourned domestic enforcement proceedings to allow a foreign court to determine the merits of a set aside application for the same award.

The arbitration at issue stemmed from the parties' disputes over alleged breaches of sales contracts, whereby Aastar Trading Pte Ltd. ("Aastar") was to sell palm olein to Olam Global Agri

[111] *Spain* at para 44.
[112] *Spain* at paras 59-60, 63.
[113] *Spain* at para 62.
[114] *Spain* at para 66.
[115] *Spain* at para 8.
[116] [2025] SGHC 5 [*Aastar*].

Pte Ltd. ("Olam"). The sales contracts incorporated the standard terms of the Palm Oil Refiners Association of Malaysia ("PORAM") "Contract No 2", which provided that the governing law would be that of Malaysia.[117] As mandated by the PORAM Contract, the parties proceeded to a Malaysia-seated arbitration under the PORAM Rules, with Malaysia's *Arbitration Act 2005*[118] applying to the proceeding. After the tribunal rendered an award, Olam brought an appeal to the PORAM Appeal Board. At the appeal hearing, Aastar adduced four letters as new evidence, the authenticity of which were disputed by Olam. A majority at the Appeal Board found in favour of Aastar and dismissed Olam's appeal.

In early September 2024, Aastar successfully applied to the SGHC for permission to enforce the appeal award. On 24 September 2024, Olam bought applications in two different courts. The first was a set aside application of the appeal award, made to the Malaysian High Court. Olam's claims included that the appeal award conflicted with Malaysian public policy. The second application was to the SGHC under section 31(5) of the *SIAA*, requesting that the Court adjourn its enforcement proceedings pending the Malaysian set aside application.

The Court affirmed that section 31(5) gives "statutory effect" to Article VI of the *New York Convention* in Singaporean law.[119] This provision gives the enforcement court "a wide and open-textured statutory discretion", which requires a multi-factorial approach of weighing and striking a balance on the factors in favour and against adjournment.[120] The SGHC referred to the following as a non-exhaustive list of factors that enforcement courts should consider in determining whether to exercise discretion, the applicability and weight of which will depend on the facts of each case:

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[117] *Aastar* at paras 5-6.
[118] No 646 of 2005.
[119] *Aastar* at paras 45-46, citing *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd*, [2019] 4 SLR 537 [*Man Diesel*].
[120] *Aastar* at para 47.

(a) Whether the setting aside application before the seat court (in this case, Malaysia) is brought *bona fide* and not as a delaying tactic;

(b) The strength of the merits of the setting aside application. This is only a preliminary evaluation of the strength of the argument;

(c) Whether an adjournment will make enforcement more difficult due to, for example, the award debtor's dissipation of assets or improvident trading caused by the delay;

(d) The likely length of the adjournment and prejudice to the award creditor; and

(e) Considerations of international comity.[121]

The SGHC found that adjourning the enforcement proceedings in Singapore was the "most just outcome" when weighing the totality of the relevant circumstances.[122]

The SGHC was satisfied the evidence showed that Olam had brought the set aside application *bona fide*, rather than as a delay tactic.[123] Similarly, Olam had a properly arguable case on the alleged breach of the rules of natural justice ground such that the award was neither manifestly valid nor manifestly invalid.[124] There was also no indication that an adjournment would obstruct the enforcement of the appeal award, considering Olam's financial stability, the lack of evidence of Olam's improvident trading of dissipation of assets, and Aastar's decision not to apply for security in response to Olam's sought adjournment.[125] Furthermore, it was not obvious that the adjournment period and resulting delay to enforcement would be unduly long.[126] Finally, the

[121] *Aastar* at paras 47-61.
[122] *Aastar* at para 62.
[123] *Aastar* at paras 64-67.
[124] *Aastar* at paras 68-73.
[125] *Aastar* at paras 74-77.
[126] *Aastar* at paras 78.

SGHC found that comity considerations, such as the risk of inconsistent concurrent judgments, were in favour of an adjournment.[127]

Accordingly, the SGHC adjourned the Singapore enforcement proceedings pending the Malaysian court's decision on Olam's set aside application. Olam's request to address the enforcement proceedings, if the set aside challenge was struck down, was ordered to be held in abeyance pending the Malaysian court's decision.[128]

3. ***Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd*., 2024 INSC 242 (India)**

The Supreme Court of India ("INSC") also remarked on the supervisory role of courts in *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd.*[129] The parties were HSBC PI Holdings (Mauritius) Ltd. ("HSBC", the respondent) and Avitel Post Studioz Limited ("Avitel", the appellant). Both had proceeded to arbitration at the SIAC, where an award was rendered in favour of HSBC in September 2014. The dispute in question had spanned a considerable length of time and involved many prior legal challenges and court rulings, including from the INSC.

In the appeal brought by Avitel, the INSC was asked to determine whether an award was unenforceable on the basis that it violated Indian public policy, under section 48(2) of *The Arbitration and Conciliation Act, 1996* ("*Indian Arbitration Act*"). The basis of Avitel's claim was that a tribunal member failed to disclose material facts concerning a conflict of interest.

In articulating the role of the judiciary, the INSC stated that "minimal judicial intervention to a foreign award is the norm and interference can only be based on the exhaustive grounds

[127] *Aastar* at paras 79-82.
[128] *Aastar* at para 84.
[129] 2024 INSC 242 [*Avitel*].

mentioned under section 48."[130] The Court affirmed that "pro-enforcement bias" is an entrenched principle of Indian law.[131]

The INSC noted that the grounds for resisting the enforcement of a foreign award under section 48 have a 'high threshold" and are "much narrower" than those for domestic awards.[132] Adopting an "internationalist approach" towards public policy grounds for international arbitration awards, the INSC found a "clear distinction" between public policy standards for domestic and international commercial arbitration.[133] Thus, the INSC took a narrow view of the doctrine of public policy for foreign arbitral awards, in line with standards encouraged by the International Law Association.[134] The INSC also found that courts should adopt international "best practices" when determining the presence of bias, and that awards will only be refused enforcement on this ground in "exceptional circumstances".[135]

In the case before it, the INSC upheld the High Court's decision to enforce and execute the final award. The Court held there was no bias concerning the tribunal member that would violate "the most basic notions of morality and justice or shock the conscience of the Court".[136]

Theme 4: Several Decisions Engaged with Alleged Arbitrator Bias in Set Aside Challenges

Principle/Law:

Article 34(1) of the *Model Law* provides that setting aside challenges is the exclusive recourse that parties may seek against arbitral awards. Article 34(2) captures the only grounds on

[130] *Avitel* at para 17.
[131] *Avitel* at para 17, citing *Government of India v Vedanta Limited (formerly Cairn India Ltd)*, 2020 INSC 548.
[132] *Avitel* at paras 19, 43.
[133] *Avitel* at para 21.
[134] *Avitel* at paras 20-21.
[135] *Avitel* at para 26.
[136] *Avitel* at para 39.

which parties may seek to set aside awards. One consistently raised allegation in set aside challenges is bias on the part of the arbitrator, or one or more members of an arbitral tribunal.

While Article 34(2) does not expressly refer to bias in its list of grounds, Canadian courts have found the authority to set aside awards for bias in Article 34(2)(a)(iv), which provides that an award may be set aside if the "composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties [...]".[137] Similarly, set aside challenges for apparent arbitrator bias in the UK have been brought under section 68 of the *1996 Act*, which provides parties the opportunity to challenge an award on the basis of a "serious irregularity" in the proceeding that causes "substantial injustice" to the applicant party.[138]

1. ***Aiteo Eastern E & P Company Ltd. v Shell Western Supply and Trading Ltd & Ors*, [2024] EWHC 1993 (Comm) (United Kingdom)**

Aiteo, a Nigerian energy company, entered into several agreements with the defendants for interests in certain oil fields in Nigeria. These included an agreement for an offshore facility with Shell, and an agreement for an onshore facility with the remaining eight financial institution defendants (the "Lenders"). After disputes arose, the defendants in relation to the two agreements each commenced arbitration proceedings with the ICC. Four partial awards were made in two arbitration references that were consolidated by the tribunal; all were awarded between 15 March 2022 and 25 August 2023. Aiteo eventually brought an application to the Commercial Court of the England and Wales High Court ("Commercial Court") under section 68 of the *1996 Act* to set aside each award.[139]

[137] See *Vento Motorcycles, Inc v Mexico*, 2025 ONCA 82 [*Vento*].
[138] *1996 Act*, s 68.
[139] *Aiteo Eastern E & P Company Ltd. v Shell Western Supply and Trading Ltd & Ors* [2024] EWHC 1993 (Comm) [*Aiteo*] at para 1. Aiteo also brought an application under section 80(5) to extend the time to make the application.

Aiteo made two key allegations in its application. First, that there was serious irregularity affecting the tribunal due to the apparent bias of one of the panel members ("DEG"). Aiteo based this allegation on past professional connections between the panel member and the law firm of the parties which nominated her ("the Firm"), and her lack of timely disclosure to Aiteo of these connections.[140] Second, Aiteo argued that this serious irregularity caused it substantial injustice.[141]

The professional connections in question included prior arbitral appointments of DEG by the Firm, as well as DEG's past expert advice on English law to a client of the Firm.[142] Notably, Aiteo had eventually succeeded in a challenge to the ICC regarding DEG after she had made an additional disclosure about her professional connection in November 2023.

The Court outlined the principles for apparent bias under section 68 by referring to the leading UKSC decision in *Halliburton Company v Chubb Bermuda Insurance Ltd*, which affirmed the "fair-minded and informed observer" test.[143] In applying this standard, Mr. Justice Jacobs concluded that the fair-minded and reasonable observer would find a real possibility of unconscious bias.[144] Jacobs J. emphasised the impact of the lack of timely disclosure on this finding, which added to "the cumulative picture" of the recent appointments and engagements DEG had with the Firm.[145] The Court also considered the fact that DEG had been removed by the ICC as confirming and reinforcing this view.[146]

On the argument of substantial injustice, the Court disagreed with Aiteo that a finding of apparent bias invariably determines the question of substantial injustice.[147] Jacobs J. agreed with

[140] *Aiteo* at para 5.
[141] *Aiteo* at paras 3-4.
[142] See *Aiteo* at paras 68, 76, 78.
[143] [2020] UKSC 48 at paras 52-69.
[144] *Aiteo* at paras 166, 184.
[145] See *Aiteo* at paras 168-173.
[146] *Aiteo* at paras 166, 184.
[147] *Aiteo* at para 216.

the Lenders that the inquiries are addressed separately.[148] However, in the circumstances of one of the awards (the "Onshore Jurisdiction Award"), the Court found that the presence of a tribunal member affected by apparent bias gave rise to an inference of substantial injustice.[149] As such, Aiteo was entitled to have this award remitted to the tribunal for reconsideration, while the applications for the remaining three awards were dismissed.[150]

2. ***P v D*, 2024 HKFCI 1132 (Hong Kong)**

Another notable decision is *P v D*,[151] where the HKCFI dismissed a challenge under article 26 of the Ordinance to remove the presiding arbitrators because of apparent bias.

The applicant was a Hong Kong company, and the respondent a Taiwanese corporation. The respondent had commenced an arbitration against the applicant at the HKIAC. The applicant had brought an earlier challenge to remove the arbitrators which alleged five grounds, including that the tribunal had demonstrated apparent bias in its "unjust and argumentative language".[152] In support of its bias ground, the applicant cited four comments by the arbitrators deemed to be critical of the applicant. That application was dismissed by the HKIAC's Proceedings Committee – although one of the arbitrators appointed by the applicant stepped down before the decision.

The applicant then brought an application to the HKCFI, which was also dismissed. On the issue of bias, the HKCFI found that the fair minded and informed observer (the "fictitious bystander") would not have deemed there to be a real possibility of bias with the tribunal.[153] While

[148] *Aiteo* at paras 202, 216.
[149] *Aiteo* at para 25.
[150] *Aiteo* at para 291.
[151] 2024 HKCFI 1132 [*P v D*].
[152] *P v D* at 3.6.
[153] *P v D* at 4.19-4.20, 5.32-5.33.

the arbitrators had criticised the applicant's conduct during the proceeding – which the arbitrators admitted had occurred – the Court did not find this sufficient to establish apparent bias.[154]

The HKCFI noted two key attributes of the fair-minded and informed observer. First, the fictitious bystander would be deemed to know that adjudicators "sometimes say, or do, things that they might later wish they had not", without necessarily disqualifying themselves from continuing to exercise their powers.[155] Second, the fictitious bystander, acting reasonably, would not hastily decide the appearance produced by an "isolated episode of temper or remarks to the parties or their representatives," which the Court noted was taken out of context.[156] The HKCFI added that the fictitious bystander would have found that the comments were fairly made and based on fact – as contended by the arbitrators themselves.[157]

3. *Vento Motorcycles, Inc v Mexico*, 2025 ONCA 82 (Canada)

In the recent *Vento* decision, the Ontario Court of Appeal ("ONCA") held that an application judge erred in failing to set aside an award due to a reasonable apprehension of bias.

A pre-USMCA[158] dispute arose between Vento Motorcycles, Inc. ("Vento"), a United States motorcycle manufacturer, and The United Mexican States ("Mexico"). Vento brought a claim against Mexico under NAFTA,[159] alleging that Mexico attempted to force Vento out of Mexico's domestic motorcycle market by denying preferential import tariffs to its American-assembled motorcycles.[160] The arbitration panel, which was seated in Toronto, held unanimously for Mexico and dismissed Vento's claim. However, following the arbitral award, Vento learned

[154] *P v D* at 5.29.
[155] *P v D* at 5.32.
[156] *P v D* at 5.32.
[157] *P v D* at 5.35.
[158] United States-Mexico-Canada Agreement [*USMCA*].
[159] North American Free Trade Agreement [*NAFTA*] (the predecessor of the USMCA).
[160] *Vento* at paras 7-8.

that the panel member nominated by Mexico ("Perezcano") had communicated with Mexican officials during the arbitration process, including Mexico's lead counsel.[161]

While the application judge in the Superior Court found that Perezcano's conduct gave rise to a reasonable apprehension of bias, she held that it did not undermine the award's reliability or produce real unfairness or practical injustice, noting that the apparent bias of one arbitrator in a multi-member panel did not invariably compromise the entire panel.[162] The application judge also found that the seriousness of the breach and the potential prejudice from rehearing the arbitration both supported a decision not to set aside the award.[163] The ONCA allowed Vento's appeal and overturned the application judge's decision.

The ONCA reiterated the nature of commercial arbitration as operating outside the legal system, with the oversight of courts being "strictly limited" by Article 34(2).[164] The Court also affirmed that the judiciary has no authority to review an award for an error of law "otherwise immune from appeal or review" and use that error as the basis to set aside an award for a "jurisdictional error".[165]

The Court also noted that its authority to set aside an award for a finding of reasonable apprehension of bias was granted by Article 34(2)(a)(iv), which gives effect to the "equal treatment" requirement in Article 18.[166] This authority must be exercised "having regard to the unique circumstances of commercial arbitration"; procedural issues in commercial arbitration will not necessarily raise the same concerns as those in carrying out public authority.[167]

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[161] *Vento* at paras 3, 10-11.
[162] *Vento* at paras 2, 13. See the application judge's full decision at *Vento Motorcycles, Inc. v United Mexican States*, 2023 ONSC 5964.
[163] *Vento* at paras 2, 13, 122-132.
[164] *Vento* at paras 34-35.
[165] *Vento* at para 35, citing its earlier decisions in *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254; *Mensula Bancorp Inc. v Condominium Corporation No. 137*, 2022 ONCA 769.
[166] *Vento* at para 36.
[167] *Vento* at para 37.

In setting aside commercial arbitration awards on the basis of fair hearing breaches, the ONCA served a reminder that Canadian courts engage in a balancing exercise that considers both "the extent that the breach undermines the fairness or the appearance of fairness of the arbitration and the effect of the breach on the award itself".[168] Nevertheless, there are limits on the discretion of courts to uphold an arbitral award where breaches of the fair hearing requirement are alleged, and courts do not enjoy the same degree of discretion in "more significant breaches".[169]

The ONCA affirmed the seriousness of a finding of impartiality and the remedial rule regarding bias and procedural fairness: if the finding is made, the adjudicator is disqualified; if a decision has been reached, then it is void.[170] The Court confirmed that the seriousness and effect of impartiality is no different in the context of commercial arbitration.[171] Similarly, the result is not dependent on whether the bias affects a single arbitrator, or one member of a panel.[172]

Ultimately, the Court found that Perezcano's participation in the proceeding "tainted" the tribunal and demanded the award be set aside.[173] While the ONCA noted the importance of finality and economic efficiency in commercial arbitration, this result was the only appropriate means of ensuring the "integrity of the commercial arbitration process."[174]

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[168] *Vento* at para 38, citing *Popack v Lipszyc,* 2016 ONCA 135.
[169] *Vento* at para 41.
[170] *Vento* at para 31. See also *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 SCR 623, at 645; *Canadian College of Business and Computers Inc. v Ontario (Private Career Colleges)*, 2010 ONCA 856 at para 64.
[171] *Vento* at paras 42-43.
[172] *Vento* at para 51.
[173] *Vento* at para 63.
[174] *Vento* at para 68.

Theme 5: The Possibilities for Appealing Awards Are Narrow and Restricted Where Such Appeals Are Permitted by Domestic Arbitration Regimes

Although the *Model Law* does not provide for appealing arbitral awards on their merits, many jurisdictions have included such avenues in their domestic regimes. These include England and Wales, Canadian provinces, and Australian states, all of which will be discussed below.

1. ***Sharp Corp Ltd. v Viterra BV (formerly known as Glencore Agriculture BV)*, 2024 UKSC 14 (United Kingdom)**

In *Sharp Corp Ltd. v Viterra BV (formerly known as Glencore Agriculture BV)*,[175] the appellant, an agricultural produce buyer, appealed an award appeal decision from an arbitral proceeding at the Grain and Feed Trade Association ("GAFTA") Appeal Board. The respondent sellers brought a cross-appeal of the Appeal Board tribunal's damage award.

The UKSC provided important observations on appeals of arbitral award under section 69 of the *1996 Act*, which grants parties the ability to seek leave to appeal arbitral awards. In considering section 69, the Court noted the following key principles:

(a) An arbitral award may be appealed on a question of law, which must be a question the tribunal was asked to determine (section 69(1) & (3));

(b) The question of law must be identified in the leave to appeal application (section 69(4));

(c) In granting leave to appeal, the court must be satisfied that, "on the basis of the findings of fact in the award", the tribunal's decision was "obviously wrong" or "the question is one of general public importance" and the tribunal's decision is at "least open to serious doubt" (section 69(3)(c)); and

[175] 2024 UKSC 14 [*Viterra*].

(d) In determining whether an error of law occurred, the court must proceed based on the award's findings of fact.[176]

The UKSC also reminded that a court's jurisdiction under section 69 does not extend to questions of fact; courts cannot make their own findings of fact in relation to an arbitral award.[177] This is different from a court inferring that a tribunal made a finding of fact, thereby recognising that a tribunal did reach a finding of fact.[178]

The Court took note that the right of appeal was kept in place in a limited fashion, with many safeguards.[179] The UKSC confirmed the importance of respecting these safeguards, in line with the *1996 Act*'s guiding principle that "court[s] should not intervene except as provided".[180]

In the case before it, the UKSC allowed the Buyers' appeal after finding the Court of Appeal erred in (a) deciding a question of law which was not before the Appeal Board; and (b) making a finding of fact on a matter the Appeal Board made no finding on.[181] The Court of Appeal's decision had been based on its determination that the contracts in question were varied, something that was not at all before the Appeal Board or raised by either party.[182] Secondly, the Court of Appeal had made two impermissible findings of fact that were central to its conclusion on the contractual variation, which the Appeal Board had made no finding on whatsoever.[183]

[176] *Viterra* at paras 51.
[177] *Viterra* at para 71.
[178] *Viterra* at para 72.
[179] *Viterra* at para 52.
[180] *Viterra* at para 52. See *1996 Act*, s 1(c).
[181] *Viterra* at paras 70, 79.
[182] *Viterra* at paras 63-65, 68-69.
[183] *Viterra* at paras 76-79.

2. ***Escape 101 Ventures Inc. v March of Dimes*, 2022 BCCA 294 (Canada)**

In *Escape 101 Ventures Inc. v March of Dimes Canada*,[184] the British Columbia ("BC") Court of Appeal ("BCCA") heard the first appeal of an arbitral award decided under the province's new *Arbitration Act*[185] ("*BC AA*"), which came into force in 2020 and replaced the old arbitration legislation.[186]

The dispute in this case stemmed from a purchase agreement between Escape 101 Ventures Inc. ("Escape 101") and March of Dimes Canada ("March of Dimes") for the sale of the appellant's employment and counselling services business to the respondent. The purchase agreement included provisions related to earnout payments and a contingency payment.[187] After the agreement was executed, issues arose over the understanding of the earnout payments and completion of the contingency payment, which the parties elected to resolve through arbitration.

In his decision, the arbitrator interpreted the provisions of the contract and accounted for the post-execution conduct of one of Escape 101's principals to find that its position on the earnout provision was untenable.[188] The arbitrator also dismissed Escape 101's claims regarding the contingency payment and did not address the appellant's contention that it was entitled to having certain documents produced.[189] Escape 101 sought leave to appeal this award on an error of law.

The BCCA found the Aarbitrator's interpretation of the earnout provisions raised an extricable error of law and granted leave to appeal the award on that specific issue, but denied leave to appeal for the contingency payments and record production grounds.[190]

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[184] 2021 BCCA 313 [*Escape 101 Leave*], leave to appeal dismissed 2023 CanLII 28894 (SCC).
[185] SBC 2020, c 2 [*BC AA*].
[186] *Arbitration Act*, RSBC 1996, c 55.
[187] *Escape 101 Leave* at para 3.
[188] *Escape 101 Leave* at paras 10-11.
[189] *Escape 101 Leave* at paras 12-13.
[190] *Escape 101 Leave* at para 51.

In the appeal decision, the BCCA determined that the arbitrator misapprehended aspects of the evidence before him that were crucial to the dispute and allowed the appeal.[191] As such, the earnout matter was remitted to the arbitrator for reconsideration.[192] Despite a request from the respondent, the BCCA refused to decide the issue as it was before the arbitrator, noting there were considerable deficiencies in the evidentiary record of the proceeding.[193]

The BCCA reiterated several of the principles outlined in the leave to appeal decision. First, appeals of commercial arbitration awards are limited to extricable questions of law, which may be subject to the deferential "reasonableness" standard of review to promote the objectives of commercial arbitration.[194] Similarly, since issues of contractual interpretation typically involve questions of mixed fact and law, courts should exercise caution in identifying extricable questions of law and consider relevant factors, including whether the interpretation has precedential value.[195] Finally, a misapprehension of evidence affecting "the core of the outcome" is an extricable error of law.[196] The BCCA found the appeal raised three issues:

(a) Whether a material misapprehension of the evidence is an extricable legal error;

(b) If so, whether that misapprehension must be apparent "on the face" of the award; and

(c) Whether the arbitrator's award was, in any event, reasonable.[197]

On the first issue, the BCCA confirmed that the legislature had narrowed the scope of the appeal to questions of law, but rejected the respondent's argument that a misapprehension of evidence in the arbitration fell outside the scope of an error of law.[198] While an arbitrator is

[191] *Escape 101 Ventures Inc. v March of Dimes Canada*, 2022 BCCA 294 at para 2 [*Escape 101 Appeal*].
[192] *Escape 101 Appeal* at para 108.
[193] *Escape 101 Appeal* at paras 106, 108-109
[194] *Escape 101 Appeal* at para 40
[195] *Escape 101 Appeal* at para 41
[196] *Escape 101 Appeal* at para 43.
[197] *Escape 101 Appeal* at para 2.
[198] *Escape 101 Appeal* at paras 47-77.

"uniquely positioned" to make credibility assessments and address evidentiary matters, the BCCA affirmed that arbitrators will commit an error of law where their evidentiary determinations are based on a misapprehension of evidence that is crucial in reaching a decision.[199]

On the second issue, the BCCA rejected March of Dimes' argument that the misapprehension did not "aris[e] out of" the award, as stipulated in the language of section 59.[200] The arbitrator's misapprehension was clear from the proceeding's record but not his actual decision.[201] However, in reviewing the language and history of section 59, including recommendations from the Law Reform Commission and relevant case law, the BCCA determined that it could look at the Arbitrator's reasons, which could include documents referred to in the award, and was not limited to the award itself.[202]

Lastly, the BCCA rejected March of Dimes' argument that the reasonableness standard governed the award, even if the arbitrator committed an extricable error of law.[203] The BCCA did not address the issue of whether reasonableness or correctness applied to reviewing arbitration awards from a statutory right of appeal: the parties had not addressed this question and the award would not be upheld on a reasonableness standard.[204] The BCCA could not find any basis to conclude that the arbitrator's interpretation or award on the earnout payments was reasonable.[205]

[199] *Escape 101 Appeal* at para 76.
[200] *Escape 101 Appeal* at para 28.
[201] *Escape 101 Appeal* at para 1.
[202] *Escape 101 Appeal* at paras 80-82, 96. See paras 78-96 for the BCCA's full discussion of this issue.
[203] *Escape 101 Appeal* at para 97.
[204] *Escape 101 Appeal* at paras 98-101.
[205] *Escape 101 Appeal* at para 107.

3. ***Factory X Pty Ltd v Gorman Services Pty Ltd*, [2023] VSC 247 (Australia)**

Lastly, in *Factory X Pty Ltd v Gorman Services Pty Ltd*,[206] the Supreme Court of Victoria dealt with an appeal under section 34A of the state's *Commercial Arbitration Act 2011*.[207] Section 34A – which is also found in the Commercial Arbitration Acts of other state and territorial jurisdictions – grants parties the ability to seek leave to appeal for awards on a question of law.

Factory X Pty Ltd. ("Factory X") purchased a women's apparel business from Gorman Services Pty Ltd. ("Gorman"), for which it offered 25% of a class of shares as consideration. The parties entered into a shareholders' deed to regulate the dealings of the class shares. The deed granted Gorman four put options, which were exercisable on four-months' notice. Central to this dispute was clause 6.4(a) of the deed, which the parties varied to provide that the consideration paid for the shares of each option was their market value, as determined by an expert.

Several disputes arose over Gorman's exercise of the four put options. The main issue was whether, when the shares in any option were valued, their value must be determined:

(i) at the date of the valuation (Factory X's position); or

(ii) at the date notice was given for the exercise of the option (Gorman's position).

In his award, the arbitrator agreed with Gorman's valuation. Factory X sought the Court's leave to appeal the award on questions of law, including that its construction of clause 6.4(a) was "obviously or plainly right" and that the arbitrator's interpretation was "obviously wrong".[208] The Court rejected Factory X's appeal.

[206] [2023] VSC 247 [*Factory X*].
[207] No 50/2011 (Vic).
[208] *Factory X* at para 25.

Justice Croft confirmed that the narrow limits in section 34A do not allow appeals *de novo* or "at large".[209] The legislature sought to limit appeals and promote the paramount object of resolving commercial disputes in a cost effective and efficient manner by requiring parties to seek the court's leave to appeal.[210] Citing domestic authorities, as well as a UK decision, Croft J. confirmed that the "obviously wrong" standard under section 34A is higher than an arguable or possible error, and requires the error to be readily apparent on the face of the award.[211] Croft J. did not find it appropriate to consider the construction issues in significant detail, which would effectively amount to a rehearing of the dispute's substance that is not available under section 34A.[212]

Nevertheless, without confirming whether the Court agreed or disagreed with the arbitrator's construction of clause 6.4(a), Croft J. held that the award should not be deemed obviously wrong simply because a court might have interpreted the clause differently.[213] While noting the clause in question lacked clarity, Croft J. did not find the arbitrator's determination obviously wrong on the basis that there were possible merits to Factory X's interpretation. Croft J. accepted Gorman's submission that the arbitrator reached their decision after considering constructions from both parties, and that this process did not create an obvious error.[214]

Theme 6: Courts Hesitant to Arguments or Interpretations Which Would Extend Judicial Jurisdiction

In recent decisions, courts in several jurisdictions have rejected parties' arguments that would excessively expand a court's power to intervene in the arbitral process.

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[209] *Factory X* at para 11.
[210] *Factory X* at para 13, citing *HMV UK v Propinvest Friar Limited Partnership*, [2011] EWCA Civ 1708 at para 40 [*HMV*].
[211] *Factory X* at paras 15-16, citing *Westport Insurance Corporation v Gordian Runoff Ltd*, [2011] HCA 37; *HMV*.
[212] *Factory X* at para 24.
[213] *Factory X* para 34.
[214] *Factory X* at para 37.

1. ***Betamax Ltd. v State Trading Corporation (Mauritius)*, [2021] UKPC 14 (Mauritius)**

In *Betamax Ltd. v State Trading Corporation*,[215] the Privy Council was faced with an appeal by Betamax Ltd. ("Betamax") of the Supreme Court of Mauritius' decision to allow State Trading Corporation's ("State Trading") set aside application of an arbitral award on the basis that it conflicted with the country's public policy.

The focus of the Privy Council's ruling was the arbitrator's interpretation of relevant public procurement legislative provisions and decision that these provisions did not render the parties' affreightment contract illegal. The Privy Council had to consider the scope of a court's review under section 39(2)(b)(ii) of *The Mauritian International Arbitration Act, 2008* (which reflects Article 34 of the *Model Law*) where an arbitral tribunal decided that a contract was not illegal through its interpretation of applicable legislative provisions and regulations.[216]

As noted by the Privy Council, the question for the court under section 39(2)(b)(ii) is whether there is conflict between an award and public policy, based on the findings of law and fact in that award.[217] State Trading argued that the Supreme Court's ability to correct an arbitrator's error of law on the country's public policy entitled it to consider whether the regulatory framework (a) represented the state's public policy, and (b) applied to the affreightment contract.[218] Since the affreightment contract was governed by Mauritian law, the issue of public policy went to illegality and the question of what Mauritian public policy was for the purpose of section 39(2)(b)(ii).[219] According to State Trading, the Supreme Court's authority under section 39(2)(b)(ii) was "symmetrical", such that if an illegality issue arose and was tied to public policy, the Court was

[215] [2021] UKPC 14 [*Betamax*].
[216] *Betamax* at para 52.
[217] *Betamax* at para 49.
[218] *Betamax* at para 29.
[219] *Betamax* at para 29.

also entitled to review the arbitrator's decision on the contract's illegality, otherwise it could not determine if the award was in conflict with the public policy.[220]

The Privy Council noted that the arbitrator had the jurisdiction to determine issues of fact and law, including interpretating the relevant provisions and whether they rendered the agreement illegal.[221] As such, the Supreme Court had no power to review that decision unless it could do so for public policy reasons.[222] However, the interpretation issue in this case did not invoke public policy concerns.[223] To accept State Trading Corporation's argument, the Privy Council found, would greatly expand section 39(2)(b)(ii), such that an appeal would effectively arise whenever a party alleges, but the tribunal rejects, an argument of illegality.[224] The Privy Council remarked that arguments of illegality arise "not infrequently" where provisions governing a contract are engaged in arbitral proceedings.[225]

The Court found this would be inconsistent with the underlying intentions of the *International Arbitration Act* and *Model Law*, and that the more expansive reading of section 39(2)(b) would be contrary to the provisions on award finality.[226] The Privy Council affirmed that courts could simply reconsider issues relating to the meaning and effect of the contract, or its compliance with a regulatory or legislative scheme, under the "guise of public policy".[227]

In granting the appeal and permitting Betamax's enforcement application, the Privy Council found the Supreme Court erred in reviewing the arbitrator's final and binding decision.[228]

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[220] *Betamax* at para 29.
[221] *Betamax* at para 44.
[222] *Betamax* at para 44.
[223] *Betamax* at para 46.
[224] *Betamax* at para 47.
[225] *Betamax* at para 47.
[226] *Betamax* at paras 48-49.
[227] *Betamax* at para 49.
[228] *Betamax* at para 53.

2. ***C v D*, [2023] HKCFA 16 (Hong Kong)**

In *C v D*,[229] the dispute in question was between two satellite operators. The parties' agreement included specific "pre-arbitration procedures" (also known as "multi-tiered" or "cascading" dispute resolution clauses), requiring the parties to seek a resolution through negotiation.[230] When the respondent referred the appellant to arbitration, the appellant objected on the basis that the pre-arbitral procedures were not followed. In its partial award, the tribunal rejected the appellant's objection and found it had breached the agreement. The appellant's set aside application was dismissed by the HKCFI, and its appeal was denied by the Court of Appeal.

All five members of the Court of Final Appeal presiding over the case penned separate opinions. The main conceptual differences in this decision pertained to whether a court – in considering whether to intervene in an arbitral proceeding – should distinguish between a challenge to the tribunal's jurisdiction, and a challenge to a claim's admissibility.

Mr. Justice Rebeiro adopted a distinction between "jurisdiction" and "admissibility" as a means of determining whether courts should intervene in an arbitration proceeding.[231] According to Rebeiro PJ., this distinction can also be understood as that between a challenge to the tribunal (i.e., jurisdiction) and a challenge to the claim (i.e., admissibility).[232]

Rebeiro PJ. determined that, when a challenge goes to the tribunal, rather than the claim, the objection in essence is that the party disputes the tribunal exercising authority in a specific way.[233] This might occur where a party's objections: (a) affect the validity of an arbitration agreement; (b) speak to the composition of the tribunal not being what was agreed to; or (c) allege

[229] [2023] HKCFA 16 [*C v D*].
[230] *C v D* at paras 15, 46.
[231] *C v D* at para 51.
[232] *C v D* at para 33.
[233] *C v D* at para 53.

their exclusion from the arbitral process.[234] In these instances, Rebeiro PJ. confirmed that recourse to the courts is warranted.[235]

However, judicial intervention is not warranted where the validity of the claim is at issue. Rebeiro PJ. affirmed the presumption that pre-arbitration conditions are non-jurisdictional is consistent with the "consensual basis" for the tribunal's authority.[236]

Rebeiro PJ. noted that this distinction has been widely adopted in academia[237] and by courts in England and Wales, Singapore, New South Wales (Australia), and the United States.[238] Rebeiro PJ. cited Article 2A of the *Model Law* – which provides that the interpretation of the *Model Law* should bear in mind its international nature and the need to promote uniformity – as another reason for maintaining the distinction, considering its adoption in other leading arbitral centres.[239]

Both the HKCFI judge and the majority of the Court of Appeal applied this distinction to interpret section 81 of the Ordinance and Article 34(2)(a)(iii), to find the appellants objections applied to admissibility, not jurisdiction.[240] In keeping with the "jurisdiction/admissibility" distinction, Rebeiro PJ. agreed with the trial judge that the appellant's objection went to the admissibility of the claim and, therefore, should not engage judicial review.[241]

Chief Justice Cheung, as well as Justices Fok and Lam, wrote opinions concurring with Justice Ribeiro. Gummow NPJ., while agreeing that the appeal should be dismissed, found the distinction was unnecessary and created a task of supererogation for courts.[242]

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[234] *C v D* at para 52.
[235] *C v D* at para 51.
[236] *C v D* at paras 49-50.
[237] See [2022] HKCA 116 [*C v D Appeal*] at para 42 for the academic authorities cited by the Court of Appeal.
[238] See *C v D Appeal* at paras 29-41 for the Court of Appeal's discussion of case law from these jurisdictions.
[239] *C v D* at paras 91-92.
[240] *C v D* at para 30.
[241] *C v D* at para 90.
[242] *C v D* at para 159.

3. *Tesseract International Pty Ltd. v Pascale Construction Pty Ltd.*, [2024] HCA 24 (Australia)

In *Tesseract International Pty Ltd. v Pascale Construction Pty Ltd.*,[243] the majority of the HCA provided an interesting discussion of – amongst other topics – the impact of choice of law in the context of commercial arbitration.

In *Tesseract*, the parties had submitted to arbitration in South Australia, where domestic arbitration is governed by the *Commercial Arbitration Act 2011*, and the applicable substantive law was that of South Australia. An issue emerged as to whether the subject matter of the arbitration would be governed by the state's proportionate liability regime. This question was referred to the state's Court of Appeal, which found that this regime was not applicable to the parties' commercial arbitration. In allowing the appeal, the majority of the HCA[244] determined that the state's proportionate liability regime applied to the substance of the dispute in the arbitral proceedings.[245]

At the outset, Chief Justice Gageler affirmed the international context of the *Model Law*, with its "distinctions" for arbitration and its importance in considering the capacity of arbitral tribunals to apply a law or regime in making award on the substance of a dispute.[246]

One such distinction is the central notion of party autonomy.[247] Party autonomy is what grants tribunals authority to determine the parties' rights and liability, as manifested in the *Model Law*, and one aspect of autonomy is the freedom to choose the: (a) substantive law (i.e., Article 28); (b) procedural law of the dispute (i.e., Article 19); and (c) jurisdictional seat of the proceeding and its applicable curial law (i.e., Article 20).[248] As such, the parties' choices in these areas will

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[243] [2024] HCA 24 [*Tesseract*].
[244] Chief Justice Gageler, with two joint reasons from Justices Gordon and Gleeson, and Justices Jagot and Beech-Jones, respectively. Justices Edelman and Steward wrote a dissenting opinion.
[245] *Tesseract* at paras 12-13.
[246] *Tesseract* at paras 15-17.
[247] *Tesseract* at paras 19-29 (Gageler CJ), 87 (Gordon and Gleeson JJ).
[248] *Tesseract* at paras 20-28.

determine whether a tribunal "can and must apply" a particular legal rule in determining a dispute.[249]

In discussing the interplay between Article 28 and 34, and considering the drafting history of the *Model Law*, Gageler CJ. confirmed that the decision to retain Article 34(b)(i) gives credence to the view that the parties' choice of arbitration under Article 20 was to govern issues of non-arbitrability to the exclusion of the substantive law under Article 28.[250] Gageler CJ. disagreed with the Australian Centre for International Commercial Arbitration's argument (as *amicus curiae*) that the party's choice of substantive law requires tribunals to apply the substantive law without Article 34(2)(b) imposing some "outer limit".[251] Rather, Article 34(2)(b) curtails the application of Article 28 to only permit tribunals to exercise the substantive law "within jurisdiction".[252] In *Tesseract*, the substantive laws of the proportionate liability regime were applicable as they were not excluded either by the parties, or on grounds of public policy and arbitrability.[253]

4. ***SV Samudram v State of Karnataka & Anr*, [2024] INSC 17 (India)**

The INSC in *SV Samudram v State of Karnataka & Anr*[254] reminded courts that they are not permitted to modify awards when hearing set aside challenges under the *Indian Arbitration Act*.[255] In this case, a dispute arose between a registered civil engineer (the appellant) and the state government of Karnataka (the respondents) from a construction contract. The parties sought to arbitrate their dispute, as provided for in their contract. The award found in favour of the appellant. However, the respondents brought an application under section 34 to the High Court of Karnataka.

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[249] *Tesseract* at paras 18-29. See Gordon and Gleeson JJ at para 87, and Jagot and Beech-Jones JJ at paras 333-334.
[250] *Tesseract* at paras 39-42.
[251] *Tesseract* at para 44.
[252] *Tesseract* at paras 45-48. See Jagot and Beech-Jones JJ at paras 290, 336-339, 345.
[253] *Tesseract* at paras 290-291.
[254] [2024] INSC 17 [*SV Samudram*].
[255] See also *Larsen Air Conditioning and Refrigeration Company v Union of India*, 2023 INSC 708 [*Larsen*], where the Indian Supreme Court also dealt with the interest granted in an arbitral award being modified by a court below.

The High Court determined that the award should be modified, and the respondents were directed to pay a lesser amount than was provided for in the initial award. In a separate decision, the High Court also dismissed the appellant's subsequent appeal of the award under section 37, finding the earlier modification order was justified.

A two-judge panel of the INSC determined that the High Court was not justified in allowing the set aside challenge and modifying the award. The INSC confirmed that courts reviewing an award under section 34 have no jurisdiction to modify it.[256] Courts do not have the authority to remedy errors by arbitrators under section 34, only to quash awards.[257] The INSC reiterated several established principles on judicial intervention in arbitration, including that courts should not interfere on a tribunal's awards if its position and findings are plausible, and that an award by a technical expert (as the arbitrator in this instance was) is not meant to be scrutinised as if prepared by a "legally trained mind".[258]

The INSC summarised the court's role as supervisory, with section 34 keeping this role at "a minimum level".[259] Although the award was given prior to the 2015 amendments to section 34, the INSC nonetheless found that the High Court's judgment did not provide any basis on which it could have found sufficient reason to intervene.[260]

[256] *SV Samudram* at para 14.
[257] *SV Samudram* at paras 15-16, citing *Dakshin Haryana Bijli Vitran Nigam Ltd. v M/S Navigant Technologies Pvt. Ltd.*, [2021] INSC 205 [*DHBVN*]; *Larsen*.
[258] *SV Samudram* at paras 17-19.
[259] *SV Samudram* at para 15, citing *DHBVN* at para 44.
[260] *SV Samudram* at para 28.

Concluding Theme: Courts Advising Parties (and their lawyers) Against Unmeritorious Challenges

1. ***Haide Building Materials Co Ltd v Shipping Recycling Investments Inc*, [2024] SGHC 222 (Singapore)**

In *Haide Building Materials Co Ltd. v Shipping Recycling Investments Inc.*,[261] the SGHC reminded parties and their counsel of the court's minimal curial intervention policy and advised against taking a "kitchen sink" approach to challenging arbitral awards.

Haide Building Materials Co Ltd. ("Haide"), a Hong Kong registered company, entered into an agreement to sell a vessel to Ship Recycling Investments Inc. ("Ship Recycling"), a Liberian corporation. A dispute emerged after Ship Recycling terminated the agreement for a repudiatory breach by Haide following an inspection of the vessel, which caused Ship Recycling to believe it did not meet the contractual description and consider Haide's representations about the ship to be false. Ship Recycling commenced arbitration against Haide in Singapore, as agreed to in their contract. The two-panel tribunal found in favour of Ship Recycling.

Haide subsequently brought an application under the *SIAA* to set aside the award in its entirety. Amongst its numerous objections, Haide raised three claims of natural justice breaches. The Court dismissed Haide's application, finding each of its objections "unmeritorious."[262]

The Court noted that it is increasingly common, and counterproductive, for disgruntled arbitral parties (often the losing side) to challenge the decision with a "blunderbuss" approach, "throwing everything but the kitchen sink (and often the kitchen sink itself) at the award and the tribunal."[263] These remarks echoed to similar observations in the SGHC's *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* decision,[264] which also involved a dispute related to a vessel.

[261] [2024] SGHC 222 [*Haide*].
[262] *Haide* at paras 28, 162.
[263] *Haide* at para 3.
[264] [2024] SGHC 211.

The majority of Haide's objections were deemed to be "misconceived, unmeritorious and therefore dead in the water."[265] Furthermore, the approach of "flinging any mud it could cobble together at the [a]ward" betrayed Haide's real grievance: that it was unhappy it lost.[266] The SGHC emphasized that discouraging the "kitchen sink" approach is especially pressing in set aside applications, since the grounds and success of such challenges are narrowed by the "minimal curial intervention" principle.[267] The Court concluded that aggrieved parties who choose this strategy adopt the risk that such an approach will be "called out by the court for what it really is."[268]

2. *CNG v G and another*, [2024] HKCFI 575 (Hong Kong)

In another decision released earlier last year, Madam Justice Mimmie Chan of the HKCFI felt compelled to remind arbitral parties of principles underlying the Ordinance and discouraging parties from bringing unwarranted legal challenges to arbitral awards.[269]

This case involved two respondents (both being part of a US-based commodities trading house) and CNG, a subsidiary of a Chinese state-owned enterprise. One of the respondents agreed to sell CNG 65% of the shares in "SIL" – a company that owned a mining and processing project – while retaining a 35% ownership.[270] The respondents then entered into a shareholder agreement with CNG. After disputes emerged over the rights and obligations under the shareholder agreement, the two respondents commenced arbitration against CNG at the HKIAC, as per the arbitration clauses in the share purchase and shareholder agreements. The tribunal found in favour of the two respondents.

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[265] *Haide* at para 162.
[266] *Haide* at para 162.
[267] *Haide* at para 162.
[268] *Haide* at para 162.
[269] *CNG v G and another*, [2024] HKCFI 575 at 3 [*CNG*].
[270] The exact location was redacted in the decision.

In their application, CNG sought to set aside the award on grounds that: (a) it had been unable to present its case; (b) the proceeding had not accorded with the parties' agreement; (c) the award exceeded the scope of submissions or contained matters outside the scope of the submission; and (d) the award violated Hong Kong public policy.[271] The HKCFI rejected each ground.

Chan J. characterised the application as a "typical example of a party" who agrees to the final and binding award of a tribunal, but attempts to find "loopholes and problems" with the award when they become frustrated that an award was rendered against them.[272]

While affirming that Hong Kong has strived to support arbitration agreements and awards, Chan J. noted that reminders of the guiding principles of arbitration from courts, and (sometimes substantial) cost awards against unsuccessful parties, have not been effective in deterring parties from "embarking on expensive and time-consuming proceedings by way of unwarranted challenges".[273] She lamented that "arbitration and litigation [appear to] have become a game of buying time and competing in resources."[274]

Chan J. encouraged greater involvement and responsibility of the bar in addressing this issue. Notably, Chan J. highlighted the duty of legal professionals to carry out their duties to the Court and act responsibly when advising clients on the merits of challenging arbitral awards, keeping in mind the "exceptional nature" of challenges under section 81 of the Ordinance.[275]

Conclusion

Lord Mustill provided the following observation on the appropriate function of the courts in relation to arbitration awards:

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[271] *CNG* at para 20.
[272] *CNG* at para 1.
[273] *CNG* at para 2.
[274] *CNG* at para 2.
[275] *CNG* at paras 2-3.

> "[The Judge's] task is not to re-try the case, but simply to ensure that the method of dispute resolution on which the parties agreed is what they have in the event received. Moreover, only where the departure from the agreed method is of a degree which involves real injustice, is the court entitled to intervene, and even then the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process."[276]

As the cases above demonstrate, courts from a range of jurisdictions continue to provide crucial support for arbitration. These cases discussed certainly cannot cover the entire landscape of recent jurisprudence on courts' intervening in arbitral awards. Nevertheless, they signal a trend made apparent in years prior, that courts in leading, and emerging, arbitral jurisdictions continue to support the arbitral process.

A majority of the cases discussed above can certainly be characterised as pro-arbitral, in that we see courts hesitant to intervene in, or disrupt, the arbitral process that parties have voluntarily entered into. In addition, several decisions show courts refusing to adopt positions submitted by parties that would expand their curial power to an excessive degree. This trend provides parties seeking to pursue arbitration with an increased degree of certainty that courts will respect the result of their choice for arbitration.

That is not to say that courts will not intervene where serious injustice is perceived to have occurred. As these cases also demonstrate, courts continue to intervene where irregularities undermine the integrity of the arbitral process and, thereby, harm the institution of arbitration.

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[276] David AR Williams, "Defining the Role of the Court in Modern International Commercial Arbitration", (2014) 10:2 Asian Intl Arbitration J 137 at 137, citing Lord Mustill's foreword in OP Malhotra SC, *The Law and Practice of Arbitration and Conciliation* (New Delhi: LexisNexis, 2002).