



# Arbitration Report

Issue 01 - 2017

This issue includes articles on:

Discovery in the U.S. in aid of foreign arbitrations

Is an endorsee of promissory notes bound by an arbitration agreement in the underlying contract?

Arbitration rules updates

Can a court order interim relief where the arbitration rules provide for an emergency arbitrator?

and more.

# EDITOR'S NOTE

Dear Reader,

In this issue of the Baker Botts Arbitration Report, we comment on a selection of important current decisions and trends in arbitration around the globe. We bring you the latest insights from a diversity of jurisdictions, including Dubai, New York, England, Singapore and Hong Kong. The key themes addressed in our latest report include:

**Institutional rules.** The trend of arbitral institutions seeking to innovate and make their offerings more attractive to potential parties continues with revisions to the arbitration rules of both the International Chamber of Commerce (“ICC”) and the DIFC-LCIA Arbitration Centre. While the ICC amended its Rules to include an expedited procedure for (hopefully) faster and cheaper proceedings, the DIFC-LCIA Arbitration Centre revised its Rules essentially to bring them in line with 2014 changes to the LCIA Arbitration Rules. As discussed in this report, the LCIA was one of several institutions to have released data on costs and duration of arbitration proceedings in recent years, showing an increased focus on transparency.

**Third-party funding.** In a very interesting development for those following the march of third-party funding in arbitration, an English court recently held that an arbitrator had the power to award a successful party the costs of its litigation funding. Although there is a view that the decision should be confined to its somewhat unusual facts, it could make third-party funding more attractive for participants in arbitration proceedings seated in England, particularly if the decision is consistently followed by other courts going forward.

**Emergency arbitrators.** An English court has found that the new emergency arbitrator provisions in the 2014 LCIA Rules limit the courts’ power to grant interim measures in support of an arbitration where such relief could be granted by the emergency arbitrator. In order to avoid locking themselves out of the courts for purposes of interim relief, parties arbitrating in England may wish to opt out of the emergency arbitrator provisions.

**Interpretation and scope of arbitration agreements.** In Singapore, the Court of Appeal has recently shown that there are limits to the Singapore courts’ generous approach to construing the types of claims covered by an arbitration clause, particularly in the case of claims relating to negotiable instruments such as bills of exchange. Meanwhile, in Dubai, the Court of First Instance has interpreted the FIDIC Red Book Fourth Edition, which is widely used for construction contracts in the Middle East, to require referral to an engineer as a precondition to arbitration.

We cover these and other topical developments in more depth in the pages of this report, identifying need-to-know implications for arbitration parties and practitioners. We hope you find our insights valuable and invite you to contact our team to discuss these current trends further.

Jonathan Sutcliffe  
Editor

# WHY US

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## High Court Limits English Court's Power to Grant Interim Relief in Support of Arbitration

On September 21, 2016, the English High Court, in *Gerald Metals S.A. v The Trustees of the Timis Trust & Others* [2016] EWHC 2327, held that the emergency arbitrator provisions contained in the LCIA Arbitration Rules 2014 (the “LCIA Rules”) have the effect of limiting the scope of the English court’s jurisdiction to grant interim measures in support of arbitration. The rationale of that ruling would apply equally to disputes under other arbitral rules that provide for emergency arbitral remedies.



## INTRODUCTION

Section 44 of the Arbitration Act 1996 (the “Act”) gives the English court the power to grant interim relief (such as freezing injunctions) in support of arbitration. Sections 44(3) and 44(5) provide, respectively:

*(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. ...*

*(5) In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.*

The LCIA Rules provide for an emergency arbitrator or the expedited formation of the arbitral tribunal in urgent cases. Specifically, Article 9A provides for the expedited formation of an arbitral tribunal in cases of “exceptional urgency”. Article 9B provides for the appointment of an emergency arbitrator “in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal.”

## FACTS

Gerald Metals, a commodities trader, and Timis Mining Corp. Limited (“Timis”), a mining company, entered into a financing contract for the development of an iron ore mine in Sierra Leone. Related to that agreement, Safeguard Management Corp. (“Safeguard”), the professional trustee of the trust through which Mr. Timis pursued his business interests, executed a guarantee given in the form of a deed under which Safeguard guaranteed payment of all sums due to Gerald Metals under the financing contract up to a maximum amount of US\$ 75 million (the “Guarantee”). The guarantee was governed by English law and provided for disputes to be referred to arbitration in London under the LCIA Rules.

A dispute arose between the parties and, on August 8, 2016, Gerald Metals commenced arbitration proceedings against Safeguard under the Guarantee. Before the arbitral tribunal was constituted, Gerald Metals applied to the LCIA Court for an emergency arbitrator for the purposes of seeking an urgent freezing injunction preventing Safeguard from disposing of the trust’s assets. The LCIA Court declined to appoint an emergency arbitrator under Article 9B of the LCIA Rules following undertakings by Safeguard relating to the disposal of trust assets. It also declined to enact the expedited formation of the arbitral tribunal under Article 9A even though Gerald Metals did not expressly make an application under Article 9A. The LCIA Court refused Gerald Metals’ application because it did not consider the application to be so urgent that it could not wait until the arbitral tribunal was constituted in the ordinary way.

Also on August 8, 2016, Gerald Metals applied to the Commercial Court for a worldwide freezing order against Mr. Timis. On August 22, 2016, Gerald Metals issued proceedings in the Commercial Court for urgent relief under section 44 of the Act, namely, a freezing injunction against the trust and provision

of information by the trust. With respect to the application under section 44 of the Act, it argued that the standard for the urgency requirement under section 44(3) of the Act was lower than the exceptional urgency required under Article 9A of the LCIA Rules.

## DECISION

Leggatt J, who heard both of Gerald Metals' applications to the Commercial Court, declined to grant the requested freezing injunction and the requested relief under section 44 of the Act. With respect to the section 44 application, Leggatt J held that the Court may only act under section 44 of the Act where the powers of the arbitral tribunal or an emergency arbitrator are inadequate, or where the practical ability is lacking to exercise those powers. Leggatt J agreed that there were cases in which the need for relief was so urgent that the power to appoint an emergency arbitrator is insufficient and the court may properly act under section 44. Leggatt J, however, rejected Gerald Metals' argument that the standard for urgency under the LCIA Rules was different than that under section 44 of the Act (i.e., that there were some cases that were not emergencies or were not of such exceptional urgency as to justify the expedited formation of the arbitral tribunal but which were nevertheless cases of urgency within the meaning of section 44 of the Act). Leggatt J considered that such an approach would be "*uncommercial and unreasonable*."

Leggatt J found that the purpose of Articles 9A (expedited formation of tribunal) and 9B (emergency arbitrator) of the LCIA Rules was to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It was only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, were inadequate, or where the practical ability was lacking to exercise those powers, that the court may act under section 44. This conclusion, he ruled, was not affected by Article 9.12 of the LCIA Rules which states "*Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the arbitration tribunal and it shall not be treated as an alternative to or substitute for the exercise of such right.*"

## COMMENT

It may have been thought that Articles 9A and 9B of the LCIA Rules were intended to give parties access to emergency relief from their chosen arbitral institution or tribunal in addition to, rather than instead of, the ability to rely on the courts. The *Gerald Metals* judgment, however, suggests otherwise. The decision, if followed by other courts, will substantially limit the English court's powers under the Act to grant interim relief in circumstances where the applicant can apply to its chosen arbitral institution, or the arbitral tribunal, and it has the power to act. In other words, instead of Articles 9A and 9B of the LCIA Rules being an optional mechanism available to the parties, it will now be compulsory for a party seeking interim relief, before the arbitral tribunal has been constituted, to first apply to the LCIA for emergency relief unless the party seeking relief can show that those procedures are not an adequate substitute for judicial relief. This may appear to be a surprising interpretation of Articles 9A and 9B of the LCIA.

It seems, therefore, that for arbitrations under the LCIA Rules that are seated in England, Wales or Northern Ireland, the courts may intervene in cases, for example, that are too urgent to wait for an emergency arbitrator to be appointed, require *ex parte* treatment, or where the relief sought would be inadequate if granted by an emergency tribunal and thus would need to be issued by the court.

It is likely, but not certain, that the English courts would take a similar approach with respect to other institutional arbitration rules that include emergency arbitrator provisions (such as Article 29 of the International Chamber of Commerce (ICC) Rules 2017). In light of the court's approach, parties arbitrating in England may wish to consider, *ex ante*, whether they wish to opt out of any emergency arbitrator provisions that would otherwise be incorporated in their arbitration agreement (including under arbitration rules other than the LCIA Rules) and preserve the jurisdiction of the court under section 44 of the Act. Under the LCIA Rules, for instance, it is permissible to opt out of the emergency arbitrator provisions under Article 9.14.

A further potential complication is that the enforceability of decisions of emergency arbitrators (even if contained in awards, as required by the LCIA Rules) remains, at present, a gray area. What is clear is that they would not bind third parties in the same manner as a court order may. This may further encourage parties to opt out of emergency arbitrator provisions in order to preserve the jurisdiction of the court.

The broader reach of *Gerald Metals* is not yet clear. We have not seen decisions from other jurisdictions, such as the U.S., Singapore, Hong Kong and the DIFC in Dubai, addressing this point. On the one hand, *Gerald Metals* rests on the terms of the English Arbitration Act. On the other hand, the inclusion of emergency arbitrator provisions in arbitral rules is a relatively new phenomenon, with many institutional rules only recently having adopted emergency arbitrator provisions (such as Schedule 1 of the Singapore International Arbitration Centre (SIAC) Rules 2016; Schedule 4 to the Hong Kong International Arbitration Centre (HKIAC) Rules 2013; Article 37 of the International Centre for Dispute Resolution (ICDR) Rules 2006; and Article 9B of the DIFC–LCIA Arbitration Centre's 2016 rules). Although many of these rules preserve the parties' right to apply to the courts for interim measures before the arbitral tribunal is constituted, the courts in those jurisdictions have yet to have much opportunity to decide whether their jurisdiction is complementary to the emergency arbitrator's powers.





## The Recovery of Third Party Funding Costs in Arbitration

*Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*  
[2016] EWHC 2361 (Comm)

In a recent decision of the English High Court, a successful arbitration claimant was held to be entitled to its full costs of litigation funding, amounting to just over £1.94 million. The Court held that this was the inevitable consequence of the arbitration defendant's conduct during the term of the relevant contract. In this case the claimant had effectively been forced into a position where it had no alternative but to obtain litigation funding to enforce its rights by bringing an arbitration.

## FACTS

### ICC Arbitration

Norscot Rig Management ("Norscot") brought ICC arbitration proceedings against Essar Oilfields Ltd ("Essar") for repudiatory breach of an operations management agreement (the "Agreement").

Norscot obtained litigation funding from Woodsford Litigation Funding ("Woodsford") to bring the arbitration. The sole arbitrator, who was highly critical of Essar's conduct towards Norscot during the term of the Agreement and for most of the arbitration period, found Essar liable to pay Norscot approximately US\$12 million. That sum included approximately US\$4 million in interest and reimbursement of all of its costs on an indemnity basis, including its costs of litigation funding.

The arbitrator held that Essar, by its unreasonable and exploitative conduct, had forced Norscot into a position where it had no alternative but to obtain litigation funding to bring the arbitration. Accordingly, Norscot was entitled to the costs of litigation funding, amounting to just over £1.94 million, based on Woodsford having advanced £647,000 in exchange for an entitlement in the

event of Norscot's success equal to 300 per cent of the funding or 35 per cent of the recovery. The arbitrator found that the discretionary power to award the litigation funding costs arose under sections 59(1)(c) and 63(3) of the English Arbitration Act 1996 (the "Act")—and in substantially the same terms under Article 31(1) of the ICC Rules - whereby awardable costs included "*the legal or other costs of the parties*", because litigation funding costs were "*other costs*".

### English Court Proceedings

Essar applied to the English Commercial Court to set aside the award, claiming that, as a matter of construction of section 59(1)(c), "*other costs*" did not include the costs of litigation funding, so the arbitrator had no power to include the same in his costs order. Essar alleged a serious irregularity under section 68(2)(b) of the Act because the arbitrator had exceeded his powers and, given the amount ordered, Essar would suffer substantial injustice if that sum had to be paid.

Norscot argued that there was no basis for setting aside the award for five reasons: (1) there was no serious irregularity but, at best, an error of law under section 69 of the Act, in that the arbitrator had erroneously believed that "*other costs*" could encompass the costs of litigation funding (and the parties had agreed by the ICC Rules to exclude any right of appeal for error of law); (2) there was, in any event, no error of law because the arbitrator had been correct in interpreting "*other costs*" to include the costs of litigation funding; (3) even if there was serious irregularity, it did not give rise to substantial injustice; (4) Essar had, in any event, lost its right to appeal under section 68 by reason of statutory waiver as a result of its pre- and post-

award conduct; and (5) the application to the Court on 31 March 2016 was out of time because the 28-day period for an appeal under section 70(3) of the Act ran from the date of the award on 17 December 2015 and not from the date of a clarification of the award on 3 March 2016.

### COURT'S DECISION

The Court dismissed the application, holding there was no serious irregularity within section 68(2)(b) of the Act. Section 68 was designed as a longstop, available only in extreme cases where the tribunal had gone so wrong in its conduct of the arbitration that justice called out for it to be corrected. It applied only where the tribunal purported to exercise a power it did not have, not where it *erroneously* exercised a power it *did* have. The relevant power here was the undoubted power to award costs. If the arbitrator fell into error, it was an error as to the *scope* of such costs by reason of his allegedly erroneous interpretation of sections 59(1)(c) of the Act and Article 31(1) of the ICC Rules.

That was sufficient to dispose of the application. Although the Court, in deference, went on to address the other arguments made by the parties, it recognized that none of its conclusions on those other arguments were determinative.

### COMMENT

The signals given by this decision are somewhat mixed. If one of the goals of the civil justice system is to put a wronged claimant back in the position it would otherwise have been in but for the wrongdoing, that outcome was only achievable in this case with compensation for the claimant's arbitration funding costs. On that view, it was appropriate for the tribunal to ensure that a wronged claimant was made whole. Equally, however, the decision may act as a deterrent to choosing arbitration as the dispute resolution mechanism, given the absence of an obligation to disclose the terms of funding and the potential costs exposure for losing parties, which may now include the 'uplift' element in a private funding arrangement between the successful party and its funder.

The decision may end up being confined to its facts, namely the particularly unreasonable conduct of Essar that compelled Norscot to bring the arbitration. Nonetheless, the decision, if followed consistently, could increase significantly the attractiveness of funding arbitration proceedings seated in England, Wales or Northern Ireland through external financing arrangements.





## Arbitration Agreements in Underlying Contracts and Bills of Exchange

*Rals International Pte Ltd v Cassa di Risparmio di Parma  
e Piacenza SpA*

In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53, the Singapore Court of Appeal considered the issue of whether the ambit of an arbitration agreement in an underlying equipment supply contract was wide enough to encompass disputes concerning promissory notes issued with respect to that contract. The Court of Appeal took the view that, due to the special nature of bills of exchange, a clear intention must be expressed in order to rebut the presumption that businessmen neither want nor expect bills of exchange to be taken to arbitration. In this case, despite being widely drafted, the arbitration agreement did not expressly cover disputes concerning the promissory notes and, upholding the decision of the Singapore High Court, the Court of Appeal held that such disputes were not, therefore, subject to the arbitration agreement.

## BACKGROUND

In August 2010, Rals International Pte Ltd (“Rals”) entered into an agreement with Oltremare SRL (“Oltremare”) under which Rals agreed to purchase equipment from Oltremare for the shelling and processing of raw cashew nuts (the “Supply Agreement”). Rals agreed to pay the purchase price in ten equal installments. The first two installments were to be paid in cash and the remaining eight installments by way of eight interest bearing promissory notes (the “Notes”) to be drawn in favor of Oltremare and to become due at six-month intervals following the last shipment under the Supply Agreement. Rals issued the Notes to Oltremare in late December 2010.

The Supply Agreement was governed by Singapore law and contained an arbitration agreement (the “Arbitration Agreement”) providing for arbitration of “*all disputes arising in connection with*” the Supply Agreement.

In July 2011, Oltremare entered into a contract with Cassa di Risparmio di Parma e Piacenza SpA (“Cariparma”), a bank incorporated in Italy, pursuant to which Oltremare assigned the Notes to Cariparma at a discount from their face value (the “Discount Contract”). The Discount Contract was governed by Italian law and conferred exclusive jurisdiction over disputes regarding that contract on the courts of the City of Parma, Italy. Oltremare made a number of declarations in the Discount Contract, including that the Notes were “*autonomous and abstract*” from the credit deriving from the Supply Agreement and that the Supply Agreement contained an arbitration clause providing for disputes to be resolved by arbitration in a New York Convention country.

Rals refused to honor the first four Notes presented by Cariparma to Rals for payment. Cariparma filed an action against Rals in the Singapore court (“Action 1173”) claiming from Rals the face value of the first four Notes with interest, together with a declaration that Cariparma was the holder of the Notes and that Rals was liable to pay the face value of the remaining Notes as and when they fell due.

In response, Rals sought a stay of Action 1173 under section 6 of the Singapore International Arbitration Act (the “IAA”) on the basis that the dispute over the Notes was subject to the Arbitration Agreement.

## THE ISSUES

Section 6(1) of the IAA provides that “*where any party to an arbitration agreement...institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may...apply to that court to stay the proceedings.*”

Section 6(5)(a) of the IAA provides that “*a reference to a party shall include a reference to any person claiming through or under such party.*”

The stay application gave rise to two issues:

1. whether Cariparma was a party to the Arbitration Agreement, either directly as a party or claiming through or under Oltremare pursuant to section 6(5)(a) of the IAA (the “Party Issue”); and
2. whether Rals’ obligation to pay under the Notes was a matter which is the subject of the Arbitration Agreement pursuant to section 6(1) of the IAA (the “Subject Matter Issue”).

## THE DECISION OF THE HIGH COURT

On the first limb of the Party Issue, the High Court relied on the case of *Rumput (Panama) SA And Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd’s Rep 259, holding that, as a mere assignee, Cariparma had not become a party to the Arbitration Agreement in the contractual sense. Mere knowledge of the existence of the Arbitration Agreement did not make Cariparma a party to it—there was no meeting of minds between Rals and Cariparma on an agreement to arbitrate their disputes.

On the second limb of the Party Issue, after a detailed analysis of other Commonwealth cases on the meaning of the words “*through or under,*” the High Court took the view that Cariparma was claiming through or under Oltremare within the meaning of section 6(5)(a) of the IAA and was, therefore, a party to the Arbitration Agreement.

On the Subject Matter Issue, the High Court held that Cariparma’s claim in Action 1173 was not a dispute arising in connection with the Supply Agreement since the rights and obligations under the Supply Agreement were separate and independent from the statutory contracts represented by each of the Notes. In arriving at this conclusion, the High Court relied heavily on the cash equivalence principle, namely, that the commercial purpose of a bill of exchange is to be a freely-transmissible store of economic value and to function as a substitute for cash.

Rals submitted that the previous decision of the Singapore High Court in *Piallo GmbH v Yafriro International Pte Ltd* [2013] SGHC 260 (“Piallo”) represented the modern approach to reconciling the conflicting commercial purposes of arbitration and bills of exchange. In Piallo the High Court held



that a dispute involving dishonored checks was implicitly covered by the arbitration agreement in the underlying distribution agreement, reasoning that, in the absence of express provision to the contrary, commercial parties would ordinarily intend claims arising out of the same incident to be resolved by the same process.

The High Court, however, distinguished Piallo on two grounds. First, the litigants in Piallo (namely, the payee and drawer of the checks) were the same parties to the underlying distributorship agreement (namely, manufacturer and distributor respectively). Second, the claim of the payee on the dishonored check was closely connected with a cross-claim of the distributor under the underlying distributorship agreement and the distributor's likely defenses to the claims on the checks would be intricately tied to the distributorship agreement.

Accordingly, the High Court declined to grant the stay application.

## THE DECISION OF THE COURT OF APPEAL

Rals appealed to the Court of Appeal on the Subject Matter Issue. Rals relied on the decision in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 ("Larsen") in which the Singapore Court of Appeal stated that arbitration clauses should be generously construed so that all manner of claims, whether common law or statutory, would generally fall within their scope unless there was good reason to conclude otherwise.

The Court of Appeal considered the legal nature of promissory notes, noting in particular the English case of *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 ("Nova") and the Hong Kong case of *CA Pacific Forex Limited v Lei Kuan leong* [1999] 1 HKLRD 462 ("Pacific Forex"). In *Nova*, the House of Lords refused to grant a stay of an action brought in the courts for the dishonoring of bills of exchange related to an underlying contract containing an arbitration agreement on the basis that bills of exchange are equivalent to deferred cash and it would require a very clear intention to rebut the presumption that businessmen neither want nor expect bills of exchange to be taken to arbitration. In *Pacific Forex*, the Hong Kong Court of Appeal took the view that, as a matter of commercial common sense, it is difficult to see why any right-thinking merchant would choose to give up his rights in respect of bills of exchange.

The Court of Appeal further noted that the availability of summary judgment procedures in international arbitration is controversial and that this "injects an element of uncertainty that is at odds with the unconditional nature of the obligation to pay under a bill of exchange that is prized by business people."

In view of the above, Court of Appeal held that, due to the special legal and commercial nature of bills of exchange, coupled with the fact that the obligations under the Notes were separate and autonomous from those arising out of the Supply Agreement, the Arbitration Agreement did not apply to the Notes. Accordingly, Rals' appeal was dismissed.

## CONCLUSION

Although the decision does not displace the approach laid down in *Larsen* of generously construing the ambit of arbitration clauses, it does highlight that there are limits to how far the courts will go. In particular, the presumption in a widely drafted arbitration clause that the parties intended all manner of disputes to be submitted to arbitration can be displaced where there is good commercial (or other) reason why the parties would not have so intended. The dishonoring of negotiable instruments, which are equivalent to deferred cash, is one such case where the presumption is rebutted.

Parties to contracts involving payment by negotiable instruments are advised to draft the arbitration clause such that it expressly extends to disputes arising out of the negotiable instruments if they wish such disputes to be caught by the arbitration agreement in the underlying contract.



## Enforcement of Award Granted in Hong Kong Despite Contrary Prior Decision by Singapore Court at Seat of Arbitration

*Astro Nusantara International BV and others v Pt Ayunda  
Prima Mitra and others, CACV 272/2015*

## INTRODUCTION

In 2015, the Hong Kong Court of First Instance granted the enforcement of five SIAC arbitral awards that were made in favor of Astro Nusantara International BV and its subsidiaries (“Astro”) against PT First Media TBK and its subsidiaries (“First Media”). First Media had attempted to challenge the enforcement of the SIAC awards by Astro under section 44(2) of the Hong Kong Arbitration Ordinance (Cap. 341)<sup>1</sup>, which establishes the grounds on which enforcement may be resisted in Hong Kong. The application was made 14 months after the time limit under Hong Kong law had expired. As such, First Media was also required to seek a retrospective extension of time for its application.

The court rejected First Media’s request for an extension of time. It noted that, even if the extension of time had been granted and a ground for refusal had been made out under section 44(2), the court would decline to uphold the challenge to enforcement, as First Media had not acted in good faith. This decision was made in contrast to the Singapore Court of Appeal’s earlier decision in related proceedings to decline enforcement of the same arbitral awards in Singapore.

In 2016, the Hong Kong Court of Appeal dismissed an appeal by First Media against the decision of the Hong Kong Court of First Instance. The Court of Appeal found there had been no breach of the principle of good faith, as parties were entitled to utilize “active” remedies (such as contesting the tribunal’s jurisdiction at the seat of the arbitration) or “passive” remedies (such as

resisting enforcement) in arbitral proceedings. However, it would not overturn the lower court’s decision to refuse an extension of time for the application to oppose the enforcement of the awards in Hong Kong.

## BACKGROUND FACTS

Astro first commenced arbitration proceedings in Singapore in 2008 under the auspices of the Singapore International Arbitration Centre (“SIAC”). The proceedings were commenced by eight Astro entities, three of which were not a party to the arbitration agreement, but were joined to the proceedings by the tribunal pursuant to the 2007 SIAC Arbitration Rules. Although First Media objected and reserved its rights, it continued to participate in the arbitration proceedings. Subsequently, a number of arbitral awards were issued in 2009, including awards in favor of the three joined Astro entities. First Media did not seek to set aside the awards before the Singapore courts by challenging the tribunal’s joinder decision within the prescribed time limits under the UNCITRAL Model Law<sup>2</sup>. Instead, it opted to challenge later the enforcement of the awards in Singapore.

First Media was partially successful in the Singapore Court of Appeal, which found that First Media had consistently raised objections to the tribunal’s jurisdiction as a result of the joinder of the three additional Astro entities and properly reserved its rights. The Court of Appeal held that the tribunal did not have jurisdiction to join the three Astro parties to the arbitration, and that the awards concerning those parties were outside

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<sup>1</sup> Arbitration Ordinance (Cap. 341) has since been replaced by the Arbitration Ordinance (Cap. 609).

<sup>2</sup> The UNCITRAL Model Law (excluding Chapter VIII), as adopted by the United Nations Commission on International Trade Law on June 21, 1985, was directly enacted in Singapore through Section 3 of the International Arbitration Act (Cap 143A).

the jurisdiction of the tribunal and could not be enforced. Finally, the Court of Appeal determined that resistance towards enforcement of an award was a passive remedy that parties were entitled to take even if they had not pursued the active remedy of challenging the tribunal's preliminary decision on jurisdiction in the court through Article 16(3) of the Model Law or attempting to set aside the final award.

When Astro commenced enforcement proceedings in Hong Kong, First Media did not challenge enforcement within the 14-day time limit stated in the Hong Kong Arbitration Ordinance. Astro succeeded in having a judgment entered against First Media in Hong Kong, followed by a subsequent garnishee order over debt owed by First Media's parent company to First Media. It was not until 14 months after the expiration of the time limit for challenging enforcement of awards in Hong Kong that First Media did make such an application, requiring it to seek an extension of time retrospectively.

### HONG KONG HIGH COURT DECISION

The Hong Kong High Court declined to exercise its discretion to grant the requested extension of time to challenge enforcement of the SIAC awards. It found that (i) the 14-month delay was substantial (particularly in light of the prescribed 14-day time limit to challenge enforcement), (ii) First Media had made a deliberate and calculated decision earlier not to challenge enforcement because it was under the mistaken impression that there were no assets in Hong Kong and (iii) First Media had not taken steps to set aside the SIAC awards.

The High Court held that it would only have discretion to refuse enforcement of a New York Convention award if one of the grounds under

section 44 of the old Hong Kong Arbitration Ordinance (Cap. 341) (which gave effect to Article V of the 1958 New York Convention) was satisfied. The judge noted that, under Hong Kong law, a party can only rely on a section 44(2) ground to resist enforcement if it has acted in good faith. The judge held that his discretion as to whether to permit or deny enforcement was governed by Hong Kong law. Even if another jurisdiction (in this case, Singapore) had denied enforcement based on parallel grounds of the New York Convention, the Hong Kong court would apply the domestic Arbitration Ordinance and Hong Kong law when determining whether to allow enforcement. As such, discretion to refuse enforcement would not be exercised under section 44(2), even if a ground for refusal might otherwise be made out, if there was a breach of the good faith principle on the part of the party against whom the award was made. The High Court considered that a party should raise a jurisdictional challenge when the issue arises: in this case, applying to the court under Article 16(3) of the Model Law to settle the challenge to the tribunal's preliminary decision on jurisdiction over the three Astro entities. The Court held that despite Singapore's refusal to enforce the awards, the awards had not been set aside and could therefore still be enforced in Hong Kong.

### HONG KONG COURT OF APPEAL DECISION

First Media appealed to the Hong Kong Court of Appeal against the judge's exercise of discretion, arguing that the fact that the awards had not been set aside in Singapore was irrelevant, and that the extension of time should have been granted. The Court of Appeal found that the Court of First Instance had failed to take into account the fundamental defect that the awards were made in favor of parties who were wrongly

joined to the arbitration, as determined by the Singapore Court of Appeal. The Court of Appeal said that when determining whether a party had breached the good faith principle, the law of the seat of arbitration would need to be examined. As such, the Singapore court's finding that the awards were made without jurisdiction was to be taken into account when exercising the narrow discretion in deciding whether to permit enforcement under section 44(2). The Hong Kong Court of Appeal also agreed with the Singapore Court of Appeal that parties are entitled to pursue both "*active remedies*" in the supervisory court (such as an application to contest jurisdiction) and "*passive remedies*" (such as an application to resist enforcement), and the court must have full regard to the circumstances surrounding the decision not to pursue an active remedy (for example, a clear reservation of rights so the opposite party was not misled as to the possibility of later challenging the award). It was held that the Court of First Instance had mistakenly not taken into consideration the "*fundamental defect*" that enforcement was sought against the parties who had been wrongly joined to the arbitration, which would have led the judge to refuse enforcement.

However, the Court of Appeal found that the Arbitration Ordinance encourages "*speedy finality*" in arbitration proceedings, and that the Court of First Instance was entitled to refuse the application for an extension of time to challenge enforcement of the awards, particularly in light of the delay of 14 months in bringing the application. The appeal was therefore dismissed.

## CONCLUSION

First Media was successful in appealing the finding that it had breached the principle of good faith by participating in the arbitration without

challenging the tribunal's finding on jurisdiction in the Singapore courts under Article 16(3) of the Model Law, and later objecting to the tribunal's jurisdiction at the enforcement stage. However, it was unable to overturn the lower court's decision against granting an extension of time for its application against enforcement due to its substantial delay in making that application. The judgment is a reminder that there are various options to resisting an arbitral award. In this case, First Media was entitled to apply for: (i) a set aside of the joinder order (on the grounds of lack of jurisdiction) under Article 16(3) of the Model Law; (ii) a set aside of the SIAC awards in Singapore under Article 34 of the Model Law; and (iii) a challenge to enforcement in the jurisdiction where the award was being enforced (namely, Hong Kong). The Hong Kong Court of Appeal decision is consistent with the Singapore Court of Appeal's position concerning a party's right to elect "*active*" or "*passive*" remedies in arbitral proceedings. In other words, parties are entitled to challenge enforcement of an award even if they have not pursued the active remedy of attempting to challenge the tribunal's jurisdiction with respect to joinder in the first place or set aside the final award. In determining whether the parties have acted in good faith, the court will consider a party's reasons for refusing to pursue an active remedy, as well as other factors such as whether there was a clear reservation of rights during the arbitration, so that the other party was not misled.

In March 2017, the Hong Kong Court of Appeal dismissed an application by First Media for leave to appeal to the Hong Kong Court of Final Appeal, finding that the arguments raised by First Media were not reasonably arguable and were not questions of great general or public importance.





## When Does an Arbitration Award Acquire *Res Judicata* Status in Dubai?

*Res judicata* is a fundamental legal principle, ensuring that there is a definitive end to litigation and providing reassurance that parties cannot be pursued for the same matter twice. In the UAE, *res judicata* is only applied to causes of action and issues which have actually been tried and adjudicated in a previous proceeding. This constraint seeks to exclude causes of action and issues that could or ought to have been presented in the previous proceedings. Here, we address the specific question of when the Dubai courts will give an arbitration award *res judicata* status.

## THE *RES JUDICATA* STATUS OF ARBITRATION AWARDS ISSUED IN DUBAI

As the UAE is a civil law jurisdiction, the doctrine of *res judicata* is codified in law by virtue of article 92 of the UAE Civil Procedures Law and article 49 of the UAE Evidence Law. Judge Abdul Wahhab Abdoul of the Union Supreme Court explained in his judgment issued on 6 October 2004 (Case No. 707/Judicial Year 23) that the effect of these two articles is that “... a dispute may not be resubmitted in respect of a question that has already been judicially decided.”

In accordance with article 49 of the UAE Evidence Law, issues that have been determined and are subject to a final court judgment have acquired *res judicata* status and cannot be brought before the court again. A court judgment receives final status once it has been passed by the Court of Appeal, irrespective of the fact that it can be appealed to the Court of Cassation (Judge Al Husayni Al Kanani of the Union Supreme Court, Case No. 190/26 9-JY-27, June 20, 2005). In other words, it is not necessary to wait for a final decision of the Court of Cassation before a court judgment is given *res judicata* status.

Applying a similar reasoning to arbitration awards, the Court of Cassation has, on numerous occasions, held that arbitration awards are also given *res judicata* status as soon as they are issued. For example, in a decision rendered on February 3, 2008 (Case No. 265/2007), the Court of Cassation held that it was “well settled that the award of the arbitrators acquires the status of *res judicata* immediately upon its being issued.” A similar sentiment has been noted in earlier decisions of the Court of Cassation, in particular a judgment issued on December 10, 2005, in Case No. 225/2005.

The Court of Cassation has recently reconfirmed the above position in a judgment dated August 21, 2016, issued in Commercial Appeal 199 of 2014. In this case, the parties had entered into a contract for the supply of work. The claimant carried out the works but was not paid in full by the respondent. The claimant then commenced arbitration proceedings for payment of the outstanding debt. The claimant filed its arbitration request with the Dubai International Arbitration Centre (“DIAC”). DIAC appointed an arbitrator who heard the case and issued an award in the claimant’s favor.

Upon receiving the award, the claimant applied to the Dubai Court of First Instance to have the award recognized and enforced. At the same time, the respondent filed an application with the same court to have the award set aside. The respondent also filed an application to have an arbitrator appointed by the court on the basis that DIAC had lacked the authority to appoint an arbitrator in the first place.

The Court of First Instance dismissed the respondent’s application to appoint a new arbitrator on the basis that the respondent had acknowledged, agreed to and participated in the DIAC arbitration. With regard to the parties’ applications relating to the arbitration award, the Court of First Instance found in favor of the claimant. The respondent appealed the Court of First Instance’s decision in both the Court of Appeal and the Court of Cassation. The Court of Cassation upheld both decisions of the lower courts and found in favor of the claimant.

In rendering its decision, the Court of Cassation once again confirmed that arbitration awards are given *res judicata* status as soon as they are issued. The Court of Cassation also confirmed that this status is not lost or put on hold during any court proceedings during which the validity of the arbitration award is considered. In other words, the *res judicata* status is only removed if an award is annulled.

For a number of years, the Dubai courts have taken a clear and consistent approach in setting out when an arbitration award acquires *res judicata* status and how and when this status can be revoked. This will no doubt provide comfort to international arbitration practitioners and users in Dubai, not least because of the absence of any guidance in the institutional arbitration rules on how this issue is to be handled.



## Reference to the Engineer Is a Pre-Condition to Arbitration Under the FIDIC Red Book Fourth Edition

In Issue 2 of the 2015 Baker Botts' Arbitration Report, we considered whether a referral to a dispute adjudication board is a necessary precondition to court or arbitration proceedings in respect of contracts based on the 1999 FIDIC Rainbow Suite. A recent decision in Dubai has addressed a similar question arising in relation to the older FIDIC Red Book Fourth Edition. Specifically, is the referral of a dispute to the appointed contract administrator (the engineer) for a decision required as a necessary precondition to arbitration proceedings?



This question is of particular significance in the Middle East, as the FIDIC Red Book Fourth Edition is still widely used in the region.

In Commercial Case No. 757 of 2016, the claimant entered into a construction contract with the respondent for the construction of a factory and its associated buildings in Dubai Investment Park. That contract appears to have been based on the FIDIC Red Book Fourth Edition. The claimant constructed the factory and its associated buildings to the agreed specifications. However, after handing over the project to the respondent, the respondent failed to make certain payments to the claimant and refused to release the performance bond.

The claimant started arbitration proceedings under the Dubai International Arbitration Centre rules, and a tribunal found ultimately in the claimant's favor. The respondent did not satisfy the award voluntarily, so the claimant applied to the Dubai Courts for ratification and enforcement of the award.

Before the Dubai courts, the respondent argued that the award should be annulled because the claimant had filed for arbitration without having complied with a necessary contractual precondition. The respondent's argument rested on Clause 67 of the FIDIC Red Book Fourth Edition General Conditions of Contract, which provides a multi-step dispute resolution procedure, beginning with a request to the engineer for a decision on a particular dispute. If either party is not happy with the decision once it is given, or if the engineer has not issued its decision within a defined period of time, a party wishing to start arbitration proceedings must then file a notice

of intention to commence arbitration. There must then be a period for attempts at amicable settlement, and it is only at the end of that period that arbitration proceedings may commence.

In response to the respondent's challenge to the award, the claimant seems to have accepted that it had not referred the dispute to the engineer. Instead, the claimant sought to rely on the agreed terms of reference (termed the "*Arbitration Document*"), which the parties had signed in the early stages of the arbitration. The claimant argued that this Arbitration Document constituted an effective waiver of the respondent's right to insist upon an engineer's decision as a precondition to arbitration proceedings. On that basis, the claimant argued, the award should be upheld.

The Dubai Court of First Instance found in favor of the respondent and annulled the award. The Court agreed with the respondent that the parties' arbitration agreement contained a precondition that had to be satisfied before either party had the right to commence arbitration proceedings in respect of a particular dispute. In this case, because of the claimant's failure to comply with this precondition, the Court found that the arbitration agreement was not engaged and the arbitral tribunal lacked jurisdiction to determine the parties' dispute as a result.

The Dubai Court of First Instance also considered the parties' Arbitration Document, holding that it did not constitute a waiver of the respondent's right to require any dispute first to be referred to the engineer. Rather, the Arbitration Document was held simply to reflect the arbitration agreement contained in the parties' contract.

As a decision of the Dubai Court of First Instance, it is potentially subject to two rounds of appeal (first to the Court of Appeals and then to the Court of Cassation). Further, the UAE is a civil law jurisdiction, and so the courts are not bound by precedent. Nonetheless, this decision is a helpful judicial clarification of an issue that

arises frequently in the Middle East. Unless it is overturned on appeal, this case is likely to become one of the handful of cases that are cited frequently by counsel practicing in construction arbitrations regarding the proper interpretation of clause 67.1 of the FIDIC Red Book Fourth Edition General Conditions of Contract.







## U.S. Federal Court for the Southern District of New York Permits Discovery in Aid of Foreign Arbitrations

In *In re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6909712 (S.D.N.Y. Nov. 16, 2016), the United States District Court for the Southern District of New York held that 28 USC § 1782 applies to private foreign arbitrations, allowing parties to foreign arbitrations to seek discovery in New York. The decision represents a departure from prior case law and exacerbates a divergence amongst United States jurisdictions.

## BACKGROUND

Kleimar N.V. (“Kleimar”) and Dalian Dongzhan Group Co. Ltd. (“Dalian”) were engaged in a series of arbitrations in London before the London Maritime Arbitration Association (“LMAA”). In October 2016, Kleimar filed an *ex parte* application in the United States District Court for the Southern District of New York pursuant to 28 USC § 1782, seeking discovery in connection with those ongoing arbitrations in London. The district court granted Kleimar’s application for *ex parte* relief, and Kleimar subsequently served a subpoena upon Vale S.A. (“Vale”), a non-party to the arbitration.

In response, Vale moved to quash the subpoena. Vale’s arguments included that (i) Vale neither resided nor could be found in the Southern District of New York and (ii) the LMAA did not constitute a “foreign tribunal” as required by 28 USC § 1782.

## U.S. DISTRICT COURT DECISION

Section 1782 provides that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.”

### Vale Could be “Found” in New York

The district court first addressed whether Vale could be found in the Southern District of New York for the purposes of 28 USC § 1782. The district court noted that Vale issued American Depository Receipts on the New York Stock Exchange and regularly filed forms with the Securities and Exchange Commission, in which Vale listed Vale Americas, Inc. as its registered agent for service of process. Vale Americas, Inc. was an indirect subsidiary of Vale, duly registered to do business in New York and listed as an importer for Vale’s nickel product in North and South America. Considering these interactions, the district court was persuaded that Vale’s “systematic and regular business” constituted “significant contacts with New York such that Vale reside[d] or [could be] found in New York for the purposes of Section 1782.”

### The LMAA is a “Foreign Tribunal”

Next, the district court turned to whether the London arbitrations constituted a “foreign tribunal” for the purposes of 28 USC § 1782. The district court began by acknowledging that the Second Circuit (the federal Court of Appeals that is superior to the federal court for the Southern District of New York), in *National Broadcasting Co., Inc. v Bear Stearns & Co., Inc.*, 165 F.3d 184, 190 (2d Cir. 1999), had previously excluded private foreign arbitration proceedings from the scope of 28 USC § 1782. However, the district court pointed to subsequent dictum in a 2004 United States Supreme Court decision which, in its view, cast doubt on the Second Circuit’s approach. Specifically, in *Intel Corp. v Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the U.S. Supreme Court referenced a footnote in an international litigation treatise that provided a definition of “tribunal” as including “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”

To justify its departure from the Second Circuit's previous holding, the district court noted that the Second Circuit had not taken up the issue subsequent to the Supreme Court's 2004 *Intel* decision. The district court, in further support of its ruling, pointed to rulings of other courts. For instance, it referred to a 2012 holding by the Eleventh Circuit Court of Appeals that similarly held (also based on *Intel*) that private foreign arbitrations fall within the scope of 28 USC § 1782 (*In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v JAS Forwarding (USA), Inc.*, 685 F.3d 987, 995 (11th Cir. 2012)). Although the Eleventh Circuit subsequently vacated its opinion on other grounds, the Eleventh Circuit expressly declined to address the applicability of 28 USC § 1782 to private foreign arbitrations in its superseding opinion (*Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1269-70 (11th Cir. 2014)). The district court in *Kleimar* noted that at least two other district courts had previously ruled that the LMAA, specifically, fell within the scope of a "foreign tribunal" under 28 USC § 1782 in light of the Supreme Court's *Intel* decision. See *In re Owl Shipping, LLC*, No. 14-5655 (AET) (DEA), 2014 WL 5320192, at \*2 (D.N.J. Oct. 17, 2014) and *In re Application of Winning (HK) Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at \*9-10 (S.D. Fla. Apr. 30, 2010).

Based on this broader definition of "tribunal", the district court held that the LMAA constituted a "foreign tribunal" for the purposes of 28 USC § 1782. Consequently, the district court denied Vale's motion to quash *Kleimar*'s subpoena.

## COMMENT

As discussed above, the court in *Kleimar* relied, at least in part, on the presence and activities of one of Vale's indirect subsidiaries as a basis for holding that Vale could be found in New York for purposes of 28 USC § 1782. This determination may provide parties to foreign arbitrations with greater access to discovery in New York from a foreign-based parent company if it can be shown that the parent company conducts "systematic and regular business" in the Southern District of New York through a subsidiary company. The ruling on that issue, however, may not be generally followed, particularly in light of the Supreme Court's recent decision in *Daimler AG v Bauman*, which significantly limited the ability of plaintiffs to subject foreign corporations to personal jurisdiction in the United States (134 S. Ct. 746, 754 (2014) (Courts may assert general jurisdiction over foreign corporations only if "their affiliations with the [s]tate are so 'continuous and systematic' as to render them essentially at home in the forum state." (quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 465 U.S. 915, 919 (2011))). Because *Bauman* did not concern a Section 1782 request, it remains to be seen whether courts will feel themselves bound to apply the Supreme Court's ruling in such proceedings.

In permitting *Kleimar* to conduct discovery in the United States under 28 USC § 1782, the Southern District Court of New York also broke with strong, controlling precedent of the Second Circuit. As the court noted, a number of district courts have interpreted the Supreme Court's *Intel* decision to extend 28 USC § 1782 to private foreign arbitrations. However, the majority of district courts and at least one



court of appeals (the Fifth Circuit) have held the opposite: *Intel* did not directly address, and is therefore not controlling, as to whether the scope of 28 USC § 1782 includes private foreign arbitrations. Although *Kleimar* concerned itself specifically with the LMAA, this ruling joins a growing minority of those that have permitted use of Section 1782 in connection with foreign arbitrations. Ultimately, the Supreme Court will need to resolve the judicial split on this issue within the United States. In the meantime, it remains to be seen whether the *Kleimar* decision remains an outlier. For now, however, it is one decision in a growing mosaic that, itself, is not binding on any other court (or even any other case within the Southern District of New York).





## Ad Hoc Arbitration: The Position in China and Russia

An arbitration involves a number of procedural steps, including commencing the process, appointing the tribunal, making written and evidentiary submissions, conducting an evidentiary hearing, and issuing an award. The procedures are usually set out in the rules agreed to by the parties, such as those published by arbitration institutions like the ICC, the LCIA, the SIAC and the HKIAC. There is also the well-known set of procedural rules not associated with an arbitration institution, namely the UNCITRAL Rules of Arbitration.

These rules were first published by the United Nations in 1976 and were revised in 2010, and again (slightly) in 2013.

An arbitral proceeding conducted under the rules of an institution is known as an administered arbitration. The institution provides an administrative function to oversee certain procedural steps with the objective of making the proceedings more efficient. An administrative fee is charged to the parties for this service, often based on a scale relating to the monetary value in dispute.

*Ad hoc* arbitration, by contrast, is an arbitration that takes place without any arbitration institution, or where the parties may have selected a set of procedural rules without the administrative function of an institution, such as the UNCITRAL Rules. The administration of the process is placed in the hands of the parties and the tribunal. Some important procedural matters may be covered by the arbitration legislation of the seat of arbitration (e.g., the English Arbitration Act, the Singapore International Arbitration Act, and the Hong Kong Arbitration Ordinance, to name but a few).

The People's Republic of China ("PRC") and Russia, however, have unique and differing approaches to *ad hoc* arbitration. In the PRC, the Arbitration Law (1994) does not allow *ad hoc* arbitrations seated in the PRC (excluding Hong Kong and Macau) to take place, due to the requirement that an "*arbitration commission*" must be appointed to administer the arbitration, which is usually (although not always) deemed to be a Chinese arbitral institution. While some Chinese commentary has indicated

acceptance of *ad hoc* arbitral awards made outside of the PRC, the position is still uncertain. On the other hand, while there is no general prohibition under the Russian Arbitration Law, certain disputes may not be referred to *ad hoc* arbitration. If an arbitration is *ad hoc*, then the proceeding must comply with certain rules.

## PEOPLE'S REPUBLIC OF CHINA

### PRC Seated Arbitrations Required to be Administered by PRC Arbitration Commissions

The PRC Arbitration Law states that an "*arbitration commission*" must be selected to administer a PRC-seated arbitration (Articles 10-16). In particular, the Arbitration Law requires: (i) a valid arbitration agreement to expressly nominate the parties' choice of arbitration commission (Article 16); and (ii) that the arbitration commission should comply with local PRC requirements regarding its establishment, affiliation and regulation (Articles 10-15). The most recognized arbitration commission is CIETAC, although there are many others including the recent breakaway bodies from CIETAC known as the Shenzhen Court of International Arbitration and the Shanghai International Economic and Trade Arbitration Commission. As such, *ad hoc* arbitrations seated in the PRC are not permitted, as no arbitration commission is selected to administer the proceedings.

In the last two decades, questions have arisen as to whether arbitrations administered by non-PRC institutions are permissible. For example, case law has developed on the issue of whether an award issued by an ICC-administered arbitral tribunal seated in the PRC is enforceable in the PRC. The issue arises because the ICC is not an arbitration



commission, as defined by the Arbitration Law. In 2003, the Supreme People's Court ("SPC") in the case of *Züblin International GmbH v Wuxi Woke General Engineering Rubber Co., Ltd.* held that an award published by an ICC tribunal seated in Shanghai was invalid. The court determined that the award was a "non-domestic" award under the 1958 New York Convention, but that recognition and enforcement should be refused on the basis that the arbitration clause was invalid because the ICC was not an arbitration commission under the PRC Arbitration Law.

However, in 2009, the Ningbo Intermediate People's Court in *Duferco S.A. v Ningbo Arts & Crafts Import & Export Co Ltd* held that an award from an ICC arbitration conducted in Beijing could be enforced in China. The Court ruled that the award was "non-domestic" for the purposes of Article I(1) of the New York Convention and there were no grounds for refusal under Article V. Therefore, it was held that a non-domestic award made in Beijing was not subject to Article 10 of the PRC Arbitration Law (i.e., there was no requirement for a PRC arbitration commission). As such, the award could be enforced in the PRC under the New York Convention.

There was further development with regard to this issue in 2013, when the Intermediate People's Court of Hefei in *Longlide Packaging Co Ltd v BP Agnati SRL* upheld the validity of an arbitration clause referring disputes to a PRC-seated ICC arbitration. When BP commenced arbitration proceedings against Longlide, Longlide submitted a jurisdictional challenge on the basis that the arbitration clause breached Article 16 of the PRC Arbitration Law by failing to identify a Chinese

arbitration commission and that the nomination of the ICC as administering institution would violate the PRC's judicial sovereignty. The Intermediate People's Court of Hefei found that the PRC arbitration market had not been opened up to foreign arbitration service providers for the purposes of Article 10, which meant that Article 16 could not be satisfied by reference to an ICC arbitration, as this was not an arbitration commission. As the case gave rise to a foreign-related arbitration decision, the matter was reported to the Anhui Higher People's Court to confirm the decision. In a split decision, the majority of this court held that the agreement was valid since Article 16 (which requires (i) an expression of intention to use arbitration, (ii) the matters to be referred to arbitration, and (iii) a designated arbitration commission) was satisfied given the parties' clear intention to designate the ICC as the arbitral institution. The matter was then referred to the SPC, which upheld the majority view. The SPC stated that Article 16 of the "*Interpretation concerning Some Issues on the Application of the Arbitration Law of the PRC*" (adopted at the meeting of the Judicial Committee of the Supreme People's Court on December 26, 2005) requires the Arbitration Law to be applied to determine the validity of the arbitration clause, as the seat of the arbitration was the PRC. The SPC held that the arbitration clause met all three elements of Article 16 and was therefore a valid and enforceable arbitration agreement. In other words, the selection of the ICC to administer the arbitration satisfied the requirement of an "arbitration commission".

### Overseas Ad Hoc Arbitration Awards Enforceable in the PRC

As the PRC acceded to the New York Convention in 1986, an award issued by an *ad hoc* tribunal in another New York Convention jurisdiction is likely to be enforceable in the PRC. It should be noted that the PRC adopted both the reciprocity reservation and the commercial reservation, meaning that it will recognize and enforce only those arbitral awards made in other states that are signatories to the Convention and in commercial cases.

While the PRC Arbitration Law is silent on whether or not it recognizes international arbitral proceedings (seated outside of the PRC) conducted on an *ad hoc* basis, in 1987, the SPC issued a “Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China”, which expressly states that China will recognize and enforce awards made in other contracting states. In 1999, the Beijing Higher Court issued an opinion stating that an *ad hoc* award is enforceable in the PRC under the New York Convention if the award has been issued in another contracting state to the New York Convention and the law of that state recognizes *ad hoc* arbitration. In 2007, the SPC confirmed that awards resulting from *ad hoc* arbitrations conducted in Hong Kong were enforceable in the PRC. While there is an arrangement of mutual enforcement of arbitral awards between the PRC and Hong Kong (as well as between the PRC and Macau), it is understood that even for other foreign jurisdictions, there is likely no distinction with respect to enforceability of awards made in foreign *ad hoc* arbitrations and those in foreign administered arbitrations.

### RUSSIA

As opposed to China, Russian arbitration law does not prohibit *ad hoc* arbitrations. However, recent arbitration reform has subjected *ad hoc* proceedings to certain special rules.

Over the last several years, Russia has undergone significant arbitration reform aimed at increasing the credibility of arbitration and developing a legal framework for it. On December 29, 2015, the new Law on Domestic Arbitration and amendments to the 1993 Law on International Arbitration (an UNCITRAL-based law) were enacted, coming into effect on September 1, 2016.

One of the most important changes brought about by the new arbitration law is the introduction of mandatory licensing of arbitral institutions by the Russian government. With the exception of long-standing Russian institutions (the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation), any domestic or foreign arbitration institution must now go through the licensing procedure in order to operate in the territory of Russia. The only statutory prerequisite for a foreign arbitral institution is the institution's widely recognized international reputation. An award issued in a Russian-seated arbitration and administered by a foreign arbitral institution without a license shall be treated as an award obtained in an *ad hoc* arbitration.

The status of *ad hoc* arbitration has also undergone some important changes. Historically, *ad hoc* arbitral awards have enjoyed a lesser degree

of confidence in Russian courts than awards made under institutional rules. *Ad hoc* awards were sometimes used as tools in hostile takeovers or dubious transfers of property. This affected the approach of the legislator to the new arbitration laws, which impose certain distinctions between institutional arbitration and *ad hoc* arbitration.

1. Corporate disputes. There has been ongoing discussion in Russia for some time as to whether corporate disputes are arbitrable at all. A corporate dispute is any dispute in connection with the establishment of, governance of or participation in a legal entity (the law provides a broad and non-exhaustive list of such disputes). The new regime expressly allows arbitration of certain types of corporate disputes. However, no *ad hoc* arbitration of a corporate dispute is allowed under the current regulation.
2. Involvement of state courts. Under the new legal regime, state courts now provide assistance, as necessary, when parties appoint, substitute or challenge arbitrators. As Russian judges have not been involved in this process before, it will be worth paying close attention to how this historic novelty is implemented in practice. Parties to institutional arbitration can waive the possibility of assistance from

the state court. However, parties to *ad hoc* arbitration cannot. Furthermore, while arbitral tribunals and parties to administered arbitrations may seek assistance from the Russian court with evidence collection, tribunals and parties to *ad hoc* arbitrations may not. Another feature is that an *ad hoc* tribunal, but not an administered tribunal, must lodge a copy of its award with a state court at the place of arbitration (unless the parties agreed on an arbitral institution for these purposes).

3. Waiver of challenge. Another important revision is that parties to *ad hoc* arbitrations are not entitled to waive the possibility of challenging the arbitral award in set aside proceedings. Parties to institutional arbitration may validly waive such a right in the arbitration agreement.

With the special regulation set out above, *ad hoc* arbitration remains permissible and available for parties under Russian law in most contexts, but is subject to different rules than administered arbitrations. Most parties arbitrating in Russia are likely to favor an administered arbitration over an *ad hoc* arbitration.



## The DIFC-LCIA Arbitration Centre Updates its Arbitration Rules

Following its recent re-launch, the DIFC-LCIA Arbitration Centre (“the Centre”) has issued the first revision to its arbitration rules since the Centre was first launched in 2008. As expected, the revised rules are almost identical to the current version of the LCIA Arbitration Rules, which have been in effect since 2014. The new rules will apply to all DIFC-LCIA arbitrations commenced on or after 1 October 2016.

While almost every provision of the old rules has now been revised, there are a handful of material substantive changes. In summary, these are:

### ACCESS TO AN EMERGENCY ARBITRATOR

Either the claimant or the respondent will have the option of applying to the LCIA Court for the appointment of a temporary sole arbitrator to conduct what are termed “*emergency proceedings*”. Although not specifically defined in the new rules, the purpose of the emergency arbitrator is to deal with claims for “*emergency relief*”. This is likely to include, for example, injunctive orders and orders for specific performance.

If the LCIA Court grants the application, an emergency arbitrator is to be appointed within three days. He or she is then to consider and rule on the claim for emergency relief within 14 days of being appointed. Any order or award of the emergency arbitrator can be confirmed, varied, discharged or revoked by the tribunal once formed.

### PROVISION FOR THE CONSOLIDATION OF ARBITRATIONS

The tribunal can now consolidate separate arbitration proceedings. However, there are several important restrictions on this power:

1. the arbitrations must have been commenced under the same arbitration agreement (or any compatible arbitration agreement(s) between the parties);
2. no tribunal may have been formed in the other arbitration(s) to be consolidated, or the tribunal is the same for both/all arbitrations; and
3. the tribunal requires the agreement of the parties or the permission of the LCIA Court.

### DISCONTINUATION OF THE ARBITRATION

The tribunal now has the power to discontinue the arbitration if it appears that the arbitration has been abandoned or all claims and counterclaims have been withdrawn.

### PROVISION FOR MULTI-PARTY DISPUTES

The new rules now recognize in express terms the possibility of there being one or more claimant and one or more respondent, each of whom can be jointly or separately represented. This was implicit in the old rules, but not expressly stated.



## AMENDMENTS TO TIME LIMITS

Many of the default time limits have been shortened. For example, the default time limit for filing written submissions has been reduced from 30 days to 28 days.

## LEGAL REPRESENTATION

Each party's representative must be lawfully authorized to act in that capacity. The representative does not have to be a qualified lawyer, but it must be somebody who has been lawfully appointed by the relevant party to provide representation. The tribunal has the right to request evidence, such as a power of attorney, to prove the lawful appointment of the legal representative.

The revised rules also give the tribunal more power with regard to the appointment, replacement and conduct of the parties' legal representatives. In particular, the revised rules require parties to seek the tribunal's approval of any changes to their legal representatives. Importantly, the tribunal can withhold any such approval where the change could "*compromise the composition of the Arbitral Tribunal or the finality of any award.*"

## CONDUCT OF LEGAL REPRESENTATIVES

Annexed to the revised rules is the identical "*General Guidelines for the Parties' Legal Representations*" annexed to the 2014 revision to the LCIA Arbitration Rules. The guidelines are intended to promote "*good and equal*" conduct of the parties' legal representatives. The revised rules give the tribunal power to take quasi-disciplinary action against legal representatives who breach these guidelines. The guidelines cover similar ground as the International Bar Association's ("IBA") Guidelines on Party Representation in International Arbitration, published in 2013. The new DIFC-LCIA guidelines, however, will form part of the parties' arbitration agreement.

## MEASURES TO INCREASE EFFICIENCY AND AVOID DELAYS IN PROCEEDINGS

There are various measures that are intended to speed up arbitration proceedings and to make them more efficient. For example, the parties and the tribunal are now encouraged to make contact with each other as soon as practicable, but in any event within 21 days of receipt of written notification of formation of the tribunal.

## REVOCAION OF ARBITRATOR'S APPOINTMENT

The LCIA Court now has the power to revoke any arbitrator's appointment upon its own initiative. Previously this was only available by way of an application from the other arbitrators or either party.

## ONLINE FILING AND COMMENCEMENT OF PROCEEDINGS

The claimant and respondent may use a standard online electronic filing form for the Request for Arbitration and the Response.

Although this revision aligns the DIFC-LCIA rules with the current version of the LCIA rules, it has also been presented as part of the Centre's wider plan to enhance its appeal as a forum for arbitration. A new DIFC-LCIA Director and Registrar, Mr. Robert Stephen, has been appointed. The transfer to the DIFC-LCIA of all DIFC-LCIA casework previously administered by the LCIA in London is also understood to be ongoing. This is in the expectation that a larger active caseload likely will improve the DIFC-LCIA's exposure in the market and increase its popularity. When coupled with the appeal of the DIFC as a common-law seat for arbitration proceedings, the Centre's most recent efforts may well enable the DIFC-LCIA to catch up with the more established Dubai International Arbitration Centre ("DIAC") as a preferred institution for arbitration in Dubai.

The DIAC is not standing still, however. Notably, the DIAC has held its own public consultation on a revised draft set of arbitration rules. These draft rules contain a number of similarities to the new DIFC-LCIA rules, including allowing for the possibility of an emergency arbitrator (albeit that this is optional, rather than applying by default). The new draft rules would also fix some of the well-known issues with the current rules, most notably by including specific reference to the tribunal's authority to award the costs of legal representation. The DIAC has also signed a memorandum of understanding ("MOU") with the DIFC Dispute Resolution Authority ("DIFC DRA"). The DIFC DRA replaced the DIFC Judicial Authority and has taken over governance of the DIFC Courts, as well as other DIFC judicial and academic institutions. The MOU seeks to expedite the recognition and enforcement of DIAC arbitration awards in the DIFC courts. In addition, DIAC has opened an office in the DIFC, again with the aim of expediting and assisting with the enforcement of DIAC arbitration awards in the DIFC Courts.

It appears that competition between the DIFC-LCIA and DIAC is leading to significant improvements for users of arbitration in Dubai. This bodes well for the continued development of Dubai as a major arbitral centre.



## ICC Amends its Arbitration Rules to Include Expedited Procedure

In the previous issue of the Arbitration Report, we reported on efforts by the International Chamber of Commerce International Court of Arbitration (the “ICC Court”) to promote the transparency and efficiency of ICC arbitration, including by setting clear expectations for the timeliness of awards and providing that arbitrators’ fees may be reduced when those expectations are not met. Last November, the ICC Court announced amendments to its Rules of Arbitration (the “Rules”) to further enhance efficiency and cost-effectiveness.

## EXPEDITED PROCEDURE

The ICC's new Rules introduce an expedited procedure that will apply by default to arbitrations where the amount in controversy is US\$2 million or less, provided that the arbitration agreement was concluded on or after March 1, 2017, the effective date of the new Rules. Parties may also agree to use the expedited procedure in higher-value disputes. Parties may also agree to opt out of the expedited procedure, and the ICC Court may, upon a party's request or *sua sponte*, determine that the expedited procedure is inappropriate for a specific case.

The Expedited Procedure Rules are found in Article 30 and Appendix VI of the new Rules. Pursuant to the expedited procedure, the ICC Court may appoint a sole arbitrator "*notwithstanding any contrary provision of the arbitration agreement.*" Alternatively, the parties may jointly nominate a sole arbitrator within a time period fixed by the ICC Court. The sole arbitrator must hold an initial case management conference within 15 days after receiving the case file from the ICC. The Terms of Reference (a hallmark of ICC arbitration) is dispensed with, and the sole arbitrator is given discretion to implement procedural measures to accelerate the case, including, for example, eliminating document disclosure, limiting written submissions and deciding the dispute solely on the basis of written submissions without an evidentiary hearing. The arbitrator is required to render a final award within six months of the initial case management conference (unless the ICC Court extends this deadline). According to the ICC Court, "*The quality control on awards—performed by the ICC Court and its Secretariat through the scrutiny of the award—will however be maintained at its long-established highest level.*" Additionally, new arbitrator fee schedules for disputes handled under the expedited rules are approximately 20% less expensive than the standard schedules.

With these amendments, the ICC now joins some other arbitration institutions and court systems that provide for expedited procedures when disputes meet specific criteria (generally, when the amount in dispute is below a certain threshold), including, for example, the American Arbitration Association's International Centre for Dispute Resolution, the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre.

## OTHER AMENDMENTS

The amended rules have various additional changes to promote speed and transparency. For example, the deadline for the establishment of Terms of Reference (in non-expedited cases) will be reduced from two months to 30 days from the date the case is transmitted to the arbitrators. The Rules will also be amended to permit the ICC Court to provide reasons for its decisions in response to arbitrator and jurisdictional challenges, without having to seek the consent of all parties to the dispute, as has been a requirement under the 2012 ICC Rules. The ICC Court has stated that this change is meant to further increase the transparency of ICC arbitration.

## CONCLUSION

The ICC's new expedited procedure is designed to increase the speed and decrease the cost of arbitration in appropriate cases. Given that roughly one-third of the cases administered by the ICC Court in recent years have involved disputes valued at less than US\$2 million, and that parties to higher-value disputes may also agree to use the expedited procedure, it can be expected that the new Rules will have a significant impact.

For further information and a link to the updated Rules, see International Chamber of Commerce International Court of Arbitration, *ICC Court amends its Rules to enhance transparency and efficiency*, Nov. 4, 2016, available at <http://www.iccwbo.org/News/Articles/2016/ICC-Court-amends-its-Rules-to-enhance-transparency-and-efficiency/> (last accessed January 27, 2017).





## A Comparison of Institutional Data on the Cost and Duration of Arbitration Proceedings

In the last 18 months, four of the leading arbitral institutions have published information on the duration and costs of arbitration proceedings administered under their rules. The London Court of International Arbitration (“LCIA”) was the first to release its report, in November 2015. The Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) released its report in February 2016, followed by the Singapore International Arbitration Centre (“SIAC”) in October 2016. Finally, the Hong Kong International Arbitration Center (“HKIAC”) published data in its December 2016 report.

All four reports provide figures for (i) the average length of proceedings, (ii) administrative fees and (iii) tribunal fees and expenses. Direct comparison between the institutions is difficult because their reports do not use the same analytical parameters or present their results in easily comparable form. Nonetheless, some broad observations can be drawn from the data, which we set out below in tabular form.

### DURATION (IN MONTHS)

|       | Sole Arbitrator |               | Three-Member Panel |               | All Tribunals |        |
|-------|-----------------|---------------|--------------------|---------------|---------------|--------|
|       | Mean            | Median        | Mean               | Median        | Mean          | Median |
| LCIA  | 18.5            | 15.0          | 21.0               | 19.0          | 20.0          | 16.0   |
| SCC   | 10.9            | 10.3          | 19.0               | 15.8          | 16.2          | 13.5   |
| SIAC  | 13.0            | 11.3          | 15.3               | 11.7          | 13.8          | 11.7   |
| HKIAC | Not Available   | Not Available | Not Available      | Not Available | 12.3          | 11.6   |

*\*Duration was measured from the date of commencement of the arbitration through the date of final award, inclusive of any stay periods.*

### TOTAL ARBITRATOR FEES AND EXPENSES (IN US\$)

|       | Sole Arbitrator |               | Three-Member Panel |               | All Tribunals |               |
|-------|-----------------|---------------|--------------------|---------------|---------------|---------------|
|       | Mean            | Median        | Mean               | Median        | Mean          | Median        |
| LCIA  | Not Available   | Not Available | Not Available      | Not Available | Not Available | Not Available |
| SCC   | Not Available   | 19,092.66     | Not Available      | 140,105.48    | Not Available | Not Available |
| SIAC  | 31,497.00       | 22,449.00     | 143,133.00         | 70,904.00     | 71,367.00     | 26,852.00     |
| HKIAC | Not Available   | Not Available | Not Available      | Not Available | 51,643.87     | 22,422.55     |

### ADMINISTRATION COSTS (IN US\$)

|       | Sole Arbitrator |               | Three-Member Panel |               | All Tribunals |               |
|-------|-----------------|---------------|--------------------|---------------|---------------|---------------|
|       | Mean            | Median        | Mean               | Median        | Mean          | Median        |
| LCIA  | Not Available   | Not Available | Not Available      | Not Available | Not Available | Not Available |
| SCC   | Not Available   | 7,274.91      | Not Available      | 22,215.66     | Not Available | Not Available |
| SIAC  | 7,710.00        | 5,836.00      | 11,238.00          | 6,723.00      | 8,970.00      | 5,853.00      |
| HKIAC | Not Available   | Not Available | Not Available      | Not Available | 13,077.39     | 9,281.49      |

## TOTAL COSTS IN US\$

|       | Sole Arbitrator |               | Three-Member Panel |               | All Tribunals |               |
|-------|-----------------|---------------|--------------------|---------------|---------------|---------------|
|       | Mean            | Median        | Mean               | Median        | Mean          | Median        |
| LCIA  | Not Available   | Not Available | Not Available      | Not Available | 192,000.00    | 99,000.00     |
| SCC   | Not Available   | 26,367.58     | Not Available      | 162,321.14    | Not Available | Not Available |
| SIAC  | 39,207.00       | 27,941.00     | 154,371.00         | 80,230.00     | 80,337.00     | 29,567.00     |
| HKIAC | Not Available   | Not Available | Not Available      | Not Available | 65,721.26     | 31,704.04     |

\*SCC figures converted from EUR at 24 February 2016 exchange rate of the European Central Bank.

\*Total costs include disclosed tribunal fees and expenses and administration fees only. Legal fees and expenses for representation are excluded.

## GENERAL OBSERVATIONS

- Median durations for all tribunals span from 11.6 to 16 months. The median (i.e., the “midpoint” where half of the values fall above and half below) is a more useful indicator here than the mean (i.e., the arithmetical average) because much of the data does not appear to fall in a normal distribution. For example, the higher mean values over median values for the duration of arbitrations suggests that there may be significant outliers in the data, such as a few proceedings with unusually long proceedings, or even stays of proceedings. The LCIA noted that its data was affected by the existence of stayed proceedings. While the duration of any arbitration will depend on many factors, including the complexity of the dispute and the will of the parties and the arbitrator(s) to reach an award, a median duration of one year to one and one-quarter years is promising for users of arbitration—particularly when compared to the duration of litigation in many national systems.
- As might be expected, three-member panel arbitrations have longer median durations than sole arbitrator proceedings (11.7 to 19.0 months for three member tribunals versus 10.3 to 15.0 months for sole arbitrators)<sup>1</sup>. Notable, however, was the fact that the additional time was not overwhelming. Indeed, in SIAC proceedings the median time was virtually identical.
- Although mean and median values are useful indicators, these measures provide only a limited view of the data. As one example, while the mean and median values for SCC three-member panel arbitrations were 19.0 months and 15.8 months, respectively, additional data provided by the SCC revealed that approximately 25% of those arbitrations took more than 24 months to complete and approximately 10% stretched over 30 months. Statistically, mean and median values may be skewed when the data is not symmetrically distributed about the mean, such as when there are “tails” or outliers. More detailed information would allow for more reliable conclusions to be drawn.

<sup>1</sup> Excluding LCIA arbitrations, since the LCIA did not disclose duration figures to this level of detail.

- There is limited cost data available in the recent reports. The mean and median figures for total administrative and tribunal costs reported by the LCIA, SIAC and the HKIAC may not accurately reflect the average costs of arbitration because of the significant difference between costs for three-member panel arbitrations and sole arbitrator panels. Instead, it may be more useful to view these two categories separately, although only the SCC and SIAC have disclosed data at that level of detail. Interestingly, while the median values for total costs for sole arbitrator proceedings was comparable between the SCC and SIAC (US\$ 26,367.58 versus US\$ 27,941.00), the median value for three-member panel arbitrations for the SCC was significantly higher (US\$ 162,321.14 versus US\$ 80,230.00). This difference could stem from the relative amounts in dispute for three-member arbitrations between the institutions: the SCC reported that almost 8% of its three-member panel arbitrations had an amount in dispute in excess of EUR 100 million. While no similar data for SIAC is available, the average sum in dispute for the last three years at SIAC, as reported in October 2016, was US\$ 16 million.
- The median value for duration and total costs of HKIAC and SIAC arbitrations are fairly comparable. This observation is interesting in light of the continued competition between HKIAC and SIAC, with both reporting a record number of disputes in their 2015 annual reports and significant growth from 2014.

## CONCLUSION

While the differences in the preparation and presentation of data limits the value of comparisons between particular institutions, the information published by the LCIA, SCC, SIAC and HKIAC provides some benchmarks that users of arbitration may cautiously apply when considering the consequences of triggering an arbitration, when discussing procedural calendars at initial case management conferences and ultimately, when assessing case management skills at the end of the proceedings. Continuing and expanded institutional transparency can make those benchmarks even more useful to arbitration users and their advisers.

# CONTACTS

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