February 2025

ISSUE 43

THE QUARTERLY JOURNAL OF NZDRC AND NZIAC

ReSolution

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From the Editor

Tēnā koutou katoa

Welcome to the 43rd issue of ReSolution, our first for 2025. If we have not yet had the opportunity to do so, we wish you a happy calendar and Lunar New Year.

Late last year, NZIAC hosted two delegations from China: from the People's Congress of Beijing and the Hunan Province Political and Legal Affairs Commission. Both delegations were very interested in the dispute resolution landscape in New Zealand. This year, we will continue to promote New Zealand as a high-quality, neutral venue for international dispute resolution, particularly on the "southern link" between Asia and South America.

A focus area for NZDRC this year is expanding our property-related work across cross-lease disputes, body corporate issues, and rent and other commercial lease disputes. This complements the building and construction dispute focus of our Building Disputes Tribunal. Another sister company, the New Zealand Family Dispute Resolution Centre, is similarly targeting more relationship property work and elder mediation, trusts, wills and estates dispute-related work.

In this issue, we continue our work bringing together a broad range of topics from around the globe. In our feature article, I discuss the problem of 'noise' in decision-making and how it introduces unfairness into the system. Sam Dorne underscores the importance of precision when drafting contracts, Alexander Lyall untangles a tricky question about jurisdictional challenges, and Maria Cole reviews a decision in which the High Court highlighted the evidence required to defend a claim for specific performance.

Although not covered in this issue, I note that *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea* [2024] NZSC 164 (2 December 2024) is an important Supreme Court judgment on when customary marine title exists under section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011. Interestingly, the Court emphasised reconciling tikanga-based and common law-based views to reach a balanced outcome. It adopted a narrower view of when customary marine title survives while recognising and respecting important tikanga-based concepts.

Thank you to all who have contributed to this issue of ReSolution. Contributions of articles, papers, and commentary for future ReSolution issues are always welcome, as are letters to the editor.

I hope you find this issue interesting and useful. Please feel free to distribute ReSolution to your friends and colleagues.

Ngā mihi nui, nā

Michael Jamieson
Editor

ReSolution is the quarterly journal of NZDRC and NZIAC, published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

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THE PROBLEM OF 'NOISE' IN DECISION-MAKING

This article provides an overview of the role that 'noise' plays in introducing unfairness into systems of professional judgements, with a focus on legal judgments.

Written by **MICHAEL JAMIESON**

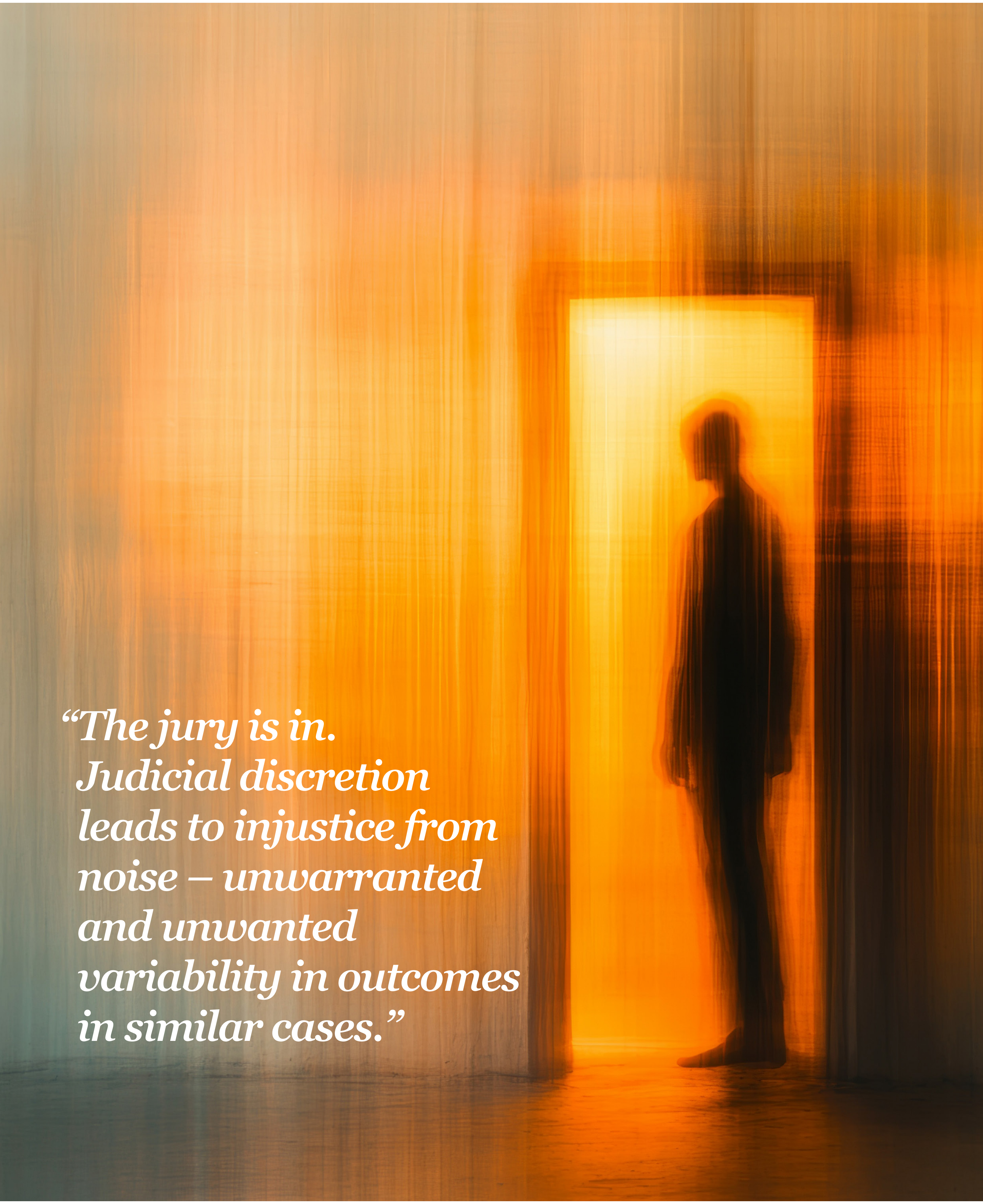
What is 'noise'?

Noise is "scatter" or the unwanted and unwarranted variability of decisions or judgements based on similar facts. In legal judgments it offends against the principle of stare decisis (that precedent should be followed and like cases should be decided alike).[1] However, it is not limited to the legal context: the problem of noise affects all areas of professional judgement.

To readers interested in this topic, I recommend the book *Noise: A Flaw in Human Judgment*, written by a heavyweight triumvirate of Nobel Laureate Daniel Kahneman, HEC Paris Professor Olivier Sibony and Harvard Professor Cass R. Sunstein.[2]

1 Cornell Law School's Legal Information Institute website states: "In *Kimble v. Marvel Enterprises*, the U.S. Supreme Court described the rationale behind stare decisis as "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." https://www.law.cornell.edu/wex/stare_decisis accessed 9 January 2025.

2 Kahneman, Sibony and Sunstein, Noise: *A Flaw in Human Judgment* (William Collins, 2021).



"The jury is in. Judicial discretion leads to injustice from noise – unwarranted and unwanted variability in outcomes in similar cases."

Bias and noise

Two kinds of error affect our decision-making.

What is the problem?

The authors identify two kinds of error that affect our decision-making: bias and noise. Bias is a familiar topic, but noise is much less discussed.

In the context of legal judgments, *[e]xperiments show large disparities among judges in sentences they recommend in identical cases. This variability cannot be fair*. Where the disparities are skewed consistently in a particular direction, that indicates bias. Where they are scattered, that is an indicator of noise.

As an example of noise, the authors quote a study that involved 208 federal judges *exposed to the same 16 hypothetical criminal cases. The central findings were stunning:*

> In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there were substantial variations [in sentence]. In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, but the longest prison term recommended was 15 years.

These were hypotheticals. It is worse in the real world. Shockingly, based on large data sets, statistically significant effects were shown from factors such as decisions made at the beginning of day, or before or after a food break; whether the local football team won or lost at the weekend prior; and outside temperature. Greater leniency is shown on a defendant's birthday.[3]

The jury is in. Judicial discretion leads to injustice from noise – unwarranted and unwanted variability in outcomes in similar cases.

What can be done about it?

Guidelines (tariffs) are effective in reducing noise and bias.[4] The authors note that when the US Sentencing Commission introduced mandatory guidelines, the differences in sentencing among judges fell from 17% to 11%. Numerous judges felt the guidelines were unfair because they prohibited judges from considering the specifics of the case.

Harvard law professor Crystal Yang studied the actual sentences of nearly 400,000 criminal defendants in the United States. When the guidelines were mandatory, the sentence given by a relatively harsh judge was 2.8 months longer than the sentence from an average judge. Unsurprisingly, when the guidelines became advisory only, the disparity between the sentences of average judges and those of the harshest judges doubled.

Also, the judges were more likely to base their decisions on personal values. The disparity between the sentences of *African American defendants and white people convicted of the same crimes* significantly increased.

Professor Yang concluded that these *findings raise large equity concerns because the identity of the sentencing judge contributes significantly to the disparate treatment of similar offenders convicted of similar crimes*.[5]

The examples above are examples of system noise. *System noise is inconsistency and inconsistency*

3 Above n 2, at page 17.
4 At page 20.
5 At page 20.

damages the credibility of the system.[6] I would add that it damages the credibility of the key participants in the system, too.

Another type of noise is called occasion noise. It is disturbing in many contexts.

Occasion noise

Occasion noise refers to the same decision-maker making a decision or judgement of the same facts on a different occasion and coming up with a different result. For example, this afflicts doctors diagnosing illnesses, fingerprint experts examining fingerprints for matches, judges at wine competitions, and many others.[7]

The reasons are complex and varied. Mood is a key factor. We are not the same person all the time. Good mood makes us more likely to accept our first impressions at face value, lets our biases affect our decision-making, makes us more gullible and impacts moral judgement. Stress and fatigue are also key factors: for example, a study of 700,000 cases showed that doctors are more likely to prescribe opioids at the end of a long day. Other studies showed increases in prescriptions for antibiotics and decreases in flu shots toward the end of the day.[8]

Weather is a statistically significant factor: sentences tend to be more severe when the weather is hot.

So, too, is the order in which cases are examined: immediately prior decisions provide a frame of reference for the next decision. The gambler's fallacy bias means that we underestimate the likelihood that a streak or run of outcomes will occur by chance, and we overcorrect for them. For example, *[A]sylum judges in the United States… are 19% less likely to grant asylum when the previous two cases were approved*.[9]

What role could mathematical models, machine learning and AI play?

Perhaps counterintuitively, simple mathematical models of a judge produce better results than the judge. Part of the reason for this is that a model cannot add any factors to the decision beyond the data the model is given, but a human decision-maker brings with them extraneous and usually flawed further factors, insights and prejudices – often called "gut-feel", "intuition" or "judgement". The decision-makers who rely on these generally suffer from an over-confidence bias: they confuse the comfort level they experience with their assessment with its accuracy.

As long ago as 1954, Professor Paul Meehl identified that simple mechanical rules are better than human judgement and that clinicians and other professionals are *distressingly weak* in their ability to integrate information.[10]

Machine learning and AI models can improve accuracy compared to simple models.[11] An appropriate future balance might be where machine learning models and AI are used to provide judges with instant, reliable data, not just on the applicable guidelines or tariffs for sentencing set by higher courts, but also on the averages and ranges of sentences given by their peers in like cases, and even a recommendation. The judge could then apply any discretionary factors in the context of this information.

This would preserve judicial discretion within sensible limits whilst reducing noise, thereby improving fairness.

6 At page 53.
7 At page 80.
8 At pages 87–89.
9 At page 90.
10 At page 114.
11 See the discussion in chapters 9 and 10, pages 111 to 135.

About the author

Michael is the Commercial Manager of the New Zealand Dispute Resolution Centre.

Michael brings 30 years of legal practise, including 20 years gained in-house, most recently as General Counsel and Company Secretary for a State-owned enterprise.

This article is based on the author's letter to the editor published in The New Zealand Law Society's *LawPoints* magazine in 2024.

ReSolution *in Brief*

New Zealand signs innovative trade deal with likeminded countries

Has the era of environment-focused trade deals begun? New Zealand and a collection of small States from vastly different parts of the globe are about to find out.

Last November, the Government announced that it had signed the Agreement on Trade and Sustainability (**ACCTS**) along with Costa Rica, Iceland and Switzerland.

The stated purpose of ACCTS is to promote sustainability. ACCTS will primarily achieve this by removing tariffs on goods deemed to be eco-friendly, including insulation materials, recycled paper, LED lamps and rechargeable batteries. Notably, ACCTS also establishes rules to try and eliminate subsidies encouraging the use of fossil fuels. Another way in which ACCTS is innovative is that it introduces the first ever set of guidelines on eco-labelling.

More relevant for New Zealand businesses, ACCTS will see the removal of tariffs on exports such as wood and wool products. The Government had previously identified these sectors as being crucial to achieving New Zealand's goal of doubling exports by 2034.

Entry into ACCTS has been a long time coming. Negotiations began in September 2019 in New York with a clear view to shaping trade with climate change in mind. At the thirteenth round of negotiations in 2023, the future signatories reached a conclusion on eco-labelling. Finally, in June 2024, the trade ministers from each of the signatory States announced that they had concluded negotiations.

Fiji was initially included in talks and promoted the agreement as recently as 2022. However, there is no indication whether Fiji intends on signing ACCTS.

Court of Appeal touches on relationship between arbitration and comity

The New Zealand Court of Appeal (the **Court**) has provided commentary on how New Zealand courts should evaluate dispute resolution clauses. The comments were made as part of the *Wikeley v Kea Investments Limited* [2024] NZCA 609 decision, where the Court considered whether it should grant an injunction preventing the enforcement of a foreign judgment.

Background

The case's underlying dispute involved Wikely Family Trustee Limited (**Wikely**) alleging that Kea Investments Limited (**Kea**) had breached the parties' contract and fiduciary duties. Wikely commenced proceedings in the United States Circuit Court of Kentucky (the **Circuit Court**). The Circuit Court issued a default judgment against

Kea for USD $123 million.

In the New Zealand High Court, Kea applied for an interim worldwide anti-suit and anti-enforcement injunction (the **injunction**). The High Court granted the injunction after finding the contract to have been obtained fraudulently. In the Court of Appeal, Wikely sought to set aside the injunction. Wikely argued that to maintain the injunction would be to uphold an *unprecedented breach of international comity*.

Dispute resolution clauses and the interest of justice

The Court discussed whether it should maintain the injunction. Maintenance ultimately would depend on the interest of justice. If one party is looking to have the dispute heard in a foreign jurisdiction or arbitral tribunal, then courts should assess the risk of justice failing if that is to occur. If any court leans towards a view that justice would fail, it is to be *extremely cautious* that this is the correct conclusion.

At [177], the Court discussed the relationship between dispute resolution clauses and comity. Comity is the doctrine that courts recognise each other's decisions out of courtesy, if not necessarily as a matter of law. When applying comity, a court is responding to the fact that another court is hearing the same matter. As such, the court will not hear the matter at that moment.

The Court presented two views on the misguided nature of invoking comity to give effect to a dispute resolution clause. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, the High Court stated that when a court gives effect to an arbitration clause, it does so because of contractual rights. It does not do so out of comity. Professor Dickinson of the University of Oxford has similarly agreed, criticising the idea that the role of comity is to give effect to a dispute resolution clause.

The Court noted that Kea had since applied to the Kentucky Court of Appeals. In the spirit of comity, the Court stated that it had to defer to this judgment. However, the Court affirmed that Kea could reapply to the Court later.

Freshly ground look at whether arbitrator had shown bias: Ontario Court of Appeal reinstates award

In ReSolution Issue 36, we covered a finding in the Ontario Supreme Court that an arbitrator had caused a reasonable impression of bias. The Supreme Court had found that such an impression was caused by its failure to disclose a previous appointment. Consequently, the Supreme Court set aside the award.

The Court of Appeal in *Aroma*

Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc., 2024 ONCA 839, has now addressed the matter, finding that the arbitrator did not create such an impression. It has reinstated the award.

The dispute between Aroma Franchise Inc. (**Aroma Franchise**) and Aroma Espresso Bar Canada Inc. (**Aroma Espresso Bar**) involved an allegation of breach of contract and wrongful termination of their franchise agreement.

Their contract contained a dispute resolution clause for arbitration. One of these requirements was that no arbitrator could have a *prior social, business or professional relationship with either party*.

At the conclusion of the arbitration, the arbitrator accidentally made it known that he had accepted an appointment by the lawyers of Aroma Espresso Bar. This omission spurred on the Supreme Court decision, which reaffirmed the principle that the appearance of bias is just as fatal as actual bias.

The Court of Appeal (the **Court**) has disagreed with the Supreme Court. In the Court's view, the action did not create an apprehension of bias. The Court framed the situation as being one where the arbitrator received income from the parties to a second, but unrelated, arbitration. It just so happened to be that one of the parties shared counsel with Aroma Espresso Bar. Aroma Franchise's big concern in relation to this, had been over the lack of disclosure about the arrangement. However, leading cases on apparent bias had not considered payment from a party to be a reason for disclosure in and of itself.

The Court held that the context did not give a reasonable apprehension of bias:

> In my view, neither the familiarity concern nor the financial aspect of a second appointment is, on its own, objectively likely to give rise to justifiable doubts about impartiality.

The Court reinstated the award.

Cryptocurrency trading platform loses appeal to stay proceedings in favour of arbitration

The Ontario Court of Appeal (the **Court**) has re-examined arguments over whether a cryptocurrency dispute between cryptocurrency holders and the trading platform should have been heard in arbitration.

In Lochan. v. Binance Holdings Limited, 2023 ONSC 6714, the Ontario Supreme Court rejected pleas from Binance Holdings Limited (**Binance**) that legal proceedings should be stayed in favour of arbitration. Despite having an agreement directing arbitration as the forum for dispute resolution, the Supreme Court held that the nature of cryptocurrency meant that court was the most appropriate venue.

In Lochan v. Binance Holdings Limited, 2024 ONCA 784, Binance has again failed. The appeal saw Binance raising four points related

to the competence-competence principle, that is – arbitral tribunals have the power to rule on their own jurisdiction. In Binance's view, the Supreme Court was mistaken in:

1. thinking that it, rather than an arbitral tribunal, should decide on whether a cryptocurrency award would contravene public policy on the basis of unconscionability;
2. holding that in the relevant circumstances, the competence-competence principle did not apply;
3. focusing on whether the validity of the arbitration clause could be decided if the dispute was referred to arbitration; and
4. analysing whether, because of cost and distance, the average purchaser of cryptocurrency could access the Hong Kong-based arbitral tribunal.

The Courted rejected each argument:

1. Binance had misinterpreted how the view on public policy was reached. The Supreme Court had not in fact launched straight into a discussion on public policy. It had first considered whether the circumstances allowed for the competence-competence principle to be excluded from consideration. Finding that they had, the Supreme Court could then consider public policy.
2. The Supreme Court had analysed competence-competence correctly. It first acknowledged that the default position was that a tribunal should hear its own jurisdiction. It then recognised that the onus rested with the party seeking to avoid arbitration to prove competence-competence should not apply. The respondent accordingly did so. On these facts, the Supreme Court decided to disapply the principle.
3. In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, the Supreme Court of Canada held that a court is to undergo a superficial review of any documents relied on for arbitration. The Court found that the Supreme Court had done no more than this.
4. If the Supreme Court gave effect to the arbitration clause, then the dispute would go to arbitration. Public policy is sensitive to unconscionability. The Court was familiar with how the agreement directed arbitral proceedings. As a result, it was natural to call into question the capacity of the cryptocurrency holders.

ARTICLE

Shanghai International Commercial Court Established

Shanghai experience

The Shanghai International Commercial Court will incorporate international common rules on judicial review and arbitral practices.

Written by **CHLOE YANG**

On December 30, 2024, the Shanghai International Commercial Court (hereinafter the **Court**) was inaugurated and issued the Rules of the Shanghai International Commercial Court (Trial) (hereinafter **Court Rules**) and the Consensual Jurisdiction Model Clauses of the Shanghai International Commercial Court (hereinafter **Consensual Jurisdiction Model Clauses**).

The Court is located in the Shanghai No. 1 Intermediate People's Court and centrally handles first- and second-trial of foreign-related commercial cases, arbitration judicial review and other cases that were originally under the jurisdiction of the Shanghai No. 1 and No. 2 Intermediate People's Courts. The Court Rules consist of 13 chapters and 50 articles, covering a series of key processes and supporting mechanisms such as jurisdiction, litigation participants, case trials, and overseas evidence review. On the same day, it also released the Chinese and English versions of the Consensual Jurisdiction Model Clauses to the public, providing guidance and reference for Chinese and foreign parties to agree on jurisdiction, applicable laws, as well as efficiently resolve foreign-related commercial disputes.

The establishment of the Court is of great strategic significance. Shanghai is the frontier of China's reform and opening up, and an international metropolis closely linked to the world. It is also a sample city for the World Bank to assess China's business environment. Thus, it needs a good legal environment and efficient foreign-related judicial services as support. Providing more fair, transparent and efficient judicial services through the Court will help attract more international commercial entities to invest in Shanghai, promoting Shanghai's economic development and enhancing its international influence. At the same time, its exercise of exclusive jurisdiction over judicial review of arbitration cases can further strengthen the capacity of Shanghai courts in arbitration judicial review, innovate Shanghai's international commercial multi-dispute resolution mechanism and help cultivate world-class Shanghai arbitration institutions. These developments will help promote Shanghai as a global preferred place for international commercial dispute resolution.

It is expected that the Court will make full use of the resources available to it, including geography. Taking advantage of these factors will accelerate an international commercial trial system that is more smoothly connected with international common rules on judicial review and arbitral practices. Relevant government departments and institutions have already welcomed these principles, and many attended the Court's opening ceremony.[1]

Ultimately, the hope is that the Court will contribute more "Chinese wisdom" and the "Shanghai experience" to the resolution of international commercial disputes.

1 Attendees included officials from the Shanghai Municipal Party Committee, the Political and Legal Affairs Commission, the Shanghai Municipal People's Congress Supervision and Judicial Committee, and the Shanghai High People's Court. Organisers also invited representatives of the National People's Congress in Shanghai, relevant responsible persons from the Shanghai Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), and experts and scholars from the Shanghai University of Political Science and Law, the Law School of Renmin University of China, the Law School of Shanghai University of Finance and Economics, and the School of International Law of East China University of Political Science and Law.

About the author

Chloe Yang (legal name: Yuyan Yang) is a PhD student at Auckland Law School, University of Auckland, specialising in intellectual property law. She holds a master's degree in international law from South Korea and completed her undergraduate education from the China University of Political Science and Law. Chloe has worked in diverse legal roles, including at the Zhejiang Provincial Postal Administration, the China International Economic and Trade Arbitration Commission's Zhejiang Sub-Commission, and Peidi Zhichuang (Hangzhou) Pet Technology Co., Ltd., gaining experience in administrative law, litigation and arbitration, corporate law and compliance, as well as IP law.

Chloe has authored articles on topics such as the creativity of works in copyright law and the attribution of liability for copyright infringement by AI-generated content. Additionally, Chloe is a co-author of the book "Explorations in Legal Research and Practice."

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A Bugsby's life – Arbitration or Alternative Dispute Resolution?

Plain reading

The parties disagreed whether the ADR clause mandated arbitration.

Written by **SAM DORNE**

The case of *Bugsby Property LLC & Anor v Omni Bridgeway (Fund 5) Cayman Investments Ltd & Anor* [2024] EWHC 2986 (Comm) examines how the English courts interpret dispute resolution agreements and underscores that a plain reading of contractual clauses will typically be preferred if a dispute happens to arise. The ruling highlights the critical importance of precise drafting in contracts and looks at whether a contract which stipulated that disputes would be resolved via an opinion from King's Counsel could be taken to mean that the dispute would be resolved via an arbitration process.

Background

The case revolves around a dispute between Bugsby Property LLC (**Bugsby**) and its litigation funders, Omni Bridgeway (Fund 5) Cayman Investments Ltd (**Omni**) and Therium Litigation Finance A IC (**Therium**). Bugsby had initiated legal proceedings against LGIM Commercial Lending Limited and Legal & General Assurance Society Limited (collectively referred to as **L&G**).

On 27 July 2022, the Court delivered judgment in favour of Bugsby in these proceedings. Subsequently, on 10 November 2022, the parties entered into a variation agreement to the litigation funding agreement between Bugsby and Omni (the **Variation Agreement**). This agreement amended the terms on which Omni would continue to fund Bugsby's ongoing litigation, including costs associated with a consequential hearing.

However, prior to the hearing of the appeals, Bugsby and L&G reached a settlement. This led to a dispute between the parties as to whether the Therium and Omni funding agreements were enforceable and, in particular, whether and to what extent the funders could claim a portion of the settlement proceeds.

In this dispute, Bugsby sought to resolve the matter by invoking a specific clause under the Variation Agreement; clause 19.2, which provided for the appointment of an independent King's Counsel to adjudicate certain disputes between the parties. Bugsby's application to the Court sought the appointment of an arbitrator under section 18 of the Arbitration Act 1996.

The dispute: Arbitration or ADR?

At the heart of the dispute was the interpretation of clause 19.2 in the Variation Agreement. The clause stipulates that if a dispute arises concerning the interpretation, enforcement, or adjudication of the Variation Agreement or the Omni Funding Agreement, the dispute should be referred to an independent King's Counsel for a final and *binding opinion*.

Bugsby argued that the clause should be interpreted broadly as an arbitration clause. They relied on the language of clause 19.2, which refers to an independent King's Counsel providing a final and binding opinion and argued that this effectively mirrored the arbitration process. They also referenced the case *Arenson v Casson* [1977] AC 405 to support their position, which Bugsby argued established a precedent for recognising dispute resolution clauses as arbitration agreements under certain circumstances.

However, Omni contended that clause 19.2 did not establish an arbitration agreement. Instead, they argued that it set up a form of alternative dispute resolution (**ADR**) that was different from arbitration. According to Omni, clause 19.2 was intended to provide a means for resolving disputes through a King's Counsel, rather than through arbitration governed by the London Court of International Arbitration (**LCIA**) rules. Furthermore, Omni highlighted that section 10.2 of the main litigation funding agreement explicitly provided for arbitration under the LCIA rules, and the two dispute resolution mechanisms were mutually exclusive.

Court's judgment

The Court ruled in favour of Omni, dismissing Bugsby's application. The Court found that clause 19.2 did not constitute an arbitration agreement. The language of the clause, which provided for a King's Counsel to issue a final and binding opinion, was not sufficient to establish that the parties had agreed to arbitrate disputes. Instead, the Court interpreted clause 19.2 as an ADR mechanism that did not involve arbitration.

Given the plain reading of the clause it was hard to see how any other outcome was possible.

Turning to Bugsby's reliance on Lord Fraser's comments from *Arenson* regarding the similarities between an arbitrator and a valuer, the Court observed that these were taken out of context. Lord Fraser had been discussing immunity and not the exact nature of the dispute resolution mechanism in question. His remarks were not intended to establish a general rule about how dispute resolution clauses should be interpreted. Bugsby had misinterpreted this passage in an attempt to frame clause 19.2 as an arbitration clause, despite the fact that the role of King's Counsel in the case was clearly distinct from that of an arbitrator.

Conclusion

The decision underscores the importance of clear and precise drafting in contractual agreements, particularly in relation to dispute resolution clauses, and that a plain reading of contractual clauses will typically carry the day. For future cases, the judgment serves as a reminder that courts will carefully examine the language and context of dispute resolution clauses to determine whether they constitute arbitration agreements – and so it is important for parties to consider which particular dispute resolution method they want to engage with at the time of drafting the contracts and to make sure that the language used encapsulates the parties' desired intentions.

About the author

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

Case in Brief:

Sloppy arbitration clause fine, but Hong Kong Court of First Instance takes issue with party's delay

Written by **ALEXANDER LYALL**

In *Friendship Shipping and Trading S.A. v. I.V.L. Dhunseri Polyester Company S. A.E.,*[1] the Hong Kong Court of First Instance (the **Court**) considered the merits of an anti-suit injunction (**ASI**) in favour of arbitration. Friendship Shipping and Trading S.A. (**Friendship Shipping**), the owner of a vessel, brought the injunction against Dhunseri Polyester Company S. A. E. (**Dhunseri**), a distributor of imported goods, to restrain civil proceedings in Egypt on the basis that the parties had agreed to an arbitration clause. Although the Court found prima facie evidence of an arbitration agreement, it could not tolerate how long Friendship Shipping had waited to request the injunction.

1 *Friendship Shipping and Trading S.A. v. I.V.L. Dhunseri Polyester Company S. A.E.* [2024] HKCFI 3180.

Background

Operating its business from Egypt, Dhunseri had purchased cargo shipped from China on Friendship Shipping's vessel. The cargo was damaged and Dhunseri commenced court proceedings in Egypt against Friendship Shipping. Friendship Shipping served a notice of arbitration in Hong Kong on Dhunseri, which Dhunseri rejected.

While the Egyptian courts considered the matter, Friendship Shipping applied to the Court to grant the injunction to restrain the Egyptian proceedings. Friendship Shipping argued that the parties had agreed to an arbitration clause where any dispute would be resolved by arbitration in Hong Kong, applying English law. Dhunseri argued that there had been no arbitration agreement and, in any event, it was too late because the Egyptian Court had already reserved judgment.

Issues

The Court identified three core issues:

1. When parties dispute the existence of an arbitration agreement, what applicable standard of proof must be met?
2. Did Friendship Shipping establish the agreement to that standard?
3. If so, did the circumstances mean that the Court must order an ASI?

The standard of proof

Citing a recent Singapore decision,[2] Friendship Shipping argued that it simply had to make a *prima facie* case that the parties had agreed to arbitration. Once the prima facie case is established, the disputed matter should be left to the nominated tribunal. The tribunal may also determine whether it has jurisdiction at all. The Court agreed.

Had Friendship Shipping proven that prima facie there was an arbitration agreement?

Friendship Shipping pointed out that "Conditions of Carriage" existed alongside the bill of lading. The first part of the conditions described their function: *All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated*. The supposed Law and Arbitration Clause directed that *Abtri if any in Hong Kong and English law to apply*.

2 *Asiana Airlines Inc v Gate Gourmet Korea Co Ltd* [2024] SGCA(I) 8.

Arbitration

→ The Hong Kong Court of First Instance established principles for considering whether an anti-suit injunction should be granted.

The Court agreed that this was a valid arbitration clause. The Court also rejected Dhunseri's arguments that "abtri" might not mean "arbitration" and "if any" implied that arbitration was optional.

Should the Court order an anti-suit injunction?

The Court started with the principle that a party to an arbitration agreement has a right to have the contract enforced. However, enforcement would also be dependent on any delay between the contested proceedings and the application for the injunction. This is partially to prevent court proceedings progressing too far.

The Court adopted the following principles:

- The party resisting the ASI does not need to show that the other party's delay was detrimental.
- That the opposing party may have breached the agreement does not mean that a court should overlook the delay of the party seeking the injunction.
- The applying party should not adopt a 'wait-and-see' attitude towards the development of any foreign proceedings.
- The longer it takes for a party to seek an ASI, the further into proceedings a court will step. Courts should therefore take delays seriously and avoid rewarding them by granting the injunction.
- Considering the factors above, the longer an action continues without any attempt to restrain it, the less likely a court is to grant the injunction.

In the present circumstances, the Court readily found that Friendship Shipping had taken too long to bring forward the injunction. The delay in action suggested Friendship Shipping was doing nothing more than trying its luck in another dispute resolution forum:

> In the absence of any other plausible explanation of the chronology, it appears that once it became apparent that things were going against [Friendship Shipping] in the Egyptian Action following the Expert Report, [Friendship Shipping] decided to try to have a second bite of the cherry in the Hong Kong arbitration.

The Court rejected Friendship Shipping's application for an ASI.

ARTICLE

Couple ordered to complete the purchase of two apartments after claims of misrepresentation and financial hardship rejected

Written by **MARIA COLE**

A married couple speculated on being able to on-sell two off-the-plan apartments prior to settlement. They could not do so and failed to settle the purchases. The developer took them to court seeking to enforce the contracts. The couple claimed they had relied on misrepresentations made before they signed up about being able to on-sell and were entitled to cancel the contracts. The Court rejected their claims and the question then became whether ordering specific performance of the contracts was the appropriate remedy. The Court found it was.

Background

Finsbury Trustee Limited (**Finsbury**) is the developer of apartments on Great South Road, Auckland, which it marketed off the plans before construction. Li Zhang and Stephen Cowell (the **Purchasers**) signed contracts to purchase two of the apartments. Once construction was completed, the contracts became unconditional with settlement due in March 2024. The Purchasers failed to settle and Finsbury applied for summary judgment for an order for specific performance by the Purchasers of the contracts.

The Purchasers opposed the application. They claimed they were entitled to cancel the contracts

Specific performance

→ Gaping holes in evidence sunk the defence of financial hardship.

because they were induced to enter into them by misrepresentations, which they relied on, by the salesperson acting for Finsbury. In essence, the alleged representations were that *there was absolutely no risk* to the Purchasers in entering into the contracts, as the properties would be on-sold before settlement and they

> would receive the profit on any on-sale, but any risk of the units on-selling at less than the price they contracted to pay, or alternatively not on-selling at all, was to be borne by others. Their deposits would be refundable no matter what.

The Purchasers also argued that even if the contracts were held to be enforceable, the application should be declined because they did not have the financial means to complete settlement of either contract, meaning ordering specific performance would not be appropriate.

The Court traversed the legal tests for mispresentation and misleading and deceptive conduct. After a consideration of the evidence, the end result was a finding that if the salesperson had

> made statements regarding expected movements in the property market in general, the value of the subject units, and the likelihood of on-sales at a profit, then these were statements of opinion. There is no evidence that those opinions were not genuinely held or could not have been rationally held.

In case the Court was wrong in this finding, it went on to look at the issue of reliance. It rejected the Purchasers' evidence that they signed the contracts in reliance on the statements which they attributed to the saleperson and found

> [n]o reasonable person, with even a rudimentary understanding of the legal obligations that flow from a contract for the sale of land, would have relied on the statements attributed to [the salesperson] as amounting to a guarantee of on-sales negating the obligation to settle the contracts.

The conclusion was that Finsbury had shown the Purchasers had no defence. The next step was a consideration of whether an award of specific performance of the contracts was an appropriate remedy.

When will specific performance be an appropriate remedy?

The Court first set out the law and legal tests surrounding specific perfomance, as follows:[1]

> An award of specific performance of a contract for the sale of land is discretionary. Specific performance will not be ordered where there is a very substantial probability that a defendant would not be able to comply,[2] or where it would occasion great hardship to the defendant, to the extent that an order would be "unreasonable or harsh".[3]
>
> The parties agree that the critical factor in this case

1 *Finsbury Trustee Limited v Cowell and Zhang* [2024] NZHC 2935 at [95]–[96].

2 *Ngai Tahu Property Ltd v Dykstra* (2009) 10 NZCPR 734 (HC) at [12].

3 *Revell v Hussey* (1813) 2 Ball & B 280; *Norton v Angus* (1926) 38 CLR 523; and *Patel v Ali* [1984] 2 WLR 960.

is whether Ms Zhang and Mr Cowell are unable to pay the purchase prices. Inability is not to be confused with difficulty.[4] Mere difficulty in paying the purchase price is unlikely to amount to a defence of impossibility or hardship.[5]

Show me the (lack of) money: evidence of inability to pay

This is where the wheels really came off for the Purchasers, as they basically provided no evidence to the Court to support their claims that their financial status was inadequate to complete the purchases.

Mr Cowell gave evidence that he was previously the director of a company which was put into liquidation, forcing him to sell his home in Glen Eden, Auckland. However, the Court noted he did not expressly state he did not own any real estate. Further, although Mr Cowell asserted he had *minimal disposable income* the Court noted he did not provide a statement of his financial position to support this claim.

In response to affidavit evidence from the salesperson acting for Finsbury, which was that he was aware Ms Zhang owned two properties in China and believed she had the means to settle, Ms Zhang told the Court that she did not own any real estate in China. She acknowledged that she had use of a property in Beijing but said she never held title and could not sell it. Again, the Court noted no documentary evidence in support was provided.

Ms Zhang then said that she had sold her Beijing investment property in 2022 and realised NZD 1.36 million, but had lost nearly 90 per cent of the proceeds after investing them in the stock market. Yet again, the Court recorded that no documentary evidence in support was provided.

The likelihood that the Court only had 'half the story' as to the Purchasers' financial position was reinforced by evidence that Ms Zhang bought a property in New Zealand, against which there was no mortgage registered. The Purchasers' counsel confirmed to the Court that it was their residence.

The Court rejected a submission that the evidence adduced by the Purchasers was sufficient to establish it was arguable they did not have the financial means to complete settlement. It said that, faced with applications for summary judgment, it was incumbent upon them to give full disclosure of their financial positions and provide evidence in support of their defence that they were financially unable to settle the contracts.

The end result was that the Purchasers were ordered to settle both contracts.

Conclusion

When faced with any court proceeding, evidence is required to support a party's position. When dealing with an application for summary judgment for specific performance of a contract for the sale and purchase of land, where judgment will occur "on the spot" if there is no real doubt or uncertainty that the defendant has no defence, a party must pull out all the stops to provide a proper evidential foundation of either their inability to pay, or that doing so would cause great hardship. To cause a Judge to exercise their discretion in a defendant's favour, an evidential *all cards on the table* approach is advised.

4 *D'Arcy Smith v Stace* (2003) 4 NZ Conv 193, 771 at [19].

5 *Gilbert v Manninen* (2009) 10 NZCPR 209 at [49].

About the author

Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, including working with NZDRC and NZIAC. She was previously a civil litigation barrister for over a decade. During that time, she worked on several multi-million-dollar development disputes and was involved in arbitrations and mediations.

ASEAN SHOULD TAKE THE RCEP REINS TO STRENGTHEN ECONOMIC AND POLITICAL SECURITY

Written by **JULIA TIJAJA (ISEAS–YUSOF ISHAK INSTITUTE) AND IMAN PAMBAGYO (BAHAR CONSULTING)**

Published 08 November 2024

IN BRIEF

Global security and economics are increasingly intertwined, leading to more insular actions and complicating efforts to address challenges like climate change and digital technology advancement. ASEAN's reliance on global value chains means it's more exposed to growing security risks and securitisation, prompting the need for a more strategic, comprehensive response. The Regional Comprehensive Economic Partnership (RCEP), the world's largest trade bloc, has been an important part of these efforts. Having successfully led RCEP negotiations to conclusion, ASEAN should now prove its leadership in ensuring RCEP's effective implementation.

EASTASIAFORUM

The world is faced with heightened uncertainties, including from growing interlinkages between economics and security. Weakened rules-based multilateralism has led to a rise in unilateral actions and minilateralism that undermines the system. The eroding appetite for global rules and multilateral actions may toughen efforts to overcome common challenges arising from climate change and rapid technological change. Fragmenting external markets and elevated security risks are driving countries to strengthen their individual and collective security.

ASEAN's economy, with its embeddedness in global value chains, is disproportionately exposed to the impact of growing securitisation. This calls for a comprehensive look at regional security and informed responses at both the strategic and technical levels that help to strengthen it.

The development of a new framework in ASEAN demands time and resources. ASEAN will need to leverage existing frameworks to build resilience to shocks and to shifts arising from geostrategic competition. One extant framework is the Regional Comprehensive Economic Partnership (RCEP), a mega-regional free trade agreement (FTA) among the 10 ASEAN member states, Australia, China, Japan, South Korea and New Zealand.

Though India actively participated in the RCEP negotiations from its start in 2012, it eventually pulled out at the final stage. Text-based negotiations were concluded in November 2019, prior to the COVID-19 pandemic and as the US–China trade tensions escalated during Trump's presidency. Following its signing in November 2020, RCEP entered into force in January 2022 as geostrategic competition peaked.

Evidence about the utilisation and impact of RCEP is still patchy. Anecdotal observations indicate that China, Japan and South Korea are RCEP's biggest, early beneficiaries, as it acts as a surrogate FTA among the three countries which previously had no free trade agreement among them. Also, within ASEAN, socialisation and promotion of RCEP is uneven, with Cambodia and the Philippines among the more active members.

The lack of promotion of RCEP may be due in part to the slow establishment of the RCEP Support Unit, an interim arrangement for the RCEP Secretariat, which provides support to the RCEP Joint Committee and its subsidiary bodies as envisaged under the agreement. Countries often allocate less resources for FTA implementation than negotiations given the latter's greater visibility and scrutiny.

Still, RCEP can be a powerful instrument to boost security in Southeast Asia given its economic weight, binding rules and potential for shaping future regional economic governance. As an ASEAN-driven undertaking, RCEP's implementation can contribute to regional security and reaffirm ASEAN centrality in broader regional architecture.

Following the United States' exit from the Trans-Pacific Partnership (TPP) in 2017, RCEP has become the world's largest trading bloc, accounting for 30 per cent of the global population and the global economy and 28 of global trade in 2023. Recent events and policy trajectories highlight rising threats to supply chain security and resilience. These developments raise the value of a clear and binding cooperation framework like RCEP.

Trade intensity measures how much countries trade with each other compared to their total trade with the world and the significance of their trade relationship relative to their overall trade. In 2023 trade intensity among RCEP parties stood at 1.76, meaning that RCEP parties are trading more than expected from their share in global trade with each other. In the same year, the region attracted almost US$460 billion in foreign direct investment, or over a third of global inflows. The economic significance and interdependence among RCEP partners means there is a great deal at stake that encourages cooperation and collective stability.

A common criticism of RCEP is its lack of ambition, especially compared to the TPP and its post-United States successor, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. This claim fails to recognise RCEP's success in navigating political and economic sensitivities and in bringing together — under shared and binding rules — 15 economies as diverse as Japan and Australia on the one hand and Cambodia and Laos on the other.

During a time of widespread unilateralism, RCEP offers a rules-based trade and investment framework that supports the multilateral system as well as policy certainty for businesses in the region. The cumulative rules of origin in RCEP facilitate regional supply chain development and region-wide sourcing. Its provisions on security exceptions restrict them to legitimate usage.

RCEP's institutional mechanisms include RCEP ministers' meeting, the RCEP Joint Committee and its committees on goods, services and investment, sustainable growth and business environment. RCEP summits may also be convened to bring together the governments of RCEP member states to discuss shared concerns. These arrangements serve as platforms to discuss RCEP implementation and other issues of common concern. RCEP also includes a built-in agenda and compels periodic general review with a view to updating the agreement and ensuring its continued relevance. This provides room for emerging issues — such as supply chains, digitalisation and the green economy — to be considered by RCEP in the future. This gradual approach, starting small before expanding in scope, is common in ASEAN economic cooperation and hence unsurprising as RCEP is an ASEAN-centric agreement.

ASEAN's long experience in bringing together partner countries in forums, such as ASEAN Plus Three and the East Asia Summit, despite their differing stances on non-economic issues can be applied to RCEP. The priority is to build mutual understanding of the importance of mitigating conflicts through a rules-based framework and of fully implementing RCEP to strengthen supply chain connectivity and resilience in the region.

RCEP signals not only continued commitment to markets and rules-based multilateralism, but also the use of rules and procedures to address differences instead of resorting to unilateral actions. Within the context of RCEP, dialogue is prioritised over the escalation issues into conflict. This holds strategic value for many RCEP parties — particularly middle powers such as ASEAN, Australia and South Korea — that are more exposed to the risk of rising unilateralism and global fragmentation.

The benefits of RCEP can only be realised if it is fully implemented and utilised by businesses. A competent RCEP Support Unit with sufficient capacity is paramount to enforce and monitor RCEP implementation. RCEP needs to be promoted and socialised so that businesses and investors can easily understand and utilise the agreement.

The full and effective implementation of RCEP has the potential to reinforce regional security by promoting rules-based conduct, mutual trust and confidence and building shared understanding of emerging issues and concerns. Having successfully led RCEP negotiations to their conclusion, ASEAN should now prove its leadership in the full and effective implementation of RCEP.

The Authors would like to thank Riky Maulana Ikhwan for the support rendered on data.

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ARTICLE

A point of importance for investment treaty arbitration: English Commercial Court dismisses South Korea's jurisdictional challenge following Samsung dispute

In accordance with

The English High Court reflected on whether a claim spoke to jurisdiction or the issue.

Written by **ALEXANDER LYALL**

Like the New Zealand regime, England's Arbitration Act 1996 (the **Act**) was enacted with the intention of giving legitimacy to arbitration. However, the Act does allow for challenges to an arbitral award.[1] One of the most common challenges is jurisdictional. Losing parties may often claim that the tribunal lacked substantive jurisdiction.

However, what is a court to do if the question of jurisdiction turns into a rehashing of the issues discussed by the tribunal? Is discussing what is essentially the foundation of the dispute a contravention of the Act, or is it a legitimate exploration of the tribunal's jurisdiction? This is a question that the English Commercial Court (the **Court**) has had to deal with many times in recent years. *Elliott v Republic of Korea*[2] is a further addition to the list.

Background – Elliott's fair share in Samsung

Elliott Associates, LP (**Elliott**) is a United States-based fund with investments in South Korea. Elliott was a shareholder in Samsung C&T Corporation (**SC&T**), part of the Samsung group, which became the subject of a merger with Cheil Industries Inc (**Cheil**). Elliott opposed the merger.

The National Pension Fund of Korea (**NPF**), a company managed by a public South Korean fund (**NPS**), is another shareholder in SC&T. NPF had supported the merger and in fact, without NPF's vote, it would not have passed.

Elliott commenced arbitral proceedings against South Korea under the investment provision contained in the U.S. - Korea Free Trade Agreement (the **BIT**).

1 Section 67.

2 *Republic of Korea v Elliott Associates, LP [2024] EWHC 2037 (Comm)*.

The dispute goes to arbitration

During proceedings, Elliott alleged that South Korea had improperly directed NPS to vote in favour of the merger. In doing so, the South Korean government had contravened central components of the BIT – the minimum standards of treatment and the national treatment standard.

The tribunal considered the scope of the BIT. Under Article 11, the BIT regulates "measures" related to investors and investments. It was South Korea's main contention that the actions of the South Korean government could not have contravened the BIT because:

1. There had been no relevant "measure".
2. South Korea had not "adopted or maintained" a measure.
3. If there had been a measure, it did not "relate to" Elliott or its investment.

The tribunal addressed these points. It found:

1. Any actions of the State could be considered "measures" under the BIT.
2. While NPF's vote could be considered mere commercial conduct, the act was essentially under the direction of the South Korean ministry. Furthermore, while NPS was not a de jure organ of the South Korean state, it was *functionally and financially closely linked to, and effectively part of*, it.
3. A measure "related to" an investor or an investment if, at the time the measure in question was adopted, it was reasonably foreseeable that it could adversely affect an investor of the other party or a covered investment. In this case, the impact of the South Korean government's intervention was reasonably foreseeable and the relevant government agencies were aware of Elliott's opposition.

Upon establishing that it had jurisdiction, the tribunal turned to whether South Korea's intervention had contravened the minimum standard of treatment clause at Article 11 of the BIT. The tribunal found it had, and consequently awarded Elliott over USD $49 million.

South Korea seeks to have the award set aside

Elliott went to the English High Court to have the award enforced. South Korea sought to have it set aside, alleging that the tribunal did not have substantive jurisdiction to make the award.

Under section 67 of the Act, a court can assess whether the tribunal had substantive jurisdiction. "Substantive jurisdiction" is defined at section 30(1) of the Act. The Act states that substantive jurisdiction exists where:

a. there is a valid arbitration agreement;

b. there is a properly constituted tribunal; and

c. the disputed matters relate to the arbitration agreement.

South Korea's argument concerned (c). In South Korea's view, the tribunal did not have substantive jurisdiction because it had not considered a matter in respect of the BIT. This was a reiteration of its points raised during the arbitration – there had been no investment and if there was, the State had not interfered with it. Without an investment having been made and no interfering action by the State, there could be no matter on which to arbitrate.

The contention – why did South Korea's argument warrant scrutiny?

Section 67 clearly instructs a court to consider the matter as it relates to the jurisdiction of the tribunal. This is not an opportunity for the resistant party to argue about the substance of the tribunal's decision. However, whether a matter is one of jurisdiction or one regarding the substantial matter can be difficult to distinguish. For example, South Korea argued that Elliott was not really an investor. This was jurisdictional – the tribunal could not consider the matter unless it related to investment. However, it was also substantive. The tribunal's core role was to decide whether the South Korean government had breached Chapter 11.

The Court rejects South Korea's argument

Elliott v Republic of Korea was not the first case in which the Court had to draw a fine line with respect to section 30(c). In previous decisions,[3] the Court had assessed a range of arguments under the guise that they spoke to jurisdiction. Drawing on the Court's responses to these

3 *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm); *Korea v Dayyani* [2019] EWHC 3580 (Comm); and *Czech Republic v Diag Human SE and Mr Stava* [2024] EWHC 503 (Comm).

arguments, the Court stated it could draw the principle that:

> Where determination of the issue said to be jurisdictional would require the supervisory court to determine issues which are integral to the merits, that in itself may suggest that the issue is not jurisdictional in the s.30 sense, as this would involve a municipal court and potentially enforcement courts determining issues which are the natural domain of the arbitral tribunal.

Further, the Court identified a means in which one might distinguish between an argument that goes to jurisdiction and one that goes to the foundations of the dispute:

> I am persuaded that if a particular issue is integrated to a significant extent into the merits of a dispute, that weighs to some extent against according it a jurisdictional characterisation.

On the three key points raised by South Korea, a discussion of each would go beyond a technical analysis of the terms of the BIT. For each, South Korea was not just looking to define the elements of the term, but to use an interpretation of the facts to argue that it had not breached the minimum standards of treatment. The Court reiterated the main issues in dispute to illustrate the point:

- **"Adopted or maintained a measure"** – explaining whether South Korea had "adopted or maintained" a "measure" would fall on the interpretation of NPS' motive. The Court would potentially have to look at whether NPS had acted independently in its own commercial interest or under the direction of the Ministry.
- **"Related to"** – for the Court to assess whether any action "related to" Elliott's investments, it would have to consider what the foreseeable harmful effects of the action was at the time it was executed and whether it intended to harm the investments.

The dispute goes on

This will not be the last the English courts will say on the dispute. At the end of the decision, the Court considered whether there was more to say on the matter. Although the Court had rejected South Korea's argument, the Court nevertheless shared their view that it had a *real prospect of success*.

Furthermore, the question is one that needs answers. Whether a question on the substantive dispute can amount to one of jurisdiction will likely be of *sufficient importance* to the determination of challenges to investment treaty arbitration awards before the English Commercial Court. The Court consequently granted leave to South Korea to have the matter heard in the Court of Appeal.

Conclusion

That the Court immediately granted leave to South Korea indicates that this matter is far from resolved. A challenge to the substantive jurisdiction and one to the merits of the dispute might seem clear, but the presence of section 30(1)(c) makes it complicated. Determining whether a matter is *in accordance with* the arbitration agreement could be difficult in the absence of discussing any merits of the dispute. In any case, the Court of Appeal will shine further light on a distinction which might come down to the smallest of margins.

About the author

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team, working with NZDRC and NZIAC. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff, the Kluwer Arbitration Blog and The Press. Alexander recently completed a Mandarin course at Peking University in Beijing.

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