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ReSolution

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From the Editor

Tēnā koutou katoa,

Welcome to the 46th issue of ReSolution. As we move into summer, we hope this issue provides interesting information and articles to explore.

2025 has been a busy year for NZDRC and NZIAC. From launching our commercial lease rent review arbitration scheme to receiving our very first case under the Grocery Industry Dispute Resolution Scheme (more on this below), we have enjoyed providing quick and cost-effective dispute resolution for the business community.

One of the key themes of this final quarter has been groceries. In October, NZDRC managed its first case under the Grocery Industry Dispute Resolution Scheme. The Scheme was established under the Grocery Industry Competition Act 2023 (GICA) with the goal of making it easier for suppliers and wholesale customers to challenge the conduct of retailers. The details are confidential, but I can confirm that the process worked well. Almost a week later, I travelled to Christchurch, where NZDRC had a stand at the New Zealand Food & Grocery Council conference. This was a great experience, and there was a high degree of interest in the fact that the scheme had dealt with its first case.

This quarter, we welcomed visitors from the Shijiazhuang Arbitration Commission (SAC), the People's Procuratorate of Anhui Province and the Hainan International Arbitration Court (HIAC). We have signed Memoranda of Understanding with SAC and HIAC, which will support our work in the Asia-Pacific region.

ReSolution issue 46 continues to bring together a broad range of topics from around the globe. In our feature article, Nicole Smith discusses a 2024 case involving a dispute over gas. Although it did not receive much attention at the time, it raises real questions about what courts may consider when granting interim measures. We also have articles from Alex Lyall and Chloe Yang on investment arbitration.

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

I hope you find this issue interesting and useful. Please feel free to distribute ReSolution to your friends and colleagues or ask them to register with us.

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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In this issue

ARBITRATING GAS SUPPLY DISPUTES

Interim measures and the interests of third parties and the general public

Written by **NICOLE SMITH**

The issues of the cost of gas to businesses and households, and security of gas supply have been making headlines in New Zealand and around the world.

In New Zealand, natural gas is sourced from the Taranaki region, from onshore and offshore wells. Most gas in New Zealand is sold under long-term contracts, with a limited quantity sold in the spot price market.

There are overlapping interests across the upstream[1] and downstream[2] sectors of the gas industry. Many of the companies involved in exploration and production are also involved (directly or through related companies) in the supply of gas to industry and consumers.

The contracts for the long-term sale and purchase of gas generally include detailed arrangements for what is to happen (in particular, as to who is to have priority) when supply is constrained or there is a short-term peak in demand. Many of the gas supply contracts provide for disputes to be referred to arbitration. The details of any disputes that arise under those contracts therefore only become known to the public where

1 Exploration and production.

2 Including distribution and sale.

"There are circumstances in which actions taken by the parties under a commercial contract will impact third parties and the general public."

the assistance of the courts is sought, prior to or in support of the arbitration process or in relation to enforcement issues.

What can we learn from *Methanex New Zealand Ltd v Nova Energy Ltd*?

The decision in *Methanex New Zealand Ltd v Nova Energy Ltd*[3] gives a relatively rare insight into the types of arrangements that apply between upstream and downstream participants in the gas industry.

Background

Nova Energy is part of the Todd Group. The Todd Group has been a major participant in the extraction and exploitation of oil and gas in New Zealand, since the first field (Kapuni) was discovered in 1959. Todd Energy also has interests in a number of other onshore and offshore fields in Taranaki. Nova Energy generates electricity from a number of plants, including solar and gas peaking plants. It is also one of New Zealand's largest wholesalers of natural gas and the eighth largest electricity retailer in New Zealand.

Methanex predominantly uses the gas obtained from Nova Energy to produce methanol. Methanex is the world's largest supplier of methanol. It is ultimately owned by the Canadian Methanex Corporation.

Dispute over suspension

In mid-2024, a dispute arose as to whether Nova could temporarily suspend the supply of gas to Methanex. Nova proposed to rely on a provision in the gas supply agreement with Methanex (the **Agreement**) that (according to Nova) allowed it to temporarily suspend supply of gas to Methanex, provided it paid a specified amount to Methanex (in lieu of supplying the gas). Methanex's position was that if Nova chose not to supply gas, it would be in breach of the Agreement. Methanex argued that the provision for Nova to pay a specified amount to Methanex, if it did not supply gas, was a conventional liquidated damages provision setting the amount to be paid for Nova's breach.

The High Court considers interim measures

The Agreement contained an arbitration clause. Methanex applied to the High Court for an interim order, requiring Nova to continue supplying gas to Methanex. At that time, the arbitration proceedings had not commenced and the parties were in the process of appointing an arbitrator. They advised the Court that they had both committed to a speedy arbitration.

The statutory basis for a court to grant interim measures, where the substantive dispute is to be referred to arbitration, is contained in Article 9 of Schedule 1 of the Act:

> **9 Arbitration agreement and interim measures by court**
>
> (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure and for a court to grant such measure.
>
> (2) For the purposes of paragraph (1), the High Court or the District Court has the same powers as an arbitral tribunal to grant an interim measure under article 17A for the purposes of proceedings before that court, and that article and article 17B apply accordingly subject to all necessary modifications.

The matter came before Justice Fitzgerald in early June 2024. In the judgment (issued under two weeks later), Justice Fitzgerald set out a summary of the state of the gas supply market in New Zealand, noting that Nova is part of the Todd Group, which is the second largest producer of natural gas in New Zealand (after OMV). Approximately 40% of gas supplied in New Zealand is used for petrochemical production, with Methanex being the main gas purchaser in that sector of the market. Methanex obtains gas from both Nova and OMV.

The judgment notes that Nova has a waterfall priority regime that applies to its customers. Under this regime (in situations of constrained supply), if it stopped supplying gas to Methanex, then the gas would instead be allocated to Fonterra Co-operative Group (**Fonterra**) and Oji Fibre Solutions (NZ) Limited (**Oji**). Some of the gas would also be used to supply Nova's "peakers", being electricity generation units that can produce electricity at short notice to support the national grid of electricity in times of constrained supply. Nova's two gas peaker facilities contribute at least 40% of

3 *Methanex New Zealand Limited v Nova Energy Ltd* [2024] NZHC 1604.

Interim measures

→ How much weight should the courts attach to third-party interests?

the fast-start peaking capacity in New Zealand.

It appears from the judgment (although there are a number of redactions for commercial sensitivity) that the waterfall arrangements (referring to Fonterra and Oji) are referenced in the contract between Nova and Methanex (clause 7.1 of the Agreement). The provision to temporarily suspend supply (and pay a sum in lieu) appears at clause 9.9 of the Agreement.[4]

Methanex sought an interim measure under Articles 17A and 17B of Schedule 1 of the Act, requiring Nova to *maintain the status quo*[5] and to continue supplying it under the contract.

Article 17A grants the tribunal the power to grant interim measures and Article 17B sets out the test for granting interim measures:

17A Power of arbitral tribunal to grant interim measure

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure.

17B Conditions for granting interim measure

(1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that—

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and

(b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and

(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

4 *Methanex New Zealand Limited v Nova Energy Ltd* [2024] NZHC 1604 at [44], [72] and [77].

5 An interim measure is defined in Article 17 of Schedule 1 of the Act to include a temporary measure by which a party is required to *maintain or restore the status quo pending determination of the dispute.*

> …
> (4) A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination.

Justice Fitzgerald found that there was a reasonable possibility that Methanex would succeed on the merits of its claim (the requirement in Article 17(1)(c)) and therefore went on to consider the weighing up of harm exercise required by Article 17B(1)(a) and (b).

Her Honour noted that if the measure were granted and it was subsequently found that Nova had the right to suspend supply, the harm to Nova would be largely financial. In particular, it would not be able to obtain the higher price that it could command on the sale of gas to other industry participants and it would not receive the revenues from the operation of its gas peakers. That financial harm could be remedied with damages.

Can a court consider the interests of third parties?

However, Justice Fitzgerald also considered whether the court could take into account harm to third parties (namely Fonterra and Oji) and also harm to the general public, when considering whether to grant interim measures. Her Honour acknowledged the prior decision of Justice Asher in *Safe Kids in Daily Supervision v McNeill*[6] on an application under Articles 17A and 17B and his observations that such matters should not be taken into account.

The *Safe Kids* case involved an application for an interim injunction restraining the operation of a childcare centre, said to be in breach of a restraint of trade provision. Justice Asher noted that Articles 9 and 17 of Schedule 1 of the Arbitration Act had come into force with the Arbitration Amendment Act 2007 and that the new interim measures regime had originated from the United Nations Commission on International Trade Law (UNCITRAL) 2006 amendments to the UNCITRAL Model Law on Arbitration. New Zealand was one of the first countries to adopt those new measures.

Justice Asher noted that prior to 2007, Article 9 had allowed the Court to have the same powers it would have in granting interim injunctions, when considering an application for an interim measure in support of an arbitration. However, the 2007 amendment had removed that provision and stated that the courts had the same power as an *arbitral tribunal*, when granting an interim measure. He considered that this meant that the general High Court jurisdiction in relation to the granting of interim injunctions no longer applied. He considered that issues such as the public interest and *consequences to innocent third parties … do not seem to be matters that would naturally fall within the ambit of an arbitration tribunal*.[7] However, these were obiter comments as it is not clear that Justice Asher had been asked by either party to take into account the interests of third parties, in considering the application for the interim measure.

Justice Fitzgerald considers the public and third parties

Justice Fitzgerald did not consider herself constrained from considering the interests of the public and third parties. Her Honour stated that such matters could be taken into account where evidence on harm to third parties had been put before the Court or tribunal. Her Honour took the view that, while Article 17B(1)(b) only refers to the harm likely to result to the respondent if the measure is granted, that does not preclude the Court from taking into account suggested harm to third parties:[8]

> Ultimately, the granting or otherwise of interim measures involves the exercise of a discretion under art 17A and, in my view, there is nothing in the statutory scheme that precludes the Court (or an arbitral tribunal) from taking into account third party interests.

Her Honour did not consider it likely that Parliament intended that interim measures might be granted by a Court or arbitral tribunal even where there was clear and compelling evidence before the Court or arbitrator of serious irreparable harm to third parties, were the interim measures to be granted.

The consequences that would flow from granting the interim

6 *Safe Kids in Daily Supervision v McNeill* [2012] 1 NZLR 714.
7 *Safe Kids in Daily Supervision v McNeill* [2012] 1 NZLR 714 at [36].
8 *Methanex New Zealand Limited v Nova Energy Ltd* [2024] NZHC 1604 at [55].

measure, that could not be remedied by damages were:

a. impacts on Fonterra and Oji; and

b. impacts on Nova's ability to provide security of electricity supply over winter via its peaking facilities and the resulting impact on New Zealand businesses and households.

Her Honour noted that Fonterra had an option to require Nova to prioritise Fonterra in its supply of gas. However, Oji had no such option. If Nova was not able to supply Oji, that could mean that operations at its Kinleith Mill would have to be paused, halting packaging operations and affecting customers producing food for export markets.

In relation to the potential impact on electricity generation, her Honour noted that only limited evidence had been provided and it was somewhat speculative.[9] However, Justice Fitzgerald accepted that the Nova peakers were an important facility where demand for electricity outstrips baseload supply, such as during winter peaks and that granting the orders sought by Methanex could affect the supply of electricity in times of peak demand.[10]

On balance, exercising the broad discretion available under Article 17A, Justice Fitzgerald decided that the interim measures application ought to be declined. Her Honour considered that there was a greater likelihood of irreparable harm if the interim measures were granted than if they were not granted.

Conclusion

While an arbitration agreement is only binding on the parties to the agreement, there are circumstances in which actions taken by the parties under a commercial contract will impact third parties and the general public. That is particularly so in relation to the supply of constrained essential products and services such as oil and gas and electricity. Where an applicant for an interim measure under Article 17A (or a respondent resisting the granting of such a measure) can show that the interests of the general public or third parties will be affected by the measure, in accordance with *Nova Energy v Methanex*, that evidence can be taken into account.

9 Some of the information on this issue was also redacted.

10 *Methanex New Zealand Limited v Nova Energy Ltd* [2024] NZHC 1604 at [157]-[158].

About the author

Nicole Smith is an experienced arbitrator and adjudicator, sitting on New Zealand and international disputes. She is admitted to practise in New Zealand and England & Wales. Nicole has a particular expertise in the energy industry and has acted for a number of energy companies on disputes relating to supply issues and operational and construction issues. She has experience in all fields of commercial disputes including disputes involving shareholders, small and medium enterprises, fraud, leases and post-settlement revenues.

Nicole also has a strong interest in issues associated with climate change and is a member of the ICC Task Force on Disputes involving climate related issues and is advising on a Waitangi Tribunal inquiry on climate change issues. She is a Fellow of the Chartered Institute of Arbitrators (UK) and of AMINZ and ACICA (Australia). She is a member of the arbitral panels of AMINZ, ACICA, NZDRC, HKIAC and BIAC. She is the author of the NZ report on the Recognition and Enforcement of New York Convention Awards (ICC Special Supplement).

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ReSolution *in Brief*

English Commercial Court declines serious irregularity challenge

In *K1 & Ors v B (Re An Arbitration Claim)* [2025] EWHC 2539 (Comm), the English Commercial Court (the **Court**) considered an application under section 6(2)(g) of the UK's Arbitration Act 1996. The applicant, K1, sought to set aside an unfavourable award. K1 argued that serious irregularities had impacted the award.

The parties had been bound by a letter of engagement. The letter directed that:

> Any disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration...

However, according to K1, the letter of engagement was tainted by fraud. K1 claimed that the letter was in fact:

> a contract for provision of services to "obtain information from targets by deception", and was performed in that way. The "targets" were foreign state officials or authorities possessing confidential information about a foreign Ministry and Authority.

K1 argued that enforcing the award would contravene public policy.

The Court disagreed with K1's premise. It held that section 68 is not supposed to cover the claim on which the award is based, but rather the actions of the parties during the arbitration. In this case, K1 had not raised the fraud argument during arbitration. K1 argued that this was because it had simply failed to consider the point during the process. However, the Court was not persuaded that this was enough to ignore section 68's emphasis on the *parties' conduct in the arbitration and the process by which the award is obtained*.

The Court concluded that K1 could not rely on section 68 to have the Court set aside the award.

Questioning the ambit: Hong Kong Court of First Instance finds dispute not covered under arbitration agreement

In *Soremi Investments Ltd v. China National Gold Group Hong Kong Ltd and another* [2025] HKCFI 4514, the Hong Kong Court of First Instance (the **Court**) considered whether a dispute between parties was covered by their arbitration agreement.

The parties, Soremi Investments Ltd (**SIL**) and China National Gold Group (**CNG**) had entered into a shareholder agreement. This resulted in CNG with a 65% shareholding in SIL. SIL then alleged that during the transaction, CNG misappropriated funds. SIL sought to

have the matters heard in the Court.

SIL applied to stay proceedings in favour of arbitration on the basis that clause 13.17 of the agreement provided for arbitration. The agreement had stated:

> Any dispute, controversy or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration ...

The Court agreed with SIL that this was a broadly worded clause. However, the Court did not agree that it covered the nature of the parties' dispute.

The Court found instead that a dispute over misappropriation of funds was a question about CNG's equitable and fiduciary duties to SIL. These were claims in tort and equity. They were not matters dealt with in the contract.

The Court declined CNG's application to stay the proceedings.

"Why else was it included?" – High Court reassesses simple annual rent review clause, declines leave to appeal to the Court of Appeal

In *Caisteal An IME Ltd v Mount Cass Holdings Ltd* [2024] NZHC 3706, the High Court (the **Court**) had dismissed a party's application to set aside an unfavourable award. The Court had not found any identifiable errors in the arbitrator's approach to the contractual interpretation of a rent review clause.

Now, in *Caisteal An IME Limited v Mount Cass Holdings Limited* [2025] NZHC 1494, the High Court has dismissed an application to appeal the earlier judgment.

Annual rent review

The parties had executed an agreement to lease their Canterbury property in 2021. The agreement was completed using the Auckland District Law Society's (now The Law Association of New Zealand) ADLS 6th edition form. Clause 11 of the agreement allowed the parties to select when the annual rent review would occur. The parties chose "annually".

Arbitration

The parties disagreed on whether and when a rent review should be conducted. The dispute went to arbitration.

Caisteal argued that "annually" was not a clear enough date to give effect to the rent review provision. Mount Cass argued that it was, especially as the parties had crossed out the "nil" option to make way for "annually".

The arbitrator found in favour of Mount Cass. The arbitrator determined that *the only rational conclusion is that this was to occur annually on the anniversary of the commencement date of the Lease.*

Caisteal An IME Ltd v Mount Cass Holdings Ltd [2024] NZHC 3706

Caisteal applied to set aside the arbitral award. The Court held that the arbitrator had applied orthodox principles of contractual interpretation, most notably those set out in the Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85.

The Court also agreed with the arbitrator that the parties must have intended for a rent review process to occur annually.

Caisteal An IME Limited v Mount Cass Holdings Limited [2025] NZHC 1494

As this was an application for leave to appeal, the Court assessed whether the appeal raised a question of fact or law capable of serious argument. After considering submissions from Caisteal, including its argument that the contra proferentum rule should apply, the Court concluded that the appeal did not and declined the application.

At [28], the Court emphasised the clear implication of including the word "annually":

> The parties having agreed to use the word "Annually" must have intended it to have some effect. Why else was it included? The parties did not intend to delete the CPI rent review clause—had they done so, they would have struck the clause through in the same way that they deleted the market rent review clause.

The outcome will be no surprise to property lawyers. However, the extra clarity is welcomed.

Linklaters

Hong Kong courts declined to restrain Cayman winding-up proceedings despite arbitration clause

Written by **ANDREW CHUNG, DENISE FUNG, JUSTIN TANG AND CECILIA CHOI**
Published on 18 August 2025

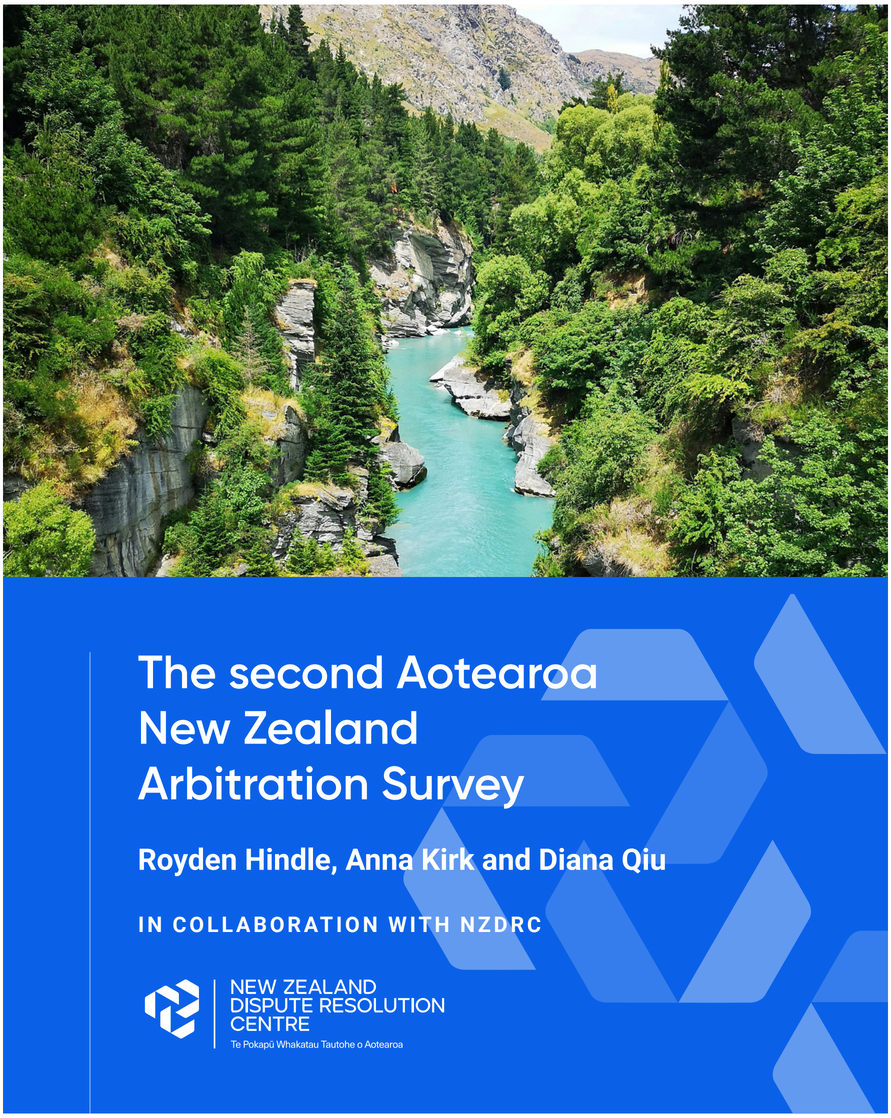
Following *Re Guy Lam*[1] and *Sian Participation Corp v Halimeda International*[2], the Hong Kong courts have diverged from their English and offshore counterparts on the threshold for staying winding-up proceedings in favour of arbitration: courts in Hong Kong will generally stay proceedings unless an abuse is demonstrated, whereas English law requires a debtor to show a bona fide dispute.

In one of the very first anti-suit injunction applications to restrain foreign winding-up proceedings in favour of arbitration before the Hong Kong courts, the Hong Kong Court of First Instance (the **Court**) in *Hyalroute Communication Group Limited v Industrial and Commercial Bank of China (Asia) Limited* [2025] HKCFI 2417 considered, as Recorder William Wong SC described it, the "*interesting and novel*" question of whether the Hong Kong courts would restrain winding-up proceedings in foreign jurisdictions that follow the *Sian* approach in favour of Hong Kong arbitration.

Background

The dispute arose from a term facility agreement (**TFA**) entered into between Hyalroute Communication Group Limited (**Hyalroute**), which is incorporated in the Cayman Islands (as guarantor), its Myanmar subsidiaries (as borrowers), and Industrial and Commercial Bank of China (Asia) Limited (**ICBCA**, as lender). The TFA included an arbitration clause which mandated that "*any dispute, controversy or claim arising in any way out of or in connection with [the TFA] … shall*

1 (2023) 26 HKCFAR 119, a decision in the Hong Kong Court of Final Appeal.
2 [2024] UKPC 16, a decision in the Privy Council.



be referred to and finally resolved by binding arbitration" in the Hong Kong International Arbitration Centre.

Hyalroute and its subsidiaries operated in the fibre optic communications sector in Myanmar, where business faced significant disruption following a military coup and foreign currency restrictions imposed by local authorities. ICBCA had secured insurance against war, civil unrest, and currency transfer restrictions (**Covered Risks**). The TFA allowed Hyalroute to suspend obligations for any default caused by a Covered Risk, pending an insurance claim by ICBCA. Hyalroute accordingly claimed its repayment obligations were suspended and that it bore no liability for the loan, as ICBCA had made several claims under the insurance contract.

Despite Hyalroute's position, ICBCA served a statutory demand against Hyalroute in the Cayman Islands and threatened to commence winding-up proceedings to enforce its debt. In response, Hyalroute applied to the Court for an anti-suit injunction, arguing that all disputes under the TFA, including the question of indebtedness, fell within the arbitration clause and thus should be resolved through arbitration rather than Cayman insolvency proceedings.

Decision and reasoning

The Court reaffirmed the general rule that it will ordinarily uphold the parties' contractual bargain where there is a valid and binding arbitration agreement and may restrain proceedings brought in breach of such an agreement.

However, given that the express language of the arbitration clause under the TFA precluded the parties from having disputes finally resolved in a non-contractual forum, whether foreign insolvency proceedings (such as a Cayman winding-up petition) would be restrained depended on whether those proceedings had the effect of "*finally resolving*" the underlying dispute. That question, in turn, depended on how Cayman courts viewed their own winding-up proceedings – Hong Kong law cannot regard the Cayman proceedings as finally resolving the dispute if Cayman law does not.

As such, the Court accepted that even though Hong Kong law applied in determining whether the arbitration agreement was breached, reference had to be made to Cayman law in determining the effect of the Cayman winding-up proceedings. Applying the principles laid down in the Privy Council decision in *Sian*, winding-up petitions in Cayman, as well as in the British Virgin Islands and

England, do not finally resolve substantive questions regarding the existence or amount of a disputed debt. Rather, such proceedings simply address a threshold issue for insolvency without adjudicating on the merits of the underlying claim. On this basis, the Court concluded that the Cayman winding-up petition would not definitively resolve the dispute and would not contravene the arbitration agreement, and the anti-suit injunction was dismissed.

Key takeaways

The guidance from this case is significant because parties incorporated in offshore jurisdictions, such as the Cayman Islands, often opt for Hong Kong arbitration in their contracts for dispute resolution.

As can be seen, there are significant differences amongst jurisdictions as to the effect of winding-up petitions where there is a disputed debt, which give rise to opportunities and practical challenges when cross-border insolvency and arbitration obligations intersect. Creditors should be aware that, notwithstanding the existence of an arbitration agreement, it may still be possible to pursue insolvency proceedings in certain foreign jurisdictions. Conversely, debtors seeking anti-suit relief to restrain such proceedings must be prepared to adduce persuasive evidence that the foreign process would result in a final determination of the dispute, in breach of the arbitration agreement.

For more on anti-suit injunctions and cross-border enforcement, or potential impacts to your group's existing structures, please reach out to your Linklaters contact.

About the authors

Andrew Chung

Andrew Chung is the Linklaters China Managing Partner and a member of the firm's Litigation, Arbitration & Investigations team in Hong Kong. He advises financial institutions, funds, major corporates, professional services firms, brokerages and PRC-based businesses on their business-critical disputes, including litigation, arbitration and regulatory investigations. Andrew has significant experience of contentious regulatory investigations and commercial disputes, including many with cross-border aspects.

Before joining Linklaters in 2018, Andrew was a managing director in the legal department of a major U.S. investment bank, where he had responsibility for managing teams involved in regulatory investigations, litigation & arbitration, employment, private wealth management, real estate, contracts, company secretarial and governance matters.

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Denise is a Litigation, Arbitration and Investigations partner at Linklaters in Hong Kong. She advises corporate and financial institutions on high-value contentious matters arising in company and commercial litigation as well as internal and regulatory investigations, and restructurings. She has particular expertise in the financial services sector, and has represented financial institutions at all levels of the Hong Kong Courts up to the Court of Final Appeal, in matters involving fraud claims, injunction and disclosure orders, creditor enforcement proceedings, insolvency, and shareholder and joint venture disputes.

Her experience also includes regular interactions with Hong Kong and international regulatory authorities. She supports clients on the planning, conduct and reporting of complex investigations and the resolution of matters with regulators and other stakeholders, and has advised financial institutions on a wide range of financial and non-financial misconduct investigations, including in the areas of mis-selling, insider dealing and AML.

She is deeply involved in the firm's ESG practice, and leads the contentious ESG practice in Asia, regularly advising and delivering training on litigation and regulatory risks in connection with ESG matters in Hong Kong and Asia.

Denise is a solicitor advocate of the Hong Kong courts, with full rights of audience in the Hong Kong courts in respect of civil matters.

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Justin Tang is a partner at Linklaters in Hong Kong and a member of the Litigation, Arbitration & Investigations practice. He has significant experience in advising on China-related cross-border commercial disputes for corporates, banks and state-owned enterprises.

His practice covers international arbitration, complex commercial litigation and insolvency related litigation in jurisdictions such as Hong Kong, Singapore, PRC and BVI, with a particular focus on China-related disputes and arbitrations. He has particular expertise in advising on shareholders and joint venture disputes, insolvency proceedings, disputes with activists or minority shareholders, and urgent asset tracing and injunction applications.

Justin is a solicitor advocate with full rights of audience in the Hong Kong courts in respect of civil matters, and has appeared and advocated before Tribunals in English and Mandarin.

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Cecilia Choi is a Counsel in the Litigation, Arbitration and Investigations practice at Linklaters in Hong Kong. She has significant experience advising on cross-border commercial disputes involving listed corporations, major private conglomerates, and state-owned enterprises. Cecilia specialises in complex commercial litigation across Hong Kong, Singapore, mainland China, the United Kingdom, and Australia, with a particular emphasis on China-related matters and international commercial arbitration. Cecilia is qualified in Hong Kong SAR and is a Fellow of the Chartered Institute of Arbitrators.

ARTICLE

SINGAPORE:

Anti-suit injunctions and sovereign immunity — injuncting a state-related entity

Written by **ASHISH CHUGH & DANIEL HO**

Published on 26 June 2025

Baker McKenzie Wong & Leow.

In brief

In the case of *Cooperativa Muratori and Cementisti — CMC di Ravenna, Italy v. Department of Water Supply & Sewerage Management, Kathmandu and other* [2025] SGHC(I) 16, the Singapore International Commercial Court (SICC) considered the intersection between the law of anti-suit injunctions and sovereign immunity. In its written grounds of decision, the SICC clarified the distinct requirements between a contractual anti-suit injunction and a noncontractual anti-suit injunction, as well as the availability of injunctive relief against state or state-related entities in the Singapore courts.

This is a positive development in the context of disputes involving state or state-related entities in commercial, construction and infrastructure projects, particularly where an arbitration clause has been incorporated in the underlying contract documents.

In depth

The factual background to this case is summarized below:

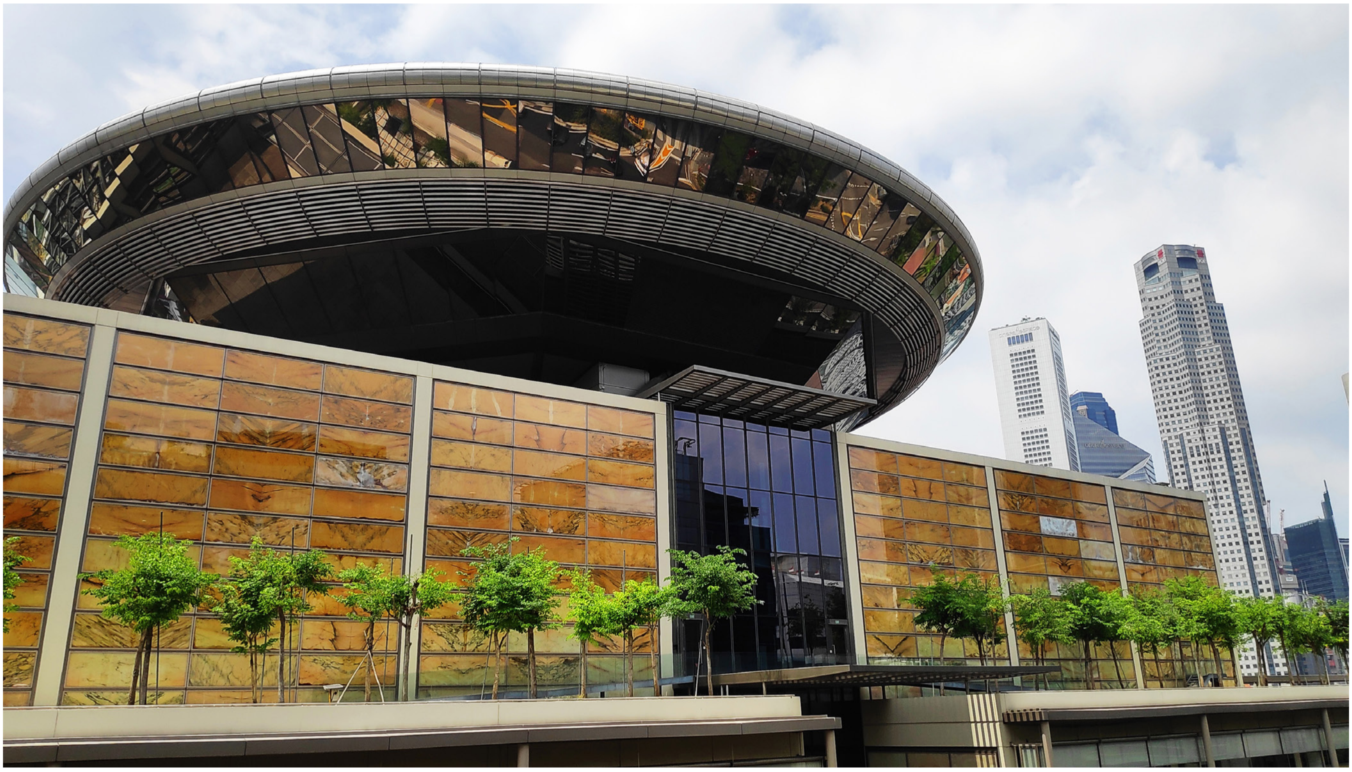
- Cooperativa Muratori and Cementisti — CMC di Ravenna, Italy ("**CMC**") entered into a contract with Melamchi Water Supply Development Board ("**MB**") (a state-related entity in Nepal) ("**Contract**") to provide certain construction services for a project to alleviate chronic water shortage in Kathmandu Valley, Nepal.

- The Contract contained an arbitration agreement, which provided, among other things, for the "place of arbitration" to be Singapore ("**Arbitration Agreement**"). Disputes subsequently arose between the parties, and CMC commenced an arbitration against MB administered by the Singapore International Arbitration Center ("**Arbitration**").
- As the parties did not agree on the seat of the Arbitration (CMC maintained that the seat was Singapore while MB argued that the seat was Nepal), the issue was submitted to the tribunal for determination.
- The tribunal found in favor of CMC and issued a decision determining that the seat of the Arbitration was Singapore ("**Seat Decision**").
- Dissatisfied with the Seat Decision, MB applied to the Patan High Court in Nepal for the Seat Decision to be set aside (termed the "**Second Annulment Application**" in the SICC's judgment).
- In response, CMC applied for an interim anti-suit injunction to restrain MB from pursuing or continuing to pursue the Second Annulment Application or any other foreign proceedings to challenge the Seat Decision on account of the seat of the Arbitration being Singapore, among others.

Test for an anti-suit injunction

In addition to noting the well-established general principles applicable to the issue of anti-suit injunctions, the SICC began an analysis by noting the distinction between the following:

- A contractual anti-suit injunction, i.e., an injunction granted to restrain the defendant from pursuing foreign proceedings in breach of a jurisdiction clause or arbitration agreement unless there are strong reasons not to grant the injunction
- A noncontractual anti-suit injunction, i.e., an injunction granted to restrain the defendant from pursuing foreign proceedings that (i) unduly interfere with the process, jurisdiction or judgments of the forum court; or (ii) amount to vexatious or oppressive conduct



In the present case, CMC was seeking a contractual anti-suit injunction to restrain MB from breaching the Arbitration Agreement. In an application for a contractual anti-suit injunction, the applicable test may be condensed to the following requirements:

- The defendant is amenable to the jurisdiction of the court.
- The foreign proceedings are in breach of an exclusive jurisdiction clause or arbitration agreement between the parties.
- There are no strong reasons to decline enforcement of the parties' agreement.

This contrasts with an application for a noncontractual anti-suit injunction, where, in lieu of showing that the institution of foreign proceedings was or would be in breach of an agreement between the parties, the applicant will generally also have to address the court on the following matters:

- Whether Singapore is the natural forum for the resolution of the dispute between the parties.
    - This consideration is superseded where there is a contractual agreement between the parties to submit to the jurisdiction of the Singapore courts.
- Whether the foreign proceedings would be vexatious or oppressive to the applicant if they are allowed to continue.
    - This consideration does not directly feature in an application for a contractual anti-suit injunction as the enforcement of contractual right is a separate inquiry distinct from the requirement of vexatious or oppressive conduct. Although this factor may be relevant to the determination of whether there are strong reasons to decline enforcement of the parties' agreement.

- Whether the anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings.
  - As above, this consideration does not directly feature in an application for a contractual anti-suit injunction.

On the facts of the case, the SICC found that the contractual anti-suit injunction sought by CMC should be granted for the following reasons:

- MB was amenable to the jurisdiction of the SICC. This is because the effect of the designation of Singapore as the "place of arbitration" in the Arbitration Agreement was either an express or implied agreement by the parties for Singapore to be the seat of the Arbitration. It is well-established that choosing a seat embodies the parties' agreement to submit to the curial jurisdiction of the courts of the seat.
- MB's Second Annulment Application breached the Arbitration Agreement. This is because a choice of seat by the parties is generally construed as a choice of the exclusive jurisdiction in which the parties can challenge decisions made by an arbitral tribunal. Therefore, MB's Second Annulment Application was a breach of its negative obligation that it would not challenge the Seat Decision other than before the Singapore courts.
- There were no strong reasons not to grant an anti-suit injunction to restrain MB's breach of the Arbitration Agreement. One example of such "strong reasons" premised on comity would be an excessive delay in bringing the injunctive application, causing the foreign proceedings to become far too advanced. However, this was not the case here.

In coming to its decision, the SICC also noted the well-established principle that when granting an injunction, the court does not contemplate that it will be disobeyed. Therefore, the potential futility of the anti-suit injunction due to MB's noncompliance and CMC's inability to enforce it in Nepal, was not a reason for the SICC to refrain from granting the injunction.

Relevance of sovereign immunity where a state or state-related entity is involved

The SICC also considered whether MB enjoyed sovereign immunity from the jurisdiction of the Singapore courts pursuant to Section 3(2) of the State Immunity Act 1979 (SIA), which provides that:

> … [a] court is to give effect to the immunity conferred by [Section 3 of the SIA] even though the State does not file and serve a notice of intention to contest or not contest in the proceedings in question.

In so doing, the SICC held as follows:

- The issue of sovereign immunity relates to the court's jurisdiction and there is a duty on a domestic court to consider the issue on its own motion. This is also because if a court exercises jurisdiction over a foreign state that is entitled to state immunity, there is a breach of international law.
- There is a distinction between the court's "adjudicative jurisdiction" (i.e., jurisdiction to adjudicate upon claims against foreign states) and "enforcement jurisdiction" (i.e., jurisdiction to enforce by legal process judgments pronounced and orders made in the exercise of the court's adjudicative jurisdiction).
- The grant of an anti-suit injunction to enforce an arbitration agreement falls within the court's enforcement jurisdiction rather than its adjudicative jurisdiction. The submission to the court's adjudicative jurisdiction does not equate to submission to the court's enforcement jurisdiction. The former requires a specific reference to a waiver of sovereign immunity or a clear and unambiguous reference to the state's consent to an award being wholly enforceable.
- As such, without a specific waiver or clear and unambiguous reference to the state's consent, no anti-suit injunction may be issued against a state.

Specifically for this case, the SICC held as follows:

- As there was no specific waiver or clear and ambiguous reference to MB's consent for an anti-suit injunction being wholly enforceable against it, no anti-suit injunction may be issued or maintained against MB if MB enjoyed sovereign immunity.

- In this regard, the SICC determined that MB was a separate entity from the state of Nepal and that, pursuant to Section 16(2) of the SIA, MB would only enjoy sovereign immunity from the court's enforcement jurisdiction if, among other things, the present proceedings related to anything done by MB in the exercise of sovereign authority.
- However, on the facts, the SICC determined that the Contract, being a contract for the supply of services by CMC, was a commercial transaction as defined under Section 5(3)(a) of the SIA and did not concern the exercise of sovereign authority. Therefore, MB was not entitled to sovereign immunity from the jurisdiction of the Singapore courts and the anti-suit injunction sought by CMC may be granted against MB.

About the author

Ashish Chugh

Ashish is qualified to practice law in England and Wales, India, New York and Singapore and is a fellow of the Chartered Institute of Arbitrators.

Within the firm, Ashish sits on the (i) Global International Arbitration Steering Committee, (ii) Global India Steering Committee, (iii) Global TMT Dispute Resolution Working Group and (iv) Joint Asia Offices Dispute Resolution Working Group on TMT and South Asia.

Ashish represents numerous parties with respect to disputes across a wide range of industries including technology and telecommunications as well as aviation, commodities, hospitality, investment funds, power and shipping.

Ashish has broad experience in the conduct of international arbitrations with seats in Singapore, Dubai, Hong Kong, India, Kuala Lumpur, London and New York under a variety of ad hoc and institutional arbitration rules, including AAA, AIAC, DIAC, HKIAC, ICC, LCIA, SIAC and UNCITRAL.

Daniel Ho

Daniel is an engineer-turned-lawyer with more than 14 years of experience in project management. Apart from his legal qualifications, Daniel holds a Bachelor's degree in Engineering from the National University of Singapore and is currently pursuing a Master's degree in Major Programme Management from the University of Oxford. He is accredited by the Singapore Academy of Law as an Accredited Specialist in Building and Construction Law.

Daniel provides legal support for construction, engineering and technology projects through: (i) designing, planning, drafting, negotiating and execution of contracts and related documentation for new projects; (ii) consultation and advisory support for ongoing and completed projects; and (iii) resolution of disputes arising from projects.

REGULAR

Case in Brief:

Shareholder dispute: High Court declines to set aside arbitral award

Written by **ALEXANDER LYALL**

In *Sumner (as shareholders of Gilpin Corporate Travel Ltd) v Helloworld Travel Services (NZ) Ltd*,[1] the High Court (the **Court**) considered an application to set aside an arbitral award concerning a shareholder dispute between travel agency companies.

Background

In 2019, Gilpin and its majority shareholders (the **shareholders**), who were also Gilpin's directors, each entered into an associate agreement with Helloworld. This required a put option whereby the shareholders could compel Helloworld to purchase their shares.

The agreement provided that, if the shareholders exercised the put

1 *Sumner (as shareholders of Gilpin Corporate Travel Ltd) v Helloworld Travel Services (NZ) Ltd* [2025] NZHC 2681.

option:

a. The parties would enter into a sale and purchase agreement (**SPA**).
b. Entering into the SPA would bind the parties to the associate agreement.
c. The associate agreement contained an arbitration clause. If given effect to, the resulting award would be "final and binding".

In 2023, the shareholders exercised the put option. Helloworld did not comply. The shareholders issued a dispute notice, and the parties went to arbitration.

The award

The tribunal considered a range of issues, but the Court identified two as the most relevant for the application in front of it:

- Was the put option validly exercised? If so, when?
- Did section 149 of the Companies Act 1993 apply? That is, were the shareholders restricted from disposing of their shares? Helloworld had raised this argument because the shareholders were also Gilpin's directors.

The tribunal had found in favour of the shareholders on these issues.

Helloworld applies to set aside the award

Helloworld's position was that the tribunal had erred in its findings.

The Court reassessed the tribunal's conclusions, finding that in neither instance could Helloworld *strongly argue* that the tribunal had applied the law incorrectly. To give an example, the Court accepted the tribunal's application of *Thexton*[2] when assessing section 149.

The Court then looked at other factors:

- The arbitrator had already assessed all the matters raised in the application to set aside the award.
- The arbitrator, a former High Court judge, was highly qualified.
- A trial in the Court of Appeal would only delay resolution. Such a delay would be *disproportionate and unreasonable in the circumstances.*[3]

The Court then identified the most important factor – the associate agreement provided that the decision of the tribunal would be "final and binding".[4] The Court agreed with the shareholders that they should be able to "rely on the finality and certainty of the arbitral process as both parties agreed".

The Court declined Helloworld's application to set aside the award.

2 *Thexton v Thexton* [2002] 1 NZLR 780 (CA). This asks whether the director had information in their capacity as director that would not be available otherwise. It also asks whether the information is material to an assessment of the value of shares issued by the company.
3 The shareholders were attempting to retire.
4 *Sumner*, above n 1, at [62].

Final and binding

→ The Court emphasised the purpose of the arbitration agreement.

About the author

Alexander Lyall is a Resolution Specialist in the ADR Centre's commercial team. 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.

ARTICLE

Non-participant in GAFTA arbitration bringing post-award challenge not subject to 28-day time limit

Hill Dickinson

Written by **IAIN SHARP & DIMITRA DAMASKOPOULOU**
Published on 2 October 2025

African Distribution Company SARL -v- AASTAR Trading Pte Ltd [2025] EWHC 2428 (Comm)

This was an application brought by the claimant, African Distribution Company SARL, to set aside a GAFTA arbitration award in favour of the defendant, AASTAR Trading Pte Ltd.

The claimant was a "non-participant" under s.72 of the Arbitration Act 1996 (AA 1996), which means it was a party to the GAFTA proceedings, but had not taken part, as it contended it had not been validly served with the Notice of Arbitration.

The claimant's applications under ss. 67 and 68 AA 1996 for extensions of time to challenge the award were unsuccessful. However, the Court found that the claimant could seek appropriate relief under s.72(1) AA 1996 and that the 28-day time-limit under s.70(3) AA 1996 would not apply.

Even though the application was brought under the AA 1996, the Court also usefully considered the relevant sections in light of the amendments made by the Arbitration Act 2025 (AA 2025).

The background facts

The claimant was an Ivorian company specialising in the trade of fresh or industrial nature food products.

The defendant was a Singaporean trading company specialising in the supply of various products, including food products.

The parties entered into numerous contracts on the defendant's standard form. The contracts provided for GAFTA arbitration "in Singapore in accordance with Arbitration Rule 125 of GAFTA". The GAFTA arbitration rules (GAFTA Rules) provide for arbitration in London.

A dispute arose across sixteen contracts, under which the defendant demanded payment. The defendant proceeded to email a letter before claim to the claimant using two generic email addresses.

After no response had been received, the defendant issued GAFTA arbitration proceedings by emailing a Notice of Arbitration to the same two generic email addresses and then to GAFTA. The claimant did not respond to the Notice or to any of the following emails sent by the defendant and GAFTA to those same email addresses.

The arbitrator was appointed in London and in due course issued an award in London in favour of the defendant in respect of 13 out of the 16 disputed contracts (Award). In the Award, the arbitrator stated that whilst the GAFTA Rules changed in January 2022, under each version, the seat of an arbitration by GAFTA was London, which took precedence over the reference to Singapore in the arbitration clause. Subsequently, local enforcement proceedings were physically served by a bailiff on the claimant in the Ivory Coast.

The claimant applied to the English High Court seeking to set aside the Award on three grounds for lack of substantive jurisdiction under s. 67 AA 1996 and/or procedural irregularities under s.68 AA 1996. It also sought an extension of time to apply for relief available to a non-participant in the arbitration under s. 72(1) AA 1996.

The claimant's application was brought after the expiry of the 28-day limit for s.67 and s.68 challenges, which is set out in s.70(3) AA 1996. The claimant relied on the Court's discretion under CPR 62.9 to seek an extension of time. An issue also arose as to whether the 28-day time-limit applied to an application under s.72(1).

AA 1996

S.72 provides as follows:

"72 Saving for rights of person who takes no part in proceedings.

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award (a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or (b) by an application under section 68 on the ground of serious irregularity within the meaning of that section affecting him; and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case."

The Commercial Court decision

The Court confirmed that s72(1) applies only to non-participants in an arbitration.

Furthermore, s.72(1) is a free-standing right (i.e. separate to and independent of any rights under s.67 to 69 AA 1996) by proceedings for injunctive, declaratory or other relief. It is not, therefore, subject to time-limit constraints applicable to the ss.67 and 68 applications in this case.

Additionally, and on the authorities (which appeared to be, but the Court found were not, inconsistent), the Court decided that s.72(1) relief is available post-, and not only pre-, award.

By contrast, s.72(2) is not a free-standing right and allows non-participants to exercise a similar right to that of a participant party to challenge an award under ss.67 and 68. It is, therefore, subject to the 28-day time-limit. The s.72(1) claim could, therefore, proceed but the Court sought further submissions from counsel in this regard.

In deciding whether to exercise its discretion to grant time extensions for challenging the Award under ss.67 and 68, the Court considered the relevant (non-exhaustive) factors set out in *AOOT Kalmneft -v- Glencore* [2001] 2 All ER Comm (59), namely:

1. the length of the delay
2. whether the claimant acted reasonably
3. whether the respondent or the arbitrator contributed to the delay

4. whether the respondent would suffer irremediable prejudice
5. whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have
6. the strength of the application
7. whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined

Having considered the relevant circumstances in this case, the Court concluded that there was significant delay in seeking the extension of time, for which the defendant bore no responsibility. This delay was not justified when expedition was fundamental to the arbitral system.

The claimant also failed to get appropriate legal advice about challenging the Award. While the issue of whether there had in fact been no valid service of the arbitral proceedings was relevant to the question of fairness, the Court noted that as the claimant had an alternative remedy under s.72(1), the prejudice that the defendant would suffer if an extension of time were granted for the ss.67 and 68 applications weighed against doing so. Therefore, it dismissed those extension applications.

Validity of email service

In reaching its decision, the Court made some useful observations on the validity of service of arbitration proceedings by email to a generic email address. The Court confirmed that service of the claim in arbitration proceedings can be effective when sent to a generic email address.

The defendant's Singaporean lawyers did not request a "read receipt" when emailing the Notice of Arbitration nor did GAFTA do so with its later emails, which would have allowed the Court to find "as fact that those emails were received". It was plausible that the emails were caught by spam or deleted over time. The lack of a receipt created an "evidential gap about whether the Notice was read".

Comment

The decision provides useful guidance on a number of principles regarding post-award applications by non-participants.

From a practical standpoint, it also reinforces important principles:

- The time-pressure on litigants to act promptly in assessing whether to challenge awards.
- The importance of having clear service provisions in the contract.
- Absent clear service provisions, when serving by email, it is good practice to include "read receipts".
- A party cannot rely on the content of legal advice they received while also reserving privilege of over it. In this case, the claimant alleged that its Ivorian lawyer said it could ignore the Award in the enforcement proceedings and a debate ensued as to whether privilege had been waived and also as to the capacity in which that alleged advice was being relied upon.

About the author

Iain Sharp

Iain has over 20 years' experience of international trade and commodities, and international commercial dispute resolution, including alternative dispute resolution. Prior to joining Hill Dickinson, Iain was Asia-Pacific Head of Legal at leading international trading house, Gunvor Singapore, where his work covered the full spectrum of commercial, advisory and disputes for oil and gas (including crude and middle distillates), metals/ores and energy products (including LNG and LPG and biofuels).

Iain regularly advises clients on a broad range of contracts and legal issues (non-contentious and contentious) surrounding the sale and purchase of hard and soft commodities, letters of indemnity, trade and economic sanctions, operational and legal risk management, and trade finance. His dispute resolution experience spans a wide range of sectors (including energy and natural resources, pharmaceuticals, technology and defence products) and includes arbitrations under institutional (ICC, LCIA, SIAC, HKIAC, LMAA), ad hoc, and trade association rules (including LME, GAFTA, FOSFA and PORAM). Iain is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and a member of the LCIA Asia Pacific Users' Council.

Dimitra Damaskopoulou

Before joining the firm, Dimitra trained at a leading international shipping firm where she obtained experience in a wide range of contentious matters.

Dimitra has worked on a variety of disputes arising from damage or loss to cargo during domestic and international carriage by sea and road. She has also represented major national and international insurers in matters concerning vessel collisions and warehousing. The majority of her work was focused on the application of the Convention on the Contract for the International Carriage of Goods by Road ('CMR'), Carriage of Goods by Sea ("COGSA") and the Hague-Visby Rules.

Since joining the Commodities team, Dimitra has been involved in a number of High Court cases and arbitrations subject to LCIA and LMAA terms on charterparty and commodity trade disputes advising traders, insurers, charterers and energy companies.

Dimitra obtained an undergraduate Law degree from the University of Manchester.

ARTICLE

"No suggestion that Korea and the USA had in mind English domestic law"

English Court of Appeal redirects focus of investment treaty interpretation

Written by **ALEXANDER LYALL**

In an important judgment, the English Court of Appeal (the **Court**) has overturned a lower court decision on the scope of substantive jurisdiction. *Republic of Korea v Elliott Associates, LP*[1] clarifies a core treaty principle and offers insight into how sister proceedings in Singapore may have gone had Korea adopted a different legal strategy.

High Court asks whether Korea is focused on jurisdiction

In *Republic of Korea v Elliott Associates, LP*,[2] the High Court considered whether it could answer

1 *Republic of Korea v Elliott Associates,* LP [2025] EWCA Civ 905.

2 *Republic of Korea v Elliott Associates, LP* [2024] EWHC 2037

Investment arbitration

→ Korea was successful in its appeal.

a crucial jurisdictional question posed by the Republic of Korea (**Korea**).

The core dispute – claims of investment interference

Elliott Associates (**Elliott**) had alleged that the Korean State had interfered with its shareholdings in Samsung. The dispute went to arbitration, where the tribunal found in favour of Elliott.

Korea applied to set aside the award in the High Court under section 67 of the Arbitration Act 1996 (UK) (the **Act**). Korea argued that the tribunal did not have the jurisdiction to consider the dispute as under Chapter 11 of the Korea-United States Free Trade Agreement (**KORUS**),[3] parties could only arbitrate if their dispute concerned an investment. In Korea's view, Elliott was not an investor.

The High Court held that Korea's argument was not jurisdictional in nature. Rather, it was trying to relitigate what the tribunal had already decided.[4] This made Korea's challenge unworkable under section 67.

Korea appealed the High Court's decision. The High Court granted leave under section 67(4) of the Act. It acknowledged that Korea's question had significant implications for investment treaty arbitration.

Court of Appeal overturns High Court decision

The Court of Appeal found for Korea. It stressed that under KORUS, a tribunal only had jurisdiction if the dispute was relevant to Chapter 11. That is, the tribunal had jurisdiction only when the dispute concerned a "measure" "adopted or maintained" by the host State relating to the investor.

A key part of the Court's reasoning came from an assessment of the wording of Chapter 11. The Court used the Vienna Convention on the Law of Treaties (1969) (**VCLT**) to assist in its interpretation.

"Chapter" vs "Section": how the Court interpreted Chapter 11

Chapter 11 of KORUS, "Investment", is divided into sections. Section A is titled "Investment" and Section B "Investor-State Dispute Settlement". Article 11.1(1) in Section A lists the investment characteristics relevant to "[t]his Chapter". Korea believed that although this list was found in Section A, it also applied to Section B, as Section B also formed part of "this Chapter".

In the High Court, Elliott's argument succeeded that "this Chapter" referred only to Section A, and not Section B. The practical effect of this was that it removed the jurisdictional conditions from Korea's offer to arbitration in Section B.

Korea appealed the High Court's interpretation of Chapter 11. It argued that any reading that did not find "this Chapter" to mean "this Chapter" was unnatural. The Court agreed with Korea. Fundamentally, there were multiple practical reasons why the investment characteristics in Article 11.1(1) would also apply to the arbitration option in Section B. The Court also found:

- Multiple BITs use "Chapter" in similar ways. The Court found it unlikely that, if this were a mistake, it would continue to happen.
- Chapter 11 also used "this Section". For example, in Article 11.16. That suggested an intention for the terms to have distinct meanings.

Throughout proceedings, Korea had argued that no government action had impacted Elliott's investments. The Court's finding meant that this was in fact a jurisdictional argument.

Could this decision have impacted proceedings in Singapore?

Similar proceedings have concluded in Singapore. Korea was recently unsuccessful in *Republic of Korea v Mason Capital L.P*,[5] a judgment that also considered Chapter 11 in a dispute with a different investor. The Singapore High Court found that "this Chapter" should effectively be read as "this Section".

The English Court of Appeal acknowledged that the Singapore High Court had checked its reading of Chapter 11 against the English High Court's.[6] The Court of Appeal highlighted that if Korea were to

3 Chapter 11 essentially forms a bilateral investment treaty (**BIT**).

4 Specifically, the tribunal agreed that an entity of the Korean government had interfered in a shareholder vote, which amounted to a "measure" of the state.

5 *Republic of Korea v Mason Capital L.P.* [2025] SGHC(I) 9.

6 *Republic of Korea*, above n 1, at [45] and [61]. This is found in *Republic of Korea,* above n 4, at [46].

appeal that decision, the Singapore Court of Appeal would have its judgment to consider. However, the Korea Times reports that Korea decided not to appeal the High Court's decision.[7]

Further developments since the High Court's decision – a disregarded diplomatic exchange

In response to the English High Court's decision, the United States Embassy in Seoul wrote to Korea's Ministry of Justice sharing its view that the tribunal's jurisdiction was dependent on the conditions in Article 11.1. Korea's Ministry of Justice affirmed that it agreed in a reply to the Department of State.

In the Singapore High Court, Korea highlighted this exchange. It argued that this helped prove the jurisdictional component of the offer to arbitrate. Korea referred to Article 31(3)(a) of the VCLT, which states that *there shall be taken into account, together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*.

However, the High Court did not find Article 31(3)(a) applicable. It found the following:

- KORUS itself directs how it is to be interpreted.
- In Article 22.2 it confers this ability to a joint committee which holds the unique ability to *seek to resolve disputes that may arise regarding the interpretation or application of this Agreement and seek to resolve disputes that may arise regarding the interpretation or application of this Agreement*.

The English Court of Appeal did not consider it necessary or appropriate to comment on whether the diplomatic notes were admissible. However, the Court did state that its interpretation of Chapter 11 matched the view of the United States and Korea.[8]

Korea's next steps

The Court redirected Korea to the High Court, where it will be free to make its case that the tribunal lacked substantive jurisdiction. If the Court agrees, then it can set aside the award.

Conclusion

In many respects, this is an expected outcome – a court must look at a BIT in the way that it is written, and if possible, establish how it was intended. Courts should adopt this approach instead of focusing narrowly on England's arbitration regime. The Court summed it up by saying:

> There is no suggestion that, in drafting the relevant provisions, Korea and the USA had in mind English domestic law as to jurisdictional challenges to arbitration awards, and there is therefore no basis for importing and applying "rules" of construction or presumptions drawn from a collection of first instance decisions of the English courts.

For parties covered under KORUS, establishing jurisdiction may be a lengthy process. It may require arguments that get to the heart of the dispute. However, that was how KORUS was written. It is for the courts to recognise this.

7 The Korea Times "Korea pays compensation to US hedge fund Mason" (29 July 2025) <https://www.koreatimes.co.kr/southkorea/politics/20250729/korea-pays-compensation-to-us-hedge-fund-mason>

8 *Republic of Korea,* above n 1, at [64].

About the author

Alexander Lyall is a Resolution Specialist in the ADR Centre's commercial team. 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.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ARTICLE

Spain's EU law defence rejected in Australian award ruling

Written by **MAHMOUD ABUWASEL**

Published on 25 September 2025

In a landmark decision clarifying the relationship between European Union law and public international law obligations, the Federal Court of Australia has delivered a comprehensive judgment in *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028. Stewart J has ordered the enforcement of four arbitral awards, totalling approximately €500 million, against the Kingdom of Spain, providing a robust affirmation of the integrity of the international investment arbitration system. The judgment navigates a complex intersection of foreign State immunity, treaty interpretation, and the so-called "intra-EU objection" that has been litigated fiercely in courts worldwide.

The proceedings arose from Spain's alterations to its renewable energy regulatory framework in the early 2010s. Foreign investors, alleging that these changes breached the fair and equitable treatment standard under Article 10 of the Energy Charter Treaty (ECT), initiated arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Having secured favourable awards from ICSID tribunals, the investors, or their assignees, sought to enforce those awards in Australia under the *International Arbitration Act 1974* (Cth). Spain resisted, mounting a multifaceted defence that struck at the very foundation of its consent to arbitrate.

Spain's primary contention was that it was immune from the Court's jurisdiction pursuant to section 9 of the *Foreign States Immunities Act 1985* (Cth). While the High Court's recent decision in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 held that accession to the ICSID Convention constitutes a waiver of immunity for enforcement proceedings, Spain sought to distinguish the present case. It argued that the High Court's ruling did not govern a situation where the binding status of the awards themselves was in dispute. This challenge to the awards' validity was predicated on the jurisprudence of the Court of Justice of the European Union (CJEU), notably in cases such as A*chmea and Komstroy*. Those decisions established that arbitration clauses in investment treaties are incompatible with the foundational treaties of the EU when applied to disputes between an EU Member State and an investor from another Member State. Spain argued that this principle of EU law rendered its offer to arbitrate under the ECT inapplicable to the EU-based investors, meaning no valid arbitration agreement was ever formed. Consequently, the awards were not "binding" under Article 53 of the ICSID Convention, and Spain had not waived its immunity in respect of them.

Stewart J firmly rejected this line of reasoning by returning to the fundamental architecture of the ICSID Convention. His Honour affirmed the widely-held view that the Convention establishes a "self-contained or closed-loop system" for the review and enforcement of awards. The Court found that once an ICSID tribunal has determined its own jurisdiction and rendered an

award, and internal remedies such as annulment have been exhausted, the role of a domestic court in an enforcement proceeding is circumscribed. As the Full Court had previously noted, the sole issue for a competent court under Article 54(2) of the Convention is the presentation of a certified copy of the award. An Australian court cannot look behind the award to re-examine the tribunal's jurisdiction or merits. This principle, the Court reasoned, is central to the Convention's object of providing legal security for international investments by mitigating sovereign risk.

Critically, the judgment addressed the apparent conflict between Spain's obligations under EU law and its duties under the ICSID Convention. Stewart J determined that the primacy of EU law, as articulated by the CJEU, is a rule that operates within the autonomous EU legal order. It does not extinguish Spain's pre-existing obligations under public international law owed to non-EU states such as Australia. As a party to the ICSID Convention, but not the EU treaties, Australia's obligation under Article 54 to recognise and enforce the awards remained unaffected by Spain's "juridical dilemma".

The Court also dismissed Spain's alternative contention that the EU treaties had effected an inter se modification of the ICSID Convention among EU Member States. Applying the principles of treaty modification reflected in the Vienna Convention on the Law of Treaties, Stewart J found that the obligations under the ICSID Convention, particularly those concerning the recognition and enforcement of awards, were *erga omnes partes*—owed to all contracting states collectively, not merely bilaterally. Such obligations, which protect the common interest in the stability of the entire investment framework, cannot be modified by a sub-group of parties without affecting the rights of others.

Further, the Court resolved a novel issue concerning the assignment of the awards. In two of the proceedings, the original award creditors had assigned their rights to Blasket Renewable Investments LLC. Spain argued that the Court lacked power to enforce an award in favour of a non-party to the original arbitration. His Honour rejected this, concluding that the rights under an ICSID award, once given the force of law in Australia, constitute a chose in action capable of assignment. Nothing in the ICSID Convention itself prohibits such an assignment.

The decision in *Blasket* represents a significant contribution to the global jurisprudence on the enforcement of investor-state awards. It confirms that an Australian court will not permit a foreign state to use conflicts within another legal order, however profound, as a shield to resist its clear obligations under public international law as implemented into Australian domestic law. The judgment provides unequivocal support for the principle that the ICSID regime is a self-contained system, reinforcing Australia's status as a reliable and pro-enforcement jurisdiction.

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Mahmoud Abuwasel is the managing partner of Wasel & Wasel, a proudly family-owned international disputes and geopolicy firm. Mahmoud is a Harvard graduate and had coached in law practice under former senior staff from the Ronald Reagan and George Bush Sr. administrations and developed practice with the former Chief Justice of the UAE Federal Supreme Court, enhancing his expertise through direct mentorship and practical experience at the highest levels of governance and judicial leadership from West to East. Mahmoud is a licensed solicitor in Australia (of the Supreme Court of Victoria), a Qualified Arbitrator in Canada (by the ADR Institute of Canada), and registered in the UAE (with the ADGM and DIFC Courts).

Hard to restore justice in international investment disputes?

The play of the strategy "fight to settle" in investor-state arbitration

Written by **CHLOE YANG**

Investor-state dispute settlement

→ What are some of the recent trends?

Arbitration is a key method for settling international investment disputes between private investors and host states. This system is largely grounded on the system of multilateral treaties and Bilateral Investment Treaties (**BITs**), which provides a strong, underlying legal system in which investor protection is adjudicated.

In recent years, there has been a proliferation in the use of mediation, conciliation and other alternative dispute resolution processes like negotiation in complex international investment disputes to reach a settlement, saving time and expense. This trend of adopting mediation, conciliation, or negotiation is developing, and it underscores the strategic importance of arbitration.

What is meant by mediation, conciliation and negotiation?

Negotiation

Negotiation has key differences from mediation and conciliation. The parties themselves (or their representatives) directly negotiate to resolve a dispute, and no formal third-party is required. While both mediation and conciliation involve an independent third party, the role of the neutral/third party in the process is different.

Conciliation and mediation

Generally, a conciliator may have more evaluative or advisory functions than a mediator, as the former may examine facts, discuss the parties' positions and even propose terms or draft a settlement for the parties' consideration, while the latter only assists the disputing parties to reach a voluntary agreement and does not impose a solution.[1]

However, in practice, these two terms often overlap, and the United Nations Commission on International Trade Law (**UNCITRAL**) has historically treated "mediation" and "conciliation" as closely related.[2]

Wang Jiazhu arbitration case and an effective strategy

Wang Jiazhu vs. The Republic of Finland is an arbitration case between a Chinese investor and the government of Finland, and is a significant ruling case that was concluded by a settlement.[3] The *Wang Jiazhu* case began with initial investment and development activities that set the stage for a promising business venture. The investor, Wang Jiazhu, a businessman from Wenzhou, China, saw an opportunity back in 2006 to transform a former dairy plant in Kouvola, Finland, into a "Nordic China Centre", the largest Chinese trade hub in Europe. The Finnish government initially supported the project, even granting immigration access to 100 Chinese families.[4] His investment of around €6 million was made based on trust in local political and legal assurances.[5]

However, after the centre opened in 2007, things took an unexpected turn. In 2009, the Finnish authorities started investigations into illegal immigration activities. In November that year, the Finnish Border Guard, along with tax authorities, police, and customs, launched a massive raid using helicopters and 150 officers. Wang was accused of tax fraud, forgery, and facilitating illegal immigration. Authorities denied Wang bail four times and imprisoned him in Helsinki for 81 days.[6] Wang's solitary confinement and the seizure of his business records led to the collapse of the Nordic China Centre. The commercial losses were irreversible, as most businesses left, and the property was later auctioned off or expropriated.[7]

1 Baylis C "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" (1999) 30 VUW L Rev 279 at 282; New South Wales Law Reform Commission *Definitions* and Distinctions of ADR (Submission DR13, 1999) at [3.3].

2 United Nations Commission on International Trade Law *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (United Nations, 2018) at 1, 16; International Bar Association "Mediation or conciliation? Singapore Convention and recent developments in China" (International Bar Association, 21 December 2021) <https://www.ibanet.org/dec-21-mediation-conciliation?utm>.

3 *Wang Jiazhu v. The Republic of Finland* (Discontinuance) UNCITRAL Arbitration, 24 October 2023: <https://www.italaw.com/sites/default/files/case-documents/180467.pdf>.

4 Sina Finance "The Imprisonment of a Wenzhou Businessman in Finland" (28 January 2019) <https://finance.sina.com.cn/china/gncj/2019-01-28/doc-ihrfqzka1591016.shtml>.

5 *Wang Jiazhu v. The Republic of Finland* (Notice of Arbitration, 22 Jan 2021): <https://jusmundi.com/en/document/other/en-wang-jiazhu-v-the-republic-of-finland-request-for-arbitration-friday-22nd-january-2021>, at [11]; Dispute Resolution Team of Huanzhong & Partners "Investment Arbitration: Chinese Businessman Wang Jiazhu sued Finnish Government with the Strategy of 'Fight to Settle'" (9 January 2025) <https://mp.weixin.qq.com/s/kxom2pwGLKg_AFD5P8nNiw>.

6 Sina Finance, above n 4.

7 Sina Finance, above n 4.

Wang filed lawsuits in Finnish courts but lost at every level: the Helsinki District Court (2015), the Helsinki Court of Appeal (2017), and the Supreme Court (2018), despite the courts acknowledging the possibility of excessive enforcement. With no local remedies left, he turned to international arbitration in January 2021.[8]

However, Finland raised an objection to the tribunal's jurisdiction over the case, based on Article 9(3) of the China-Finland BIT (2004). Article 9(3) normally blocks investors from going to arbitration if they have already used local courts, unless they withdraw the case before a ruling.[9]

The tribunal rejected the jurisdictional preliminary objection of Finland and agreed to hear the case on the merits. This was a significant victory for the applicant. This victory was backed by a key view that judicial injustice involved in this case effectively overrides the fork-in-the-road clauses that typically serve as clear endpoints in dispute resolution. In other words, judicial unfairness ("denial of justice") could justify an exception.[10] The judicial injustice alleged in this case forced the parties into arbitration, as standard legal avenues had been exhausted.

The effectiveness of the "fight to settle" strategy became evident in the ensuing arbitration procedure. On September 14, 2023, both parties informed the tribunal of a mutual settlement under Article 36.1 of the UNCITRAL Arbitration Rules. This settlement was achieved nearly 14 years after the initial dispute. The tribunal formally terminated the proceedings on October 24, 2023.[11] This case showed that arbitration is a powerful tool for investors: international arbitration is a mechanism that assists in triggering mediation, conciliation and settlement between the foreign private investor and the host state.

How does *Wang Jiazhu* compare to investor-state dispute settlement trends?

Wang's case exemplifies the use of arbitration to promote a negotiated settlement. In fact, around 35% of International Centre for Settlement of Investment Disputes (**ICSID**) cases end without a ruling due to settlements or procedural closures.[12] CSID's latest data outlines six similar scenarios for case closures, including proceedings discontinued at the request of both parties (51%), and settlement agreements embodied in an award at the parties' request (11%).[13] Interestingly, Aron Broches, one of ICSID's founders, had predicted in 1966 that conciliation may ultimately be more important than arbitration itself.[14]

8 *Wang Jiazhu v. The Republic of Finland* (Notice of Arbitration, 22 Jan 2021), above n 5.

9 Agreement between the Government of the People's Republic of China and the Government of the Republic of Finland on the Encouragement and Reciprocal Protection of Investments, China-Finland (signed 15 November 2004, entered into force 15 November 2006), art 9(3). Article 9(3) of the China-Finland BIT provides: "An investor who has submitted the dispute to national court referred to in paragraph 2 (a) of this Article may nevertheless have recourse to one of the Arbitral Tribunals mentioned in paragraph 2 (b) and 2 (c) of this Article, if the investor has withdrawn his case from national court before judgement has been delivered on the subject matter. In that case the Contracting Party to the dispute shall agree to the submission of the dispute between it and an investor of the other Contracting Party to international arbitration in accordance with this Article."

10 *Wang Jiazhu v. The Republic of Finland* (Ruling on Respondent's Jurisdictional Objection, 10 Jun 2022): <https://www.italaw.com/sites/default/files/case-documents/italaw171131.pdf>, at [26]; Dispute Resolution Team of Huanzhong & Partners, above n 5.

11 *Wang Jiazhu v. The Republic of Finland* (Discontinuance), above n 3.

12 International Centre for Settlement of Investment Disputes (ICSID) "ICSID Caseload—Statistics Issue 2024-2" at 12.

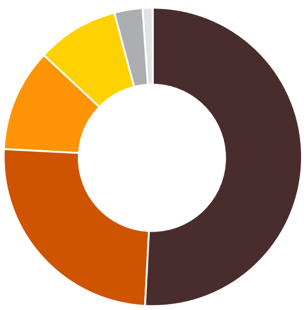
13 ICSID, above n 12, at 14.

14 Romesh Weeramantry, Brian Chang & Joel Sherard-Chow (Centre for International Law) "Investor-State Arbitration Meets Mediation: Putting Mediation and Conciliation Back into ISDS—The Asian Experience" (2 October 2 2020) Kluwer Arbitration Blog <https://arbitrationblog.kluwerarbitration.com>.

Chart 1:
Outcomes of All Concluded ICSID Arbitration Cases

(Data from ICSID Caseload—Statistics Issue 2024-2) © 2025 International Centre for Settlement of Investment Disputes

Chart 2:
Settled or Otherwise Discontinued Cases among All Concluded ICSID Arbitrations



(Data from ICSID Caseload—Statistics Issue 2024-2) © 2025 International Centre for Settlement of Investment Disputes.

Mediation, conciliation and negotiation are also acknowledged by the UNCITRAL Arbitration Rules (2021). UNCITRAL Article 36(1) states that if parties settle, the tribunal can terminate the case without giving a reason.[15]

Typical arbitration cases and the "Fight to Settle" strategy

Though mediated resolutions in investor–state disputes are normally confidential, a few notable examples have surfaced where parties reached a settlement through mediation, conciliation, or negotiation, avoiding a final ruling. These cases also illustrate how international arbitration can facilitate mediation, conciliation and negotiation between disputing parties through a "fight to settle" strategy.

In the *Glencore International A.G. and C.I. Prodeco S.A. v. Colombia* case, Glencore alleged that Colombia unlawfully annulled a coal mining concession under the Switzerland-Colombia BIT.[16] After Colombia's jurisdictional objections were dismissed, the case progressed toward an out-of-court settlement in 2022.[17] This result demonstrates that the arbitration process can exert considerable pressure on host states. Thus, host states are more likely to agree to mediation, which

15 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2021) art 36(1). Article 36(1) provides: "If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."

16 *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia* (Discontinuance) ICSID ARB/16/6, 1 June 2021.

17 E Aisbett, M Busse & P Nunnenkamp "Bilateral investment treaties as deterrents of host-country discretion: the impact of investor-state disputes on foreign direct investment in developing countries" (2018) Review of World Economics 119 at 154.

probably results in a comparatively fairer resolution accepted by both parties without a final merit ruling (2010).[18]

Then, in the *Vattenfall AB v Germany (II)* case, a Swedish company, Vattenfall, sued Germany over its nuclear phase-out following the Fukushima disaster.[19] The applicant contended that Germany's step was unfair treatment and indirect expropriation. The claim, valued over €4.7bn, was brought under the Energy Charter Treaty. In March 2021, the two sides settled their dispute and Germany agreed to provide Vattenfall with compensation. The tribunal subsequently adopted an Order recording the discontinuance under ICSID Arbitration Rule 44(2) on November 9, 2021.[20] It is another example of a high-profile investor–state dispute resolved through mediation/conciliation. It also shows how reputational damage and legal pressure can create the conditions for negotiated settlements.

Conclusion

These cases provide a good lesson for those investing in foreign countries. When conventional judicial means are alleged to fall short in safeguarding the investor's legitimate interests, investors can turn to international arbitration. In that context, arbitration is not merely a legal procedure but also a strategic tool to secure a chance for a potential mediation between the private investor and the host state. To reach a fair solution, a possible chance for mediation is vital, especially between two parties with a huge disparity in negotiating positions. Wang's case in particular proves that even individuals can use international law to defend their investments.

18 John Savage & Michael McIlwrath *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010).

19 *Vattenfall AB and others v Federal Republic of Germany* (Discontinuance) ICSID ARB/12/12, 9 November 2021.

20 *Vattenfall AB and others v Federal Republic of Germany*, above n 19. At that time, the discontinuance of the procedure was made pursuant to ICSID Arbitration Rule 44, now the Rule 55 in the 2022 version. Rule 55(2)(a) provides: "(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:
(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or
(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award."

About the authors

Chloe Yang (legal name: Yuyan Yang) is a PhD candidate 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.

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