MAYER | BROWN

July 2020

Global International Arbitration Update

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Legal Updates

ASIA

SINGAPORE CONVENTION ON MEDIATION ENTERS INTO FORCE IN SEPTEMBER 2020

12 March 2020: The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention**") will come into force on 12 September 2020. The Singapore Convention was adopted on 20 December 2018, but required ratification by at least three states before becoming effective. Singapore led the way by hosting the initial signing ceremony and Singapore, Fiji, Qatar and Saudi Arabia have all since deposited their instruments of ratification. To date, 52 countries have signed the treaty.

The Singapore Convention establishes a framework for the cross-border recognition and enforcement of mediated settlement agreements, and is lauded as a welcome advancement for the international dispute resolution scene. Prior to the Singapore Convention, parties could not directly enforce a mediated settlement agreement. This meant that parties would have had to commence fresh proceedings to seek relief for breaches of the settlement agreement instead. It is hoped that the Singapore Convention will assist in the more efficient resolution and, crucially, enforcement of disputes.

Together with specialist mediation institutions like the Singapore International Mediation Centre, the Singapore International Mediation Institute and the Singapore International Dispute Resolution Academy, it seems as if Singapore looks set to remain in the limelight with regard to global developments in alternative dispute resolution.

SINGAPORE INTERNATIONAL MEDIATION CENTRE INKS MOU WITH SHENZHEN COURT OF INTERNATIONAL ARBITRATION

17 June 2020: The Singapore International Mediation Centre ("**SIMC**") signed a Memorandum of Understanding with the Shenzhen Court of International Arbitration ("**SCIA**") to provide a collaborative 'mediation-arbitration' service to support businesses under the Singapore-China (Shenzhen) Smart City Initiative. Where a mediation is administered by the SIMC, any resulting

mediated settlement agreement may be recorded by the SCIA as an arbitral award on a case-by-case basis, in accordance with SCIA Arbitration Rules. This would wield practical benefit for users, as it would allow SIMC mediated settlement agreements to be enforced in China (and elsewhere) as an arbitral award.

Finer details such as fees and procedures have yet to be agreed between the institutions. An immediate distinction is the enforcement mechanism – under the Singapore Convention, settlement agreements are 'converted' to orders of the respective court, whereas under the SIMC-SCIA framework, settlement agreements are 'converted' to arbitral awards. A question arises as to the precise steps to be taken to enforce the arbitral award – presumably, enforcement proceedings will still have to be initiated before the local courts.

ICC APPOINTS NEW CO-CHAIRS FOR BELT AND ROAD COMMISSION

20 March 2020: Two new co-chairs have been appointed to head the ICC Belt and Road Commission: Susan Munro (managing partner of the Beijing and Hong Kong offices of Steptoe & Johnson) and Robert Pe (ICC court member for Myanmar). The two new co-chairs replace Justin D'Agostino, who has stepped down following his appointment as CEO of Herbert Smith Freehills. The ICC Belt and Road Commission promotes ICC dispute resolution services for Belt and Road disputes.

A RECORD-BREAKING YEAR FOR SIAC, AS 2019 STATISTICS RELEASED

8 April 2020: A record 479 cases were filed with the Singapore International Arbitration Centre ("**SIAC**") in 2019, with parties from across 59 jurisdictions electing to resolve their disputes at the centre. The total sum in dispute before the SIAC for 2019 amounted to the tune of USD 8.09 billion, a 14.6% increase from the year before.

The statistics in relation to the SIAC's administration of the "3Es" – Emergency Arbitration, Expedited Procedure and Early Dismissal – remain encouraging for potential users who are considering submitting their disputes to SIAC arbitration.

The SIAC maintained its track record of accepting emergency arbitration applications. 10 emergency arbitration applications were brought in 2019, all of which were accepted. This brings the total number of emergency arbitration applications to 94, with all 94 applications ultimately being accepted by the SIAC.

The SIAC accepted 32 out of 61 expedited procedure applications received in 2019. To date, approximately 60% of requests for expedited procedure have been successful, with 319 of 534 requests being accepted since the expedited procedure was introduced in 2010.

Since introducing the early dismissal procedure in 2016, the SIAC has received a total of 30 early dismissal applications, of which 18 were allowed to proceed (i.e. 60% of applications were allowed to proceed). In 2019, SIAC received 8 early dismissal applications of which 5 were allowed to proceed.

In sum, the SIAC Annual Report 2019 reflects SIAC's steady progress as an arbitration centre, in step with Singapore's growth as an international arbitration hub.

HKIAC RESPONDS TO COVID-19

15 May 2020: Due to the COVID-19 pandemic, around 85% of all hearings at the HKIAC in April and May 2020 required some form of virtual hearing support. Looking ahead, the HKIAC estimates that between February and September 2020 around 65% of its caseload will involve virtual hearing support.

Drawing from its experiences with virtual hearings, and making provision for those to come, HKIAC has produced guidelines for conducting virtual hearings ("**Guidelines**") to complement the virtual hearing services that it already provides.

The Guidelines cover numerous aspects of the virtual hearing process including set-up, testing and administration of virtual facilities; appearing at virtual hearings; examination of witnesses and experts; virtual bundles; and interpretation and transcription. The HKIAC also provides a flexible virtual service offering which includes video conferencing, audio conferencing, virtual bundle services, electronic presentation of evidence, transcription services and interpretation services.

HKIAC ANNOUNCES NEW CO-CHAIRS

26 May 2020: Debevoise & Plimpton LLP partner David Rivkin and former Hong Kong Secretary for Justice Rimsky Yuen have been appointed as co-chairs of the HKIAC. The new co-chairs replace Matthew Gearing QC, Global Co-Head of Allen & Overy's International Arbitration Group whose three year term concluded on 14 June 2020.

This marks the first time the HKIAC has had co-chairs. The new co-chairs have committed to ensuring that Hong Kong remains an impartial and supportive venue for international arbitration, enhancing HKIAC's role in the Belt and Road Initiative and ASEAN community.

HKSAR GOVERNMENT TO PROVIDE ONLINE PLATFORM TO FACILITATE COST EFFECTIVE AND EFFICIENT COVID-19 DISPUTE RESOLUTION

29 June 2020: In response to the severe economic repercussions of the COVID-19 pandemic, both globally and domestically, the Hong Kong SAR Government has launched a fully web-based online dispute resolution ("**ODR**") scheme, aimed at resolving disputes expeditiously and economically (access here). The ODR platform and other services under the scheme are independently operated by the Electronic Business Related Arbitration and Mediation ("**eBRAM**") International Online Dispute Resolution Centre (see here).

Dr. Thomas So, a Partner of Mayer Brown's Hong Kong office, is the Chairman of the Board of eBRAM. A number of Mayer Brown lawyers have enrolled as Arbitrators under the eBRAM ODR scheme.

The eBRAM ODR scheme targets disputes involving small and medium-sized enterprises and will handle claims with a cap of HK$500,000. To be eligible for the scheme, at least one party must be a Hong Kong resident or company, and each party will be required to pay a registration fee of HK$200. In addition to the fees, parties are required to enter into a dispute resolution agreement to record their consent.

Under this multi-tiered ODR scheme, parties will first attempt to negotiate their disputes. If negotiation fails, the parties will attempt to settle the disputes through mediation, failing which they will proceed to arbitration, culminating in a final, binding award. Each tier of the dispute resolution process must be conducted within a certain period of time to be announced. A mechanism is in place for appointment of mediators and arbitrators unless parties agree to appoint independent third party of their choice.

EUROPE, THE MIDDLE EAST AND AFRICA

HAGUE RULES FOR BUSINESS AND HUMAN RIGHTS DISPUTES

12 December 2019: The Hague Rules on Business and Human Rights Arbitration were launched during an event at the Permanent Court of Arbitration. The Hague Rules on Business and Human Rights Arbitration provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights. The rules are based on the 2013 UNCITRAL Arbitration Rules with modifications needed to address the particular characteristics likely to arise in the context of business and human rights disputes, such as measures to address the circumstances of those affected by the human rights impacts of business activities, a potential imbalance of power, the protection of witnesses or the public interest.

THE MADRID INTERNATIONAL ARBITRATION CENTRE OPENS ITS DOORS TO THE WORLD

01 January 2020: The Madrid International Arbitration Centre ("**MIAC**") started operating on 1 January 2020, with the ability to administer cases in either Spanish, English or Portuguese. A dispute may be eligible if it arises out of an arbitration agreement signed on or after 1 January 2020 and designates any of MIAC's four promoting entities (i.e., the top three Spanish arbitration institutions -the Madrid Court of Arbitration, the Civil and Commercial Court of Arbitration and the Spanish Court of Arbitration, which were joined by the Madrid Bar Association as strategic partner).

In accordance with its purpose of ensuring that arbitration services are delivered in accordance with high standards of independence, impartiality, transparency, efficiency and professionalism, the MIAC has recently launched its website (https://madridarb.com/), where its regulations and rules, along with other relevant information about this institution, have been made publicly available.

AFRICAN DEVELOPMENT BANK SIGNS FIVE-YEAR AGREEMENT TO USE FIDIC STANDARD CONTRACTS

10 January 2020: Under the terms of the agreement, FIDIC grants the African Development Bank a licence to use as part of the bank's standard bidding documents the latest 2017 second edition FIDIC contracts and 1999 editions. FIDIC chief executive Dr Nelson Ogunshakin said that "*this will create more certainty in the market as banks, lenders, investors and clients adopt them.*"

Commenting on the agreement, Frank Mvula, the bank's director of fiduciary services and inspection, said that "*the use of FIDIC contracts is a step towards enhancing equity and fairness as well as efficient and effective contract management as emphasised under the bank's new procurement framework.*"

The FIDIC contract documents covered by the agreement are as follows:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("**Red book**"), Second edition 2017;
- Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor ("**Yellow book**"), Second edition 2017;
- Conditions of Contract for EPC Turnkey Projects ("**Silver book**"), Second Edition, 2017);
- Client/Consultant Model Services Agreement ("**White book**"), Fifth Edition 2017;
- Conditions of Contract for Design, Build and Operate Projects ("**Gold book**") First Edition 2008;
- The Short Form of Contract ("**Green book**"), First Edition 1999; and
- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("**Red book**"), First edition 1999.

ICCA-IBA JOINT TASK FORCE ON DATA PROTECTION RELEASES CONSULTATION DRAFT OF ICCA-IBA ROADMAP TO DATA PROTECTION FOR PUBLIC COMMENT

February 2020: The ICCA-IBA Joint Task Force on Data Protection in International Arbitration released the consultation draft of the ICCA-IBA Roadmap to Data Protection in International Arbitration for public comment. In the absence of specific guidance from regulators, the ICCA-IBA Roadmap is intended to help arbitration professionals identify and understand the data protection and privacy obligations to which they may be subject to in an international arbitration context.

Whilst the initial deadline for comments was 31 March 2020, in light of the repercussions of COVID-19, the Task Force decided to extend it until 30 June 2020 to allow more time for members of the international arbitration community to provide their feedback.

TANZANIA RETHINKS ITS ARBITRATION ACT IN AN ATTEMPT TO ENCOURAGE FOREIGN-DIRECT INVESTMENT

21 February 2020: The Tanzanian government has enacted a new Arbitration Act 2020 (the "**Act**"), which has been given Presidential assent and passed into law in February 2020. The Act repeals and replaces the outdated Arbitration Act 1931. The introduction of the Act appears to be an effort to make Tanzania's arbitration offering a more attractive proposition to foreign investors. This follows recent backlash regarding Tanzania's 2017 legislation prohibiting investors from resorting to international dispute resolution mechanisms, such as international arbitration, where the dispute concerned natural resources, and 2018 legislation prohibiting international arbitration as a method for resolving investor-state disputes. The Act is aimed at creating a friendly regime that will encourage alternative dispute resolution in Tanzania and establish a more conducive framework for the enforcement of arbitral awards. The Act does not reverse the 2017/18 legislation. Therefore, the Act is a step in the right direction, although it is still very much a first step.

The Act covers rules on the appointment of arbitrators, tribunal jurisdiction, arbitration procedure, court challenges and costs, and the

distinction between domestic and international commercial arbitration. Key issues addressed in the Act include the creation of the Tanzania Arbitration Centre which will be responsible for the conduct and management of arbitration and accreditation of arbitrators in Tanzania; facilitation of the use of arbitration as a central dispute resolution mechanism in Tanzania; and the enforcement of both domestic and international arbitral awards.

THE UAE CONSTRUCTION INDUSTRY THINK TANK PUBLISHES ITS SECOND INDUSTRY WHITE PAPER

April 2020: The UAE Construction Industry Think Tank has published its second White Paper, encouraging project owners in the UAE to adopt standardised contracts to avoid high levels of waste on projects and in order to help the UAE achieve its Centenary 2071 goals. In particular, this White Paper seeks to define a standardised construction contract model which will lead to more effective projects, as the use of this type of standardised contract defines roles and responsibilities for project parties; encourages collaboration and better communication among project parties; avoids and resolves disputes without disruption to the project; benefits from the support of governments, which provides necessary legislation; incentivises social welfare and environmental sustainability targets in addition to abiding by legislation; and accounts for risks presented by new technologies and incorporates clear guidelines on implementation.

ICC COURT ISSUES COVID-19 GUIDANCE NOTE FOR ARBITRAL PROCEEDINGS

09 April 2020: The ICC has released the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (the "**ICC Guidance Note**"). The ICC Guidance Note provides instructions to parties, lawyers and arbitrators on possible case management tools that may be considered in order to mitigate the adverse effects of the COVID-19 pandemic on ICC cases and contribute to a fair, expeditious and cost-effective dispute resolution process.

The ICC Guidance Note highlights factors relevant in assessing ways to mitigate
COVID-19- related delays in the context of the ICC Arbitration Rules, including guidance on the possibility to organise virtual hearings. Two annexes of the Note provide a checklist for a protocol on virtual hearings and suggested clauses for cyber-protocols and procedural orders dealing with their organisation.

STOCKHOLM CHAMBER OF COMMERCE OFFERS ITS DIGITAL PLATFORM FOR FREE FOR AD HOC ARBITRATIONS

24 April 2020: In an initiative to support the online administration of proceedings in these challenging and uncertain times, the Stockholm Chamber of Commerce ("the **SCC**") has started offering its secure digital platform for communications and file sharing between parties and tribunals free of charge for ad hoc cases commenced during the Covid-19 pandemic. The SCC Arbitration Institute says that this platform can simplify the administration of ad hoc arbitrations especially where a large part of the proceeding needs to be coordinated and carried out online. The platform provides users with a secure and efficient way of communicating and filing documents, as well as a calendar and a notice board for the tribunal to share practical information with the parties. There is also an archiving service for document storage after the arbitration has concluded.

EU MEMBER STATES SIGN AN AGREEMENT FOR THE TERMINATION OF INTRA-EU BITS

05 May 2020: In a long-awaited arrangement, 23 EU Member States signed an agreement for the termination of intra-EU BITs (the "**Termination Agreement**") (accessible here). The Termination Agreement implemented the March 2018 European Court of Justice ("**ECJ**") judgment in the *Achmea* case, where the ECJ found that investor-State arbitration clauses in intra-EU BITs are incompatible with the EU Treaties. Article 5 of the Termination Agreement dictates that arbitration clauses concluded in intra-EU BITs cannot serve as legal basis for "New Arbitration Proceedings", which are defined as arbitration proceedings initiated after 6 March 2018 (i.e., the date of *Achmea* decision). The Termination Agreement also states that Member States shall inform "*arbitral tribunals about the legal consequences of the Achmea judgment as described in Article 4*", namely that intra-EU BIT arbitration clauses are contrary to EU Law and thus inapplicable.

The four EU states that have not signed the agreement are Austria, Finland, Sweden and Ireland (the latter terminated its sole intra-EU BIT with the Czech Republic in 2011). The United Kingdom, which exited the EU on 31 January, also did not sign. The Termination Agreement does not cover intra-EU investment disputes under the Energy Charter Treaty ("**ECT**"), which will be dealt with "*at a later stage*".

As a direct consequence, it is expected that respondent States to intra-EU BITs arbitration proceedings commenced prior to Agreement will invoke the above mentioned provisions of the Agreement as grounds for contesting jurisdiction in those proceedings. This may be the case also with respect to arbitrations in which tribunals have already rejected jurisdictional objections based upon the *Achmea* decision. It remains to be seen how tribunals will react to such objections.

LCIA REPORTS RECORD CASE NUMBERS IN 2019

19 May 2020: The LCIA Annual Casework Report (accessible here) highlights that, in 2019, a record number of 406 cases were referred to the LCIA, including 346 arbitrations pursuant to the LCIA Rules, the highest number ever received. Furthermore, the Report also states that the LCIA has received a "*spike*" in new arbitrations in the first quarter of 2020 and that in the medium-term the coronavirus pandemic will "*undoubtedly lead to additional cases*."

EU PUBLISHES PROPOSALS FOR MODERNISING THE ECT

27 May 2020: The European Commission has published its proposals for modernising the Energy Charter Treaty ("**ECT**"). According to the European Commission press release, the draft proposal (accessible here) has three main aims: (i) first: bring the ECT's provisions on investment protection in line with those of agreements recently concluded by the EU and its Member States, in another post-*Achmea* fuelled move from the European Union,; (ii) ensure the ECT better reflects climate change and clean energy transition goals and facilitates a transition to a low-carbon, more digital and consumer-centric energy system; and (iii) reform the ECT's dispute resolution provisions in line with the EU's work in ongoing multilateral reform process in the UNCITRAL.

AMENDMENTS TO THE ABU DHABI GLOBAL MARKET FOUNDING LAW

27 May 2020: The Abu Dhabi Global Market ("**ADGM**"), Abu Dhabi's International Financial Centre, announced amendments to its founding law, Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market (Founding Law). The majority of the amendments, contained in Law No 12 of 2020 ("**Amended Founding Law**"), relate to the enhancement and strengthening of ADGM's dispute resolution framework, particularly the jurisdiction of its Courts.

The Amended Founding Law confirms and clarifies ADGM's status as an 'opt in' jurisdiction: parties with no connection to ADGM can submit their civil or commercial disputes to its Courts or to arbitration seated in ADGM. The Amended Law also confirms the exclusivity of its Courts' jurisdiction regarding certain claims and dispute. It further prevents parties from using ADGM for the enforcement of non-ADGM judgments and awards in other jurisdictions, except when the originating judgment comes from another Emirati court. In order to benefit from the ADGM's favourable enforcement framework, the parties must therefore submit their original dispute to its Courts or arbitration under its rules. Finally, the Amended Founding Law codifies the mutual enforcement by the Abu Dhabi and ADGM courts of each other's judgments and recognised or ratified arbitral awards – without any review on the merits.

ARCADIS GLOBAL CONSTRUCTION DISPUTES REPORT 2020: COLLABORATING TO ACHIEVE PROJECT EXCELLENCE

03 June 2020: The 10th anniversary edition of the Global Construction Disputes Report published by the Global Design & Consultancy firm Arcadis reveals that overall volume of disputes has increased slightly but the average value of disputes and the time taken to resolve them has decreased.

The Middle East remains the region with the highest average value of disputes (US$ 62 million), while North America has now become the region with the greatest average length of disputes (17.6 months) despite having the second lowest average dispute value (US$ 18.8 million).

In line with previous years, human factors and misunderstanding of contractual obligations continue to be a primary cause of disputes. As for the methods of dispute resolution, arbitration continues to be the most popular method.

The report highlights that resilience to recovery through collaboration will be a vital factor for all projects to overcome the impact of the COVID-19 pandemic and reminds that, although collaboration is often overlooked, a willingness to compromise, set emotions aside and concentrate on what makes good business sense is a key contributor to successful dispute resolution.

RENEGOTIATIONS OF PUBLIC-PRIVATE PARTNERSHIPS

04 June 2020: The pandemic-induced financial crisis is disrupting the construction services globally, affecting the Public-Private Partnerships ("**PPPs**") and potentially leading to new arbitration cases. On the contractor's side, the crisis could cause delays in achieving milestones, obtaining supplies and complying with numerous other contractual obligations. On the government's side, the unavailability of staff due to quarantine measures could cause an inability to respond to requests from project companies, with contract breaches arising from the failure to grant approvals, carry out-on site supervision and testing. Therefore, the crisis will impact several contractual aspects, including force majeure and contractual protection and remedies resulting from it, delays, amongst others. Renegotiations and adjustments will be inevitable, requiring to recalibrate availability payments and to revise contract requirements and standards with potential scope changes, extension of terms and addition of financing facilities.

To effectively renegotiate, governments and constructors will need to assess the financial impacts of the crisis and evaluate the viability and sustainability of scheduled and ongoing projects. These evaluations might be complex as the consequences of the crisis vary from project to project and country to country. Furthermore, transparency is key to reviews and audits, considering the risk of corruption that PPPs face. As a reaction to the situation, a Rapid Response Program ("**Program**") was established by the Public-Private Infrastructure Advisory Facility ("**PPIAF**"), in collaboration with the World Bank's Infrastructure Finance, PPP & Guarantees (IPG) Group. The Program aims to support governments with strategic short-time advice on the current impacts of the pandemic and to ensure they have access to the latest information on relevant topics. The PPIAF also expects to provide practical insights with regards to the medium to long-term consequences on PPPs. The Program, centrally funded, wishes to assist 15 countries in Africa, Middle East and Europe for an initial period of six-month. Support of the international community is key to obtain effective renegotiations of PPPs with regards to emerging countries, as these contracts play a major role in their economy and as their risk management systems may not be prepared to manage the consequences of this unprecedented crisis.

AMERICAS

BRAZILIAN BAR ASSOCIATION RECOGNIZES CONCILIATORS, MEDIATORS, ARBITRATORS AND LEGAL EXPERTS AS ATTORNEY'S ACTIVITIES

10 February 2020: The Federal Council of the Brazilian Bar Association (OAB) issued Act no. 196/2020, which provides that attorneys who act as conciliators, mediators, arbitrators and legal experts are performing legal activities. This provision follows the development of ADR in Brazil and the previous guidelines of the Federal Council of the Brazilian Bar Association.

CITY OF SÃO PAULO ENACTS DECREE ON THE USE OF ARBITRATION IN DISPUTES INVOLVING THE PUBLIC ADMINISTRATION

18 March 2020: Law No. 17.324/20 of the City of São Paulo came into force to regulate the use of arbitration for the resolution of disputes involving the city and its entities. The decree seeks to avoid judicial disputes involving the Public Administration. Under the new rule, the Direct and Indirect Municipal Public Administration may use arbitration to resolve disputes related to financial and non-disposable rights, as per Federal Law no. 9,307/96.

MEXICO BLOCKS RENEWABLE ENERGY PROJECTS FROM THE POWER GRID PROMPTING LEGAL ACTIONS THAT MAY INCLUDE SEVERAL TREATY-BASED ARBITRATIONS FROM NAFTA AND EUROPEAN INVESTORS

29 April and 15 May 2020: In a striking reverse of its policies to promote renewable energies, Mexico passed two resolutions on 29 April and 15 May 2020 justified by the Covid-19 pandemic and the risk of interruption of electricity. The first resolution suspended all pre-operative testing of 26 solar and wind farms that were ready to start operations and gave preferential grid access to fossil fuel-based energy from State-owned plants. The second resolution strengthened state control over the electricity industry and imposed discretional and restrictive measures on renewable energy providers.

The measures adopted will affect 44 clean energy plants worth over US $8 billion (26 ready and 18 under construction). Mexican Amparo courts have suspended some of the effects of the first resolution – in favour of 24 investors to continue pre-operative testing – until final resolution. However, the second resolution is still in place and may infringe several standards of investment protection, such as the Minimum Standard of Treatment and may give rise to indirect expropriation claims under NAFTA and other BITs, notably from Spain, Italy, France and the UK.

Case Law Updates

ASIA

DETERMINING THE LEX ARBITRI AND THE SEAT OF ARBITRATION

27 December 2019: The Singapore Court of Appeal ("**CA**") overturned the High Court's decision in *BNA v BNB* [2020] 1 SLR 456 on the (a) seat of the arbitration and (b) law of the arbitration agreement. The CA found that Shanghai (not Singapore) was the seat, and PRC law (rather than Singapore law) governed the arbitration agreement. Since Shanghai was the seat, the party who challenges the tribunal's jurisdiction ought to file its challenge before the PRC courts. The CA allowed the appeal to the extent that it found that Singapore was not the seat.

The CA applied the *SulAmérica* framework and accepted that the governing law clause (which provided for PRC law) gave rise to a presumption that the parties had *impliedly* chosen PRC law to be the law of the arbitration agreement. The phrase "for arbitration in Shanghai" in the arbitration agreement did not displace this implied choice as this was merely a selection of Shanghai as the seat of arbitration. In this regard, the court disagreed with the respondent's argument that Shanghai was not the seat because the parties could not have chosen a seat which would have invalidated their arbitration agreement (since PRC law did not allow for domestic disputes seated in the PRC, to be administered by foreign arbitration institutions (i.e. the SIAC in this case). The court maintained that there was no evidence that the parties were subjectively aware of the interplay between PRC law and SIAC as the administering institution.

The CA articulated two main principles: first, that a reference to a geographical location in an arbitration agreement is generally construed to be the seat of the arbitration; second, that the *lex arbitri* continues to be determined in accordance with the framework established in *SulAmérica*. An express choice of law governing the substantive contract can only go so far as to infer the *lex arbitri*.

As a result if parties have agreed to a potentially unworkable arbitration agreement, the court will not strain to read the arbitration agreement otherwise just to cut a path for a valid arbitration to take place.

STRICT TIME LIMITS TO SET ASIDE AN ARBITRAL AWARD

3 January 2020: In *Bloomberry Resorts and Hotels Inc and anor v Global Gaming Philippines LLC and anor* [2020] SGHC 01, the Singapore High Court examined the limits of Article 34(3) of the UNCITRAL Model Law. The Court came to a landing that it could not extend the three-month time limit for a party to apply to set aside an arbitral award before the Court, even in the arguably extreme situation before the Court, where material evidence of the other party's allegedly fraudulent acts only surfaced after the expiry of the time limit.

In *Bloomberry Resorts*, the plaintiff Bloomberry commenced an application to set aside a partial award and to set aside the enforcement orders made by the Court in respect of the partial award, after the relevant timelines had expired, on the common ground that the fraud in question was only discovered after the expiry of the time limit. In respect of Bloomberry's application to set aside the partial award, the Court found that the time limit in Article 34(3) of the Model Law is an absolute time limit favouring the finality of arbitral awards, and was not extendable even in exceptional circumstances involving fraud, bribery or corruption. In contrast, the Court found it had the discretion to allow an extension of time for Bloomberry's application to resist enforcement of the award, and granted the extension (although Bloomberry ultimately failed in its application to resist enforcement on the merits of its allegations of fraud).

In the face of a strict and absolute application of the time limit under Article 34 of the Model Law, a practical and alternative recourse would be for an award debtor to seek to resist enforcement of the award instead of applying to set aside the arbitral award, as Bloomberry sought to do in this case.

WITNESS GATING RESULTING IN THE SETTING ASIDE OF AN AWARD

31 January 2020: An arbitral award was set aside by the Singapore High Court on the grounds of breach of natural justice in *CBP V CBS* [2020] SGHC 23. The Court found that the sole arbitrator had not afforded the respondent in the arbitration, CBP, the right to a fair hearing in declining to hear evidence from all of CBP's witnesses at the oral hearing (also termed "witness gating").

The arbitration was conducted under the Rules of Singapore Chamber of Maritime Arbitration ("**SMCA Rules**"), in accordance with parties' agreement. In the course of the arbitration proceedings, the respondent CBP elected not to submit any witness statements to the tribunal. The arbitrator subsequently decided that a hearing would be convened for parties to make oral submissions, but that the respondent CBP was not entitled to call any witnesses to the stand as it had failed to provide witness statements. The claimant CBS had elected not to call any witnesses.

The dispute in the arbitration centred on the existence of an oral agreement between CBP and a third party. The Court agreed with CBP that, but for the witness gating ordered by the tribunal, CBP's witnesses could have provided evidence directly relevant to the oral agreement. The arbitrator had breached the fair hearing rule, and this breach was directly connected to the making of the award.

The Court found that the SMCA Rules did not grant the arbitrator the power to limit the taking of evidence in the manner he had directed. The arbitrator's reliance on Rule 28.1 of the SMCA Rules did not assist, as Rule 28.1 only plainly directed that where parties have not agreed on a documents-only arbitration, an oral hearing must be held.

Importantly, the Court held that while an arbitral tribunal may be impliedly vested with the powers to limit the oral testimony of witnesses, the tribunal does not have free reign to reject all witness evidence in the interest of efficiency. This implied power must be balanced against the parties' right to a fair hearing.

APPLICATION TO SET ASIDE AWARDS ON GROUNDS OF INVALID ARBITRATION AGREEMENT AND PUBLIC INTEREST FAILED IN HONG KONG COURT OF FIRST INSTANCE

04 March 2020: In *X v Jemmy Chien* [2020] HKCFI 286, the plaintiff applied to set aside two arbitral awards on the grounds that there was no valid arbitration agreement and that enforcement of the awards was contrary to public policy in Hong Kong. The Hong Kong Court of First Instance ("**HKCFI**") rejected the application on both grounds.

On the first ground, the HKCFI held that, while it was able to review an arbitrator's decision on jurisdiction for correctness, this review must be

limited to true questions of jurisdiction and not stray into an assessment of the merits of the arbitrator's findings of fact, foreign law, or credibility of witnesses. Using the arbitrator's findings of fact and credibility, the HKCFI was unable to conclude that the arbitrator had made a mistake in finding that there had been a valid arbitration agreement between the parties.

Regarding the application for the awards to be set aside on the grounds of public policy, the HKCFI noted that the substance of the plaintiff's application was actually that the agreement containing the arbitration agreement was a sham, because it was created with the intention to hide illegality on the part of both parties. The HKCFI refused to grant the application on the following basis: (i) the plaintiff had failed to adequately particularise its application as it had failed to mention that the basis of its case was that the underlying agreement was illegal, and had failed to provide clear evidence to suggest that there was any illegality; and (ii) allowing the plaintiff's application would be tantamount to allowing the plaintiff to profit from its own illegal act, avoiding payments otherwise due to be made under the underlying agreement.

This case illustrates the deference that the Hong Kong courts will show to the findings of the arbitrator, and the importance of "clean hands" when seeking relief from the court.

HONG KONG COURT HIGHLIGHTS EXCEPTIONS TO INCORPORATION OF ARBITRATION AGREEMENT AND SUBMISSION TO ARBITRATION JURISDICTION

04 March 2020: In *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* [2020] HKCFI 375 the Hong Kong Court of First Instance refused an application for a stay to arbitration, highlighting important exceptions to the general rules on incorporation of arbitration clauses and the effects of participating in an arbitration.

OCBC sought damages against Kai Sen in the Hong Kong courts, arising from alleged mis-delivery of cargo. Kai Sen applied for a stay of these proceedings in favour of arbitration on the basis that: (i) an arbitration clause contained in the charterparty (which read: "ARB, IF ANY, IN HONGKONG UNDER ENGLISH LAW") had been incorporated into the bill of lading by reference; and (ii) OCBC had unequivocally elected to proceed with arbitration by issuing a notice to arbitrate.

The Hong Kong court dismissed Kai Sen's application for a stay to arbitration. It held that both English and Hong Kong law provided that arbitration agreements can only be incorporated into bills of lading by reference using specific wording. As only a general incorporation of the terms of the charterparty had been used, the arbitration clause had not been incorporated. Further, it held that OCBC had successfully maintained its position that the Hong Kong courts had jurisdiction over the dispute by expressly stating so in the covering letter to its notice of arbitration.

HONG KONG COURT FURTHER CLARIFIES INTERFACE BETWEEN INSOLVENCY REGIME AND ARBITRATION

12 March 2020: In *Dayang (HK) Marine Shipping Co. Ltd v. Asia Master Logistics Ltd* [2020] HKCFI 311 ("***Dayang***") the Hong Kong Court of First Instance ("**HKCFI**") refused to grant a stay to arbitration in respect of a winding-up petition. In doing so, it cast serious doubt on the Hong Kong case of *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426 ("***Lasmos***"), and indicated that further definitive developments will soon be forthcoming in this area.

As reported in Mayer Brown's January 2020 International Arbitration Update, prior to *Lasmos*, a winding-up petition based on the insolvency of a debtor would not be stayed to arbitration even if the debt arose from an agreement containing an arbitration clause. *Lasmos* changed this position, providing that a stay would be appropriate if (i) the debt was disputed; (ii) the underlying agreement contained an arbitration clause; and (iii) the debtor took the steps required under the arbitration clause to commence arbitration.

Dayang involved an alleged debtor seeking a stay to arbitration of a winding up petition based on the *Lasmos* principles. The HKCFI held, first, that even if *Lasmos* was applicable, the debtor had not met *Lasmos* condition (iii). Second, following a comprehensive review of Hong Kong, English and Singaporean case law addressing the interaction

between insolvency regimes and arbitration, the HKCFI summarized the present state of the law as follows: (i) to resist a winding up petition, a debtor-company must show a *bona fide* dispute of the underlying debt on substantial grounds; (ii) the existence of an arbitration agreement is irrelevant to the court's discretion to make a winding-up order; (iii) commencement of arbitration proceedings is relevant but not sufficient evidence of a *bona fide* dispute; and (iv) a creditor-petitioner petition with knowledge of a *bona fide* dispute runs the risk of an adverse costs order and/or liability for malicious prosecution.

HONG KONG COURT REFUSES STAY TO ARBITRATION AS DISPUTES OUTSIDE THE SCOPE OF ARBITRATION CLAUSE

26 March 2020: In *Magnus Leonard Roth v Vitaly Petrovich Orlov* [2020] HKCFI 525, the Hong Kong Court of First Instance refused an application to stay a court action to arbitration on the grounds that there was no *prima facie* case that the disputes were covered by the relevant arbitration clause.

The defendant had agreed to sell its holdings in a fishing business to the plaintiff. Subsequently, the defendant failed to complete the sale, and agreed to pay compensation to the plaintiff ("**Oral Agreement**"). Subsequently, the parties executed a further agreement for the sale of the defendant's holdings in the business to the plaintiff ("**Framework Agreement**"), governed by English law and containing an arbitration clause covering any dispute "*arising out of or in connection with*" the Framework Agreement.

Days after the execution of the Framework Agreement, the parties executed a written agreement covering the substance of the Oral Agreement ("**Loan Agreement**") with no arbitration clause, submitting to the jurisdiction of the Hong Kong courts.

The plaintiff commenced proceedings under the Loan Agreement in the Hong Kong courts. The defendant applied for a stay in favour of arbitration under the Framework Agreement, on the basis that it covered the relevant disputes. The Court refused the application holding that the defendant had not made out a *prima facie* case that the arbitration clause covered the disputes under the Loan Agreement, placing particular emphasis on the fact that the parties were sophisticated international businessmen who had been legally advised; that the substance of the Loan Agreement could have been covered by the Framework Agreement, but was not; that the agreements were governed by separate legal jurisdictions; and that the purposes of the two agreements were distinct and different.

This case is a reminder that there are still limitations on the willingness of the Hong Kong courts to stay disputes to arbitration, and emphasises the importance of contractual interpretation and context in this regard.

STAY OF WINDING UP PROCEEDINGS IN FAVOUR OF ARBITRATION

7 April 2020: In *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158, the Court of Appeal ("**CA**") dismissed a creditor's winding up application in its entirety, where the underlying dispute over the debt in question was subject to an arbitration agreement. In this case, the debtor AnAn's dispute of the debt related to the underlying agreement and transaction between parties, which fell squarely within the parties' arbitration agreement. The CA overturned the High Court's decision and clarified the standard of review that debtors must satisfy in order to successfully challenge a winding up application brought against them. The Court found that the lower "prima facie" standard of review applied where the matters in dispute were subject to an arbitration agreement, and not the "triable issue" standard which ordinarily applied to debtors resisting winding up proceedings. The "prima facie" standard of review is satisfied where claims with prima facie merit fall within the scope of a valid arbitration agreement. This lower standard of review is also adopted in England.

In addition to satisfying the "prima facie" standard of review, a debtor must also prove that there is no abuse of process on its part in resisting the winding up proceedings. To do so, a debtor must demonstrate its bona fides in disputing the debt.

As to whether such a winding up application should eventually be stayed or dismissed by the Court, much turns on whether the debtor has taken any steps towards commencing arbitration proceedings. Where the debtor has taken steps to resolve its "genuine dispute" in arbitration, the

Court is likely to dismiss the winding up application. On the other hand, where a creditor is able to demonstrate its concerns as to the debtor's solvency, and the debtor has not proven that there are "triable issues" in its dispute of the debt, the court might be inclined to order a stay of the winding up proceedings instead. Therefore, realistically speaking, a debtor would still do well to meet the higher "triable issue" standard in order to effectively dispose of winding up proceedings before the Court.

HONG KONG COURT OF FIRST INSTANCE ("HKCFI") PENALISES SERIOUS BREACH OF COURT ORDER IN SUPPORT OF ENFORCEMENT PROCEEDINGS

23 April 2020: In *La Dolce Vita Fine Dining Co Ltd v. Zhang Lan and Others* [2020] HKCFI 622, the respondents applied ("**Application**") to set aside the enforcement of CIETAC arbitral awards against them ("**Awards**") or alternatively stay the Application pending the outcome of set-aside proceedings in the PRC supervisory courts.

At the time of the Application, Zhang was in contempt of court for non-compliance with an earlier asset disclosure injunction. Therefore, in response, La Dolce Vita applied for a *Hadkinson* order against Zhang (which sought to impose the condition that Zhang comply with the asset disclosure injunction before she could be heard by the Hong Kong courts), and sought security of costs as a condition of the HKCFI granting the respondents' application to stay the Application.

In granting the *Hadkinson* order, HKCFI was influenced by Zhang's conduct in previous proceedings, noting that she had not been candid or forthcoming, and that her evidence had been generally unreliable. It further stated that a *Hadkinson* order was appropriate as Zhang was in wilful and serious contempt of court, that there was no other effective means of securing Zhang's compliance with the disclosure injunction, and that Zhang's refusal to fully disclose her assets impeded the course of justice as this information was uniquely within her knowledge and required to prevent the dissipation of her assets.

Despite taking a preliminary view that the Awards were manifestly valid, the HKCFI agreed to stay the Application pending the outcome of the set-aside proceedings in the PRC supervisory courts, provided that the respondents pay significant security for costs into court. This decision highlights the importance of the conduct of the parties in arbitration or related court proceedings, and serves as a reminder that parties may be penalized by national courts for unjustified behaviour.

EUROPE, THE MIDDLE EAST AND AFRICA

ADGM COURT ENFORCES FOREIGN ARBITRAL AWARD UNDER NEW YORK CONVENTION

8 October 2019: In *A4 v B4* [2019] ADGMCFI 0007, the ADGM court considered an application for the enforcement of a London-seated arbitral award issued in an LCIA arbitration. Both parties in this case were incorporated onshore in Abu Dhabi and there was no evidence that the award debtor had any assets located within the ADGM (the award debtor having failed to take part in the proceedings).

The Court held that a London-seated award is a "*New York Convention Award*" for the purposes of the ADGM Arbitration Regulations. Those Regulations further provide that a New York Convention Award must be recognised and enforced within the ADGM as if it were a judgment of the ADGM Courts. The court found no grounds for refusing the recognition and enforcement of the award and, therefore, made the order sought.

The Court also considered the question of whether the award creditor was using the Court as a "*conduit*" jurisdiction – i.e., seeking ratification and recognition of the award in the ADGM (where the award debtor had no assets), and then seeking enforcement of the ratified award onshore in Abu Dhabi, where the award debtor was incorporated and presumably had assets. The Court held that: (i) the award debtor had not challenged the recognition and enforcement; and (ii) there was no evidence that it did not, or would not in the future, have assets in the ADGM against which to enforce the award.

This judgment potentially casts doubt on the prevailing position in the UAE legal community that, where ratification proceedings are taking place in one jurisdiction (e.g., the DIFC or ADGM) and annulment proceedings are taking place in another (e.g., in the onshore local courts), the jurisdiction in which the award debtor's assets are located is the proper jurisdiction for any questions regarding the enforcement of the award.

JOINT JUDICIAL COMMITTEE PUTS AWARD DEBTOR BACK IN ITS SEAT

11 December 2019: In *AF Construction Company LLC v Power Transmission Gulf* (Cassation No. 8 of 2019, Judicial Tribunal), the Joint Judicial Committee in Dubai (the "**JJC**") decided that the courts of the seat of the arbitration have jurisdiction for hearing applications against the arbitral award.

The JJC was set up in 2016 to resolve jurisdictional conflicts between the Dubai International Financial Centre ("**DIFC**") and onshore Dubai Courts. Traditionally, the JJC has tended to favour the onshore Dubai Courts in determining jurisdictional questions and been used by recalcitrant award debtors to delay enforcement. However, recent JJC judgments show that it is moving away from this tendency and becoming increasingly intolerant of being used by parties to delay enforcement.

This case involved an arbitration between a contractor and sub-contractor conducted under the Dubai International Financial Centre-London Court of International Arbitration ("**DIFC-LCIA**") Arbitration Rules. The arbitration agreement specified that the seat of the arbitration was the DIFC. However, the arbitration hearing took place in the Dubai Marina, a location "onshore" in Dubai (i.e., outside the geographical limits of the DIFC). The tribunal decided in favour of the claimant (the respondent in the JJC proceedings), which then sought to ratify the award in the DIFC court. The respondent (the appellant in the JJC proceedings) challenged the award before the Dubai courts and an application with the JJC, arguing that the Dubai courts had jurisdiction to hear matters concerning the award and not the DIFC courts. In the JJC application, the respondent/appellant argued that, because the arbitration hearing took place in "onshore" Dubai, the Dubai courts have exclusive jurisdiction in relation to the award.

The JJC dismissed the application and held that the seat of the arbitration is the relevant jurisdiction for hearing applications relating to the award. Given the parties agreed that the DIFC was the seat of the arbitration, the JJC found that the DIFC courts had jurisdiction to hear the case and the Dubai courts must cease hearing this case. The JJC also noted that the DIFC-LCIA Rules expressly contemplated that an arbitration hearing conducted under them could take place in a location outside of the DIFC.

DETERMINING THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT UNDER ENGLISH LAW

20 January 2020: In the first half of 2020, the English Court of Appeal ("**EWCA**") issued two decisions on the determination of the law applicable to the arbitration agreement. Although both decisions have followed the criteria established in the *SulAmérica* case, the court reached two different conclusions.

In the first precedent, the EWCA held that an express choice of law to govern the main contract will also determine the law of the arbitration agreement contained therein, in the absence of a clear indication that the arbitration clause is to be construed separately.

The dispute in *Kabab-Ji S.A.L (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, arose out of a franchise agreement that contained: (i) an express choice of English law as the substantive law applicable to the main contract; (ii) an arbitration agreement providing for arbitration in Paris; and (iii) a No-Oral-Modification clause. Kabab-Ji brought an arbitration in Paris. The arbitral tribunal decided that, under English law, the question of whether Kout was bound by the arbitration clause was governed by French law.

Kabab-Ji sought the recognition and enforcement of the award in England, which was eventually refused. At first instance, the court noted that there was a conflict in the previous authorities as to the governing law of an arbitration clause in circumstances where the clause itself was silent.

In summary, both the High Court judge and the EWCA reached the same conclusion: that the parties' express choice of English law to govern the

main contract was also an express choice of the same law to govern the arbitration agreement. Where there was no indication that the arbitration agreement was to be construed separately from the rest of the contract, the contract should be construed as a whole and the express choice of law applied to all its provisions. The choice of Paris as the seat would not implicitly override this choice. Interestingly, the Paris court of appeal in hearing an application for the annulment of the underlying arbitration award decided otherwise and held that French law, being the law of the seat, applied.

In contrast to *Kabab-Ji*, the EWCA reached a different conclusion in a second case and held that the law of the seat would be the law governing the arbitration agreement. The main reason for this conclusion was that in that case, the parties had not expressly chosen the law governing the main contract and so the court held that there was a strong presumption that the parties had impliedly chosen the proper law of the arbitration agreement to be the choice of the seat. That case is now being brought to the UK Supreme Court which will provide some much needed clarity on this area of law.

UK SUPREME COURT LIFTS STAY ON MICULA AWARD

19 February 2020: The UK Supreme Court ("**UKSC**") has unanimously allowed Sweden's Micula brothers to enforce an ICSID arbitral award worth €300 million against Romania even though it is the subject of a pending State aid investigation by the European Commission. The judgment by the UKSC constitutes an important milestone in the *Micula* case and bears strong testament to the UK's commitment to its international obligations and, specifically, international conventions in the context of international arbitration.

The Micula brothers commenced ICSID arbitration proceedings against Romania seeking compensation for Romania's premature withdrawal of tax incentives. A majority ICSID tribunal held that such withdrawal constituted a breach of the fair and equitable treatment standard and order Romania to pay compensation, despite the European Commission ruling that such payment constituted illegal State aid. After the Micula brothers successfully registered the ICSID Award in the English High Court, Romania filed a set-aside application. The English Court of Appeal upheld a stay of enforcement of the award pending determination of the State aid proceedings before the General Court of the CJEU ("**GCEU**"), and also ordered Romania to provide security. Romania appealed the security and the Miculas cross-appealed the stay.

The UKSC lifted the stay and held that the stay was not consistent with the ICSID Convention on the basis that it was not a limited stay of execution on procedural grounds but, rather, a prohibition on the enforcement of the ICSID Award on substantive grounds until the GCEU's ruling was handed down. The UKSC also held that since the UK's membership of the ICSID Convention predated its accession to the EU, and that the UK's obligations under the ICSID Convention were owed to all other ICSID contracting states, the UK's obligation to enforce ICSID awards took precedence over its duty of sincere cooperation under EU law.

GERMAN COURT RULES ON DETERMINATION OF FOREIGN LAW BY GERMAN JUDGES

18 March 2020: The German Federal Court of Justice (*Bundesgerichtshof*) rendered a decision on the determination of foreign laws in German legal proceedings by German judges (Case No. IV ZR 62/19). The court held that the judge has to determine the foreign law ex officio based on section 293 of the German Code of Civil Procedure ("**ZPO**"). This entails that the German judge is required to apply the foreign law as a judge of the respective foreign country would interpret and apply the foreign law. The judge's duty to investigate the foreign law is determined by the circumstances of the individual case. The more complex and more unknown the foreign law is, the higher the duty to investigate is.

ENGLISH COURT CONFIRMS IT HAS THE POWER TO ORDER A THIRD PARTY WITNESS TO GIVE EVIDENCE IN SUPPORT OF ARBITRATION

19 March 2020: In *A and B v C, D and E* [2020] EWCA Civ 409, the English Court of Appeal ("**EWCA**") ruled that the powers exercisable by English courts in support of arbitral proceedings, as outlined in Section 44 of the English Arbitration Act 1996 ("**EAA**"), may apply against non-parties to the arbitration. Pursuant to Section 44(2)(a), the Court of Appeal ordered the taking of evidence by way of deposition from a third party witness in aid of an arbitration seated in New York.

The arbitration arose out of two settlement agreements between the appellants (A and B) and the first and second respondents (C and D) in connection to the development of an oil field off the coast of Central Asia. The dispute concerned deductions from payments due to the appellants from the sale proceeds of the oil field. The third respondent (E), who was not a party to the arbitration and was based in England, was one of the negotiators of the settlement agreements but could not go to New York to give evidence. The arbitrators granted the appellants permission to apply to English courts to compel E's testimony by deposition.

The High Court dismissed the appellants' application. Foxton J relied on two other Commercial Court authorities that had denied similar applications under Section 44 of the EAA: (i) *Cruz City Mauritius Holdings v Unitech Limited*; (ii) *DTEK Trading SA v Morozov*. Those cases concerned, however, the granting of interim injunctions (Section 44(2)(e)) and the preservation of evidence (Section 44(2)(b)), respectively. Eventually, the EWCA overhauled the first instance decision. According to Flaux LJ's opinion, Section 44(2)(a) shall be construed narrowly as giving the courts the power to order the taking of evidence by way of deposition from a non-party witness to support the arbitration. Flaux LJ pointed out that the "narrow approach" of interpretation of Section 44(2)(a) makes this provision to be applicable to third parties, while the other sub-items may not be, as decided in the other precedents. He concluded that "*[a]ny apparent inconsistency between the various heads of subsection (2) may be explained by the different language of those heads.*"

ENGLISH COURT ALLOWS A RARE SUCCESSFUL CHALLENGE TO AN ARBITRAL AWARD ON A POINT OF LAW

23 March 2020: In *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm), the English High Court allowed a rare appeal against an arbitral award on a point of law pursuant to section 69 of the Arbitration Act 1996 ("**Section 69**").

MTM Trading LLC ("**the Owners**") chartered a vessel to Tricon Energy Ltd ("**the Charterers**") under a charterparty. The Owners brought a demurrage claim as a result of delays, supported by various documents including the demurrage invoice and a statement of facts. The Charterers alleged that the claim was time-barred pursuant to Clause 38 of the charterparty which required the Charterer to receive "*a claim/invoice in writing and all supporting documents … within [90] days after completion of discharge of the cargo covered by this Charter Party or after other termination of the voyage, whichever occurs first.*" The Charterers contended that the Owners did not provide copies of the bills of lading within the 90 day time period.

The arbitral tribunal determined that it was not necessary for the Owners to submit the bills of lading and awarded the Owners demurrage. The Charterers appealed the award under Section 69, on the question of whether a demurrage claim will be time-barred if the vessel owner fails to provide copies of the bills of lading, where the charterparty requires demurrage to be calculated by reference to bill of lading quantities, and where the charterparty contains a demurrage time bar which requires provision of all supporting documents. The Court held that the charterparty made it clear that pro-rating for demurrage purposes had to be calculated by reference to the bill of lading quantities and that Clause 38 referred to "all supporting documents". Therefore, the Court concluded that the Owners' failure to provide the bills of lading rendered the demurrage claim time-barred.

INTERIM INJUNCTION RESTRAINING A CONSULTING FIRM WITH OFFICES IN ASIA AND UK FROM ACTING AS EXPERTS ON OPPOSING SIDES OF RELATED CONSTRUCTION ARBITRATION PROCEEDINGS

3 April 2020: In *A Company v X,Y and Z* [2020] EWHC 809 (TCC), Mrs. Justice O'Farrell, DBE, in the Technology & Construction Court ("**TCC**") extended an interim injunction preventing a global consultancy firm from acting as independent experts, in different disciplines (delay and quantum), on opposing sides of two separate arbitration proceedings arising out the same project. This was based on the fiduciary duties owed by the whole global firm to the party which had first engaged one of its experts.

The Court emphasised that the scope of instructions under the first expert engagement was critical in establishing the fiduciary duties owed by the global firm. While the expert was required to submit an expert report, act independently and

comply with the duties set out in the CIArb Expert Witness Protocol, the engagement also required the expert to provide "*extensive advice and support*" to the claimant, which gave rise to a "*clear relationship of trust and confidence*" and thereby a fiduciary duty of loyalty. This duty was held not to be inconsistent with the paramount duty of the expert to the Tribunal.

The fiduciary duties were held to apply across the separate entities of the consulting firm which is managed and marketed as one global firm, and in respect of which there are common financial interests. Once engaged by a party in relation to provision of delay analysis expert services from its Asia office in one arbitration, the same firm could not provide quantum or delay services from its UK office against the same party in a related arbitration on the same project. Importantly, the Court held that a comparison between such a firm and Barrister's Chambers (members of which routine act on opposing sides of litigation and arbitration) is not appropriate.

DUBAI COURT OF CASSATION ISSUES JUDGMENT WITH IMPORTANT IMPLICATIONS FOR CLAIMING COSTS IN ARBITRATION

06 April 2020: A recent Dubai Court of Cassation (Case No. 990 of 2019) judgment is likely to have a significant impact on the recovery of costs in arbitrations conducted under the Dubai International Arbitration Centre ("**DIAC**") Rules. In this case, the parties' lawyers signed terms of reference expressly agreeing to grant the sole arbitrator to award legal costs in a DIAC arbitration. In issuing the final award, the sole arbitrator ordered the claimant to pay the respondents' legal costs.

The claimant challenged the award before the Dubai Court of Appeal on the basis that its lawyers did not have authority to agree to grant the sole arbitrator authority to award legal costs. The Court of Appeal partially set aside the award, insofar as it related to the award of legal costs, finding that the claimant's lawyers did not have authority to make such an agreement. The Court of Cassation upheld the Court of Appeal's decision.

This is an important decision, which is likely to impact the recovery of legal costs in DIAC arbitrations. Legal costs are not recoverable under the DIAC Rules, unless parties agree otherwise. Parties will now need to expressly authorise – practically, through a power of attorney – their lawyers to agree in turn to grant a tribunal authority to award legal costs.

GERMAN COURTS DECLINES TO RULE ON SOVEREIGN ACTS OF FOREIGN COUNTRIES

06 May 2020: The German Federal Constitutional Court rejected an appeal in connection with a debt restructuring of Greek government bonds (Case No. 2 BvR 331/18). The court applied the general rule of international law that in general no foreign sovereign country is subject to a foreign jurisdiction. The restructuring of Greek government bonds is a sovereign measure of a foreign state and thus not subject to German jurisdiction.

RUSSIA APPEALS TO DUTCH SUPREME COURT AFTER THE HAGUE COURT OF APPEAL HAD REINSTATED THREE ECT AWARDS REQUIRING RUSSIA TO PAY USD 50 BILLION

15 May 2020: After the Hague Court of Appeals had reinstated three Energy Charter Treaty awards which require Russia to pay USD 50 billion to the majority stakeholders of Yukos for the expropriation of the oil company, Russia filed an appeal to the Dutch Supreme Court with a request that some questions of interpreting the Energy Charter Treaty be referred to the European Court of Justice. The appellate court ruled that there was no conflict between the ECT's investor-state arbitration provisions and Russian law. It will be interesting to see whether Russia is trying to benefit from the ECJ's opinion in the *Achmea* decision on investor-state arbitration.

NORD STREAM 2 – ECT CLAIM AGAINST EUROPEAN UNION

26 May 2020: In *Nord Stream 2 AG v The European Union*, PCA Case No. 2020-07, the European Union faced its first investment treaty arbitration as the respondent. In the Energy Charter Treaty ("**ECT**") arbitration proceedings before the Permanent Court of Arbitration ("**PCA**"), Nord Stream 2 AG, a subsidiary of the Russian company Gazprom, is suing the European Union for changes to the EU's 2009 gas directive.

The dispute relates to the Nord Stream 2 gas pipeline currently under construction and designed to transport natural gas through the Baltic Sea from Russia to Germany. The changes to the 2009 EU gas directive extend the EU's internal market liberalization rules to cover gas pipelines from non-EU countries. For Nord Stream 2, this means that the project may have to submit to the EU's rules on unbundling, tariff regulation and third-party access. Nord Stream 2 AG claims that in breach of the ECT the changes affect the profitability of the project, are equivalent to expropriation and will cause losses of more than EUR 8 billion.

AMERICAS

BRAZILIAN SUPERIOR COURT OF JUSTICE ALLOWS THE ENFORCEMENT OF AN ARBITRATION AWARD ARISEN FROM ARBITRATION AGREEMENT NOT SIGNED BY THE ENFORCEMENT PLAINTIFF

04 February 2020: In *Rogerio Inacio Rohr* v *Tres Divisas Armazens Gerais Ltda*. – REsp. no. 1,818,982, the Brazilian Superior Court of Justice ("**STJ**") allowed the enforcement action of an arbitration award that arose out of an arbitration agreement not signed by the enforcement plaintiff (creditor). Even though the arbitration agreement was not signed by the creditor, the STJ concluded that the arbitration agreement and the arbitral award are valid, as the arbitration agreement was signed by the enforcement defendant (debtor) and the arbitral proceeding was filed by the creditor. Therefore, both parties consented to the arbitration and the arbitral award is enforceable.

BRAZILIAN SUPERIOR COURT OF JUSTICE RULES THAT THE FEDERAL GOVERNMENT CANNOT BE SUBMITTED TO ARBITRATION AS THE CONTROLLING SHAREHOLDER OF A PUBLIC COMPANY WITHOUT A SPECIFIC LAW

11 February 2020: Conflict of Competence no. 151,130 filed before the Brazilian Superior Court of Justice ("**STJ**") involves an arbitration commenced by minority shareholders against Petroleo Brasileiro S.A. ("**Petrobras**") and the Federal Government to ask compensation for damages arising from the devaluation of Petrobras' shares due to the negative impacts of Operation Car Wash. After the Federal Government was notified of the arbitration, it had asked to be excluded from the arbitration, but the arbitral tribunal denied the request. Then, the Federal Government filed a lawsuit before the Federal Courts with the same request (to be excluded from the arbitration), which was granted through an injunction. In view of the conflicting decisions between the arbitral tribunal and the Federal Court, Petrobras' minority shareholders filed a conflict of competence before the STJ.

The STJ decided that the Federal Government, as the controlling Petrobras' shareholder, cannot be submitted to arbitration without a specific federal law in this regard. STJ stated that Petrobras' bylaws only set forth the company's will to submit its own disputes to arbitration, without any provision on the Federal Government's will to do so. Hence, pursuant to the principle of legality, the case must be decided by the Federal Courts.

FLORIDA COURT ISSUES "OUTLIER" RULING: PARTIES INCORPORATION OF ARBITRAL RULES DID NOT DELEGATE ARBITRABILITY DETERMINATION TO ARBITRATOR

25 March 2020: In *Doe v. Natt*, 2D19-1383, 2020 WL 1486926 (Fla. Dist. Ct. App. Mar. 25, 2020), a Florida appeals court ruled that parties to a "*clickwrap*" agreement incorporating the American Arbitration Association ("**AAA**") Rules did not "*clearly and unmistakably*" agree to delegate questions of arbitrability to an arbitrator.

Airbnb filed a motion to compel arbitration of plaintiffs' claims based on a clickwrap agreement plaintiffs entered when they created their Airbnb online accounts. The clickwrap agreement binds disputes to arbitration, which was to "*be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules . . . (the 'AAA Rules')*" and directed the account user to the AAA website. According to Airbnb, the scope of arbitrability was assigned to the AAA by reference to the AAA Rules, more specifically, AAA Rule 7 which states that the "*arbitrator shall have the power to rule on . . . the arbitrability of any claim or counterclaim.*" The circuit court agreed, finding that it was powerless to make a determination because the issue of arbitrability had to be decided by the arbitrator, not the court. The plaintiffs appealed.

Recognising that its decision "*may constitute something of an outlier in the jurisprudence of arbitration*", the appeals court reversed. It found that the parties did not "*clearly and unmistakably*" agree to delegate questions of arbitrability to an arbitrator. The court first noted that the clickwrap agreement is silent on the issue of who should decide arbitrability. The court then highlighted that the reference to the AAA Rules was limited to how "*the arbitration will be administered*", meaning the clickwrap agreement "*identif[ies] the applicability of that body of rules if an arbitration is convened*", but it is "*not 'clear and unmistakable evidence' that these parties agreed to delegate the 'who decides' question of arbitrability from the court to an arbitrator*".

Whether a party intends to delegate the issue of arbitrability to an arbitrator by incorporation of arbitral rules in an agreement is the subject of great debate. In early March, the issue was presented to the U.S. Supreme Court in the *Archer and White Sales Inc.* case. The Supreme Court has yet to rule on that pending petition.

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII V CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.

02 April 2020: In *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.*, the California Supreme Court found that agreements to waive Hague Convention formal service requirements are enforceable with parties from China. In 2008, Rockefeller Technology Investments (Asia) VII ("**Rockefeller**") entered into a Memorandum of Understanding with Changzhou SinoType Technology Co., Ltd. ("**SinoType**"). The parties agreed that they would "*submit to the jurisdiction of the Federal and State Courts in California (…)*" and resolve disputes in an arbitration in Los Angeles. They also consented to service of process by fax, email, and Federal Express ("**FedEx**").

When a dispute arose, Rockefeller used FedEx and email to send arbitration notices to SinoType. SinoType failed to appear and the arbiter entered a $414 million default award against SinoType. After the Los Angeles Superior Court confirmed the award, Rockefeller tried to enforce the judgment. SinoType argued that the agreement violated the Hague Convention, which requires service of process to go through a Central Authority, and moved to set aside the judgment. The trial court denied the motion, but the California Court of Appeal reversed, stating that service violated Hague Convention requirements.

In 2020, the California Supreme Court reversed the appellate court decision and found that Hague Convention formal service requirements did not apply. The court explained that the requirement of formal service is governed by the law of the forum, which was California in this case. The court found that the parties submitted to the personal jurisdiction of the California courts by agreeing to arbitrate in California. California's Code of Civil Procedure Section 1290.4(a) authorizes "*parties to an arbitration agreement to waive otherwise applicable statutory requirements for service of summons (…) and agree instead to an alternative form of notification.*" The court held that the parties' agreement waived formal service of process in favour of informal notification through FedEx. The contract left "*little doubt that the parties intended to supplant any statutory service procedures with their own agreement for notification via Federal Express.*" Finally, the court explained that its decision would "*promote certainty and give effect to the parties' express intentions.*"

NEW YORK CONVENTION DOES NOT CONFLICT WITH DOMESTIC EQUITABLE ESTOPPEL DOCTRINES

01 June 2020: In *GE Energy Power Conversion France SAS, Corp., fka Converteam SAS, Petitioner v. Outokumpu Stainless USA, LLC, et al.* (Case No. 18-1048), the Supreme Court of the United States ruled that state law equitable estoppel doctrines, which permit non-signatories to an arbitration agreement to force signatories to arbitrate disputes that arise under such agreements, do not conflict with the New York Convention ("**Convention**").

A non-signatory to a contract containing an arbitration clause moved to compel one of the signatories to arbitration. A United States District Court compelled arbitration. The United States Court of Appeals for the Eleventh Circuit reversed, finding that the Convention requires parties to "*actually sign an agreement to arbitrate their disputes in order to compel arbitration.*" The Eleventh Circuit held that a non-signatory could not

rely on state-law equitable estoppel doctrines to compel arbitration because equitable estoppel conflicts with the Convention's signatory requirement.

The Supreme Court reversed, finding that the Convention does not conflict with equitable estoppel doctrines. Central to the Supreme Court's unanimous holding was that the "*text of the New York Convention does not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel,*" finding the "*silence is dispositive here…*" Instead, the Court found that the Convention "*contemplate[s] the use of domestic doctrines to fill gaps in the Convention.*" The Court's opinion demonstrates the broader trend that courts favour resolution of disputes through arbitration.

Firm Updates

2020: Dany Khayat (Paris) was ranked as a "Thought Leader" in Who's Who Legal Arbitration 2020. Alain Farhad (Dubai) and Yu-Jin Tay (Singapore) were both ranked as "Global Leaders". Alejandro Lopez Ortiz (Paris), Patricia Ugalde Revilla (Paris), Rachael O'Grady (London) and Kwadwo Sarkodie (London) were all ranked in the "Future Leaders" category.

January 2020: The Legal 500 Asia-Pacific recognised our team for "Dispute Resolution – International Arbitration" in Hong Kong and "International Arbitration: South Korea" in Singapore.

January 2020: Mayer Brown was ranked in Legal 500 Asia-Pacific 2019 for Arbitration in Hong Kong, Singapore and South Korea. Thomas So (Hong Kong) was also recognised as a "Leading Individual".

February 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) was ranked for the second consecutive year as "Leading Arbitration Lawyer" in Brazil by Chambers Global Guide 2020.

February 2020: Tauil & Chequer Advogados in association with Mayer Brown was ranked as a "Highly Recommended" firm for its arbitration practice by Leaders League 2020 Edition.

February 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) and Gustavo Scheffer (São Paulo) featured as "Recommended Arbitration Lawyer" by Leaders League 2020 Edition.

February 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) was ranked for the second consecutive year as "Leading Arbitration Lawyer" in Brazil by Chambers Global Guide 2020 Edition.

March 2020: Tauil & Chequer Advogados in association with Mayer Brown was ranked as a "Recommended Firm" for its arbitration practice by Latin Lawyer 250 2020 Edition.

March 2020: Mayer Brown was ranked in Chambers Global for Arbitration in Asia-Pacific Region, China, France and Singapore. We also obtained a number of leading individual recognitions including Dany Khayat (Paris), Alejandro Lopez Ortiz (Paris), Yu-Jin Tay (Singapore) and Gustavo Fernandes de Andrade (Rio de Janeiro).

18 March 2020: Mayer Brown partner Yu-Jin Tay (Singapore) co-authored the Seoul Protocol on Video Conferencing in International Arbitration, which has been nominated for the GAR Pandemic Response Award.

April 2020: The Legal 500 EMEA recognised our team in the United Arab Emirates for "Dispute Resolution: Arbitration and International Litigation" and recognised Dany Khayat in France as a "Leading Individual for Dispute Resolution: International Arbitration".

April 2020: Mayer Brown was once again recognised in the Global Arbitration Review's GAR 100.

April 2020: Mayer Brown's COVID-19 Global Response Team launched two new tools on its COVID-19 portal, the Back to Business Navigator and the Global Stimulus Navigator, to help companies navigate the myriad legal issues across jurisdictions that most affect their business.

May 2020: Mayer Brown was ranked in BTI Consulting Group's list of top law firms for providing strong client service during the COVID-19 crisis. Based on feedback from top legal decision makers, the law firms included in the BTI list have "really stepped it up, jumped in, and are truly committed" in a time of pandemic.

May 2020: Benchmark Litigation Asia Pacific honoured Menachem Hasofer in Hong Kong as a "Litigation Star" for Construction and International Arbitration and Yu-Jin Tay in Singapore as a "Litigation Star" for International Arbitration.

May 2020: Dany Khayat (Paris) has been appointed as member of the Advisory Committee of The Cairo Regional Centre for International Commercial Arbitration.

May 2020: Alina Leoveanu (Paris) has been appointed as member of the ICC Task Force on "ADR and Arbitration", a newly constituted Task Force of the ICC Commission on Arbitration and ADR.

June 2020: The Legal 500 US recognised Mayer Brown for "International Arbitration" in the United States.

Mayer Brown Key Upcoming Events

09 July 2020: Mayer Brown partners Charles E. Harris, II and Sarah Reynolds (both Chicago) will participate as speakers on a webinar titled "What Arbitrators Need to Know: UCC "Battle of the Forms" and Arbitrability".

10 July 2020: Mayer Brown Paris will host an event during the virtual Paris Arbitration Week on the topic of Investor-State Mediation: Breaking Down Misconceptions. More details about the event will be posted shortly on the PAW's website: https://parisarbitrationweek.com/calendar/.

10 July 2020: Alina Leoveanu (Paris) will participate as a speaker at the virtual event organised by FTI Consulting as part of the Paris Arbitration Week on the topic of "*Construction arbitration – it's not all about the money*".

23 July 2020: João Marçal Martins (São Paulo) will speak about Evidence and International Dispute Resolution during a webinar hosted by the Chamber of Conciliation, Mediation and Arbitration CIESP-FIESP.

27 August 2020: Yu-Jin Tay (Singapore) will speak about IP-related disputes in International Arbitration during a webinar hosted by the Singapore Institute of Arbitrators, the Intellectual Property Office of Singapore and the National University of Singapore Faculty of Law.

13 December 2020: Fernando Pérez Lozada (Paris) has been selected as a panellist to participate in the ILA 79th Biennial Conference, Kyoto 2020 with the topic "*Investors as respondents of State counter-claims in the Energy Sector*".

Due to COVID-19, the majority of our upcoming events and speaking opportunities will be delayed to 2021. Once details have been confirmed we will email you an invitation with further details. Alternatively, please check our website which will be updated regularly.

Mayer Brown Key Past Events

10 January 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) was a moderator at a conference hosted by Arbitration and Public Administration – CBAr in São Paulo, Brazil.

16 January 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) spoke at a lecture for students of St. John's University School of Law on an overview of the Brazilian law system.

17 January 2020: Alain Farhad (Dubai) spoke at a seminar organised by CIETAC on Legal Updates in the Middle East.

20-24 January 2020: Sarah Reynolds (Chicago) spoke on issues in international arbitration at the JOI seminar focused on International Construction Dispute Resolution: Managing Risk Abroad.

23 January 2020: Kwadwo Sarkodie spoke at the Africa Summit on Investments & Projects in Brazil conference which was hosted in our London office.

31 January–1 February 2020: Alina Leoveanu (Paris) spoke about Arbitration Agreement, Arbitrability and Case strategy during Workshop I organized by ICC Poland WAW (Warsaw Arbitration Workshops).

05 February 2020: Yu-Jin Tay (Singapore) spoke at an SIAC conference in Abu Dhabi.

05 February 2020: Dany Khayat (Paris) spoke about the evolution of ICSID arbitration at the round table and book launch of The ICSID Convention, Regulations, and Rules: A Practical Commentary.

06–12 February 2020: Mayer Brown sponsored the ICC Mediation Competition Conference in Paris. ICC's biggest educational event of the year, the ICC Mediation Competition gathers over 350 students and coaches every year, in addition to 130 professional mediators and mediator trainers from all over the world and a number of volunteers, sponsors and observers.

07 February 2020: Alina Leoveanu (Paris) spoke about the efficiency of arbitral proceedings at the ICC Conference in Dakar, Sénégal: *L'Afrique et l'Arbitrage CCI*.

10–11 February 2020: Gustavo Scheffer (São Paulo) spoke at the ICC FIDIC Brazil Conference.

16–17 February 2020: Dany Khayat (Paris) moderated the panel on "Arbitrating M&A disputes in the MENA" at the 8th ICC MENA Conference on International Arbitration in Dubai.

27 February 2020: Sarah Reynolds (Chicago) spoke on a panel hosted by the Young ITA at Pepperdine's Campus. The panel provided a brief overview of the Restatement of the US Law of International and Investor-State Arbitration.

27–28 February 2020: Patricia Ugalde Revilla (Paris) spoke at the *XI Miradas Cruzadas Franco-Españolas Sobre Las Buenas Practicas En El Arbitraje Internacional* that took place in Paris. The conference was jointly organized by Club Español del Arbitraje and *Comité Français de l´Arbitrage*.

05 March 2020: Mayer Brown Paris hosted the next Young Professionals of Construction in Paris (YPCP) conference on a construction related topic in Latin America. Alejandro Lopez Ortiz and Patricia Ugalde Revilla (both Paris) also spoke at the event.

09 March 2020: B. Ted Howes (New York) moderated an event held in our New York office titled "Moneyball for Arbitrators: The Impact of Arbitrator Intelligence's New Data Analytics on the selection of Arbitrators." The keynote speaker was Professor Catherine Rogers, founder and CEO of Arbitrator Intelligence (AI).

11–12 March 2020: Gustavo Scheffer (São Paulo) spoke at the "International Commerce, Investments and Arbitration Conference" in Montevideo, Uruguay.

19 March 2020: Mayer Brown sponsored the Brazilian Arbitration Day, an event promoted by ICC Brazil in São Paulo.

25 March 2020: Alina Leoveanu (Paris) participated as a speaker at the first Generations in Arbitration Webinar Panel organised by the Moot Alumni Association on the topic "Fantastic Expert Conflicts and How to Identify Them".

01 April 2020: Mayer Brown partner Ulrich Helm (Frankfurt) was a speaker in the Mayer Brown webinar on the legal challenges for businesses in connection with COVID-19.

17 April 2020: Mayer Brown partner Sarah Reynolds (Chicago) spoke on a webinar hosted by the California Lawyers Association on "Conducting Effective Dispute Resolution with Remote Technology: A Primer for California Counsel".

28 April 2020: Gustavo Scheffer (São Paulo) moderated a panel on Collaborative Approach Against the COVID-19 Pandemic (*Abordagem Colaborativa para enfrentamento da Covid-19*) in the webinar promoted by the Brazilian Institute of Construction Law (*Instituto Brasileiro de Direito da Construção - IBDiC*). The event was chaired by Professor David Mosey, Director of the Centre of Construction Law and Dispute Resolution of the King's College London.

28 April 2020: Mayer Brown partner Sarah Reynolds (Chicago) was a panellist on a webinar organised by the American Bar Association Section of Litigation on "Effective Litigation, Arbitration & Mediation Using Remote Technology Tools".

14 May 2020: Mike Lennon (Houston), Mark Stefanini (London) and Gustavo Fernandes de Andrade (Rio de Janeiro) hosted a webinar on "Arbitration and Energy: Three Recent JOA Developments".

18 May 2020: João Marçal Martins (São Paulo) spoke on "The Career of a Young Arbitrator" during a webinar promoted by the Brazilian Bar Association, São Paulo Section.

08 June 2020: Mayer Brown partner B. Ted Howes (New York) participated as a panel moderator at the PLI International Arbitration Day 2020 on a session titled "The International Arbitrators' Point of View".

09 June 2020: Mayer Brown partner Dr. Jan Kraayvanger (Frankfurt) held a webinar regarding the duties of managing directors in light of the current COVID-19 pandemic.

09 June 2020: Mayer Brown partners Brad Peterson, James Ferguson, Sarah Reynolds (all Chicago) and Miles Robinson (London) hosted a webinar on practical ways to optimise a contract's dispute clauses. To view the webinar or download the slides, please click here.

11 June 2020: Mayer Brown partner Ulrich Helm (Frankfurt) held a webinar with the ICC regarding dispute resolution in light of COVID-19.

16 June 2020: Gustavo Fernandes de Andrade (Rio de Janeiro) spoke at the webinar on Blockchain and Cryptocurrency: Practical Approach (*Blockchain e Criptomoedas: Aplicações Práticas*) promoted by Tauil & Chequer Advogados in association with Mayer Brown.

17 June 2020: Jawad Ahmad (London) has been invited to be a participant in an ITA advocacy virtual workshop.

19 June 2020: Partner Raid Abu-Manneh and Senior Associate Sam Prentki (both London) spoke about the importance of soft law and standard contracts in commercial arbitration and litigation at an event hosted by Queen Mary University of London, part of the CCLS 40th Anniversary Online Lecture Series.

19-20 June 2020: Alina Leoveanu (Paris) spoke about Post-hearing Briefs, Awards and Costs determination during Workshop VI organised by ICC Poland WAW (Warsaw Arbitration Workshops).

24 June 2020: Partners Dany Khayat (Paris), Gustavo Fernandes (Rio de Janeiro), Yu-Jin Tay (Singapore), James R. Ferguson (Chicago) and Senior Associate Rachael O'Grady (London) hosted a webinar on key issues that will arise in arbitrating COVID-19 contract disputes.

26 June 2020: Mayer Brown Counsel Gustavo Scheffer da Silveira (São Paulo) moderated a webinar on Dispute Boards organized by the ICC Brazil Task Force on Arbitration and Infrastructure. The event was conducted by former presidents of the Dispute Resolution Board Foundation (DRBF) James Perry and Linda Patterson, QC.

02 July 2020: Yu-Jin Tay (Singapore) spoke about Early Dismissal Procedure under the 2016 SIAC Rules and in International Arbitration during a webinar hosted by the Singapore International Arbitration Centre.

6 July 2020: Dany Khayat (Paris) participated as a speaker at the virtual event organised by Diales as part of the Paris Arbitration Week on the topic of Preparation of a Virtual Hearing and Mock Cross-Examination of an Expert.

Mayer Brown Publications

OPERATION OF FORCE MAJEURE IN AN EPIDEMIC

12 February 2020: Thomas So (Hong Kong) and Tom Fu (Beijing) discuss the operation of contractual force majeure clauses in light of the Covid-19 pandemic.

To read the full article, click here.

MICULA V ROMANIA: THE NEXT CHAPTER

19 February 2020: Rachael O'Grady and Havin Jagtiani (both London) authored an article relating to *Micula and others v Romania* [2020] UKSC 5, where the UK Supreme Court allowed the enforcement of an ICSID award against Romania in the UK.

To read the full article, click here.

CROSS-BORDER DISPUTES: ENGLISH COURT ENFORCES DUBAI MONEY JUDGMENT – PUBLIC POLICY NOT OFFENDED DESPITE ILLEGALITY RULING IN PARALLEL ARBITRATION AND ENGLISH/DUBAI LAW DIFFERENCES

28 February 2020: Daniel Hart (London) and Alain Farhad (Dubai) authored an article relating to *Lenkor Energy Trading DMCC v Irfan Iqbal* Puri [2020] EWHC 75, where the English High Court decided that it would not be contrary to English public policy to recognise the judgment of a Dubai Court in England.

To read the full article, click here.

IMPACT OF COVID-19 IN INTERNATIONAL ARBITRATION

20 March 2020: Raid Abu-Manneh (London), Menachem Hasofer (Hong Kong), B. Ted Howes (New York), Dany Khayat (Paris) and Yu-Jin Tay (Singapore) collaborated on an article relating to the impact of COVID-19 in international arbitration. This legal update described the measures that the main arbitral institutions have recently adopted, and the challenges that Mayer Brown's Global International Arbitration Practice have faced as a result of the COVID-19 pandemic.

To read the full article, click here.

THE IMPACTS OF COVID-19 ON THE JUDICIARY AND THE ARBITRATION CHAMBERS IN BRAZIL

27 March 2020: In light of the development of the COVID-19 situation, the courts and the main Brazilian arbitration chambers have been adopting preventive measures to minimize potential impacts and preserve the health and safety of all those involved in the proceedings. Therefore, the Litigation & Arbitration team of Tauil & Chequer in association with Mayer Brown has developed a report on the functioning of the arbitration chambers and judicial courts in Brazil.

To read the full report, click here.

THE CHALLENGES BROUGHT BY COVID-19: HOW HAS INTERNATIONAL ARBITRATION BEEN AFFECTED?

02 April 2020: Raid Abu-Manneh (London), Menachem Hasofer (Hong Kong) and Yu-Jin Tay (Singapore) discussed the impact of COVID-19 on international arbitration in this bylined article by the *Hong Kong Lawyer*.

To read the full article, click here.

CALIFORNIA SUPREME COURT REVERSES APPELLATE COURT RULING THAT PREVENTED CHINESE PARTIES FROM WAIVING HAGUE CONVENTION SERVICE REQUIREMENTS

22 April 2020: Sarah Reynolds and Linda Shi (both Chicago) authored an article on *Rockefeller Technology Investments (Asia) VII v Changzhou Sinotype Technology Co. Ltd*, a unanimous decision by the California Supreme Court which clarified that waivers of Hague Convention service requirements are enforceable with parties located in China.

To read the full article, click here.

FOR CHINESE CONTRACTORS, BELT AND ROAD INITIATIVE REWARDS COME WITH HEIGHTENED RISKS IN A CHANGING WORLD

28 April 2020: Tom Fu (Beijing), James Morris (London) and James Lewis (Hong Kong) discussed the growing risks for Chinese contractors in the Belt and Road Initiative in an article published by *South China Morning Post*.

To read the full article, click here.

ANALYSIS OF THE APPROACH TO CONCURRENT DELAY IN ENGLAND, THE UAE, GERMANY AND BRAZIL

May 2020: Mayer Brown partners Raid Abu-Manneh (London), Ulrich Helm (Frankfurt) and Jonathan Stone (London) and Global International Arbitration Legal Assistant Marcelo Richter (London), co-authored an article in the International Construction Law Review ("**ICLR**") on the different legal approaches to concurrent delay in construction projects in England, the UAE, Germany and Brazil.

To read the full article, click here.

10 GOLDEN RULES FOR SOLVING CONFLICTS IN CONSTRUCTION AND ENGINEERING PROJECTS

May 2020: Mayer Brown partner Ulrich Helm (Frankfurt) published an article in the ICC Germany Magazine 10th Edition on the 10 golden rules for solving conflicts in construction and engineering projects, in particular in connection with future COVID-19-related disputes.

To read the article, click here.

PROTECTION BY D&O INSURANCE IN CASE OF INSOLVENCY

May 2020: Mayer Brown partner Dr. Jan Kraayvanger (Frankfurt) published an article in the E-Book *GmbH-Geschäftsführer* 2020 regarding the protection of managing directors by a D&O insurance in case of insolvency.

To purchase the publication, click here.

CONTRACTS IN THE TIME OF COVID-19 IN THE UAE

04 May 2020: Mayer Brown partner Alain Farhad (Dubai) and associates Gerard Moore (Dubai) and Ali Auda (London/Dubai) co-authored an article discussing how UAE law may provide potential solutions to contractual parties suffering from the effects of the coronavirus global pandemic and subsequent economic crisis.

To read the article, click here.

NEW "RULE OF ORIGIN" PROVISIONS IN THE UNITED STATES-MEXICO-CANADA AGREEMENT MAY LEAD TO INCREASED LITIGATION REGARDING REGIONAL VALUE CONTENT

04 May 2020: Mayer Brown partners Matthew Marmolejo (Los Angeles), Sarah Reynolds (Chicago) and associate James Coleman (Chicago) co-authored an article which cautioned that the USMCA's tight rules of origin may be expected to result in more litigation on regional value content than had occurred under the looser NAFTA system.

To read the article, please visit Transactional Dispute Management (subscription required).

BRAZILIAN JOURNAL OF ARBITRATION / BRAZILIAN ARBITRATION COMMITTEE (CBAR)

June 2020: João Marçal Martins (São Paulo) and Marcelo de Souza Richter (London) authored two articles in the Brazilian Journal of Arbitration (Issue 66). João's work analysed the impacts of the COVID-19 pandemic in administered arbitrations. Marcelo published an introductory note to the article *The Jurisdiction of an International Commercial Arbitrator*, of Alan Redfern.

To read both articles, click here.

CONSTRUCTION CONTRACTS INVOLVING PUBLIC ADMINISTRATION IN BRAZIL

June 2020: Gustavo Scheffer da Silveira (São Paulo) authored an article in the book *International Arbitration: Law and Practice in Brazil*, published by the Oxford University Press. The article compares FIDIC standard forms and contracts for public works under Brazilian law.

To purchase the book, click here.

EMERGING TRENDS IN LITIGATION MANAGEMENT

11 June 2020: Mayer Brown partner Charles E. Harris, II (Chicago), along with several partners and associates of the Litigation and Dispute Resolution team in the US authored and edited a publication examining emerging trends that have made an impact across multiple areas of litigation, including advances in technology that have profoundly affected all areas of case strategy and litigation management.

To find out more and purchase the publication, click here.

THE IMPACT OF SUMMARY DISPOSITION ON INTERNATIONAL ARBITRATION: A QUANTITATIVE ANALYSIS

Spring 2020: B. Ted Howes and Allison Stowell (both New York) authored a bylined article on the adoption of summary disposition rules in international commercial arbitration in NYSBA's *New York Dispute Resolution Lawyer*. The full version of the article originally appeared in the May 2019 issue of *Dispute Resolution International*.

To read the full article, click here.

LAWYER'S LACK OF AUTHORITY COULD PROVE COSTLY

Spring 2020: Mayer Brown senior associate Gerard Moore (Dubai) published an article in the ICC Magazine on arbitration in the UAE, discussing the powers and duties of arbitral tribunals in the UAE.

To read the full article, click here.

HKSAR GOVERNMENT PILOT SCHEME ON FACILITATION FOR PERSONS PARTICIPATING IN ARBITRAL PROCEEDINGS IN HONG KONG

3 July 2020: Mayer Brown partners Venna Y. W. Cheng (Hong Kong) and Jennifer C. W. Tam (Hong Kong) discuss the Government Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong.

To read the full article, click here.

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