ReSolution in Brief

English abuse of process law applicable before English tribunals

In *Union of India v Reliance Industries Limited and another* [2022] EWHC 1407, the High Court of England and Wales considered the degree to which an English seated arbitral tribunal could still apply English principles of abuse of process to preclude a party from raising arguments which it should have raised earlier. The parties' contracts were governed by Indian law but were referred to the London-seated UNCITRAL arbitration. The Union of India sought to introduce a late defence to one of the claims but the tribunal dismissed this as an abuse of process as the arguments should have been raised at an earlier stage. The Union appealed the decision to the High Court on the basis that the tribunal had committed an error in law in that the English law principle had no application to an Indian law governed dispute.

In dismissing the appeal the High Court held that an abuse of process is a matter of procedure and follows the law of the seat, not the substantive law of the dispute, and its power was rooted in the Court's wider jurisdiction to protect its process from wasteful and duplicative litigation.

Pro-arbitration ruling out of the English Commercial Court

In *NDK Ltd v HUO Holding Ltd and another* [2022] EWHC 1682 (Comm), a dispute arose in regard to the operation of a Russian coalmine with three investors, the largest of which, NDK, was based in Cyprus. The agreement provided for English law and arbitration to be conducted at the LCIA (London Court of International Arbitration). The Articles of Association were governed by Cypriot law but did not contain a jurisdiction clause.

Disputes arose and NDK initiated proceedings in Cyprus. The other shareholders saw this as a breach of the arbitration agreement and commenced LCIA arbitration. The tribunal granted anti-suit relief against the ongoing claim in Cyprus. NDK appealed to the English Commercial Court on the basis that the tribunal lacked substantive jurisdiction, arguing that any claim brought under the Articles did not fall within the LCIA arbitration agreement. In dismissing the appeal the Court held that *any rational businessperson could only have intended that the LCIA Arbitration Agreement would apply to any disputes between the parties*. The Court was also satisfied that the matters raised in the Cyprus proceedings related to the agreement so as to fall within the LCIA arbitration agreement.

Canadian court clarifies when arbitral award may be set aside for unfairness

In *ENMAX Energy Corporation v TransAlter Generation Partnership*, 2022 ABCA 206, the appellants were arguing before the Alberta Court of Appeal that, in the course of a lengthy and complex commercial arbitration, they were treated *manifestly unfairly and unequally* by the arbitral panel and were not given the opportunity to present their case. The issues on appeal revolved around whether the arbitral panel had denied the appellants document disclosure and whether the absence of those records denied the appellants the opportunity to present their case or resulted in *manifest unfairness* so as to

allow the award to be set aside under section 45(1)(f) of the Arbitration Act, RSA 2000. The Court confirmed that the duty to comply with the rules of natural justice and procedural fairness was fundamental to a hearing. However, the Court emphasised procedural choices in an arbitration are made at the arbitrator's discretion and not every procedural breach will result in obvious or clear unfairness. Judicial intervention is reserved for instances where there is a fundamental or fatal flaw that goes to the heart of the process. The Court found the failure to order production of the records didn't render the entire arbitral process manifestly unfair or deprive the appellants of the opportunity to present their case or respond to the other party's case.

Rule of Law Index: New Zealand maintains high international ranking, with ADR lifting the overall Civil Justice score

The World Justice Project has recently released the 2022 Rule of Law Index. New Zealand has maintained its ranking of seventh (out of 140 countries) with an overall score of 0.83. This is despite the rule of law declining in most countries (61%) for a fifth year in a row. The Index scores countries on constraints of government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

The Civil Justice factor of the Index explains that it *measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system.* To do this, *it measures whether civil justice systems are accessible and affordable as well as free of discrimination, corruption, and improper influence by public officials.* In relation to the civil courts, *it examines whether court proceedings are conducted without unreasonable delays and whether decisions are enforced effectively.* ADR is an important part of the provision of civil justice in a society, and accordingly, *it also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms*. Under the Civil Justice factor, New Zealand ranked 10/140 with an overall score of 0.78. The subfactor *Civil Justice is not subject to unreasonable delay* had an overall score of 0.71, while the subfactor *Alternative Dispute Resolution Mechanisms are Accessible, Impartial, and Effective* achieved an overall score of 0.80.

Incorporated Societies Act 2022 – societies must act to ensure their constitutions include dispute resolution procedures

The new Incorporated Societies Act 2022 (the "new Act") received Royal Assent in April 2022. Starting from October 2023, New Zealand's 24,000 incorporated societies will need to re-register. In order to re-register, every society will need to have a constitution which complies with the requirements of new Act.

One requirement is that a society's constitution must include procedures for making and dealing with complaints, disputes and grievances (section 26(1)(j) and sections 38 to 44). The previous legislation (which dates to 1908) was silent on dispute resolution, with the result that many societies have no internal procedures in place, leaving members with no option other than costly proceedings in the High Court.

Under the new Act, societies will be free to adopt their own internal dispute resolution procedures, provided that they are consistent with the requirements of natural justice. If the constitution does not provide dispute resolution procedures, then the default procedures in Schedule 2 of the Act will apply.

The Act explicitly allows societies to adopt alternative dispute resolution procedures, including mediation, facilitation, arbitration, and adjudication. Section 43 clarifies that if a society's constitution provides that a dispute must or may be submitted to arbitration, then this will be treated as a binding arbitration agreement for the society, members and officers.

You can find further information and advice on preparing for the upcoming changes on the New Zealand Companies Office website.

England and Wales Business and Property Courts' disclosure pilot scheme becomes permanent

As of 1 October 2022, the disclosure pilot scheme, which has been operating in the Business and Property Courts in England and Wales over the past three years, has become permanent.

The mandatory pilot was introduced in January

2019. It was aimed at bringing about a culture change in the disclosure process and making litigation less costly for parties, by narrowing disclosure to the issues in dispute and reducing the volume of unnecessary documentation.

Under the scheme, the previous standard disclosure practices have been replaced with an Initial Disclosure procedure and requirement for parties to disclose any 'adverse documents'. Litigants seeking further disclosure need to obtain a court order, and must select from five Extended Disclosure Models (Models A-E), depending on the type of documents and search techniques required.

Originally scheduled to run for one year, the pilot scheme was extended twice and amended following consultation and feedback from litigants and legal professionals. Further minor amendments and clarifications have been incorporated into the permanent scheme. The final version, which replaces the pilot scheme, is set out in Practice Direction 57AD.

Hong Kong Court of Appeal confirms preconditions to arbitration are a question of admissibility to be resolved by arbitrators, not the courts

In a significant ruling, C v D [2022] HKCA 729, the Hong Kong Court of Appeal (the "COA") has confirmed that compliance with a precondition to arbitration, such as an escalation clause, is a procedural matter of admissibility of the claim, and not a matter of jurisdiction of the arbitral tribunal. As a question of admissibility, it is to be determined by the arbitral tribunal, and there is no recourse to the court.

The case concerned company D's alleged failure to negotiate prior to commencing arbitration, under the escalation clause in its arbitral agreement with company C. The arbitral tribunal had found that company D had satisfied the requirements of the escalation clause and proceeded to make a partial award against company C.

Company C unsuccessfully applied for set aside at the Court of First Instance ("CFI") and then the Court of Appeal (the "COA"), on the basis that the failure to negotiate, as a condition precedent to arbitration, meant that the arbitral tribunal lacked jurisdiction to hear the claim or make the award. At the COA, company C argued that it is incorrect for the courts in Hong Kong to make any distinction between admissibility and jurisdiction.

The COA dismissed C's challenge, upheld the CFI's ruling and confirmed that there is an important distinction between jurisdiction (the power of the arbitral tribunal to hear a claim) and admissibility (whether it is appropriate for the tribunal to hear it). The COA summarised and endorsed this approach in the recent case law of Hong Kong and other jurisdictions, including England and Wales, the USA, Singapore and Australia. It gave particular significance to the Fiona Trust presumption that rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal, and highlighted the trend for judicial non-interference in arbitration.

The COA noted that parties to arbitration are free to agree that any disputes on pre-arbitration conditions are excluded from the jurisdiction of the arbitral tribunal, but that this, being an exception to the 'rational businessmen' presumption, would need to be made clear and unequivocal in the arbitration agreement.

English High Court considers test for determining validity of arbitrator appointment

In ARI v WXJ [2022] EWHC 1543 (Comm) the High Court in England considered whether an arbitrator had been validly appointed. Under the arbitration agreement, each party was required to appoint an arbitrator – with strict time limits. If the defendant failed to appoint their arbitrator within 14 days of receiving the claimant's notice of appointment, then the claimant was entitled to have their arbitrator designated sole arbitrator.

Upon receiving the claimant's notice, the defendant contacted JJJ, who confirmed it was willing to act as arbitrator, conditional on conflict checks. Just before the deadline, JJJ confirmed it was conflict free, and the defendant notified the claimant of JJJ's appointment.

However, several weeks later, JJJ declined to act because the remuneration was too low. The claimant sought to have their arbitrator designated sole arbitrator on the basis that the defendant had failed to validly appoint JJJ as arbitrator within the time limit.

In considering the case law, the Court held that the issue of appointment does not turn on whether a contract has been concluded between the arbitrator and the appointing party. The Court highlighted that arbitral appointments are often sought under significant time pressure and with only brief communications regarding availability and willingness to act. It noted that in such circumstances, in-depth negotiations and agreement as to all terms including the level of renumeration would be unrealistic.

The Court held that the correct test is whether there has been a clear and unconditional communication of acceptance of the appointment by the arbitrator, or communication of an unconditional willingness to accept the appointment, which the appointing party then acted upon.

Applying this test to the defendant's communications with JJJ, the Court noted that the only condition to appointment which JJJ had imposed at the relevant time was the conflict check. JJJ had removed this condition when it confirmed it was conflict free, and the defendant had acted on this by notifying the claimant of JJJ's appointment. The Court held therefore that all the requirements of a valid appointment had been met within the time limit, with the result that the claimant was unable to designate their arbitrator as sole arbitrator.

Australian Federal Court finds Fuji used 38 unfair contract terms in contracts with small businesses

On 12 August 2022 the Federal Court of Australia (the "Court") issued its judgment in Australia Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928, declaring that Fuji had used 38 unfair contract terms in around 34,000 standard form contracts with small businesses for supplying and servicing printers, scanners, photocopiers and software.

The Australian Competition and Consumer Commission (the "ACCC") brought the action against Fuji after receiving complaints from small businesses and the Australian Small Business and Family Enterprise Ombudsman about standard form contracts in the printing industry.

The 38 terms were found to be unfair under Australia's unfair contract regime for standard form contracts with a small businesses. Fuji's unfair terms included its ability to automatically renew contracts, terminate contracts, charge excessive termination fees, unilaterally increase prices and vary its terms, limit its liability and require customers to indemnify it and make payment before delivery.

Although the Court has no power to award penalties under the current legislation, it declared the unfair terms void and unenforceable, and made orders including that Fuji stop using and enforcing the terms. It ordered Fuji to publish a corrective notice on its website setting out the Court's orders, inform any customers who may be affected and ordered it to pay a contribution to the ACCC's legal costs.

On 9 November the new Treasury Laws Amendment (More Competition, Better Prices) Act 2022 received Royal Assent. This introduces various reforms to the unfair contract terms regime, including, for the first time, the introduction of penalties for the use of unfair contract terms in standard form contracts with small businesses. You can find further information on the upcoming changes on the ACCC website.

Hong Kong court rules that high threshold needs to be met to set aside arbitral award

A recent ruling out of Hong Kong has provided clarification on how an award should be considered by courts when dealing with setting aside applications and the high threshold that needs to be met for such applications to succeed.

In *LY v HW* [2022] HKCFI 2267, a Hong Kong company (**LY**) entered into an agreement with a Chinese company (**HW**) for the exclusive distribution of pharmaceutical products in China. The agreement required HW to meet a minimum annual sales value target (**ASV**).

LY terminated the agreement in May 2019, claiming that HW failed to achieve the ASV target. HW subsequently initiated arbitration, alleging that LY was in breach of the agreement. The Tribunal awarded in favour of HW, finding that the termination of the agreement by LY was invalid.

LY then filed an application to set aside the award, claiming the following:

- the Tribunal failed to deal with key issues;
- it failed to provide sufficient reasons for its

decision; and
- the award was contrary to the public policy of Hong Kong.

In its ruling, the Court stated that the aim of the Hong Kong Arbitration Ordinance is to ensure speedy dispute resolution without unnecessary costs or delays. The Court highlighted the following legal principles applicable to the issues before it:

- When considering whether a tribunal has dealt with an issue, the award needs to be read in a reasonable and commercial way, with a view to remedying only serious breaches of natural justice.
- The reasons provided by a Tribunal need not be detailed and lengthy.
- A Tribunal is not bound to structure its decision and reasons in accordance with the issues put to it or submissions made by the parties.
- As long as the Tribunal gives sufficient reasons for its decision, an award will be enforceable.
- Courts must be circumspect in their consideration of an award to avoid any attempt to review the correctness of the award, in law or on the facts.

The Court held that even if the Tribunal failed to consider and deal with the issues raised by LY, this was a matter that went to the substantive decision of the Tribunal. While this may amount to an error of law, it is not a ground for challenging the award.

The Court clarified that the grounds for setting aside and refusal of enforcement of an award should be construed narrowly, and that only an error that is too egregious to cause a substantial failure of justice would justify setting aside of an award.

Mandatory mediation proposed for small claims disputes in the UK

In July, the UK government launched a public consultation on increasing the use of mediation in the civil justice system, aimed at decreasing the time and money spent on civil disputes whilst resolving them fairly and proportionately.

The proposal sought to introduce compulsory mediation for parties in the County Court involved in civil disputes of a value below £10,000. This would mean that parties will be required to participate in a free hour-long telephone mediation provided by His Majesty's Courts and Tribunals Service (HMCTS) as part of the court process before the matter is scheduled for a hearing.

Just as in a typical mediation, the parties will be required to speak to the mediator separately to determine whether there are any points of agreement. If a settlement is reached, the parties can agree to include the terms of settlement in an agreement that is legally binding, negating the need for court proceedings.

While the proposal covers various types of civil cases of a value less than £10,000, including personal injury and housing disrepair claims, the government sought consultation on whether certain types of cases should be exempt from the requirement to mediate.

The government has also sought the views of stakeholders on how it can support and strengthen the external civil mediation sector, particularly on whether there is a need for increased regulation and oversight of the mediation industry.

In another nod to mediation and its effectiveness in resolving disputes, the UK government has also signalled intentions to sign and ratify the Singapore Convention on Mediated Settlements.

With consultations on increasing the use of mediation in the civil justice system now closed, if implemented, it would be the first instance of compulsory mediation being made a permanent feature of an entire area of the English courts.