ReSolution *in Brief*

Second New Zealand arbitration survey is now open

Royden Hindle, Anna Kirk, and Diana Qiu, together with the New Zealand Dispute Resolution Centre, are undertaking the second edition of the New Zealand Arbitration Survey.

We received an excellent response to our first survey, which covered the period 1 January 2019 to 31 December 2021. We published the results in the New Zealand Arbitration Survey Report 2022, and gave an overview of the trends revealed in our November 2022 edition of ReSolution. The inaugural report recently featured in the DLA Piper Asia Pacific Arbitration Roundup 2022.

Our second **survey is now open**. We are asking all New Zealand-based arbitrators who have received an arbitral appointment between 1 January 2021 and 31 December 2022 to please complete the survey.

The survey is anonymous and has been designed to protect the confidentiality of the arbitrations. The results will be used to produce an updated report on the state of arbitration in New Zealand in 2023. The more information we get, the more accurate our report and insights will be into the use of arbitration in New Zealand.

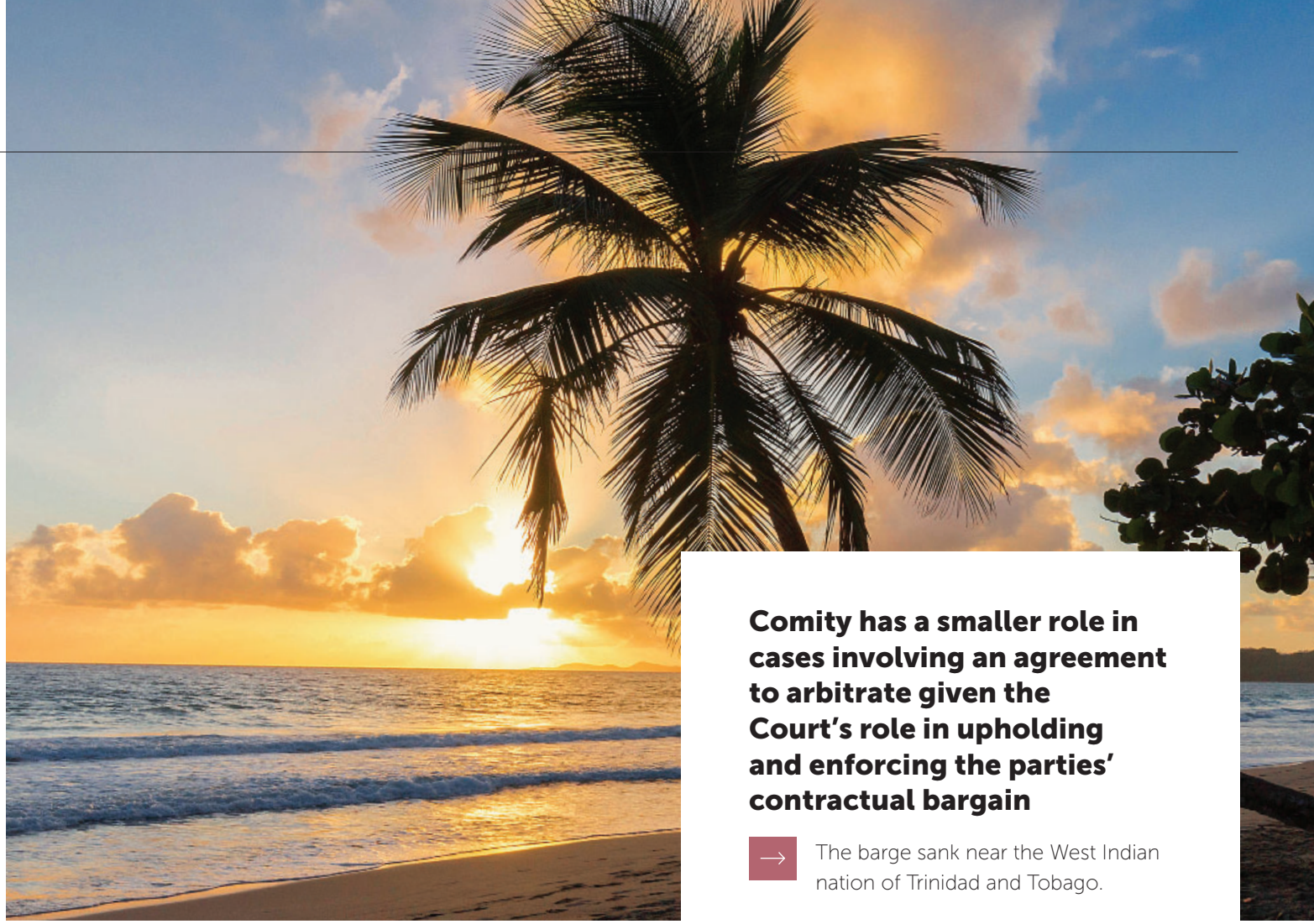
The survey will close on 16 June 2023.

New Zealand High Court grants anti-suit injunction over sunken barge

In *Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc & Sri Commodities Import and Export Inc* [2023] NZHC 793, the insurer was granted an interim anti-suit injunction over proceedings issued in Guyana regarding a barge which capsized in Trinidadian waters in December 2018, on the basis it breached an arbitration agreement.

The applicant is a New Zealand registered company which operates as a protection and indemnity club to insureds/members. At all material times the barge which capsized was subject to contracts of insurance with the applicant. As part of its rules, an arbitration clause exists which outlines that all disputes should be resolved (at the choice of the directors) in either Auckland or London. In this case the directors preferred Auckland and accordingly New Zealand's **Arbitration Act 1996** applies.

The plaintiff has been named as first defendant in the Guyanese proceedings where the barge owners (Silica) and operators (Sri



Comity has a smaller role in cases involving an agreement to arbitrate given the Court's role in upholding and enforcing the parties' contractual bargain

→ The barge sank near the West Indian nation of Trinidad and Tobago.

Commodities) seek damages in excess of GYD10,000,000 and special damages of USD1,176,000 (the latter sum being the value of the barge and cargo when it capsized). The Guyanese proceedings were issued on 20 December 2021 and named the local broker as second defendant.

On 29 December 2021, the New Zealand Association learned of the Guyanese proceedings and five months later filed a notice of application protesting jurisdiction in the Guyanese Court. On 20 December 2022, the Association filed for a permanent anti-suit injunction and without notice interim injunction in the Auckland High Court. The proceeding was put on notice, with service to be conducted by email.

The anti-suit application was granted on 14 April 2023, on an interim basis, operating on the conscience of the two respondents, rather than the Guyanese Court, as issues of comity arose. Justice Gault for the New Zealand High Court noted, *Comity has a smaller role in cases involving an agreement to arbitrate given the Court's role in upholding and enforcing the parties' contractual bargain*. The insurance policy premiums had not been paid after the capsizing, which led to the policy being cancelled in April 2021. Justice Gault further noted the delay in starting the arbitration would not count against the applicant Association, as *the Association is not the claimant, and it may seek to argue that the respondents' claim is extinguished.*

The Guyanese Court is yet to rule on the protest to jurisdiction and is undergoing timetabling. That court is aware of the New Zealand application (through the Association's Guyanese counsel) and has provided for news of the injunction in its timetabling directions. Although served, the Guyanese companies took no steps in the New Zealand application.

The New Zealand order was framed as restraining the Guyanese proceeding and the commencing of any further proceedings against the applicant Association other than in accordance with an arbitration agreement contained in insurance policies in respect of the capsized vessel.

New Zealand High Court grants leave to appeal in law firm dispute

In *Tavendale & Partners Limited v Dineen* [2023] NZHC 157, the High Court has granted leave to appeal to the Court of Appeal on a question

of law, from a decision which stayed proceedings pending an arbitral tribunal determining whether it had jurisdiction to hear an arbitration.

In the underlying judgment, Mr Dineen had successfully applied for a stay of proceeding and referral of disputes to arbitration under article 8(1) of Schedule 1 of the Arbitration Act 1996 (*Tavendale & Partners Limited v Dineen* [2022] NZHC 1530). Tavendale sought leave to appeal and argued it had reasonably arguable grounds of appeal and that it was in the interests of justice to grant leave in all the circumstances of the case. The case concerns Tavendale's claim that Mr Dineen breached his fiduciary duties in an aspect of his practice while at the applicant firm, and retained electronic data in breach of an undertaking.

As the judgment sought to be appealed from was an interlocutory judgment, leave was necessary. Associate Judge Paulsen granted leave on one ground out of four, namely, on the standard of review for leave applications involving arbitration clauses:

> *I accept the submission for Tavendale that given the prevalence of arbitration clauses in commercial contracts and the growing importance of arbitration as a means of settling disputes, an appellate precedent on the issue is desirable.*

That issue was recognised as one of general importance, as to whether a full review or prima facie review of whether an arbitration agreement exists, its validity and/or its scope.

The options the Court had considered were:

- immediately refer the matter to the arbitral tribunal;
- undertake a prima facie assessment, and if there appears to be a valid arbitration agreement that applies, refer the matter to the arbitral tribunal, or
- undertake a full analysis and finally determine questions relating to the validity and/or scope of an arbitration clause.

The Court took the middle ground in the original judgment and granted leave, in the leave to appeal decision, on the basis of seeking appellate authority on the point. The need for leave was required under the High Court Rules to sift out unmeritorious claims.

New Zealand High Court refuses leave to appeal arbitral award

The High Court has refused leave to appeal an arbitral award in *Prestige Building Removals v Vogel & Vogel* [2023] NZHC 359. The parties were involved in a contract to remove a home from Maraetai to the Coromandel, having to pass through a forest area. Prestige Homes cancelled the contract, despite Mrs Vogel being able to secure the requisite permission to access the privately owned forest. The contract contained an arbitration clause and the parties went to arbitration for three days, whereupon the arbitrator found in favour of the Vogels and awarded $163,012.88 together with costs and disbursements of

$75,140.64.

Prestige applied under clause 5(1)(c) of Schedule 2 of the Arbitration Act 1996 for leave to appeal on the grounds of material error of law. The Court found the dispute was really one of fact, dealing with the "proper access" to the private forest and that Prestige could not meet the necessary test set out in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 that leave to appeal would only be granted where determination of the question of law concerned could substantially affect the rights of the parties to the arbitration agreement.

Justice Andrew held that the arbitrator had addressed the 'proper access' issue in his award and was not in breach by admitting 'inadmissible hearsay' (evidence of prior permission for proper access to the forest) on the basis that an arbitral tribunal could conduct itself in *such manner as it considers appropriate evidentially subject to the mandatory provisions as to procedural fairness and equality*. The arbitral award was not perverse, the third leg of reproach, as the factual basis of 'proper access' was based on a factual underpinning and the arbitrator had regard to all the evidence.

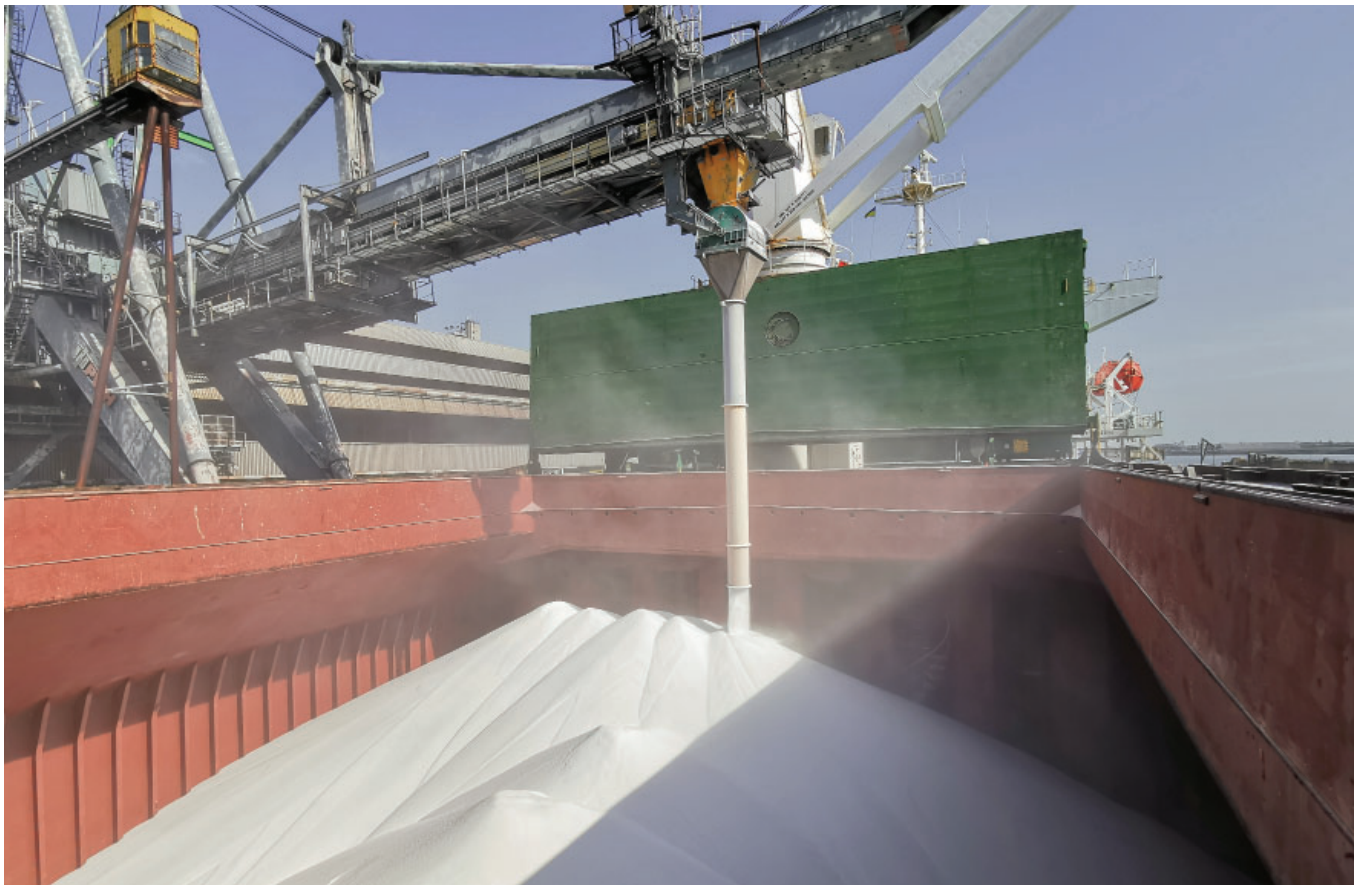
The application for leave to appeal was declined and the High Court upheld the New Zealand position that applications for leave to appeal on a question of law will be rejected if in reality they are factual appeals on the merits, dressed up in masquerade.

English High Court upholds arbitral tribunal's implied term despite error in law

Pan Ocean Co Ltd v Daelim Corporation [2023] EWHC 391 (Comm) concerned a charterparty contract between a charterer, Pan Ocean Co Ltd (the **Charterer**), and a ship owner, Daelim Corporation (the **Owner**), for the carriage of urea cargo.

The Charterer was only required to pay the Owner for vessel hire and fuel during 'on-hire' periods. The contract's cleaning inspection clause required that if the ship failed a cleaning inspection by an independent surveyor, it would be placed 'off-hire' until it passed a re-inspection.

A dispute arose when the ship



failed its inspection and was placed 'off-hire'. Three days later, the ship's master informed the Charterer that the hold had been re-cleaned and was ready for re-inspection; however, the Charterer did not arrange re-inspection until 12 days later. The ship passed the re-inspection and was only then 'on-hire' again.

A panel of arbitrators found that it was reasonable to imply a term into the contract's inspection clause requiring re-inspection without undue delay. It found that the Charterer's delay in arranging the reinspection had breached that implied term, and awarded loss of hire and fuel costs to the Owner.

The Charterer applied to the High Court to set aside the award. It argued that in implying the term, the arbitral tribunal had failed to apply the correct legal test – the award's reasoning referred only to 'reasonableness', which is insufficient on its own to imply a term. The Court acknowledged that the wording of the tribunal's award was somewhat 'shorthand' and less than ideal, but that read as a whole (including its referral to the Owner's submissions), the experienced tribunal had applied all the required limbs of the legal test.

However, the Court agreed that the tribunal had erred in law in how it had gone on to apply the implied term in its award. The tribunal had awarded the Owner loss of hire and fuel costs from the date that the ship's master had notified the Charterer that the ship was ready for re-inspection. The Court held that this was incorrect. The correct date of the breach of the implied term (and therefore the date from which the hire and fuel costs should run) was the date when the Charterer should reasonably have arranged for the re-inspection.

The Court declined to set aside the award, and instead remitted it back to the tribunal to reconsider its decision about the date of the breach and loss, in light of the Court's findings on that issue.

English Commercial Court publishes latest statistics on arbitral challenges

The English Commercial Court (**Court**) has published its latest annual report on the workings of the Court for the period 2021–2022.

As in the previous year, around 25% of applications to the Court during the report period were arbitration-related matters. This includes applications for injunctions, enforcement of awards and appointment of arbitrators. However, the majority of the applications (as in the previous year) were challenges to arbitral awards under sections 67 to 69 of the Arbitration Act 1996.

Most arbitral challenges were brought for lack of jurisdiction (section 67), procedural irregularity (section 68) or appeals on a point of law (section 69). Since last year, there has been a noticeable increase in challenges for lack of jurisdiction and procedural irregularity, and a small increase in challenges on a point of law. However, there has been a significant decrease in applications for injunctions (section 44).

There continues to be an extremely low success rate on any of the grounds of challenge – in the report period only around 5% of challenges to arbitral awards succeeded.

You can read the Court's full report and a breakdown of the arbitration-related statistics here.

United Kingdom welcomed by CPTPP 11

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) will be gaining a new member – the United Kingdom. The UK had made its formal application to join the agreement in February 2021, becoming the first country outside of the Asia-Pacific region to do so.

In late March, a joint statement was put out by the relevant ministers of the CPTPP, stating that they could confirm the conclusion of negotiations for the accession of the UK. The Accession Working Group (**AWG**) for negotiations affirmed that the UK had supplied commercially meaningful market access offers in respect of an array of sectors, such as financial services and state-owned enterprises. In turn, the CPTPP 11 confirmed and submitted their commitments to the UK. A next step is for the AWG to work with the UK for the preparation and verification of the legal instrument of accession. This period will also see the AWG ensuring the process is completed in a way which is consistent with the domestic processes of the CPTPP 11.

It is yet to be announced exactly when the UK will sign the agreement, but it is believed that this will occur in the middle of 2023. From there, the UK is to present the agreement before its

parliament under section 20 of the Constitutional Reform and Governance Act 2010.

One of the powers membership will confer on the UK is the ability to help select future members of the CPTPP. This will be relevant as there is a collection of states, including China, who have expressed their intention, or have formally applied, to join the CPTPP.

In other CPTPP news, Brunei has finally ratified the agreement. Despite being a long-time supporter of closer economic relations in the Asia-Pacific region, they are the last of the 11 signatories to take this step. The agreement is expected to enter into force in mid-July, 60 days after Brunei notified the depositary for agreement documents.

Next step in Law Commission's Consultations on English Arbitration Act

The Law Commission of England and Wales has released its second consultation paper as part of its review of the Arbitration Act 1996. Feedback to the first paper, which ReSolution covered previously in ReSolution in Brief, has guided the focus points for the second. The proposed changes centre on these three issues:

- Governing law in arbitration agreements
- Challenges for lack of jurisdiction (section 67)
- Discrimination

Governing law

The paper records that there has been a wave of thoughts on the 2020 Supreme Court decision *Enka v Chubb* [2020] UKSC 38. The case provided a framework for selecting the governing law in the absence of an express selection. The principles in the decision have now been followed in Hong Kong. However, the Law Commission believes these principles are convoluted and complex.

The Law Commission also fears the principles of *Enka v Chubb* being applied in situations where English law would be stripped from the contract. This scenario would likely occur when the arbitration centre is stipulated to be in England, but the governing law of the contract is from elsewhere and, for whatever reason, it is not specified that the governing law of the arbitration clause is supposed to be English. Under the current law in England, this would likely mean that the arbitration clause takes on the foreign law of the main contract.

The Law Commission does not want the law of *Enka v Chubb* to run riot. So, it is proposing a default law mandating the governing law of the arbitration clause to correspond with the jurisdiction the named arbitration centre sits in. This would occur unless the arbitration clause expressly stated otherwise.

Challenges for lack of jurisdiction

The Law Commission has made recommendations to limit the ability of parties to challenge arbitral awards on jurisdictional grounds. This could partially be done by restricting courts from considering any grounds of objection or evidence that were not before the tribunal. Courts would also generally not be able to rehear evidence. Exceptions would concern scenarios when "the interests of justice" require a rehearing of evidence, or if that evidence was unable to be presented to the arbitral tribunal. Any challenge would only be allowed if the tribunal's jurisdictional challenge was incorrect.

Discrimination

In addition to its previous recommendations on this matter, the Law Commission is now also proposing that it always be deemed justified to require the appointment of an arbitrator who has a different nationality from the arbitral parties. However, the Law Commission stresses that such an appointment would not be a necessity.

The full second consultation paper contains the recommendations, as well as feedback from the first paper.

Res Judicata in Hong Kong: A case of related litigation and arbitration

In *Fortune Pharmacal Co Ltd v. Falcon Insurance Company (Hong Kong) Ltd and Another* [2023] HKCA 66, the Hong Kong Court of Appeal (**Court**) aligned with English law on res judicata. Lord Sumption in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46 held res judicata meant there could be no cause of action estoppel, no issue estoppel and no abuse of process: it is a 'portmanteau term'.

The plaintiff had a construction contract with the second defendant and the first defendant was the insurance company with a surety bond. The plaintiff and the second defendant were involved in arbitration under the contract. In the litigation, the first defendant gave an undertaking to the Court to be bound by the arbitration. On the strength of that, the Court made a case management stay.

The plaintiff protested but the Court ruled the underlying issues in the litigation and arbitration are the same, despite the lack of precise mutuality of parties. In the event those issues are found in the plaintiff's favour in the arbitration, the court will rule in favour of the plaintiff on the first defendant's liability under the bond in the court proceedings, as the first defendant had agreed to be bound by the result of the arbitration by its undertaking. If the plaintiff lost the arbitration, its litigation would be deemed abusive if permitted to run new arguments again.

Attempt to set aside an arbitral award in Singapore: breach of natural justice

CWP v. CWQ [2023] SGHC 61 of the High Court of Singapore (**Court**) dealt with an appeal dressed up as an application to set aside an arbitral award on natural justice grounds. The plaintiff had contracted with the defendant to supply vessels for dredging works in its project. There were stoppages, and damages were argued for in an arbitration and awarded to the defendant.

The plaintiff (claimant) sought to avoid the majority decided arbitral award by complaining to the Court that the majority arbitrators had misinterpreted its claim (going beyond the scope of submission) on one hand, and on the other had failed to incorporate an issue into their determination. The argument followed the findings of the dissenting arbitrator who found the plaintiff did not have to pay damages. The plaintiff had also reserved its rights to argue an issue but failed to do so in arbitration and it was simply too late to do so in an application to set aside.

The Court noted that a breach of natural justice can take many forms and it will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. It would need to be an 'inescapable inference' at that. The Court ruled it was not, and rejected the application to set aside the award.

Wake up and smell the bias: Canadian court sets aside arbitrator's award in Aroma Espresso Bar franchise dispute

In *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827, the Ontario Superior Court of Justice found that an arbitrator's failure to disclose his appointment by the successful party's legal representatives in a different arbitration had caused a reasonable apprehension of bias which warranted setting aside the arbitral award.

The dispute between Aroma Franchise Inc. (**Aroma Franchise**) and Aroma Espresso Bar Canada Inc. (Aroma Espresso Bar) involved the cancellation of orders with coffee suppliers, allegations of breach of contract and wrongful termination of their franchise agreement.

The parties referred their dispute to arbitration. The terms of their arbitration clause required them to jointly select a neutral arbitrator, and specified that the arbitrator must have *no prior social, business or professional relationship with either party*.

The appointed arbitrator found in favour of Aroma Espresso Bar. He found that Aroma Franchise had wrongfully terminated the franchise agreement and ordered it to pay damages in the amount of $10 million CAD. When the arbitrator emailed his award to the parties, he mistakenly copied in a lawyer from Aroma Espresso Bar's law firm, who was not acting in the arbitration.

This raised Aroma Franchise's suspicions. After repeatedly questioning the arbitrator, it discovered that while the arbitral proceedings had been ongoing, the arbitrator had accepted an appointment by Aroma Espresso Bar's legal representatives (the same senior counsel) for a separate, unrelated arbitration. The arbitrator had not disclosed this second appointment at any stage in the proceedings. Aroma Franchise applied for the award against it to be set aside.

The Ontario Supreme Court agreed that in the circumstances, the arbitrator's failure to disclose his second appointment by Aroma Espresso Bar's representatives while the arbitration was ongoing had given rise to a reasonable apprehension of bias. The Court considered that the arbitrator had in fact 'hidden' this second appointment, and it granted set aside of the award.

Enforcing a foreign arbitral award in Ontario

An international arbitral award was enforced in Ontario pursuant to a judgment of its superior court in *Costco Wholesale Corporation v TicketOps Corporation* 2023 ONSC 573, following consideration of the province's International Commercial Arbitration Act 2017, the Convention on the Enforcement of Foreign Arbitral Awards and the Model Law on International Arbitration (**Model Law**).

In America, Costco had received in its favour both arbitral awards and a court decision. Costco sought to enforce them in Ontario. In Ontario, TicketOps raised defences of natural justice and public policy, which were ultimately rejected. The Court focused on the arbitral awards, as the judgment was derivative. The test for refusing to enforce the award was narrow and the conduct of the arbitrator in granting the original award must be *sufficiently serious to offend our most basic notions of morality or justice or for alleged violations of the due process requirements of the Model Law.*

The arbitrator had disclosed a relatively weak element of personal conflict of interest and there was a time limit on the arbitral hearing, both of which had been accepted by the parties prior to the arbitration. The Ontario Court declined to accept the threshold had been reached, nor the principles of natural justice breached. The award was able to be enforced as the Court's role was a facilitative role and not one to examine the underlying merits of the claim or to permit TicketOps to relitigate the matter in Ontario.

It takes a multilateral treaty to tango

Uruguay, the Latin American nation with a population of less than four million, has recently begun moves to further integrate itself into the global economy. Within the past few months, it has signed a major agreement as well as undergoing formal steps to try to join one of the largest trade and investment blocs in the world.

Singapore Convention

On 28 March 2023, Uruguay ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation (known as the "Singapore Convention on Mediation", the **Singapore**

Convention). In doing so, it become the Singapore Convention's eleventh State Party. The Singapore Convention is expected to enter into force for Uruguay on 28 September 2023.

CPTPP

In December 2022, Uruguay's foreign minister, Francisco Bustillo, arrived in Auckland to begin the formal process of becoming a member of the CPTPP and met with the Minister for Trade, Damien O'Connor. New Zealand is the formal depository for parties looking to join the CPTPP.

Uruguay's potential accession would be notable in that it would be the first member state without any direct access to the Pacific Ocean (the United Kingdom, the most recent member to soon join the CPTPP, governs the small Pitcairn Islands between Easter Island and French Polynesia). However, its place as a potential Latin American member would not be novel, joining Colombia, Costa Rica and Ecuador as applicants.

One challenge for Uruguay will be how it deals with Mercosur, the trade and investment bloc in South America of which Uruguay is a full member.[1] The bloc is very unfavourable to the idea of lone states promoting their own trade and investment interests. One of the founding principles of the bloc states that member states should negotiate as a bloc and through mutual consensus. Officials from the bloc have already forewarned that they will take measures to protect their interests.

RCEP wins some and loses some

The Regional Comprehensive Economic Partnership (**RCEP**) has taken a step closer to becoming a fully active bloc, at the same time as one of its members falls out of favour. In February, the Philippines became the final state in the Asia-Pacific trade and investment pact to ratify its signature. In addition to the members of ASEAN, RCEP includes China, Japan and South Korea, as well as Australia and New Zealand. While the agreement contains a chapter on investment protection, the inclusion of an investor-state dispute settlement mechanism was side-lined as a means of hurrying the negotiation process.

The Senate of the Philippines approved entry, with a notable dissenting voice coming from Senator Imee Marcos, sister of President Ferdinand Marcos Jr. Delays in ratification have been attributed to broader resistance from farming groups, fearful of the potential entry of cheaper goods.

The agreement will enter into force for the Philippines on 2 June 2023.

The approval of the agreement in the Philippines will be welcomed by the other members, especially in light of Myanmar's rejection by other members of RCEP. Both New Zealand and the Philippines rejected Myanmar's instrument of ratification, as a means of expressing their serious disapproval of the status of the Myanmar government. In February 2021, a coup d'etat established military rule over Myanmar.

1 New Zealand is an official observer member.