ReSolution *in Brief*

Corruption Perception Index 2023: New Zealand sees slight drop but stays in top three

Transparency International has released its annual Corruption Perception Index (**CPI**) for 2023. The CPI measures countries based on their abilitiy to curb corruption, using metrics such as acccess to justice. The countries are then ranked accordingly. Denmark has once again taken the top spot.

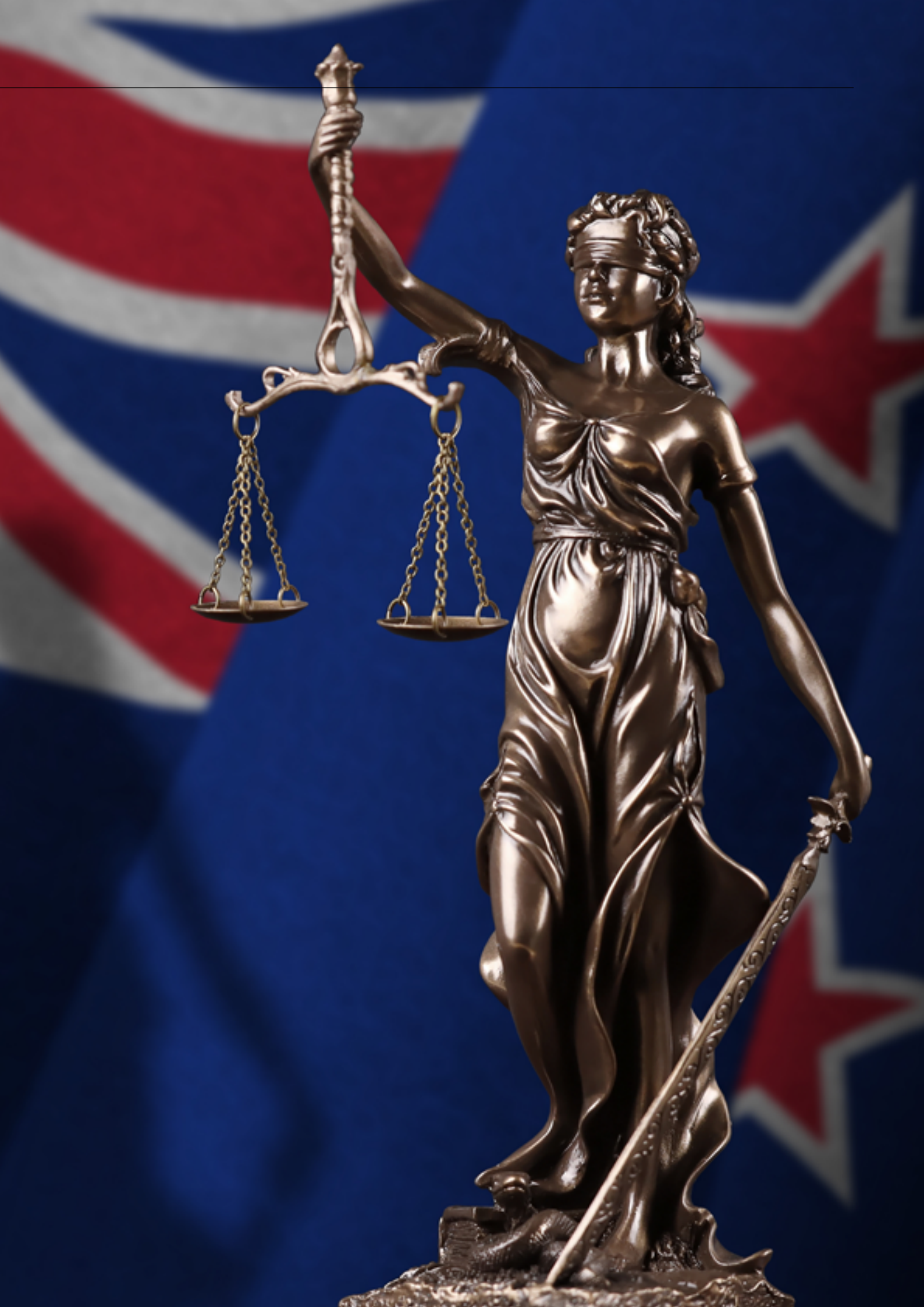
With a score of 85/100 and an overall ranking of third, New Zealand is still doing well. However, this is the third CPI in a row in which the score has slipped. In 2022, New Zealand rated 87/100 and 81/100 in 2021. Transparency International attributes this decline to a lack of confidence within the business community in the integrity of public contracting, taxation and trade opportunities.

While Australia's 2022 score of 75/100 holds, Transparency International commended measures taken by the Australian government to stem corruption, including the establishment of the National Anti-Corruption Commission and the implementation of strategies to strengthen protection for whistleblowers.

New Zealand's rating of 85/100 gives it the highest ranking in Asia. However, Transparency International notes that for Asia, 2023 was another year of *little to no meaningful progress towards curbing corruption,* although, there is plenty to be optimistic about. Bhutan is another country commended by Transparency International for strengthening its anti-corruption agency.

Other countries in Asia showing improvements in anti-corruption measures include South Korea, Maldives, Vietnam and China. China was commended for its *aggressive anti-corruption crackdown* over the past few years which has seen millions of public officials sanctioned for various acts of corruptiuon.

As the report points out, there are countries which have done well in certain areas but not in others. In Asia, Pakistan and Sri Lanka are examples of these. Both countries face political instablility on the back of high debt, but perform well maintaining judicial independence. In recent years, the top courts of both countries have expanded the rights of their citizens. Pakistan's Supreme Court enshrined the right to information in Pakistan's constitution while the Supreme Court in Sri Lanka held several high ranking politicians



responsible for poor economic management, including high ranking politicians who formerly occupied the positions of prime minister, president, finance minister and governor of the Central Bank of Sri Lanka.

High Court does not think Achilles Bulker will do a rudder from arbitration

In *CFGC Forest Managers (NZ) Limited v The Ship "Achilles Bulker"* [2023] NZHC 3130, the High Court assessed an application by CFGC Forest Managers (NZ) Limited (**GFGC**) to inspect items it believed to be significant for upcoming arbitral proceedings. The need to arbitrate arose after the MV *Achilles Bulker* suffered a detached rudder as it left Tauranga Harbour en route to China.

The *Achilles Bulker* was carrying logs owned by GFGC which had been purchased by a third party. Unable to receive the logs, the third party terminated the contract. GFGC commenced arbitral proceedings against the owner of *Achilles Bulker*, SE Apex Corporation (**SEA**).

Before arbitral proceedings could occur in London, CFGC issued proceedings in New Zealand seeking the preservation of items which may be used as evidence. The Court immediately placed the *Achilles Bulker* under arrest. GFGC then made an application to inspect the items. This would include the inspection of items ranging from arrangement plans of the ship to a copy of the official logbook.

In considering the application, Justice Lang first noted the application of articles 9(1) and 17 of Schedule 1 to the Arbitration Act 1996. These apply instead of the High Court Rules 2016 where there has been an agreement to arbitrate. Justice Lang noted that although the High Court could make interim measures under these articles, these were generally only made in circumstances of urgency. An interim measure may be granted when an arbitral tribunal cannot make procedural orders in time to provide a party with the necessary protection. In this case, protection had already been granted by the earlier decision to preserve the items. Relief cannot then be issued to inspect them.

GFGC argued that there was a real risk that the items in question would be destroyed or lost once the *Achilles Bulker* left New Zealand. Justice Lang rejected this argument. SEA had consented to the preservation orders being made. By way of this, SEA had acknowledged the existence of the items. This acknowledgement will prove important come the arbitral proceedings. SEA has essentially barred themselves from pleading that the items do not exist. Furthermore, Justice Lang believed there was no evidence suggesting that SEA would lose or destroy the items.

Nothing seriously wrong with arbitration award, says Ontario Superior Court

In *Xiamen International Trade Group Co., Ltd. v. LinkGlobal Food Inc.*, 2023 ONSC 6491, the Ontario Superior Court looked at grounds under which the recognition and enforcement of an arbitration award could be refused.

The dispute arose after Xiamen International Trade Group (**Xiamen**) commenced arbitral proceedings against LinkGlobal Food Inc. (**LinkGlobal**) on the grounds that the masks central to their commercial arrangement were faulty.

The parties' contract contained a clause for arbitration, stating that the award made by the nominated arbitration commission would be final and binding on both parties. The contract provided that the governing law of the entire contract would be that of the People's Republic of China (**PRC**). The arbitral judgment decided in favour of Xiamen. Xiamen then sought the recognition and enforcement of the award under the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**).

The Court looked at Articles 35 and 36 of the Model Law. Article 35 recognises foreign awards as binding while Article 36 provide grounds under which an international arbitral award may be refused. The Court started with the principle that grounds for refusal or enforcement should be construed narrowly. The Court identified some of these grounds as including fairness and natural justice. To set an award aside, the conduct of the arbitral tribunal must be serious enough to offend the most basic notions of morality and justice.

In this case, LinkGlobal argued that the process of the arbitration commission did not permit them to present the evidence of a witness. The Court held that this did not mean that LinkGlobal could not have presented its case to the commission.

LinkGlobal raised further points to highlight the lack of morality and

justice in the procedure. LinkGlobal argued:

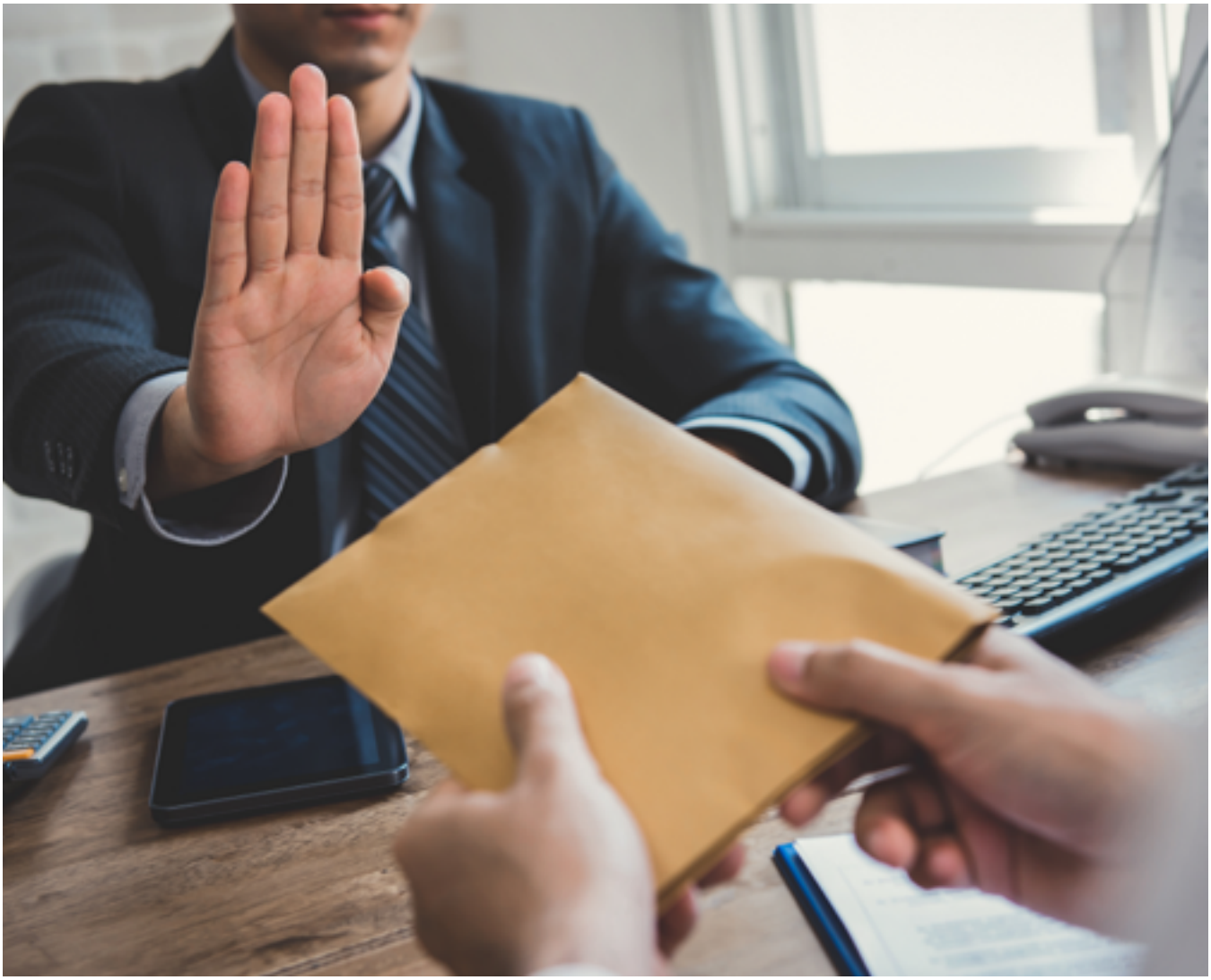
- LinkGlobal had objected to the commission's procedure;
- the commission did not follow its own rules and procedures; and
- the commission had allowed the involvement of a PRC Government actor in the process, thereby eliminating all independence in the procedure.

The Court rejected each point on the lack of evidence. Furthermore, the parties had agreed to any rules the commission may have adopted when they signed the arbitration agreement. The Court held that the award should be recognised and enforced in Ontario.

Arbitration agreement with crypto trading platform set aside by Superior Court of Ontario

In *Lochan. v. Binance Holdings Limited,* 2023 ONSC 6714, the Superior Court of Ontario looked at whether an agreement to arbitrate between crypto-exchange platform, Binance, and some of its users (represented by **Lochan** in a class action suit) could be enforced in Ontario. The agreement had stipulated that resulting disputes would be heard at an arbitration centre in Hong Kong.

At the outset, Justice Morgan described Lochan's case as being an *uphill battle*. The Supreme Court of Canada in 2022 has held that *parties should be held to their contractual agreements to arbitrate*. The Supreme Court stated that judicial intervention would be the



exception to this, not the rule. Some of those exceptions are found in Article 8 of the Model Law. Article 8 allows a court to decline the referral of parties to arbitration if it finds that the agreement is null, void, inoperative or unable to be performed.

Lochan argued that enforcement of the agreement would go against public policy in Ontario. In Lochan's view, the arbitration clause placed undue hardship on the users. The arbitration proceedings would cost each user tens of thousands of dollars in addition to legal fees and travel costs. The cost might be feasible for large investors, but it was not viable for the consumer class. Justice Morgan agreed, referring to a report by the Ontario Securities Commission which showed that over half of Canadian crypto asset owners have less than $5,000 in the market.

Justice Morgan also considered it noteworthy that Binance's agreement provided no information about the fees and costs associated with the arbitration. The result of this would see claimants facing a potentially large and ultimately unknown financial burden to recover a relatively small investment. The Superior Court held the arbitration agreement to be against Ontario public policy.

King Charles III briefed on new arbitration legislation in England

As we have covered in previous editions of ReSolution, England's Law Commission engaged in a thorough review of their Arbitration Act 1996 throughout 2022 and 2023. In September last year, that process concluded. The Commission's Final Report outlines a range of recommendations, most notably:

- creating a rule providing that an arbitration agreement is governed by the law of the chosen seat;
- codifying an arbitrator's duty to disclose; and
- expressly providing for summary disposal.

Progress is now underway in the form of the Arbitration Bill to turn at least some of those recommendations into fresh legislation.

News of this Bill was given to the King before his speech on 7 November last year. The briefing notes contain a short summary of the Bill, noting ways in which the new legislation would update the law. According to the briefing notes, the Bill is to:

- clarify the law governing arbitration agreements;
- strengthen the courts' supporting powers; and
- facilitate quicker dispute resolution.

The Bill was finally introduced to the House of Lords on 21 November last year. It has since passed its first reading in the House of Lords.

Market integrity and investor protections the central focus of new cryptocurrency regulation recommendations

The International Organization of Securities Commissions (**IOSCO**), the world's leading international policy forum for securities regulators (New Zealand's Financial Markets Authority is a member) has released their report, Policy Recommendations for Crypto and Digital Asset Markets (the **Recommendations**). The Recommendations are intended to be *principles-based and outcomes-focused* with a focus on crypto-asset service providers (**CASPs**). The Recommendations cover 18 points over six key areas:

1. conflicts of interest arising from vertical integrations of activities and functions;
2. market manipulation, insider trading and fraud;
3. cross-border risks and regulatory co-operation;
4. custody and client asset protection;
5. operations and technological risk; and
6. retail access, suitability, and distribution.

The detailed Recommendations aim to create an international regulatory threshold to hold CASPs to the standards demanded of business conduct in traditional financial markets.

The Recommendations were created after a period of public feedback on IOSCO's Consultation Report in July 2023. At the time, a high level of attention was being paid to the collapse of FTX, a CASP. The Consultation Report highlights some of the successes of Japanese regulations to shelter some of the cryptocurrency holders there. IOSCO's interpretation of that success is replicated in recommendations 12 to 16 of the Recommendations.

Re-arbitration not an obstacle to enforcing award

In *G v. X and Others* [2023] HKCFI 3316, the Hong Kong Court of First Instance assessed the degree to which re-arbitration on a matter of evidence impacted the validity of the original arbitration award. The Court looked at the issue following a dispute between G and X. G had commenced arbitration proceedings in the People's Republic of China (**PRC**) against X on the basis that they had been induced by X's fraud to sell their interests in a business at a significant undervaluation. The award was made in favour of G.

When G sought to have the award enforced in Hong Kong, X opposed the application. X argued it had not been able to present its case on the tribunal's formula for calculating damages. X also argued that the tribunal had considered matters beyond the scope of submission. As this was occurring, X successfully applied to a court in the PRC to have the award re-examined.

The PRC court ordered "re-arbitration" under Article 61 of the PRC Arbitration Law. This was on the basis that the tribunal had collected evidence on its own without the parties' examination. Doing so went against the rules of the institution presiding over the tribunal. New proceedings commenced, but the tribunal made the same finding as the first. The second tribunal also noted that the PRC court had not set aside the award.

At the Hong Kong Court of First Instance, X argued that the original award was not binding because of the re-arbitration. X also cited the PRC court's finding that the rules of the organisation had not been followed by the panel. However, Justice Mimmie Chan disagreed. Article 61 of the PRC Arbitration Law did not provide that an order for re-arbitration would result in the suspension or setting-aside of an original award. Justice Mimmie Chan held there was *absolutely no ground* for the Court to refuse enforcement of the award.

Enough BRICS to build a house

The economic-bloc, BRICS (Brazil, Russia, India, China and South Africa), has undergone its largest expansion to date. Since forming in 2006, the bloc had only seen expansion once – when South Africa was admitted in 2010. However, BRICS in 2024 can now welcome Egypt, Ethiopia, Iran, Saudi Arabia and the United Arab Emirates into the bloc.

The expansion is significant in many ways. In particular, the expansion will likely have a noticeable impact on the New Development Bank (the **NDB**). Created by the organisation in 2014, the NDB funds infrastructure and development projects in states which are members of the NDB. In addition to BRICS countries, membership is open to United Nations member states.

Without a statement yet on how the expansion will impact the NDB, it will be worth looking at what happened in previous years when the NDB member list gradually expanded to include Bangladesh, Uruguay, Egypt and the United Arab Emirates. Benefits of membership have included appointments of governmental ministers to the NDB's Board of Governors. Members have also acquired shares in the NDB.

Members of BRICs and general members of the NDB likely experience the NBD differently. The degree to which that is true can be found in the Agreement on the New Development Bank (the **Agreement**), signed by the BRICS states in Fortaleza, Brazil. For example, the Agreement lists a range of ways the Board of Governors have special powers. One of these is at Article 44, where only a special majority by the Board of Governors can allow an amendment to the Agreement.

The Agreement also contains instructions for arbitration at Article 46. Arbitration will be used in situations where a disagreement arises:

- between the NDB and a country which has ceased to be a member; and
- between the NDB and a member after a decision to terminate the NDB has been adopted.

The process begins when the parties in dispute nominate an arbitrator each to be on a panel. A third arbitrator is nominated by an authority approved by the Board of Governors. This third arbitrator is empowered to settle all questions of procedure if required by the parties. Disagreements between the NDB and a borrowing country, distinct from an NDB member, will be settled according to the respective contract.