Bennett Jones

ARBITRATION ANGLE

REFLECTING ON A YEAR OF DECISIONS AND LOOKING AHEAD

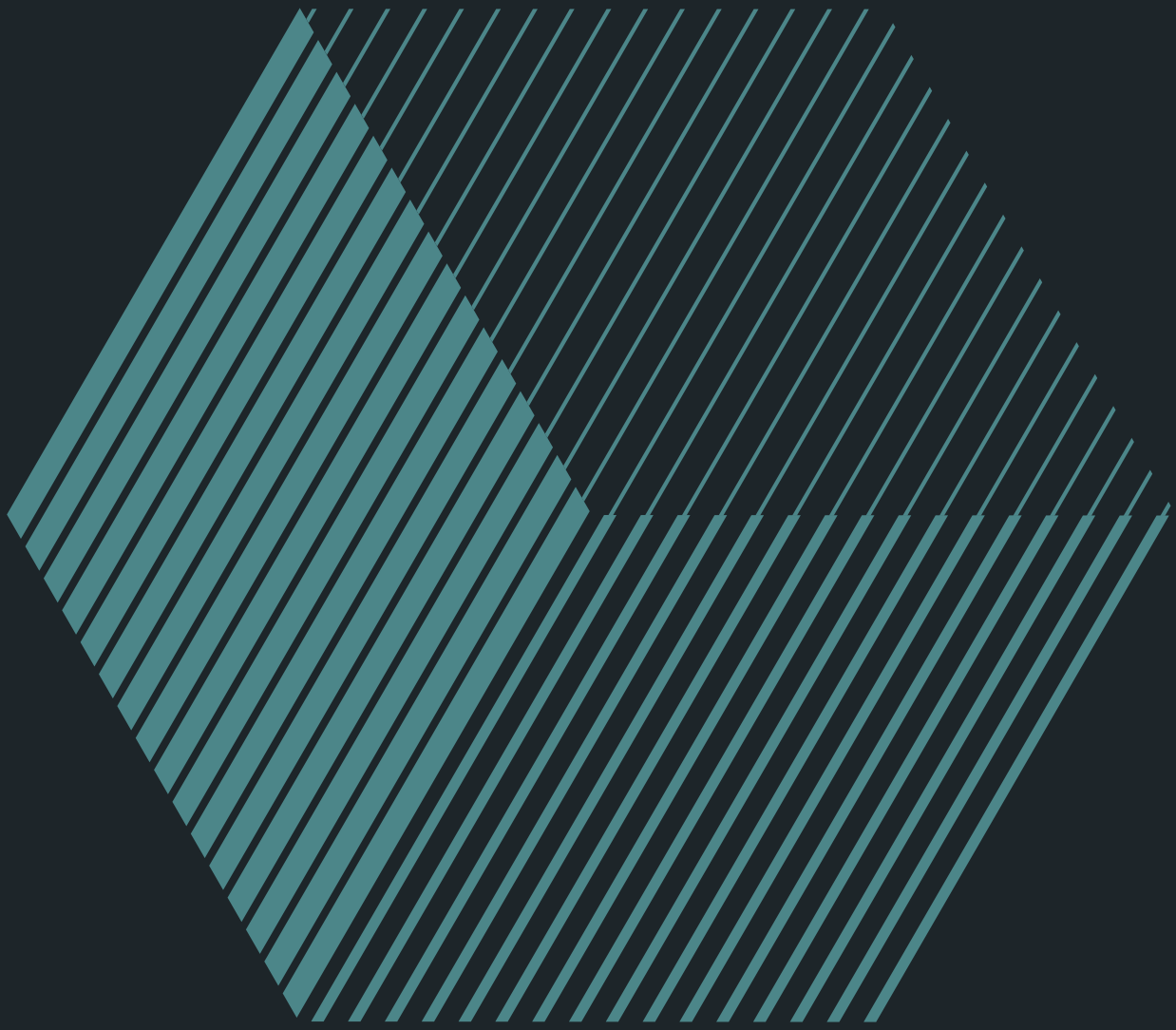


TABLE OF CONTENTS

EDITOR'S NOTE

It is my distinct pleasure to welcome you to the inaugural edition of *Arbitration Angle*, Bennett Jones' arbitration newsletter. As the head of our firm's arbitration practice group, I am delighted to introduce this comprehensive source of insights, updates and analyses in the dynamic field of arbitration. Our commitment is to provide you with a holistic view on arbitration-related news and developments through diversified perspectives—hence the name, *Arbitration Angle*.

In this inaugural edition, we delve into key developments that have transpired in the world of arbitration in recent months. We divide these developments into three broad streams: (1) domestic, (2) international, and (3) in practice. Our team of seasoned practitioners will offer valuable insights and practical, hands-on tips to help ensure that your legal rights are preserved and protected should you ever find yourself in arbitration.

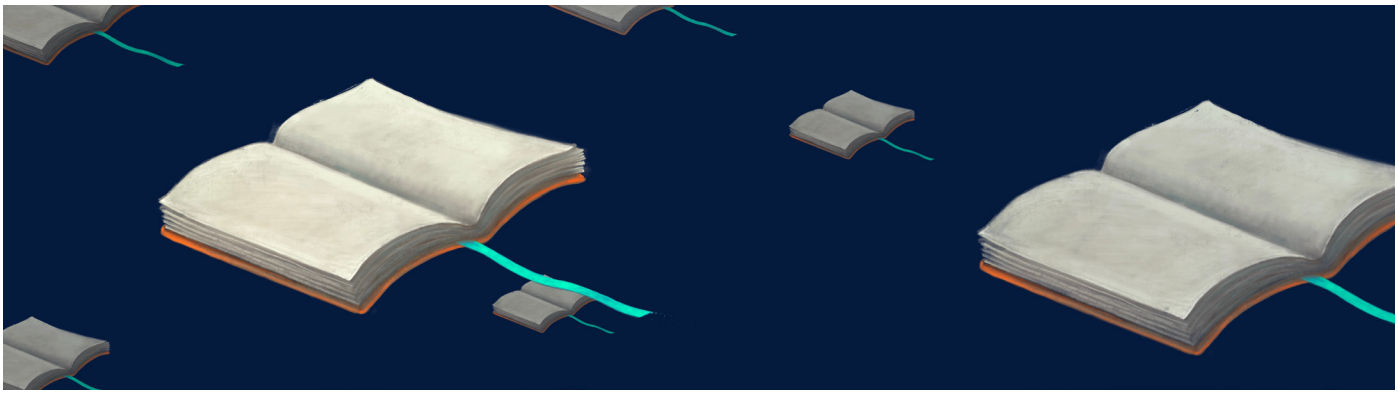
At Bennett Jones, we take immense pride in our innovative and collaborative approach to providing top-tier arbitration services. Our relentless commitment to excellence and serving our clients' needs has solidified our reputation as a leading arbitration team in Canada. We firmly believe that informed clients are empowered clients, and *Arbitration Angle* serves as an avenue to share our knowledge and insights with you.

I extend my heartfelt gratitude to our contributors, whose expertise and dedication have enriched this edition. Their insightful analyses and practical tips will undoubtedly resonate with legal practitioners, corporate decision-makers and arbitration enthusiasts alike.

Thank you for choosing *Arbitration Angle* as your source for all things arbitration. We hope you find this edition informative and engaging, and we remain at your service for any inquiries or further discussions regarding the evolving landscape of arbitration.

Vasilis F.L. Pappas
Head of International Arbitration, Bennett Jones LLP

ARBITRATION 360



UN Member States Adopt Code of Conduct for Arbitrators in Investor-State Disputes

At its 56th annual session held in Vienna in July 2023, the United Nations Commission on International Trade Law (UNCITRAL) formally adopted the *Draft Code of Conduct for Arbitrators in International Investment Dispute Resolution* (the *Code*). More than six years in development, the *Code* represents the first-ever attempt to regulate the conduct of arbitrators in investor-state disputes. The *Code* introduces extensive disclosure obligations, along with significant restrictions on "double-hatting," the practice of simultaneously serving as an arbitrator and party-appointed counsel or expert in matters concerning same state actions, same parties or same provisions of same treaties. How the *Code* will be implemented remains unclear, but there are early signs that it might be incorporated directly into the UNCITRAL *Arbitration Rules*. In addition, parties can always apply the *Code* by consent, which may become a common practice.

The adoption of the *Code* and its implications are discussed in greater detail in a special feature appearing on pages 14 to 21 of our newsletter.

EU and UK Carve Out Exemptions to Allow Russia and Russian Entities to Be Represented by Counsel in Contentious Proceedings

Since the beginning of the war in Ukraine in February 2022, Russia and Russian legal entities have been subject to an unprecedented number of sanctions impacting numerous sectors. In its eighth round of sanctions, released on October 6, 2022, the European Union expanded the sanctions to legal advisory services, prohibiting direct or indirect provision of legal advice to the Government of Russia or to any legal entities established within the country. In doing so, the EU sought to protect access to justice by narrowly defining "legal advisory services" to mean legal advice for non-contentious matters only, such as negotiations and commercial transactions.

Similar developments occurred in the UK earlier this year. On June 29, 2023, the UK introduced restrictions on providing legal advisory services, which similarly apply only to "legal advice to a client in non-contentious matters." As in the EU, legal practitioners in the UK are still permitted to represent Russia and Russian entities in litigation, administrative matters, arbitrations or mediations, but not in non-contentious business activities that fall under the UK sanctions regime. With these new restrictions in place, the EU and UK approaches to sanctions on legal services are now largely—though not entirely—aligned.

SCOTUS Mandates Stay of Proceedings During an Appeal from Denial of a Motion to Compel Arbitration

In a recent decision by the Supreme Court of the United States in *Coinbase, Inc. v Bielski*, 599 U.S. (2023), the Supreme Court held, by a slim 5-4 majority, that during any appeal from a decision to deny a motion to compel arbitration, the lower court is required to suspend all pre-trial and trial activities pending resolution of the appeal. The majority opinion emphasized the practicality of this approach, stating that in the absence of an interim stay, several adverse outcomes could arise, including, but not limited to, rendering the appeal insignificant, squandering judicial resources and compelling coerced settlements.

Proposed Changes to the *UK Arbitration Act 1996*

In September 2023, the UK Law Commission published its final report with recommendations and a draft bill for reform of the *Arbitration Act 1996*, which governs domestic and international arbitrations in England and Wales. The Commission's key recommendations include:

i. Codifying the duty of arbitrators to disclose any circumstances that might reasonably put their impartiality in doubt. This duty extends beyond the arbitrator's actual knowledge and would include what they ought to reasonably know.

ii. Permitting arbitrators to resign without liability (unless the resignation was unreasonable) and to be removed by application of the parties without liability (unless they acted in bad faith).

iii. Permitting a tribunal to issue awards on a summary basis.

iv. Restricting new grounds of objection and new evidence on appeals to the court from a decision of a tribunal regarding its own jurisdiction.

v. Expressly introducing a conflict-of-laws rule that codifies the common law. Namely, that the law governing the arbitration agreement will either be the law chosen by the parties or the law of the seat of arbitration.

vi. Supporting the enforcement of orders made by emergency arbitrators by way of peremptory orders (which, if ignored, can be enforced in court) or by applications to the court if the content of an emergency arbitrator's order is urgent in nature.

Germany's Plans for Modernizing its Arbitration Law

The German Federal Ministry of Justice has issued "*Guidelines for the Advancement of German Arbitration Law*", presenting a slate of 12 key proposals to modernize its arbitration laws. These revisions are devised to bolster Germany's standing as a preferred hub for resolution of international commercial disputes. Should these proposals be adopted, they will represent the most substantial reform of German arbitration law in over 20 years and could signal where the international arbitration practice is headed next. Some of the most notable proposals include:

i. Removing the requirement for arbitration agreements to be in writing, so as to enable recognition of electronic and verbal arbitration agreements.

ii. Introducing as-of-right judicial review of arbitral awards where the tribunal finds that it lacks jurisdiction.

iii. Introducing a system for publication of arbitral awards.

iv. Providing clarity on whether interim relief granted by arbitral tribunals can be enforced in Germany.

v. Permitting an award to be remitted back to an arbitral tribunal where a German court has refused to recognize an award or set it aside.

Luxembourg Introduces Significant Changes to its Arbitral Law

Earlier this year, Luxembourg passed new arbitration legislation (*Arbitration Act, 2023*) with the goal of promoting Luxembourg as a hub for arbitration. The new act seeks to promote flexibility, efficiency and confidentiality in the arbitral process. The major changes include:

i. Strengthening the power of a tribunal to decide its own jurisdiction (known as the doctrine of "competence-competence") by limiting the ability of a reviewing court to decide questions of jurisdiction.

ii. Creating "supporting judges" to help decide procedural issues that arise during an arbitration.

iii. Replacing the District Court with the Court of Appeal as the appeal court for arbitral matters, thus limiting the potential number of appeals from two to one. In addition, appeals will generally only be permitted on limited grounds that do not involve merits of the tribunal decision.

iv. Permitting immediate enforcement of arbitral decisions, even where the decision is subject to a request to set aside the award or an appeal (subject to the limited exception where doing so would "severely prejudice the rights of a party").

v. Confirming that insolvency procedures do not negate arbitration agreements that were entered into prior to the insolvency and that arbitration agreements can be entered into during the insolvency procedure itself, subject to limited exceptions.

vi. Promoting expeditious proceedings by setting the default duration of proceedings at six months.

New Greek Law on International Commercial Arbitration

In February of 2023, the Greek parliament introduced new legislation respecting international commercial arbitration. The new law seeks to substantively modernize Greece's international arbitral regime and now incorporates most of the UNCITRAL model law. The major changes include:

i. Broadening the scope of arbitrable disputes (all disputes are now arbitrable, unless a statute provides otherwise).

ii. Recognizing electronic exchanges as written documents.

iii. Expressly introducing a conflict-of-laws rule, which stipulates that the law governing the arbitration agreement will either be the law chosen by the parties, the law of the contract or the law of the seat of arbitration.

iv. Regulating the appointment of arbitrators by permitting the Court to appoint one arbitrator (where the parties are unable to agree) or even the entire tribunal (if the parties so request).

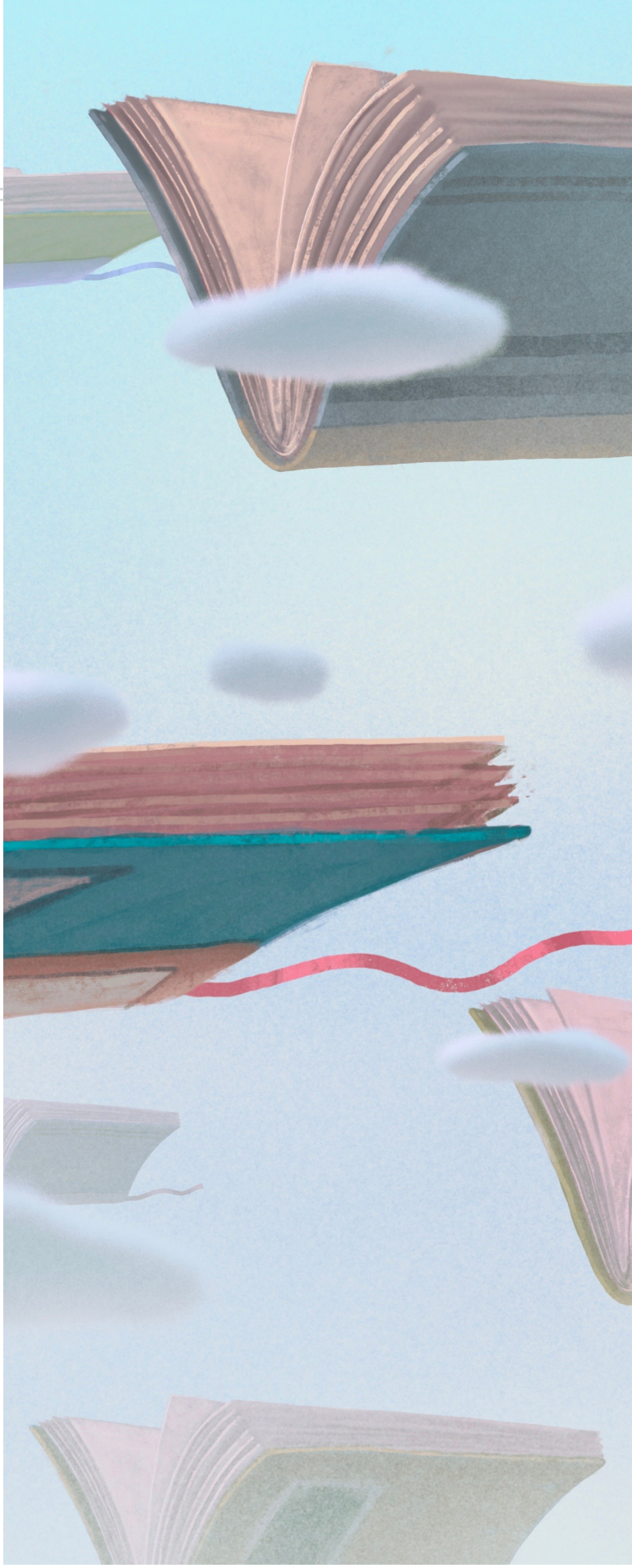
v. Introducing new procedures in multi-party arbitrations.

vi. Implementing the automatic enforcement of interim measures ordered by a tribunal, except under discrete circumstances.

vii. Permitting a tribunal to order the production of documents and other evidence.

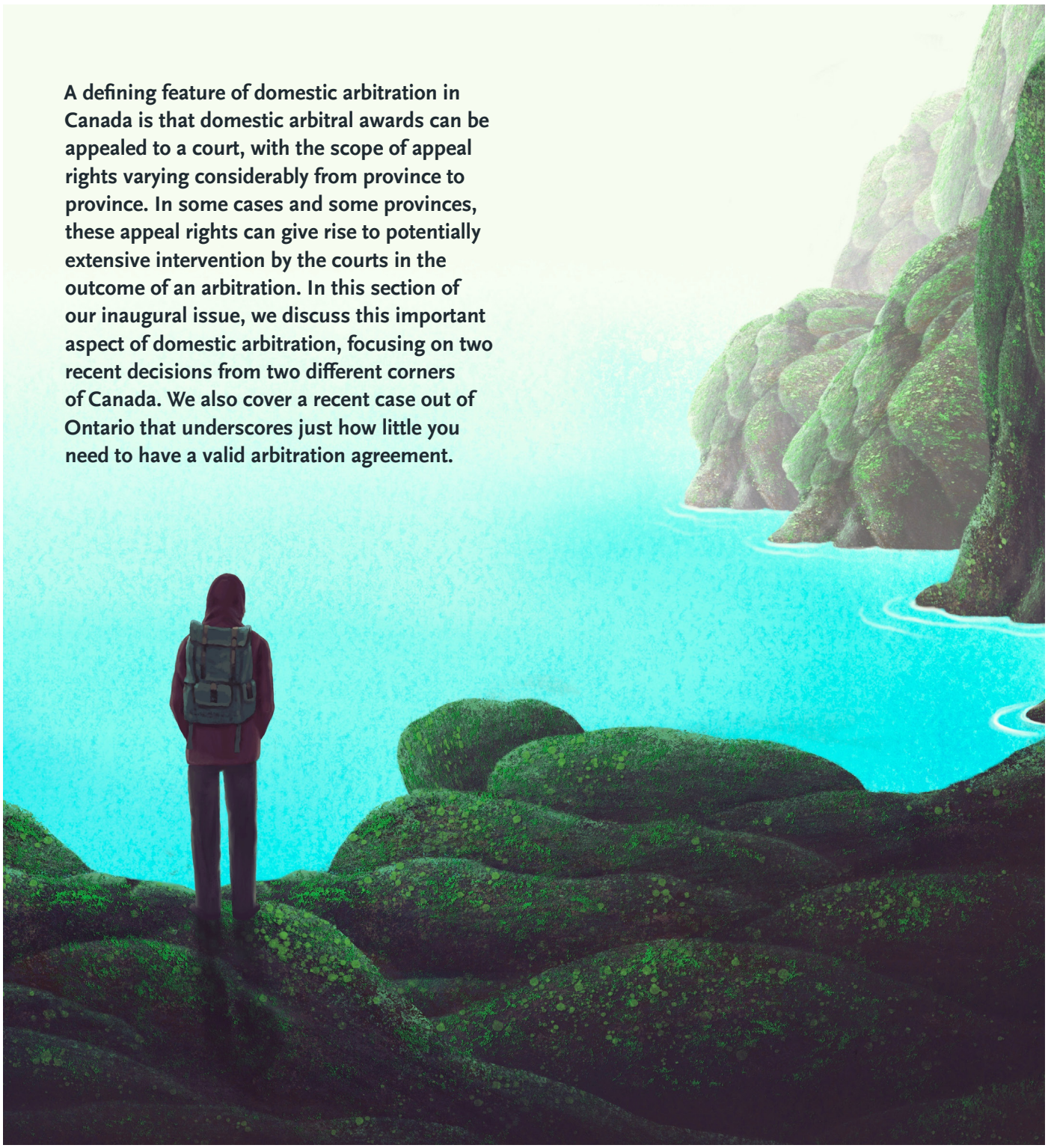
Italy Finally Allows Sole Arbitrators and Granting Interim Measures

Italian arbitration law underwent major reform on February 28, 2023, lifting the country's long-standing prohibitions on sole arbitrators in Italian-seated arbitrations and granting of interim relief by arbitral tribunals. These prohibitions—unique to only a handful of jurisdictions such as China and Thailand— have now been removed, bringing Italy in line with the rest of the world and ushering in a new era for Italian-seated arbitrations. The reform also means that interim measures issued by foreign arbitral tribunals will now likely be enforceable in Italy, a development that has been hailed a "game changer" by commentators.



DOMESTIC

A defining feature of domestic arbitration in Canada is that domestic arbitral awards can be appealed to a court, with the scope of appeal rights varying considerably from province to province. In some cases and some provinces, these appeal rights can give rise to potentially extensive intervention by the courts in the outcome of an arbitration. In this section of our inaugural issue, we discuss this important aspect of domestic arbitration, focusing on two recent decisions from two different corners of Canada. We also cover a recent case out of Ontario that underscores just how little you need to have a valid arbitration agreement.



Artem Barsukov, Vasilis Pappas & David Wahl

ONTARIO COURT OF APPEAL PROVIDES CLARITY REGARDING APPEALS OF DOMESTIC ARBITRAL AWARDS

Commercial arbitration is widely perceived as a pathway to obtaining a final and binding decision (styled as an "award") that is not subject to appeal. However, this is not always the case in Canada. The degree of finality of the award may vary considerably depending on whether the dispute is international or domestic in nature and the province in which the seat of arbitration is located.

International commercial awards issued in Canada are governed by the *International Commercial Arbitration Acts* of various provinces, which are generally identical and which follow the UNCITRAL *Model Law on International Commercial Arbitration*. Under these acts, an international commercial award is not subject to an appeal on the merits, but can only be "set aside" on a very limited number of narrow grounds, all of which go to whether there exist circumstances where there was a fundamental defect in the manner in which the arbitration was undertaken. These grounds are:

1. invalidity of arbitration agreement or lack of capacity to enter into the arbitration agreement;
2. lack of proper notice or other inability to present one's case;
3. the tribunal exceeding its jurisdiction;
4. failure to conduct the arbitration in accordance with the arbitration agreement;
5. lack of arbitrability; and
6. conflict with public policy.

By contrast, domestic awards issued in Canada are not only subject to set-aside on similar grounds, but may also be appealed on their merits in some instances. To further confound matters, the default rules and the scope of appeal rights vary somewhat between each province's *Arbitration Act*, and are not always intuitive. In the case of Ontario, section 45 of the *Arbitration Act, 1991,* SO 1991, c 17 [*Arbitration Act*] provides as follows:

> **Appeal**
>
> **Appeal on Question of Law**
>
> **45** (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.
>
> **Idem**
>
> (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.
>
> **Appeal on Question of Fact or Mixed Fact and Law**
>
> (3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

Section 49 of the Ontario *Arbitration Act* further provides that a decision of the Superior Court of Justice on an appeal or set-aside application may be appealed to the Ontario Court of Appeal with leave of that court.

In the recent decision in *Baffinland Iron Mines LP v Tower-EBC GP/SENC*, 2023 ONCA 245 [*Baffinland Iron Mines*], the Ontario Court of Appeal introduced much-needed clarity regarding the availability and scope of appeal rights in domestic arbitrations, as well as the circumstances in which the Superior Court's decision on a leave to appeal may be appealed further to the Court of Appeal under section 49. This decision, and the key takeaways arising from it, is discussed hereto.

Facts

In 2017, Baffinland Iron Mines (BIM) and Tower-EBC (TEBC) entered into two earthworks contracts to support BIM's construction of a railway to transport ore from its mine on Baffin Island, Nunavut, to a nearby port. Both contracts provided that any disputes that had not been resolved through other mechanisms available under the contracts were to be "finally settled" by arbitration under the *Rules of Arbitration of the International Chamber of Commerce* (the *ICC Rules*). Neither contract expressly addressed appeals from an eventual arbitral award.

In 2018, BIM terminated the contracts due to delays. TEBC commenced arbitration proceedings challenging BIM's right to terminate the contracts and claiming damages arising from the termination. The arbitral tribunal reached a split decision in favour of TEBC, with one member of the tribunal issuing a partial dissent disagreeing with the majority on their interpretation of Ontario law and reducing the damages awarded to TEBC by more than 50 percent.

Subsequently, BIM sought leave to appeal under section 45 of the *Arbitration Act* on questions of law, including those that it believed drove the divergent results reached by the majority and the dissent. The Superior Court of Justice refused to grant leave to appeal, holding that the arbitration agreement precluded any appeal by (1) stating that disputes would be "finally settled" by arbitration, and (2) incorporating the *ICC Rules*, which included a waiver of any form of recourse against the award. On this basis, the application judge declined to grant BIM leave to appeal.

BIM subsequently appealed the application judge's decision to the Ontario Court of Appeal pursuant to section 49 of the *Arbitration Act*. In response, TEBC moved to quash BIM's appeal on the basis that section 49 does not contemplate an appeal from a decision on a leave application. The Court of Appeal dismissed TEBC's motion to quash the appeal, but ultimately held that the application judge made no reversible error in finding that the arbitration agreement precluded appeals to the court on any question.

Key Takeaways

The Court of Appeal decision in *Baffinland Iron Mines* contains four key takeaways for domestic arbitrations that are seated in Ontario.

1. Clear Framework for Availability of Appeals from Domestic Awards in Ontario

As drafted, section 45 of the Ontario *Arbitration Act*, which governs availability of appeals from domestic awards, is not inherently intuitive. The Court of Appeal introduced some much-needed clarity by expressly finding that it contemplates three different scenarios:

1. **Where an arbitration agreement expressly provides for appeals:** there is an appeal as of right.
2. **Where an arbitration agreement is silent on appeals:** there is an opportunity to appeal but only with leave of the Superior Court of Justice.
3. **Where an arbitration agreement precludes appeals:** there is no appeal or right to seek leave to appeal.

2. Clear Framework for Availability of Appeals from a Decision on a Leave Application

As noted, section 49 of the Ontario *Arbitration Act* provides for a further appeal to the Court of Appeal from a decision of the Superior Court of Justice on an appeal or a set-aside application, with leave of the Court of Appeal. However, section 49 is silent on appeals from a denial of leave to appeal under section 45(1).

The Court of Appeal in *Baffinland Iron Mines* again introduced some much-needed clarity on this issue while explaining and reconciling two of its own seemingly competing decisions cited by the parties in support of their respective positions. The Court set out the following rules for when an appeal lies to the Court of Appeal under section 49 of the *Arbitration Act* from a decision on a leave application:

1. **Where the Superior Court of Justice *declines to consider the merits* of an application for leave to appeal:** an appeal to the Court of Appeal is available with leave.
2. **Where the Superior Court of Justice *duly considers the merits* of an application for leave to appeal and denies leave:** an appeal to the Court of Appeal is not available.

As noted, in this case, the application judge refused to consider the merits of BIM's leave application on the basis that the arbitration agreement precluded any appeals. Applying the above principles, the Ontario Court of Appeal dismissed TEBC's motion to quash BIM's appeal to the Court of Appeal.

3. The Words "Finally Settled" Preclude Appeals under Ontario *Arbitration Act*

Having considered and rejected TEBC's motion to quash BIM's appeal, the Court of Appeal went on to consider the merits on BIM's leave application, affirming the decision of the Superior Court of Justice to deny leave to appeal. In doing so, the Court of Appeal:

(a) affirmed that the words "finally settled" in an arbitration agreement preclude appeals from an arbitration award in Ontario; and

(b) held that there is no distinction between the meaning of phrases "final and binding" and "finally settled," even if those phrases are used within the same agreement.

In reaching these conclusions, the Court of Appeal emphasized the word "final," holding that a different phrase containing the word "final" will convey the same meaning, as long as the additional words accompanying it do not materially modify it. The Court further cited approvingly its prior decision in 1988 decision in *Yorkville North Development Ltd v North York (City) (1988)*, 64 OR (2d) 225 (CA), in which it held that the word "final" should be construed as admitting of no further disputation, thereby excluding any right of appeal.

4. Appropriately Worded Arbitration Rules May Preclude Appeals under Ontario *Arbitration Act*

As noted above, the Superior Court of Justice's decision in the Superior Court to refuse to consider the merits of BMI's leave application was based in part on the *ICC Rules*, which were incorporated by reference into the arbitration agreement. In this case, the pertinent rule was Rule 35(6), which provides as follows:

> **Every award shall be binding on the parties.** By submitting the dispute to arbitration under the *Rules*, the parties undertake to carry out any award without delay and shall be **deemed to have waived their right to any form of recourse** insofar as such waiver can validly be made.

In considering whether Rule 35(6) was inconsistent with the phrase "finally settled," the Court of Appeal made the following observation in obiter:

> The application judge, however, held the terms were not inconsistent, and there was no error in that finding. As noted above, [the arbitration agreement] was properly interpreted to preclude appeals, just as the wording of ICC Rule 35(6) does. **To the question of whether appeals are permitted, both provisions give the same answer: no, they are precluded.**
>
> *[emphasis added]*

Thus, while not establishing a binding precedent, the Court of Appeal gave strong indication that the parties may successfully contract out of appeal rights simply by adopting appropriately worded arbitration rules, such as the *ICC Rules*.

Conclusion

The Court of Appeal decision in *Baffinland Iron Mines* provides much-needed clarity regarding availability of appeals from domestic arbitral awards rendered in Ontario. It also carries important implications for transaction counsel. In particular, it reinforces the importance of discussing the desirability of appeal rights with one's clients and expressly addressing the issue in the arbitration agreement. While the decision indicates that the word "finally settled" or "final and binding" may be sufficient to oust appeal rights, transaction counsel would be well-advised to include express language that the parties agree to waive any and all appeal rights to the extent permitted by law if that is desired by the parties.

It is also important to appreciate that the discussion and authority above applies to Ontario only, and that the rules governing appeals from domestic awards are different in other provinces in Canada. This, in turn, underscores the importance of carefully selecting the legal seat of arbitration.

All of the above reinforces the importance of obtaining expert advice when drafting dispute resolution clauses for commercial agreements.

David Wahl, Vasilis Pappas, Artem Barsukov & Kassandra Devolin

A TRIBUNAL'S INTERPRETATION OF A PRIOR ARBITRAL AWARD: A QUESTION OF LAW

In its recent decision in *Kingsgate Property Ltd. v Vancouver School District No. 39*, 2023 BCSC 560, the Supreme Court of British Columbia considered, among other things, whether an arbitral tribunal's interpretation of a prior arbitration award that was rendered under the same agreement to identify possible issue estoppel was a question of law that was appealable to the Supreme Court of British Columbia pursuant to section 31 of the *Arbitration Act*, RSBC 1996, c 55. The Court found that it was a question of law and granted leave to appeal.

Background

In 2005, the petitioners in the case, Kingsgate Property Ltd. (Kingsgate) and Beedie Development LP (Beedie), were assigned a lease that was originally entered into between the respondent in the case, the Vancouver Board of Education of School District 19 (the Vancouver Board of Education) and Royal Oak Holdings Ltd. (Royal Oak). That lease commenced in 1972 and was for an initial term of 25 years, with multiple options to renew. Under section 29.09 of the lease, rental payments were to be calculated at 8.25 percent of the market value of the lands.

The First Arbitration

In 1999, an arbitration took place between the original parties to the lease: namely, Royal Oak and the Vancouver Board of Education (the First Arbitration). The First Arbitration was in connection with the interpretation of section 29.09 of the lease, in order to determine the market value of the property for the term of 1997 to 2007 so that the rent payable for that term could be ascertained. In its decision in the First Arbitration, the tribunal found that the market value of the property under section 29.09 needed to be calculated with reference to "outright approval use" rather than "discretionary conditional use" under the applicable zoning laws.

The Second Arbitration

Royal Oak assigned the lease to Kingsgate and Beedie in 2005. In 2020, these new parties to the lease commenced an arbitration to assess the market value of the property for the term of 2017 to 2027 in order to calculate the rent payable for that term pursuant to section 29.09 (the Second Arbitration). Kingsgate and Beedie argued that issue estoppel applied and the previous award from the First Arbitration was binding on the parties in the Second Arbitration.

The majority of the tribunal in the Second Arbitration disagreed, noting there were "*strong factors militating in favour of exercising [its] discretion not to apply the doctrine of issue estoppel and instead to apply what it found to be the intended meaning of the Lease.*" On this basis, the tribunal in the Second Arbitration engaged in an interpretation of section 29.09 of the lease without considering the 1999 award from the First Arbitration. Contrary to findings in the First Arbitration, the tribunal in the Second Arbitration determined the market value of the lands could be calculated pursuant to section 29.09 of the lease with reference to "discretionary conditional use" under the applicable zoning laws.

Thus, on January 19, 2022, the majority of the tribunal granted an award which set the market value of the leased lands at $116.5 million. This substantially increased the rent Kingsgate and Beedie had to pay, as compared to the prior lease term. It also created outstanding back rent of $42 million.

Decision

Kingsgate and Beedie petitioned the Supreme Court of British Columbia for leave to appeal the tribunal's award in the Second Arbitration pursuant to section 31 of the *Arbitration Act*, which provides the following in relevant part:

> **31** (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if:
>
> (a) all of the parties to the arbitration consent; or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that:
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice;
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member; or
>
> (c) the point of law is of general or public importance.

In particular, Kingsgate and Beedie sought leave to appeal the Second Arbitration determination that market value could be calculated with reference to "discretionary conditional use" under the applicable zoning laws in light of the opposite finding in the First Arbitration.

Kingsgate and Beedie argued that the Second Arbitration decision constituted an error on a question of law entitling them to seek leave to appeal pursuant to section 31 of the *Arbitration Act*. In response, the Vancouver Board of Education asserted that the Second Arbitration decision was in respect of a question of mixed fact and law, which is not appealable under section 31 of the *Arbitration Act*, and alleged that Kingsgate and Beedie were strategically framing the issue as a question of law in order to advance an appeal they were not entitled to bring. The Vancouver Board of Education also asserted that Kingsgate and Beedie were arguing a version of issue estoppel which had not been argued in the Second Arbitration.

The Supreme Court of British Columbia found that interpreting a prior arbitration award for the purpose of considering issue estoppel was more akin to interpreting a statute (a question of law) than a contract (a question of mixed fact and law). In particular, the Court found that such an exercise involved the interpretation of a legal text with binding force to determine the parties' obligations under a legal doctrine. As such, the Court found that the tribunal's ruling on issue estoppel in the Second Arbitration was subject to appeal as a question of law pursuant to section 31 of the *Arbitration Act* and granted leave to appeal.

Conclusion and Key Points

In a commercial agreement subject to multiple domestic arbitration proceedings in British Columbia, the question of whether an arbitration award in one of those prior proceedings under the same agreement results in issue estoppel will likely be considered an appealable question of law, with inconsistent findings to be determined by the Court.

It is important to appreciate that the discussion and authority above applies to British Columbia only, and that the rules governing appeals from domestic awards are different in other provinces in Canada. This, in turn, underscores the importance of carefully selecting the legal seat of arbitration.

All of the above reinforces the importance of obtaining expert advice both when drafting dispute resolution clauses for commercial agreements and when involved in an arbitration proceeding.

David Wahl, Vasilis Pappas, Artem Barsukov & Chelsea Tolppanen

AN ARGUABLE CASE MAY BE ALL YOU NEED TO GO TO ARBITRATION IN ONTARIO

In the recent Ontario Court of Appeal decision in *Husky Food Importers & Distributors Ltd. v JH Whittaker & Sons Limited*, 2023 ONCA 260, the Court addressed the question of what standard of proof a party would need to meet in order to establish that an agreement to arbitrate exists, such that a stay of a court proceeding should be granted and the dispute referred to arbitration under section 9 of Ontario's *International Commercial Arbitration Act*. The Court found that the applicable standard of proof is that of "arguable case," which is lower than the ordinary balance of probabilities standard, consistent with the prevailing view in Ontario that deference should be given to agreements to arbitrate and the jurisdiction of arbitral tribunals to determine their own jurisdiction.

Background

The Unsigned Distribution Agreement

Husky Food Importers & Distributors Ltd. (Husky Food), an Ontario company, and JH Whittaker & Sons Limited (JH Whittaker), a New Zealand chocolate manufacturer, entered into an initial distribution arrangement under which Husky Food would import, distribute and market JH Whittaker's products in Canada. Husky Food and JH Whittaker sought to negotiate a formal, long-term, exclusive distribution agreement. The parties exchanged drafts of a distribution agreement toward the end of the negotiations. A final version was never signed. The drafts of the distribution agreement included the following arbitration clause:

> Where the Customer is located outside of New Zealand, any dispute, controversy or claim arising out of or in connection with these Terms, or any question regarding its existence, breach, termination or invalidity, will be referred to the New Zealand International Arbitration Centre for arbitration in accordance with the New Zealand *Arbitration Act 1996*. Such arbitration shall also be as follows:
>
> the number of arbitrators will be: one;
>
> the place of arbitration will be: Wellington, New Zealand; and
>
> the language of the arbitration will be: English.

There was evidence that Husky Food accepted this arbitration clause, including that in its Statement of Claim, Husky Food pled that "*[a]fter a lengthy negotiation process, Husky and JHW reached agreement on all the material terms as of May 15, 2020*".

In the recent Ontario Court of Appeal decision in *Husky Food Importers & Distributors Ltd. v JH Whittaker & Sons Limited*, 2023 ONCA 260, the Court addressed the question of what standard of proof a party would need to meet in order to establish that an agreement to arbitrate exists, such that a stay of a court proceeding should be granted and the dispute referred to arbitration under section 9 of Ontario's *International Commercial Arbitration Act*. The Court found that the applicable standard of proof is that of "arguable case," which is lower than the ordinary balance of probabilities standard, consistent with the prevailing view in Ontario that deference should be given to agreements to arbitrate and the jurisdiction of arbitral tribunals to determine their own jurisdiction.

Husky Food's Action in the Ontario Superior Court of Justice

A dispute regarding breach of contract arose between the parties and Husky Food commenced an action in the Ontario Superior Court of Justice against JH Whittaker, arguing that the parties had agreed on all the material terms of the distribution agreement, and that JH Whittaker had breached its obligations under that agreement.

JH Whittaker moved to stay Husky Food's action pursuant to Section 9 of Ontario's *International Commercial Arbitration Act*, which states:

> Where, pursuant to article II (3) of the *[New York] Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]* or article 8 of the [UNCITRAL] *Model Law [on International Commercial Arbitration]*, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

Article II(3) of the *New York Convention Guide*, in turn provides that "*when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate], [the court] shall, at the request of one of the parties, refer the parties to arbitration* ...". Similarly, article 8 of the UNCITRAL *Model Law* provides that "*[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests ... refer the parties to arbitration* ...".

In effect, all of the Ontario *International Commercial Arbitration Act*, the *New York Convention*, and the UNCITRAL *Model Law* require a domestic court seized with a dispute that is subject to an arbitration agreement to (1) stay court proceedings in respect of such a dispute, and (2) refer the dispute to arbitration in accordance with the arbitration agreement.

In response to JH Whittaker's motion to stay proceedings, Husky Food took the position that it never agreed to arbitrate disputes that might arise under the distribution agreement.

The motion judge found that the applicable standard of proof to prove the existence of an arbitration agreement is an "arguable case," and that JH Whittaker had met this standard on the facts. Accordingly, the motion judge granted the stay and referred the matter to arbitration.

Husky Food appealed to the Ontario Court of Appeal on the following two grounds:

1. the motion judge erred in holding that a court should grant a stay where it is arguable that an arbitration agreement exists; and
2. the motion judge made a palpable and overriding error in holding that it was arguable on the record that an agreement to arbitrate existed between Husky Food and JH Whittaker.

The Ontario Court of Appeal Decision

The Applicable Standard of Proof

There are two components common to stay provisions in provincial arbitration legislation: (1) the technical prerequisites for a mandatory stay of court proceedings, and (2) the statutory exceptions to a mandatory stay of court proceedings.

As the Supreme Court of Canada observed in *Peace River Hydro Partners v Petrowest Corp.*, 2022 SCC 41 *[Peace River]*, provincial arbitration legislation typically contains four relevant technical prerequisites for a stay:

1. an arbitration agreement exists;
2. court proceedings have been commenced by a "party" to the arbitration agreement;
3. the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and
4. the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.

The Ontario Court of Appeal held that while the *Peace River* framework was crafted in the context of domestic arbitration legislation, it applies equally to stays sought under section 9 of the *International Commercial Arbitration Act*.

Husky Food contended that a party moving for a stay must demonstrate, on a balance of probabilities, that an arbitration agreement exists. Relying on the SCC's decision in *Peace River,* the Ontario Court of Appeal found that the motion judge was correct in applying the lower standard of whether it was arguable that an arbitration agreement exists.

The Court of Appeal of Ontario held that if all the technical prerequisites are met, the mandatory stay provision is engaged and the Court should then move on to the second component of the analysis, which concerns the statutory exceptions to granting a stay. Issues under the second component did not arise in this case.

The Existence of an Arbitration Agreement was Arguable on the Record

Husky Foods submitted that the motion judge "*expressly ignored certain material facts which clearly demonstrate that Husky did not agree to submit disputes to arbitration*." The Ontario Court of Appeal saw no error by the motion judge. The record before the motion judge contained evidence demonstrating that Husky Foods did agree to submit disputes to arbitration, which the Ontario Court of Appeal found fully supported the motion judge's findings that:

> [T]here is evidence here that the Terms did come to Husky's attention. Whittaker's sent the Terms containing the Arbitration Clause to Husky. As noted, Husky then engaged with the Terms by selecting the days for payment and removing the track changes in the Terms. It left the Arbitration Clause in place.
>
> The Ontario Court of Appeal dismissed the appeal, confirmed the stay of court of proceedings in favour of arbitration, and awarded JH Whittaker costs in the amount of $30,000.

Key Takeaways

The standard of proof for whether an arbitration agreement exists in Ontario under both the domestic and international arbitration legislation is the "arguable case" standard, which is lower than the balance of probabilities standard. This means that even where parties do not execute a formal written agreement, they may find themselves before an arbitral tribunal to resolve a dispute.

It is important to appreciate that the discussion and authority above applies to Ontario only and that the rules governing the standard of proof for whether an arbitration agreement exists may be different in other provinces in Canada.

The above reinforces the importance of obtaining expert advice both when drafting dispute resolution clauses for commercial agreements and when involved in an arbitration proceeding.

INTERNATIONAL ARBITRATION 2023 SPOTLIGHT

VASILIS F. L. PAPPAS, FCIARB

PARTNER, HEAD OF
INTERNATIONAL ARBITRATION

604.891.5114
PAPPASV@BENNETTJONES.COM

"Vasilis is organized, articulate and not afraid of a challenge. I doubt there are many better."

"I expect my external lawyers to add real value and out-of-the-box strategy and advice. Vasilis ticks this box."

WHAT CLIENTS SAY

MEMBER SPOTLIGHT: 2023 EDITION

Vasilis is Head of the firm's International Arbitration Practice Group. He is a recognized leader in the fields of international commercial arbitration and investor-state arbitration, with particular expertise in the arbitration of construction disputes.

Prior to joining Bennett Jones, Vasilis practiced for eight years in New York City in the international arbitration group of a leading international law firm. He also practiced for two years with the Trade Law Bureau of the Department of Foreign Affairs and International Trade (now Global Affairs Canada), representing Canada in investor-state arbitrations.

Currently, in addition to leading Bennett Jones' arbitration team, Vasilis is an adjunct professor at the University of Calgary's Faculty of Law in international commercial arbitration and investor-state arbitration. He is also a member of the Canadian chapter of the ICC International Court of Arbitration, is a Fellow of the Chartered Institute of Arbitrators, is a member of the Western Canada Commercial Arbitration Society and sits on the board of the Canadian Chapter of the Chartered Institute of Arbitrators.

Q&A

HOW DID YOU GET YOUR START IN INTERNATIONAL ARBITRATION?

I always had an interest in all things "international." In my undergraduate studies, I majored in International Relations. Later, I attended the McGill University Faculty of Law specifically because of its strengths in international law. And subsequently, I accepted a position in the litigation group of Coudert Brothers LLP in New York City, specifically due to the fact that it was then one of the leading international law firms in the world. However, I initially struggled to find a way to incorporate my interest in all things "international" into my practice. In speaking with senior partners at Coudert Brothers, I discovered I could pursue my passion for international work in a career focused on international arbitration. Fortunately, I was welcomed into the group, and I haven't stopped practicing international arbitration since then.

WHAT MOTIVATES YOU THE MOST IN YOUR PRACTICE?

What motivates me the most is the incredible, talented, and hard-working team that we have assembled at Bennett Jones. Each of our team members brings different and unique skillsets, backgrounds, and expertise to bear, but the one thing we all have in common is how much we enjoy working with one another and with our clients. It is truly a delight coming into work every day with such a wonderful and inspiring group of people.

WHAT IS THE MOST IMPACTFUL ADVICE YOU HAVE RECEIVED?

The most impactful advice that I have received is that if you enjoy and have a passion for your work, it feels less like work and more like a calling, and that you should therefore find the area of law that interests you most and focus your efforts on cultivating a career and practice in that area, rather than "settling" for an area of law in which you have little or no interest. I have tried to follow that advice throughout my career, and while I cannot say that every day does not feel like "work," I can definitely say that I genuinely enjoy coming into work every day and feel a tremendous sense of gratitude that I was able to find a practice I love.

INTERNATIONAL

In the world of international arbitration, this year was marked by UNCITRAL's adoption of the first-ever *Code of Conduct* for arbitrators in investor-state proceedings. More than six years in the making, the *Code* is aimed at strengthening transparency and institutional credibility of investor-state arbitration. But like all well-intentioned changes, the *Code* comes with unintended consequences. We discuss this watershed development and its implications in this special feature of our newsletter.

Artem Barsukov & Madison Bergen

A WATERSHED MOMENT IN INVESTOR-STATE DISPUTES: NEW ARBITRATOR CODE OF CONDUCT ADOPTED BY UNCITRAL

Background: A Vexing Issue

In what arguably represents the most significant change in the world of investor-state arbitration in recent years, at its 56th annual session held in Vienna in July 2023, the United Nations Commission on International Trade Law (UNICTRAL) adopted the *Draft Code of Conduct for Arbitrators in International Investment Dispute Resolution* (the *Code*). The *Code* is the first comprehensive set of rules regulating arbitrator conduct that applies to all types of investor-state disputes, irrespective of the "instrument of consent" (e.g., an investment treaty) that the dispute arises under. Principles enshrined in the *Code* include an arbitrator's duty of independence and impartiality, a prohibition on double-hatting (i.e., the practice of an arbitrator concurrently acting as counsel or an expert in other ISDS cases), and extensive disclosure obligations. The *Code* also contains obligations related to the confidentiality of proceedings, reasonable fees and expenses, and the role and duties of tribunal assistants.

More than six years in development, the *Code* is the work product of the UNCITRAL Working Group III (the Working Group), originally established in 2017 to identify concerns with Investor-State Dispute Settlement (ISDS) mechanisms and to provide solutions for reform in the face of mounting criticism of ISDS. The first draft of the *Code* was released in 2019, and was followed by several iterations to solicit stakeholder feedback. The Working Group approved the *Code* in their 44th and 45th sessions, held in January and March 2023, respectively, leading to the presentation of the *Code* to UNCITRAL for adoption at its 56th annual session.

The *Code*: Safeguarding the Integrity of the Process

The *Code* embodies nearly six years of debates, consultations and revisions aimed at safeguarding the integrity of the arbitration process. It consists of 12 articles and accompanying commentary. The commentary is intended to clarify the contents of the articles, their practical implications and to provide practical examples. The *Code* itself can be split into four parts:

- Introduction (articles 1-3);
- Substantive obligations (articles 4-11);
- Code compliance (article 12); and
- Annexes.

Article 1 defines key terms to be applied throughout the *Code*, including what constitutes an international investment dispute (IID), to which the *Code* applies. An IID is defined as a dispute between an investor and a State or a regional economic integration organization (REIO) on the basis of an instrument of consent to arbitrate. An instrument of consent is defined as a treaty providing for the protection of investments or investors, foreign investment legislation, or an investment contract between a foreign investor and a State or a REIO, or any constituent subdivisions or agencies thereof, upon which the consent to arbitrate is based.

Article 2 deals with the *Code*'s application. The *Code* applies to any arbitrator in, or candidate for, an IID proceeding, including a former arbitrator. Notably, article 2 also identifies that the *Code* may be adopted by agreement of the parties in any other dispute resolution proceeding, meaning that it could be employed outside investor-state disputes and arbitrations more generally. The *Code* applies to IID proceedings in its entirety, subject to any exceptions in the applicable instrument of consent, which prevails to the extent of any inconsistency. As such, the *Code* is intended to take a supplementary role to any provisions within an instrument of consent. Finally, in terms of timing, the *Code* generally applies to arbitrator conduct prior to and throughout their appointment; however, the restrictions on double-hatting in article 4 and the confidentiality obligations in article 8(1) and (2) survive the proceedings.

Article 3 of the *Code* codifies an arbitrator's duty to be independent and impartial. It defines "independence" as the absence of a relationship with a disputing party that might influence an arbitrator's decision and defines "impartiality" as the absence of bias or predisposition of an arbitrator towards a disputing party that might influence the arbitrator's decision. Commentary on article 3 suggests that the assessment of an arbitrator's independence and impartiality may be made by reference to the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (the *Guidelines*), which have been around since 2004 and received wide acceptance among members of the arbitration bar in both investor-state and commercial proceedings. Quite user-friendly, the *Guidelines* set out basic parameters for what is sufficient to give rise to justifiable doubts about the arbitrator's impartiality and independence and provide comprehensive "Red," "Orange" and "Green" lists of various conflict situations, ranging from those that cannot be waived even with the parties' consent (i.e., the so-called "Non-Waivable Red List") to those that do not constitute a conflict of interest at all (i.e., the "Green List").

What makes the *Code* different is that it, for the first time, supplements an arbitrator's duty to be independent and impartial with restrictions on double-hatting, codified in article 4 of the *Code*. Concerns about double-hatting have been a hot topic of discussions for many years, with some scholars supporting a total ban on the practice as being contrary to an arbitrator's independence and impartiality, and others strongly opposing any such regulation. The *Code* seeks to strike a balance between these opposing views, providing for restrictions on double-hatting that are time-limited and are subject to the consent of the parties.

Under article 4 of the *Code*, absent the parties' agreement to the contrary, an arbitrator is not permitted to act concurrently as a legal representative or an expert witness in any other proceeding involving: (a) the same measure(s) (i.e., action taken by a state); (b) the same or related parties; or (c) the same provision(s) of the same instrument of consent. The restriction on double-hatting is narrowly crafted, insofar as the word "same" in this context means "identical" and not merely "similar or sufficiently related to". More specifically:

- the "same measure" refers to situations that include the same law, regulation, procedure, requirement, conduct or practice of a state or an REIO, which allegedly affects the investor's protected rights in breach of an instrument of consent;

  Example: an arbitrator cannot concurrently act as an arbitrator in an IID proceeding concerning a specific regulation, while acting as an expert witness in another IID proceeding that considers the same section of the regulation.

- the "same or related parties" refers to a subsidiary, affiliate or parent company of a disputing party, or, in the case of a state, a constituent subdivision thereof;

Example: an arbitrator cannot concurrently act as an arbitrator in an IID proceeding while concurrently acting as an expert witness for a foreign affiliate of one of the disputing parties in another proceeding.

- the "same provision(s) of the same instrument of consent" is intended to be interpreted narrowly as referring to specific interpretation of a provision at issue; the restriction is not intended to apply to situations where the same provision of the instrument of consent is merely the basis for initiating investor-state proceedings.

  Example: an arbitrator can simultaneously preside over two proceedings initiated pursuant to article 3 of an instrument of consent, provided that only one of the proceedings pertains specifically to the interpretation of article 10.

The restriction on double-hatting applies for a period of three years following the conclusion of the arbitration to any proceedings involving (a) the same measure(s); or (b) the same or related party (parties). The duration of the restriction is reduced to one year for any proceedings that merely involve the same provision(s) of the same instrument of consent.

Article 5 of the *Code* codifies an arbitrator's duty of diligence, specifically requiring an arbitrator to perform their duties diligently, devote sufficient time to the IID proceeding, and to render all decisions in a timely manner. Where an arbitrator does not have sufficient time to perform their duties, they have an obligation not to accept the appointment pursuant to article 12 (as discussed below).

Article 6 codifies an arbitrator's duty to discharge their duties in a competent and honest manner. Article 6 requires an arbitrator to: (a) conduct the IID proceeding competently and in accordance with high standards of integrity, fairness and civility; (b) possess the necessary competence and skills and make all reasonable efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties; and (c) not delegate his or her decision-making function. The *Code* provides for two exceptions to the prohibition on delegation of an arbitrator's decision-making authority: (1) where an applicable arbitration rule allows for such a delegation; and (2) where an assistant drafts a portion of the decision, provided that the substance of the decision comes from the direction of the arbitrator. The *Code* is one of the first instruments to specifically permit a long-established informal practice of having tribunal secretaries draft portions of arbitral awards.

Article 7 codifies a prohibition on *ex parte* communications with the arbitral tribunal to the extent they are not permitted under the instrument of consent, the applicable rules or have not otherwise been agreed upon by the parties. Article 7 is consistent with established practice and specifically excludes communications that occur as part of a party's assessment of an arbitral candidate's qualifications, provided that no procedural or substantive issues relating to the IID proceeding are discussed.

Article 8 of the *Code* deals with the arbitrators' obligations of confidentiality. It expressly provides that an arbitrator's duty of confidentiality survives the arbitration proceedings, and that an arbitrator shall not comment on a decision unless this is done with consent of the parties, or the decision is publicly available.

Article 9 provides that any fees and expenses of an arbitrator must be reasonable and in accordance with the instrument of consent or the applicable rules. Prior to being retained in any IID proceeding, the arbitrator should come to an agreement with the parties concerning any fees and expenses that may be incurred throughout the proceeding. The arbitrator should then keep detailed records of their time entries and be prepared to provide them to the parties upon request.

Article 10 requires an arbitrator to come to an agreement with the disputing parties on the role, scope of duties and fees and expenses payable to an assistant prior to the arbitrator engaging an assistant. The arbitrator is responsible for ensuring that their assistant complies with the *Code*.

Article 11 of the *Code* deals with an arbitrator's disclosure obligations, which are often regarded as being fundamental to the assessment of an arbitrator's independence, integrity and avoidance of conflicts of interest. Article 11 is modeled after article 11 of the UNICITRAL *Arbitration Rules*, which imposes extensive disclosure obligations on arbitrators both at the appointment stage and throughout the proceedings. In particular, article 11 of the *Code* requires an arbitrator (including a prospective arbitrator) to disclose all investor-state disputes and related proceedings in which the arbitrator is currently involved or has been involved in the past five years as an arbitrator, legal representative or expert witness, as well as any appointments by a disputing party or its legal representatives in the past five years, including outside investor-state disputes. Article 11 also requires an arbitrator to disclose any financial, business, professional or close personal relationship in the past five years with the parties, counsel, co-arbitrators, expert witnesses and third-party funders, as well as any financial or personal interest in the outcome of the investor-state dispute or other proceedings involving the same measures or parties. Finally, article 11 imposes an overarching obligation to disclose any circumstances likely to give rise to "justifiable doubts" as to the arbitrator's independence or impartiality, accompanied by duties to make all reasonable efforts to become aware of such circumstances and to err in favour of disclosure in cases of doubt.

The final two sections deal with Code compliance. Article 12 confirms that both prospective and appointed arbitrators shall comply with the *Code*. Under article 12, an arbitral candidate is required to decline an appointment if they are unable to meet any of the requirements under the *Code*. Article 12 further clarifies that any dispute or challenge to the arbitrator, or the *Code*, shall be governed by the instrument of consent or the applicable rules. Finally, annex 1 (candidates/arbitrators) and annex 2 (assistants) to the *Code* provide forms of declarations confirming that the respective parties have read, understood, and agree to be bound by the *Code*.

Implications: The Double-Hatting Conundrum

The *Code* represents a watershed moment for ISDS, as it is the first time an international body has sought to regulate the conduct of arbitrators in what previously were entirely consent-driven proceedings. More importantly and specifically, the *Code*'s prohibition on double-hatting represents the first time an international body has imposed restrictions on what used to be an unfettered right of the disputing parties to select their party-appointed arbitrators, counsel and expert witnesses.

Whether these new restrictions will be a benefit or a detriment to investor-state arbitration remains to be seen.

Historically, ISDS arbitrators have generally been drawn from one of the following three categories: (1) full-time arbitrators; (2) academics; and (3) legal practitioners. Many legal practitioners have not been able to sustain full-time arbitrator practices, with many receiving just one or two appointments throughout their career. This phenomenon has resulted in the practice of double-hatting, as most individuals who are not full-time arbitrators have been forced to supplement their income through their day-to-day legal practices.

The practice of double-hatting is among a number of factors that have given rise to mounting criticism of ISDS in recent years. Double-hatting has drawn criticism for, among other things, apparent lack of transparency and independence, possibility for conflicts of interest, lack of common ethical standards and lack of diversity among arbitrators. These criticisms are not entirely unwarranted. As a fundamental principle of natural justice, parties appearing before an arbitral tribunal have a right to be heard by a neutral and impartial decision maker applying prescribed and transparent norms. The practice of double-hatting, however, has created the perception that ISDS arbitrators lack neutrality—regardless of whether a given arbitrator is actually neutral—as they may at any time serve as a "hired gun" for one of the disputing parties or have taken strong positions on the issues in dispute. Similarly, double-hatting potentially

enables arbitrators to create a precedent that they could subsequently follow as legal counsel. Legal commentators have suggested that since investor-state arbitration takes on a semi-judicial form, it would benefit from court-like practices where such conflicts would be impermissible. Finally, double-hatting has been criticized for creating the risk of unintentional disclosure or misuse of information acquired in one's arbitrator capacity. By imposing a prohibition on double-hatting, bolstered by extensive disclosure obligations, the *Code* seeks to address these concerns.

One also cannot ignore the issue of diversity in arbitrator appointments. There is general consensus among ISDS practitioners that diversity leads to better decision making" and "better results." However, this factor has been cited on both sides of the double-hatting debate. Proponents of the prohibition on double-hatting point out that there is a small cadre of established arbitrators account for a disproportionate share of appointments, and that it is this small group of arbitrators with numerous arbitral appointments that engage in double hatting most frequently. By prohibiting double-hatting, the *Code* effectively forces parties to go outside traditional circles, thus promoting ISDS diversity and enhancing decision-making.

Finally, one can argue that the prohibition on double-hatting stands to improve the quality of decision-making in ISDS. In particular, by prohibiting double-hatting, the *Code* is likely to funnel more cases to full-time arbitrators, the only one of the three groups of arbitrators that has no need to engage in double-hatting to supplement their income. This group is almost universally made up of seasoned practitioners with extensive experience and broad industry recognition, without which it would be impossible to attract the number of appointments sufficient to sustain a full-time practice. By funneling cases to this group of arbitrators, the *Code* stands to enhance the overall quality of decision-making.

However, every rose has its thorn. While the prohibition on double-hatting will in all likelihood have the desired effect of addressing arbitrator independence and impartiality, it is also likely to create a number of unintended consequences both for disputing parties and arbitrators.

To begin, the prohibition on double-hatting undermines the principle of party autonomy, which lies at the core of arbitration. By prohibiting an arbitrator from acting as counsel or expert witness, both concurrently and within the past one or three years, the prohibition may impose substantial restrictions on a party's ability to appoint an arbitrator, counsel or an expert witness of its choice. Parties will have to strategize as to who they appoint as their arbitrators, counsel and experts in each matter, knowing that they will not be able to act on other disputes for the next one or three years. For example, a party that chooses to appoint a leading professor of investor-state law as its arbitrator will be unable to use that individual as an expert witness in another proceeding for three years. Where such decisions have to be made, compromises will be inevitable.

Moreover, the prohibition on double-hatting can substantially decrease the available pool of ISDS arbitrators in what is already a highly concentrated industry. As discussed above, there is a relatively small cadre of full-time arbitrators who do not need to engage in double-hatting to supplement their income. Indeed, in a 2017 study based on a sample of 1,077 investment arbitration cases, 47 percent of arbitrators were found to involve at least one arbitrator acting simultaneously as legal counsel. While not all of these cases would have necessarily involved the same parties, measures or instruments, given the prevalence of double-hatting, parties may find themselves unable to appoint their preferred arbitrator because they are already acting as counsel or an expert in another matter. Parties may also seek to mitigate their risks by foregoing candidates who engage in double-hatting altogether, thus effectively reducing the pool of available arbitrators.

The reduction in the pool of available arbitrators may also, in turn, increase the already significant costs and delays associated with ISDS. This is a simple matter of supply and demand. As the same number of parties compete for a smaller pool of arbitrators, full-time arbitrators who are free from the restrictions

of the *Code* will be able to command higher fees. Simultaneously, as their already busy dockets get booked, full-time arbitrators will find it increasingly difficult to commit sufficient time to move disputes forward in an expedient manner. Hearings will need to be booked further into the future. Awards will take longer to be released. This will be particularly acute where there is a need to coordinate the busy schedules of three full-time arbitrators.

Finally, the prohibition on double-hatting may present a major obstacle to succession planning and replenishing the pool of ISDS arbitrators. It is common knowledge that investment arbitrators are primarily drawn from the ranks of counsel in the field. As a result, they must continue to practice until receiving sufficient appointments to make full-time service as arbitrators economically feasible. In many cases, these individuals' past or present experience with particular measures or instruments will be the reason they are considered for appointment as arbitrator. By imposing a prohibition on serving as an arbitrator in proceedings involving the same measures or same instruments, the *Code* has the potential to create a Catch-22 situation, whereby qualified legal practitioners will be conflicted out of getting arbitral appointments that they need to build and sustain a conflict-free practice in the first place.

Replenishing the pool of ISDS arbitrators goes hand-in-hand with promoting diversity. On this point, the prohibition on double-hatting is likely to *decrease* diversity among arbitrators by funneling even more cases to a small group of established full-time arbitrators who have no need to engage in double-hatting and who already dominate the field. Indeed, as discussed above, parties may choose to manage their risk by altogether foregoing less established arbitrators who still "double-hat" as legal practitioners. Coupled with what is already a strong natural tendency for parties to appoint the most experienced and well-recognized names as their arbitrators, the prohibition on double-hatting may discourage or even lock out younger, more diverse practitioners, from pursuing a career as an arbitrator. Indeed, one commentator went as far as to suggest that a blanket ban on double-hatting "would be tantamount to reversing any progress made on gender diversity by the international arbitration community, including ICSID and UNCITRAL, over the past years."

While some commentators have suggested that the *Code* stops short of a blanket ban on double-hatting, and that its restrictions are "fairly limited, if not entirely symbolic" given the multiplicity of measures and instruments at issue in investor-state proceedings, this may be of little solace to arbitrators in markets influenced by a handful of major treaties and state organizations. For example, investor-state arbitrations in North America, a market with a combined population of over 500 million, primarily arise under NAFTA and its successor treaty, USMCA. The problem is further exacerbated by the rise of mega-treaties, such as the CPTPP, which spans 11 states representing almost 500 million people and a combined GDP of $13.5 trillion, with more member states potentially joining in the future. Consequently, even with the limited restrictions on double-hatting, the *Code* could effectively function as a blanket ban on the practice in certain markets.

Conclusion

The *Code* represents the first instance of an international body seeking to regulate the conduct of arbitrators in ISDS proceedings. It recognizes the importance of the parties' right to have an investor-state dispute adjudicated by a neutral and impartial adjudicator and seeks to address mounting criticisms of ISDS, including the practice of double-hatting, through extensive disclosure requirements and a prohibition on double-hatting. It remains to be decided how the *Code* is to be implemented in light of its relationship with the UNCITRAL *Arbitration Rules*, the ICSID *Arbitration Rules* and any other relevant arbitration rules. Individual member states will be consulted by the ICSID secretariat to provide their opinion on how the *Code* should be implemented.

If implemented, the *Code*'s prohibition on double-hatting has the potential to improve the quality of decision-making in investor-state arbitration, not only by helping minimize conflicts of interest, but also by channeling more cases to full-time arbitrators, who tend to be more experienced. On the other hand, aside from being an obvious restriction party autonomy, the prohibition on double-hatting has the potential to effectively lock out younger investor-state practitioners from arbitral appointments, leading to further concentration of appointments among the few established full-time arbitrators, driving up costs and delays and setting back years of progress made in fostering arbitrator diversity.

While the effect of the *Code* remains uncertain, its adoption signals clear recognition of the criticisms that have been leveled recently against ISDS proceedings, reflecting the industry's willingness to change and adapt in response to rising challenges. This willingness alone is strong reassurance that the future of investor-state of arbitration remains a bright one, regardless of where the adoption of the *Code* will lead us.

INTERNATIONAL ARBITRATION TEAM SPOTLIGHT

CHRISTOPHER PETRUCCI, PARTNER

403.298.4489 / PETRUCCIC@BENNETTJONES.COM

Chris has an extensive arbitration practice across Canada and internationally. He represents clients in large, complex domestic and international arbitrations under multiple procedural regimes, such as UNCITRAL, the International Court of Commerce (ICC), the International Bar Association (IBA) and the London Court of International Arbitration (LCIA). Many of Chris' arbitration cases are focused on construction disputes.

ARTEM N. BARSUKOV, FCIARB, PARTNER

780.917.4266 / BARSUKOVA@BENNETTJONES.COM

Fluent in Swedish and Russian, Artem carries on a global arbitration practice out of Edmonton, leveraging more than a decade of experience in international dispute resolution. He acts as both counsel and arbitrator, having represented parties in over $1.5 billion worth of complex disputes all over the world. Artem is on the VanIAC roster of arbitrators and proudly holds a Foreign Arbitrator Diploma from the Stockholm Chamber of Commerce.

DAVID J. WAHL, PARTNER

403.298.3187 / WAHLD@BENNETTJONES.COM

David J. Wahl helps clients solve their most complex international arbitrations. He has particular expertise in construction disputes, drawing on his business and executive experience in the construction industry before entering the field of law. Clients benefit from his organizational efficiency and team management experience on large-scale projects around the world.

MICHAEL P. THEROUX
PARTNER, CO-HEAD OF COMMERCIAL LITIGATION PRACTICE

403.298.4438
THEROUXM@BENNETTJONES.COM

MELANIE TEETAERT
PARTNER

604.891.5110
TEETAERTM@BENNETTJONES.COM

PASCALE DIONNE-BOURASSA
PARTNER

514.985.4510
BOURASSAP@BENNETTJONES.COM

BRIAN P. REID
PARTNER

403.298.3146
REIDB@BENNETTJONES.COM

SABRINA A. BANDALI
PARTNER

416.777.4838
BANDALIS@BENNETTJONES.COM

GANNON G. BEAULNE
PARTNER

416.777.4805
BEAULNEG@BENNETTJONES.COM

ALISON G. FITZGERALD
PARTNER

613.683.2306
FITZGERALDA@BENNETTJONES.COM

MARTIN J. VALASEK
PARTNER

514.985.4528 / 416.777.7845
VALASEKM@BENNETTJONES.COM

CHRIS ABTOSWAY
ASSOCIATE

403.298.3420
ABTOSWAYC@BENNETTJONES.COM

ANDREW FROH
ASSOCIATE

604.891.5166
FROHA@BENNETTJONES.COM

IAN MAHOOD
ASSOCIATE

403.298.3686
MAHOODI@BENNETTJONES.COM

CONOR HOLASH
ASSOCIATE

780.917.4293
HOLASHC@BENNETTJONES.COM

KRISTEN REINBOLD
ASSOCIATE

780.917.4292
REINBOLDK@BENNETTJONES.COM

KELLY L. HAMMEL
ASSOCIATE

780.917.4258
HAMMELK@BENNETTJONES.COM

At Bennett Jones, international arbitration is not merely an occasional mandate; it is what we do. Our lawyers have a wide breadth of experience in all of the leading arbitration rule systems, under virtually any law in the world and in multiple languages.

To learn more about our International Arbitration practice, visit:
BennettJones.com/InternationalArbitration

IN PRACTICE

In this recurring section of our newsletter, we aim to gather practical tips that can help practitioners and non-practitioners alike in navigating the complex world of arbitration. We start with a feature article authored by our team—and previously published by the *Global Arbitration Review* in *The Guide to Energy Arbitrations*—on the vexing issue of multi-tier dispute resolution clauses. We then go back to the basics by tapping into our years of experience to provide our top ten tips for drafting effective arbitration clauses. Read on to learn more.

Vasilis Pappas, Artem Barsukov & Madison Bergen

THE RISKS ASSOCIATED WITH MULTI-TIER DISPUTE RESOLUTION CLAUSES AND HOW TO AVOID THEM

Multi-tier dispute resolution clauses—which provide that when a dispute arises, the parties must undertake certain defined steps prior to commencing arbitration—have become widespread in complex contracts where long-term relationships and continuous cooperation are contemplated.

While there are a number of benefits to such clauses, there are also drawbacks. Moreover, some uncertainty exists as to whether such clauses are binding, whether they constitute jurisdictional conditions precedent to the commencement of arbitrations and what the consequences are in the event of a party's failure to comply with them.

This article canvasses how national courts and arbitral tribunals have dealt with non-compliance with multi-tier dispute resolution clauses and the extent to which it affects an arbitral tribunal's jurisdiction. As will be seen, while there remain differing opinions with respect to the effects of non-compliance, there has been a promising trend toward uniformity in recent years.

This article concludes by outlining considerations for transactional lawyers and parties incorporating multi-tier clauses into their agreements and provides recommendations for how arbitration practitioners should deal with such clauses when they encounter them.

Function, Benefits and Drawbacks of Multi-Tier Dispute Resolution Clauses

Definition

In its simplest form, a multi-tier clause will require parties to engage in a single step prior to commencing arbitration, such as negotiations among party representatives. In its more complex forms, a multi-tier clause may require parties to undertake multiple steps prior to commencing arbitration, such as negotiation among lower-level representatives, followed by negotiation by higher-level representatives, followed by formal mediation proceedings.

Benefits

There are a number of benefits to multi-tier clauses. For example:

- they provide the parties with a contractually mandated opportunity to resolve disagreements inexpensively without incurring the costs associated with arbitration proceedings;
- they provide a contractual 'cooling-off period' during which the parties can reassess and evaluate whether to strike a compromise outside of the contentious arbitral context;
- they can be particularly useful in circumstances where parties have a long-term relationship that they wish to preserve; and
- they may narrow the issues to be arbitrated, by settling those issues on which the parties find common ground in advance of arbitration.

Drawbacks

Depending on the circumstances, multi-tier clauses may also give rise to several drawbacks:

- pre-arbitration negotiations where the parties are entrenched in their positions can lead to an unnecessary waste of time and expense;

- the obligation to conduct pre-arbitration negotiations can impair a party's ability to secure interim measures in time-sensitive disputes by postponing the commencement of arbitration;
- a failure to strictly abide by multi-tier clauses can lead to objections to a tribunal's jurisdiction, which may result in termination of the arbitration or the final award being set aside;
- multi-tier clauses can lead to objections regarding the admissibility of claims that were not specifically discussed in pre-arbitration negotiations, which may result in those claims being dismissed;
- in particularly complex disputes, where additional claims are discovered or developed after an arbitration has commenced, multi-tier clauses can lead to objections on the ground that they were not expressly discussed during pre-arbitration negotiations;
- where counterclaims are advanced in an arbitration that were not specifically discussed in pre-arbitration negotiations, objections can arise with respect to the admissibility of such counterclaims in an arbitration; and
- where a limitation period is set to expire before the contractually mandated negotiation period has elapsed, a claim can be time-barred.

In view of the foregoing, while there are benefits to multi-tier dispute resolution clauses, they are not without risks and could impose significant challenges and procedural concerns.

Non-Compliance

Historically, a number of national courts and arbitral tribunals found that the pre-arbitral steps in a multi-tier clause constituted jurisdictional conditions precedent to the commencement of arbitration. In other words, they ruled that where a party failed to carry out the contractually mandated pre-arbitral steps, a tribunal did not have jurisdiction to hear a dispute. Accordingly, a failure to comply with the pre-arbitral steps in a multi-tier clause carries with it significant risks.

The question of whether the pre-arbitral steps in a multi-tier clause constitute jurisdictional conditions precedent to arbitration has been answered differently in different jurisdictions, although there has been a clear trend toward harmonization in recent years. Most national courts and arbitral tribunals are now reluctant to find that pre-arbitral steps constitute jurisdictional conditions precedent to commencing arbitration, absent clear language to that effect within the multi-tier clause. However, there are still some jurisdictions that appear to be inclined to find such steps to constitute jurisdictional conditions precedent, even in the absence of clear language.

Moreover, even in jurisdictions where the pre-arbitral steps in multi-tier clauses have been found not to constitute jurisdictional conditions precedent to the commencement of an arbitration, authorities in those jurisdictions did not necessarily find that failure to comply with such pre-arbitral steps could not result in the dismissal of claims. Rather, they have simply found that failure to comply with pre-arbitral steps did not deprive arbitral tribunals of jurisdiction and have instead ruled that it is for arbitral tribunals—rather than courts—to assess what consequences, if any, should flow from a failure to comply with pre-arbitral steps in multi-tier clauses, including dismissal of those claims on the basis that they are inadmissible.

In the sections that follow, we will review recent national court decisions and arbitral awards involving multi-tier dispute resolution clauses to assess the degree to which these clauses have been held to constitute jurisdictional conditions precedent to arbitration.

Recent Treatment of Multi-Tier Dispute Resolution Clauses by National Courts

England and Wales

Historically, English courts have been reluctant to find that pre-arbitral steps in multi-tier clauses constitute jurisdictional conditions precedent to arbitration, absent clear language to that effect.

For example, in the 2012 case of *Sulamerica CIA Nacional de Seguros v Enesa Engenharia*, [2012] EWCA Civ 638, the Court of Appeal was asked to rule on whether a multi-tier clause that required that "prior to a reference to arbitration, [the parties] will seek to have the Dispute resolved amicably by mediation" constituted a binding jurisdictional condition precedent to the commencement of arbitration. The Court held that it was not, as it did not contain clear language to that effect and did not define the obligation to mediate with sufficient certainty. Accordingly, the court ruled that mediation was not a jurisdictional condition precedent to arbitration.

Similarly, in the 2012 case of *Tang Chung Wah & Anor v Grant Thornton International Ltd*, [2012] EWHC 3198 (Ch), the contract at issue contained a multi-tier clause that provided that prior to commencing arbitration, the parties were required to refer disputes to conciliation, after which the parties were required to refer disputes to a panel of three individuals identified in the clause. The High Court was asked to consider whether compliance with these pre-arbitral steps constituted binding conditions precedent to an arbitral tribunal exercising jurisdiction. The High Court held that they did not, because the multi-tier clause did not contain clear language to that effect and because it did not adequately specify the form in which the pre-arbitral steps should proceed.

However, in 2014, the English High Court released a decision that appeared to contradict *Sulamerica* and *Tang Chung*. In *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*, [2014] EWHC 2014 (Comm), the contract at issue contained a multi-tier clause that required the parties to negotiate for four weeks prior to commencing arbitration. The claimant commenced an arbitration against the respondent, and the respondent brought an application to the High Court seeking an order that the tribunal lacked jurisdiction on the ground that the parties had allegedly failed to negotiate as required by the multi-tier clause. The High Court held that negotiation was a "condition precedent to the right to refer a claim to arbitration", but ultimately found that on the facts of that case, the parties had sufficiently negotiated to confer jurisdiction on the tribunal.

The *Emirates Trading* decision was heavily criticised by international arbitration practitioners. Moreover, *Emirates Trading* relied in large measure on an Australian case that is itself generally regarded as an outlier in international arbitration circles.

Ultimately, the decision of the High Court in *Emirates Trading* was overruled in 2021 by the High Court itself in *Republic of Sierra Leone v SL Mining Ltd*, [2021] EWHC 286 (Comm). In this case, the Court was faced with a challenge to a Partial Final Award on Jurisdiction in an ICC arbitration pursuant to Section 67 of the English *Arbitration Act* (1996), where an arbitral tribunal ruled that it had jurisdiction in circumstances where one of the parties had failed to comply with pre-arbitration steps in a multi-step dispute resolution process. In deciding on the challenge, the High Court expressly refused to follow the precedent set in *Emirates Trading*, noting that this decision has been heavily criticised by leading academic writers, and concluded that the weight of the international authorities is "plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction". Rather, the High Court stated that "if reaching the end of the settlement period is to be viewed as a condition precedent at all, it could ... only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction".

United States

In the United States, the prevailing view appears to be that pre-arbitral steps in multi-tier clauses will not constitute jurisdictional conditions precedent to the commencement of arbitration, unless the multi-tier clause at issue expressly includes language to the contrary. For example, in the 2014 decision of *BG Group plc v Republic of Argentina*, 572 U.S. 25 (2014), the United States Supreme Court took the position that a failure to comply with pre-arbitral steps set out in multi-tier clauses does not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute, without clear language to the contrary.

That case concerned a bilateral investment treaty between Argentina and the United Kingdom. The treaty contained a multi-tier clause that stated that prior to the commencement of an arbitration by a foreign investor, the investor was required to submit the dispute to a local court. However, the claimant commenced arbitration without first submitting the dispute to a local court. Accordingly, Argentina applied to the arbitral tribunal to dismiss the case for lack of jurisdiction. The tribunal, however, determined that it had jurisdiction and rendered a final award. Argentina then sought to vacate the final award before the United States District Court for the District of Columbia. The District Court denied Argentina's claims and confirmed the award. Argentina appealed and the case eventually ended up before the Supreme Court.

The Supreme Court analysed the issue by considering whether the multi-tier clause constituted a 'procedural' or a 'substantive' condition precedent to arbitration. If a procedural condition precedent, it observed that it was for the tribunal to determine whether the multi-tier clause bound the parties to carry out the pre-arbitral steps prior to commencing arbitration. By contrast, the Supreme Court stated that if the pre-arbitral steps constituted a substantive condition precedent, it meant that it constituted a substantive limitation on a party's right to commence arbitration, and a failure to comply with such pre-arbitral steps would be a jurisdictional bar to a party's commencing arbitration. Ultimately, the Supreme Court found that the pre-arbitral steps constituted procedural conditions precedent, reversed the Court of Appeals and found that the tribunal had jurisdiction to adjudicate the dispute between the claimant and Argentina.

BG Group is consistent with other cases in the United States that have held that pre-arbitral steps in multi-tier clauses do not constitute jurisdictional conditions precedent absent express language to the contrary. For example, in *Int'l Ass'n of Bridge, Structural v EFCO Corp and Constr. Products Inc*, 359 F.3d 954 (8th Cir. 2004), the Court of Appeals for the Eighth Circuit was confronted with a multi-tier clause requiring that the parties undertake certain pre-arbitral procedures. The plaintiff filed suit with the District Court for the Southern District of Iowa to compel arbitration. The defendant, however, resisted on the ground that the plaintiff had failed to comply with the pre-arbitral steps. The District Court agreed with the defendant and denied the application to compel arbitration. On appeal, however, the Court of Appeal reversed the District Court's findings. It held that the pre-arbitral steps constituted procedural, not substantive, conditions precedent and accordingly ruled that an arbitral tribunal had jurisdiction to rule on the consequences of the plaintiff's failure to comply with the pre-arbitral steps.

Recent decisions confirm that the decisions in *BG Group* and *EFCO Corp* continue to remain the prevailing view in the United States. For example, in a 2021 decision, *George Weis Co. v Am. 9 Constr.*, 2021 WL 5038144 (E.D. Mo.), the Eastern District of Missouri was tasked with deciding whether a mediation clause in a multi-tier clause was a condition precedent to arbitration. The Court ultimately held that the condition precedent was procedural in nature, and not a jurisdictional condition precedent to arbitration.

Notwithstanding the foregoing, there are a number of cases in the U.S. where courts have ruled that pre-arbitral steps in multi-tier clauses constitute jurisdictional conditions precedent to arbitration, even without express reference to 'condition precedent'. For example, in *Kemiron Atlantic Inc v Aguakem International Inc*, 290 F 3d 1287 (11th Cir 2002), the parties did not use express language in their multi-tier dispute resolution clause, but the Court of Appeals for the Eleventh Circuit found that the pre-arbitral steps in the clause constituted jurisdictional conditions precedent to arbitration. Similarly, in *Red Hook Meat Corp v Bogopa-Columbia Inc*, 31 Misc 3d 814 (NY Sup Ct 2011), the Supreme Court of New York likewise held that pre-arbitral steps in a multi-tier clause constituted jurisdictional conditions precedent even though the clause did not use the term 'condition precedent' or any other mandatory phrase.

Thus, while the prevailing view adopted by the United States Supreme Court and other Courts of Appeal appears to be that pre-arbitral steps in multi-tier clauses do not constitute jurisdictional conditions precedent absent clear language to that effect, a number of other cases have held otherwise. Accordingly, it remains to be seen how U.S. courts will deal with this issue in the future.

Moreover, even in cases where U.S. courts have ruled that pre-arbitral steps do not constitute jurisdictional conditions precedent, they have acknowledged that they are procedural conditions precedent, and that it is up to arbitral tribunals to determine what, if any, consequences should arise from any failure to comply with them. In other words, U.S. courts have not gone so far as to state that pre-arbitral steps are not conditions precedent to the commencement of an arbitration, just that arbitral tribunals are the correct forum of assessing what consequences should arise from any failure to comply rather than the courts. In these circumstances, U.S. courts have not ruled out that the appropriate remedy for any failure to comply with a pre-arbitral step in a multi-tier clause may still be the dismissal of claims on the grounds of inadmissibility or otherwise.

Switzerland

In Switzerland, the prevailing view appears to be that a failure to comply with a pre-arbitral step in a multi-tier clause does not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute.

For instance, in a Swiss First Civil Law Court decision from March 2016, (Case No. 4A_628/2015), two companies, X and Y, entered into a series of contracts that contained multi-tier dispute resolution clauses requiring the parties to undertake conciliation proceedings prior to arbitration. Following the emergence of a dispute, Y submitted a demand for conciliation. Before the conciliation was formally terminated, however, Y commenced arbitration proceedings. X objected to the arbitral tribunal's jurisdiction owing to Y's failure to comply with the pre-arbitral steps. The tribunal rendered a partial award confirming its jurisdiction. X challenged the tribunal's decision at the Swiss Court arguing, among other things, that the tribunal wrongly accepted jurisdiction, its jurisdiction should be terminated, and Y's claim should be rejected.

The Swiss Court refused to terminate the tribunal's jurisdiction or to reject Y's claim. Rather, it held that terminating the tribunal's jurisdiction 'is certainly not the most appropriate solution' as doing so would require that another tribunal be constituted following conciliation proceedings, accomplishing little more than prolonging the proceedings and creating additional costs. Further, it observed that in other circumstances, such a finding could lead to unduly punitive results, particularly in circumstances where a limitation period had expired following the commencement of an arbitration.

Accordingly, the Swiss Court found that the most sensible solution was simply to stay the arbitration so that the conciliation proceedings could conclude, after which the arbitration could resume before the originally constituted tribunal. The Court further ruled that decisions as to the nature of the stay and the conciliation proceedings should be deferred to the tribunal, which had overall jurisdiction over the dispute. Therefore, the Court effectively ruled that a pre-arbitral step in a multi-tier clause did not constitute a jurisdictional condition precedent and that a failure to comply with it would not deprive a tribunal of jurisdiction. However, it did make clear that parties to multi-tier clauses should generally be enforced.

Singapore

Up until 2020, case law emerging from Singapore indicated that Singaporean courts were prepared to attach significant jurisdictional consequences to any failure to satisfy the pre-arbitral requirements of a multi-tier dispute resolution clause. In particular, in the 2013 decision *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another*, [2013] SGCA 55, the Singapore Court of Appeal ruled that strict compliance with multi-tier dispute resolution

clauses was a binding precondition to arbitration, the non-compliance of which could deprive a tribunal of its jurisdiction.

Nevertheless, a 2020 decision of the Singapore Court of Appeal in *BTN v BTP*, [2020] SGCA 105, calls into question the extent to which Singapore Courts will hold that pre-arbitral steps in multi-tier clauses constitute jurisdictional conditions precedent to the commencement of arbitration proceedings moving forward. In that case, the Court of Appeal held that decisions made by arbitral tribunals 'on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness and ripeness are matters of admissibility, not jurisdiction.' In reaching its decision, the Court of Appeal relied on its reasoning in a prior 2019 decision in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho*, [2019] 1 SLR 263, for the distinction between the concepts of admissibility and jurisdiction, where the Court of Appeal held that jurisdiction refers to the power of the tribunal to hear a case, whereas admissibility refers to whether it is appropriate for the tribunal to hear it.

The findings of the Singapore Court of Appeal in *BTN v BTP* was cited with approval by the High Court in the *Republic of Sierra Leone v SL Mining Ltd* decision discussed above. Thus, it would appear that, much like their UK counterparts, the Singaporean courts have moved away from treating multi-tier dispute resolution clauses as jurisdictional conditions precedent to arbitration in favour of treating them as conditions to admissibility of claims. However, it does not follow from this that failure to comply with pre-arbitration steps in multi-tier clauses will not result in the dismissal of claims. Rather, it simply means that arbitral tribunals are the correct entities to decide what consequences, if any, flow from a failure to comply with pre-arbitral steps in multi-tier clauses, and that claims can still potentially be dismissed on the ground of inadmissibility.

Hong Kong

Hong Kong recently joined the UK, the U.S., and Singapore in their reluctance to treat the pre-arbitration steps in multi-tier clauses as jurisdictional conditions precedent to arbitration. This authority comes from a 2021 decision by the High Court of Hong Kong in *C v D*, [2021] HKCFI 1474, of a Partial Award rendered in a confidential arbitration. In that case, the parties entered into an agreement for the development and manufacturing of a satellite. The agreement stated that if a party thought that the other was in default, it was to give written notice to the other party. If the other party failed to remedy its default within 30 days, the parties were to 'attempt in good faith' to resolve the dispute by negotiation. A subsection further permitted either party to have the dispute referred to the chief executive officers of their respective companies. If the parties could not come to an agreement within 60 business days, the dispute was to be referred to arbitration.

In the circumstances of that case, the claimant wrote a letter to the chief executive officer of the respondent, stating that the respondent was in breach of the parties' agreement, and stating it was issuing that correspondence as a last effort prior to further legal proceedings. The respondent requested that, per the parties' agreement, all communications were to be sent directly to their counsel. No further correspondence occurred until the claimant issued a notice referring the dispute to arbitration. The respondent then objected to the jurisdiction of the arbitral tribunal on the grounds that the claimant breached the condition precedent of negotiation.

The High Court agreed that the clause requiring negotiation was a condition precedent to arbitration. However, after canvassing case law in the U.S., UK, Singapore and Hong Kong, the High Court agreed that failure to comply with the condition precedent went to the question of admissibility and not the jurisdiction of the tribunal. The Court noted that this still conferred significant power to arbitrators, permitting them to enforce dispute resolution clauses as conditions precedent to arbitration. These views are consistent with the authorities in other jurisdictions, discussed elsewhere in this article.

Australia

In Australia, it appears that pre-arbitral steps in multi-tier clauses are generally considered to be enforceable and binding on the parties, but it is unclear whether they constitute jurisdictional conditions precedent to arbitration. Recent case law has done little to add clarity to this topic.

For example, in *United Group Rail Services Ltd v Rail Corp New South Wales*, [2009] NSWCA 177, the New South Wales Court of Appeal was confronted with an arbitral agreement that contained a multi-tier clause requiring disputes to be referred to party representatives to 'meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference' prior to arbitration. The issue before the Court was whether the requirement for negotiation in the multi-tier clause was enforceable and binding on the parties. After reviewing the history of legal scholarship on the subject, the Court of Appeal found that the requirement for negotiation was enforceable.

However, it is not clear from the Court's determination whether the Court would be of the view that the negotiation requirement was not only enforceable, but also a jurisdictional condition precedent to arbitration—that is to say, that a failure to comply with the negotiation requirement would result in the termination of a tribunal's jurisdiction or the setting aside of an arbitral award for lack of jurisdiction. Recent Australian case law has done little to bring clarity to this question.

Accordingly, there seems to be no conclusive answer yet regarding whether Australia finds multi-tiered dispute resolution clauses to be enforceable, jurisdictional conditions precedent to arbitration. It remains to be seen how Australian law develops on the subject.

Treatment of Multi-Tier Dispute Resolution Clauses by Arbitral Tribunals

Arbitral tribunals have demonstrated a general reluctance to choosing a course of action that would bar the commencement of an arbitration or deprive a tribunal of jurisdiction where a party has failed to fulfil the pre-arbitral steps in a multi-tier clause: see Gary Born, I*nternational Commercial Arbitration* 2nd ed (Kluwer Law International, 2014) at 923–924.

For example, in *Ethyl Corporation v Canada*, 38 Int'l Legal Mat 708 (1998), arbitration was commenced under Chapter Eleven of the North American Free Trade Agreement (NAFTA). Article 1120 of NAFTA required that a foreign investor could only commence an arbitration 'provided that six months have elapsed since the events giving rise to a claim'. In that case, a U.S. investor commenced an arbitration against Canada with respect to a measure that was in the process of being enacted more than six months prior to the commencement of the arbitration, but that only took legal effect within six months prior to the commencement of the arbitration. Accordingly, Canada objected to the jurisdiction of the tribunal.

While acknowledging that Canada was technically correct, and that the claimant had jumped the gun when it commenced the arbitration, the tribunal rejected Canada's objection to its jurisdiction. To begin, it held that if it were to rule that it did not have jurisdiction, such a determination would be inconsistent with the object and purpose of NAFTA. Further, the tribunal held that 'no purpose would be served by any further suspension of Claimant's right to proceed'. In particular, the tribunal ruled that because the measure took legal effect within the six months of the date on which the arbitration was commenced, '[i]t is not doubted that today Claimant could resubmit the very claim advanced here' and that 'a dismissal of the claim at this juncture would [therefore] disserve, rather than serve, the object and purpose of NAFTA'. In other words, the tribunal held that little purpose would be served by dismissing the arbitration for lack of jurisdiction, other than to cause wasted time and expense. Accordingly, the tribunal held that the claimant's failure to satisfy Article 1120 of NAFTA should not 'be interpreted to deprive this Tribunal of jurisdiction'. However, it ruled that because

the claimant failed to comply with Article 1120, the claimant should bear all costs associated with the jurisdictional proceedings.

Similarly, *Salini Costruttori v Morocco*, ICSID Case No. ARB/00/4 (2001), involved a bilateral investment treaty between Italy and Morocco that contained a multi-tier clause requiring that all disputes 'should, if possible, be resolved amicably' and that a dispute could only be referred to arbitration if it 'cannot be resolved in an amicable manner within six months of the date of the request [for amicable settlement]'. In that case, two Italian investors commenced an arbitration against Morocco, and Morocco objected to the tribunal's jurisdiction on the ground that the investors did not seek to negotiate the dispute within the six months pre-dating the commencement of the arbitration with the necessary governmental authorities. In response, the investors pointed to a number of letters and memoranda they had sent to various branches of the Moroccan government generally referring to the dispute.

The tribunal ultimately rejected Morocco's application to dismiss the case for lack of jurisdiction. In particular, the tribunal observed that:

> The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimant actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.

Because the investors had issued correspondence and memoranda that generally referred to the dispute to Moroccan government authorities, the tribunal concluded that they 'constitute[d] a written request aimed toward the amicable settlement of the dispute and satisf[ied] the requirement set out in the Bilateral Treaty'. In so holding, the tribunal demonstrated a reluctance to interpret strictly the pre-arbitral steps in the multi-tier clause as binding conditions precedent to arbitration to avoid the termination of the arbitration.

Likewise, in an ICC case from 2001, (ICC Case No. 8445, Final Award, XXVI Y.B. Comm. Arb. 167 (2001)), the contract at issue required that the parties undertake efforts to negotiate disputes prior to submitting them to arbitration. The claimant commenced an arbitration without making any effort to negotiate and the respondent challenged the jurisdiction of the tribunal. In response, the claimant contended that negotiations would have been futile. The tribunal rejected the respondent's application and asserted jurisdiction over the dispute. It relied in large measure on its finding that there would have been little prospect of settlement had they carried out negotiations prior to arbitration.

In view of the above cases, it appears that arbitral tribunals are generally reluctant to find that pre-arbitral steps in multi-tier clauses are jurisdictional conditions precedent to the commencement of arbitration, particularly where doing so would have the effect of terminating an arbitration or otherwise depriving a tribunal of jurisdiction.

Practical Guidelines

The determination of whether the pre-arbitral steps in a multi-tier dispute resolution clause constitute jurisdictional conditions precedent can have serious consequences.

For example, if a claimant commences an arbitration without complying with the pre-arbitral steps in a multi-tier clause and a limitation period expires while the arbitration is pending, a finding that the pre-arbitral steps constituted a jurisdictional condition precedent can result in the arbitration being dismissed and the claimant being time-barred from pursuing its claims.

Similarly, if a claimant fails to carry out pre-arbitral steps in a multi-tier clause and successfully obtains a final award against the respondent, a determination by a court after the conclusion of the arbitration that the pre-arbitral steps constituted jurisdictional conditions

precedent could result in the award being set aside or otherwise not enforced for lack of jurisdiction, resulting in wasted time and resources.

Moreover, even where pre-arbitral steps are not found to constitute jurisdictional conditions precedent, there is a risk that arbitral tribunals could dismiss claims for lack of admissibility where there is a failure to perform those pre-arbitral steps.

As a result, multi-tier dispute resolution clauses bring with them significant risks, and there are a number of considerations both transactional lawyers and arbitration practitioners need to bear in mind when confronted with such multi-tier clauses.

Practical Guidelines for Transactional Lawyers

While recent years have seen increasing pushback against the idea that multi-tier dispute resolution clauses constitute jurisdictional conditions precedent to arbitration, there are still risks. As such, careful consideration should be given to whether a multi-tier dispute resolution clause should be included in an arbitration clause at all. Often, commercial parties will request that they be included to maximise the likelihood of reaching a settlement prior to arbitration. However, the risks associated with such clauses should be clearly explained, as well as the reality that there is nothing to prevent commercial parties from seeking to negotiate a settlement—or, indeed, to agree to participate in a formal mediation or conciliation process—at any time, regardless of whether the parties' dispute resolution clause formally requires the parties to do so. As a result, transactional lawyers should carefully assess with their clients whether a multi-tier dispute resolution clause is necessary or desired.

To the extent that a multi-tier clause is desired, the pre-arbitral steps should be described in detail with clear and unequivocal language to ensure that they can be followed and enforced. For instance, where the parties wish to incorporate a requirement that the parties negotiate prior to commencing arbitration, they should avoid simply stating that the parties must negotiate prior to arbitration. Rather, the clause should specify precisely what the parties' obligations are. For example, the clause should specify:

- what event triggers the commencement of the negotiation period (e.g., a written notice);
- the period over which the parties must negotiate prior to commencing arbitration;
- what party representatives must participate in the negotiations;
- how the negotiations are to take place (e.g., in person, telephonically, or virtually);
- how many negotiation sessions are required; and
- a clear event that triggers the termination of the negotiation requirement (e.g., the expiration of the negotiation period).

Similarly, where the parties wish to incorporate a requirement that formal mediation or conciliation proceedings take place prior to arbitration, they should again avoid simply stating that mediation or conciliation is required prior to arbitration. Rather, they should specify:

- what event triggers the commencement of the conciliation or mediation (e.g., a written notice);
- the period in which the parties will be required to mediate or conciliate;
- an institution before which mediation or conciliation is to take place;
- the mediation or conciliation rules that will apply;
- what party representatives are required to participate;
- how many sessions are required; and
- a clear event that triggers the termination of the mediation or conciliation.

Lastly, whether the parties incorporate negotiation, mediation or conciliation as a pre-arbitral condition

precedent, they should also avoid using indeterminate statements that require the parties to negotiate, mediate or conciliate 'genuinely' or in 'good faith', for example, to avoid either party being able to assert that while its counterpart may have participated in negotiation, mediation or conciliation sessions as required, it did not do so genuinely or in good faith, to pre-empt the commencement of an arbitration.

Where the parties wish to incorporate multiple tiers of pre-arbitral steps (e.g., negotiation among low-level representatives, followed by negotiation among higher-level representatives, followed by mediation or conciliation), the transition between the different tiers must be outlined in sufficient detail so that the sequence of procedures can be clearly followed and enforced.

Practical Considerations Before Initiating Arbitration

When advising a party contemplating arbitration, careful attention should be paid to whether there is a multi-tier clause in the parties' agreement that will need to be satisfied prior to commencing an arbitration. Failure to do so may result in an objection from the opposing party that the tribunal has not been appropriately vested with jurisdiction, an allegation that may result in the termination of the arbitration or, at worst, lead to the setting aside or non-enforcement of an award after it has been delivered. Failure to do so could also result in an objection from the opposing party that a claim or group of claims are inadmissible.

To minimize the risk of objections arising from an alleged failure to comply with a multi-tier clause, counsel should undertake the following steps, to the extent applicable:

- counsel should ensure that the parties have carefully performed all steps required by the multi-tier clause prior to commencing arbitration;
- counsel should carefully document the commencement, performance and completion of all pre-arbitral steps required by the multi-tier clause so that there is a clear documentary record of the parties' compliance;
- prior to commencing the pre-arbitral steps, counsel should ensure that all limitation periods or time considerations have been taken into account, and that ample time is provided for the pre-arbitral steps to be carried out to avoid any time-bar or prescription issues;
- prior to commencing the pre-arbitral steps, counsel should review the claims that will be advanced in the arbitration, with expert assistance if necessary, to ensure that all claims that will be made in the arbitration form part of the pre-arbitral negotiations, mediation or conciliation, and written notice should be provided of all such claims prior to commencing the pre-arbitral procedure. This will prevent a counterparty from asserting that specific claims made in the arbitration were not previously raised as required by the multi-tier clause to challenge a tribunal's jurisdiction. If insufficient time is available for counsel to undertake this prior to commencing the pre-arbitral steps, the disputes at issue should be framed as broadly as possible in the party's notice and during the negotiations, mediation or conciliation to ensure that all claims raised in the arbitration can be linked back to the pre-arbitration discussions; and
- in the event that the respondent is served with notice of the commencement of the pre-arbitral steps by the claimant and the respondent anticipates it will advance counterclaims in a future arbitration, the respondent should ensure that all potential counterclaims form part of the pre-arbitral negotiations, mediation or conciliation and that written notice of them is provided so that the claimant cannot seek to have such counterclaims dismissed for lack of jurisdiction. Ideally, the respondent should review the counterclaims that will be advanced in the arbitration, with expert assistance if necessary, to ensure that all such counterclaims specifically form part of the pre-arbitral procedure. But, if insufficient time is available, the counterclaims should be framed as broadly as possible to ensure that all counterclaims raised in the arbitration can be linked back to the pre-arbitration discussions.

Conclusion

Parties to complex, long-term agreements may be inclined to include a multi-tier clause into their agreements to avoid the cost of arbitration and to minimise any upset to the parties' ongoing relationship that would result from escalated proceedings. However, despite the benefits that flow from such clauses, careful consideration should be given to whether a multi-tier clause warrants inclusion in an agreement, particularly if both parties are sophisticated and are likely to engage in settlement negotiations irrespective of the presence of a multi-tier clause.

The assessment of whether to include a multi-tier clause in an agreement must take into account the risks that may arise from the failure to comply with such a clause. While recent years have seen increasing reluctance among national courts and arbitral tribunals to find multi-tier clauses as jurisdictional conditions precedent to arbitration, there is still a risk that a failure to comply with them may have jurisdictional or admissibility consequences. Accordingly, multi-tier clauses should not be treated as boiler-plate provisions whose inclusion in an arbitration agreement can be treated as an afterthought, nor should multi-tier clauses be ignored in the lead-up to an arbitration. Rather, given their potentially very serious ramifications, counsel should pay careful attention to multi-tier clauses, and fully apprise their clients of the implications of not complying with them.

This is an abridged version of an article originally published by the Global Arbitration Review.

Artem Barsukov

TOP 10 TIPS FOR DRAFTING ARBITRATION CLAUSES

As arbitration becomes an increasingly attractive means of dispute resolution, more and more commercial contracts feature arbitration clauses. Yet, too often in negotiating their contracts, parties prefer to focus on closing the deal and avoid dealing with the unpleasant topic of dispute resolution. In the result, arbitration clauses often become an afterthought, dropped in at the 11th hour before closing.

And yet, a well-drafted arbitration clause make the difference between a highly efficient dispute resolution process and spending millions of dollars only to end up with an unenforceable award. Here are ten tips that should be kept in mind any time you draft an arbitration clause.

01 **Ensure you have all essential elements.** For an arbitration clause to be effective without further assistance from courts or tribunals, it must contain five essential elements: (1) an express statement that all disputes arising from or in connection with the contract shall be resolved through arbitration; (2) applicable arbitration rules; (3) place or legal seat of the arbitration; (4) number of arbitrators; and (5) language of the arbitration. Make sure your arbitration clause addresses all five of these elements at a minimum.

02 **Consider whether the arbitration should be institutional or ad hoc.** An arbitration can either be administered by an arbitral institution or carried out ad hoc. In institutional arbitration, the parties rely on an arbitral institution—such as ADRIC (ADR Institute of Canada), VanIAC (Vancouver International Arbitration Centre), ICC (International Chamber of Commerce) or LCIA (London Court of International Arbitration)—to administer the case in accordance with its rules and to provide a range of ancillary services, including receipt and distribution of documents, managing advances on costs, resolving procedural issues before the arbitral tribunal is appointed and even performing a final quality check of the arbitral award. By contrast, in ad hoc arbitration, the parties and the arbitral tribunal manage the case on their own. Ad hoc arbitration tends to be less expensive and provides ultimate procedural flexibility, but requires experienced counsel and arbitrators to be effective. On the other hand, institutional arbitration might be more expensive and somewhat less flexible, but worthwhile when parties and their counsel are either unfamiliar with the process or come from different legal systems (e.g., common law vs civil law). Arbitral institution may also assist with the appointment of experienced arbitrators through their formal and informal rosters.

03 **Choose appropriate and modern arbitration rules.** There is a wide range of arbitration rules for the parties to choose from. What set of rules will be appropriate depends on the nature of the dispute and the surrounding circumstances. For example, some arbitration rules permit dispositive motions for early resolution of discrete issues, while others do not. Some arbitration rules may be more up-to-date than others and address emerging issues, such as third-party funding and virtual hearings. Finally, an increasing number of arbitral institutions, including VanIAC and ICC, offer a separate set of "expedited rules" which provide for simplified procedures to enable faster and less expensive resolution of smaller disputes. Given that arbitral institutions usually administer arbitrations in accordance with their own rules, the choice of arbitration rules may strongly influence the choice of arbitral institution and vice versa.

04 **Choose the place of arbitration carefully.** The choice of the "place" or "legal seat" of the arbitration is of critical significance as it determines the laws that will govern arbitral proceedings. The choice may thus affect a host of key issues, including whether the dispute can be settled by arbitration, the format and content requirements for the award, grounds for setting aside the award and appeal rights, to name a few. For this reason, never choose the place of arbitration based simply on how attractive or convenient the location is. Always consult with experienced arbitration counsel or local counsel in the place of arbitration to determine potential risks and pitfalls. Note that you can always agree to hold the actual hearing at a different location than the "legal seat" of arbitration.

05 **Do not constrain your choice of arbitrators.** While the ability to "select your own judge" is often seen as a key benefit of arbitration, it is not always prudent to specify arbitrator qualifications in the arbitration clause. You rarely know in advance what type of dispute will end up going to arbitration. An arbitration clause that requires arbitrators to have technical expertise may be ill-suited for a dispute that is purely legal in nature. Further, prescribing qualifications—especially multiple qualifications—may significantly shrink the pool of available arbitrators. Finally, specifying arbitrator qualifications increases the risk of that the award might be set aside, as the losing party will have an opportunity to argue that the arbitral tribunal was not constituted in accordance with the arbitration agreement.

06 **Expressly set out appeal rights.** Most people think of arbitration as producing a final decision that is not subject to any appeal on its merits. However, as with other things, this too can be customized in the arbitration clause. Thus, before drafting the arbitration clause, you need to consider whether and to what extent you would like to have appeal rights. Not having a right of appeal will promote quick and final disposition of the dispute; however, parties will have to live with the arbitrator's decision, even if the case is wrongly decided on the merits. If the primary goal is to achieve prompt resolution of the dispute and to move on, then there is little rationale for a right of appeal. If, however, the primary goal is to "get it right," then rights of appeal should be given some thought. In either case, ensure that the arbitration clause expressly addresses the issue, particularly in the context of domestic arbitrations, where there may be statutory rights of appeal if the arbitration clause is silent on the matter.

07 **Address confidentiality of proceedings.** While confidentiality is often seen as one of key benefits of arbitration, few arbitration rules actually address this topic, and when they do, they often limit the scope of confidentiality protections. If you want every element of the arbitral proceedings —including their existence—to be confidential, ensure you address this in the arbitration clause. Confidentiality may also play in favour of choosing institutional arbitration, as arbitral institutes can privately resolve procedural disputes that arise prior to the appointment of the arbitral tribunal. By contrast, in ad hoc arbitration, any such disputes would have to be dealt with in open court.

08 **Avoid mandatory time limits**. It is becoming increasingly common for arbitration clauses to provide time limits for proceedings. These time limits are often unrealistic and couched in mandatory terms (e.g., "an award shall be rendered within six months from the constitution of the tribunal"). If the prescribed time limit is not met, the arbitral award may be set aside on the basis that the arbitration agreement was not complied with. If you must have a time limit, ensure that it is couched in aspirational terms and expressly allows the arbitral tribunal to extend the time limit where necessary.

09 **Address continuing performance.** Arbitration rules generally do not require parties to continue to perform their obligations after proceedings had begun. This can sometimes lead to one of the parties suspending performance during an arbitration as a pressure tactic. To avoid this, ensure that your arbitration clause requires parties to continue performing their obligations during any pending arbitration.

10 **Consult experienced arbitration counsel.** These tips are only general suggestions that will not work for every situation. To ensure that you have a robust arbitration clause that meets your unique needs, always consult an experienced arbitration practitioner when drafting the underlying agreement, whatever the nature of the transaction. The time to figure it out is when the parties shake hands, not when they throw down the gauntlet.

ARBITRATION ANGLE, OCTOBER 2023

BennettJones.com

Bennett Jones

The firm that businesses trust
with their most complex legal matters.