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Preface

On behalf of the Asian International Arbitration Centre (AIAC), it is my distinct pleasure to introduce the third edition of the AIAC Alternative Dispute Resolution Journal.

On behalf of the AIAC, I would like to take this opportunity to express my heartfelt gratitude to the contributors, whose insightful perspectives and research have enriched the pages of this journal. Your expertise and dedication to advancing ADR are invaluable to our collective pursuit of excellence.

The AIAC Alternative Dispute Resolution Journal aims to serve as a vital resource for arbitration professionals, legal practitioners, scholars, and students of alternative dispute resolution (ADR). With each edition, we strive to provide a comprehensive and diverse collection of articles that showcase the latest developments, trends, and challenges in the realm of ADR.

This Volume III encompasses an array of thought-provoking articles that delve into various facets of ADR. From maritime law to energy arbitration, arbitration agreements to emergency arbitrator proceedings, the topics covered in this edition exemplify the breadth and depth of the ADR field.

We are confident that the articles would be able to contribute to the advancement of knowledge and understanding in the ever-evolving domain of ADR.

By upholding an unwavering commitment to excellence, accomplishment and progress, the Centre will aim to continue to thrive and achieve greater accomplishments.

One of the AIAC's mission is upholding an unwavering commitment to excellence in alternative dispute resolution services, dispute avoidance mechanisms, and dispute management. This Journal marks another journey of our commitment to fostering a vibrant and inclusive arbitration community.

Furthermore, I am delighted to witness the growing interest and diversity of submissions that we have received since the inception of this journal. The remarkable range of topics covered in this edition demonstrates the remarkable intellectual capital within our community and the spirit of collaboration that drives our progress.

As we embark on this new chapter with Volume III, I invite our esteemed readers to engage with the articles, delve into the depths of scholarly research, and participate actively in the ongoing conversations that shape the landscape of ADR.

Lastly, I extend a special call to our readers to continue supporting this free and open-access journal by sharing your insights, research, and experiences for our forthcoming publication, Volume IV. Your contributions will play a crucial role in fostering the dissemination of knowledge and fostering innovation in the field.

On behalf of the AIAC, I extend my warmest wishes for a stimulating and enlightening reading experience. May the articles presented in this volume inspire dialogue, spark innovation, and further enrich our collective understanding of alternative dispute resolution.

Sincerely,

DATUK SUNDRA RAJOO
Director, Asian International Arbitration Centre (AIAC)

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Stabilisation Clauses and Energy Arbitration – Risk Management without Jeopardising State Sovereignty

by Ignacio Tasende, Bruno Balbiani, Santiago Pin, and Sebastián Antúnez • FERRERE Abogados

ABSTRACT

Stabilisation clauses constitute an agreement of wills between investors and host states of the investment, set out in investment contracts, or among states within the framework of an investment protection treaty. The greater or lesser degree of freedom of negotiation between the parties to a contract containing this type of clause will depend, in general, on the degree of development of the countries involved.

Stabilisation clauses seek to protect the foreign investor from any legislative or regulatory change affecting its investment. In essence, by preventing a host state from changing the rules that prevailed at the time the investor decided to inject capital into a project in the foreign country.

Developing countries are more likely to feel pressured to agree to these clauses as a way of attracting foreign capital, as these clauses provide foreign investors with more safety and may be a crucial factor for them to decide to invest or not.

This article will analyse stabilisation clauses from a multidisciplinary perspective, with a focus on the energy field, and will address: (1) the kind of agreements that usually include stabilisation clauses; (2) the modalities of stabilisation clauses and their consequences, from a case law perspective; (3) the enforceability of stabilisation clauses; (4) environmental and human rights concerns arising out of their application; and (5) a treaty-based analysis.

This article concludes that stabilisation clauses are crucial for attracting foreign investment, but overuse of stabilisation clauses can make them counterproductive.

A conciliatory approach that considers and strives to balance the interests of both parties should prevail. In short, it is not advisable to draft stabilisation clauses in a way that inhibits a state's absolute regulatory power. Likewise, states must remain accountable for their covenants and compensate investors for negative consequences arising from the use of their authority.

KEYWORDS

stabilisation clauses, energy, international arbitration, foreign investments, human rights, environment.

1 Introduction

It is not uncommon for states to pass wide-ranging regulatory measures that have detrimental effects on multiple sectors simultaneously.

The recent COVID-19 pandemic provides ample evidence of how states react to public emergencies by enacting regulations that may inevitably harm sectors other than the targeted ones. Nevertheless, experience shows that States have imposed measures that affect investors even in scenarios not as extreme as the pandemic.

To a greater or lesser extent, depending on the degree of interventionism of a current government, states have historically protected their interests by passing regulations that create rebound or deliberately negative outcomes on foreign investment. Examples include the most varied social, political, economic, and health-related justifications.[1]

It would be impossible and endless to make an all-encompassing analysis of the many sectors historically impacted by state intervention. Thus, this article will focus on the energy sector and the weight of stabilisation clauses on the industry's businesses, under the lens of international arbitration cases. Furthermore, it will explore the nature and purpose of stability clauses, the extent to which they are

1 Governments may introduce new laws or regulations to address: (1) social concerns or promote public welfare, such as protecting the environment, ensuring labor rights and safety standards, promoting social equity, or addressing human rights issues (*e.g.*, a government might enact stricter environmental regulations to mitigate pollution caused by certain industries, even if it affects existing investments); (2) political commitments: governments may enact changes to align with evolving political ideologies, policy priorities, or to fulfill electoral promises (*e.g.*, measures aimed at reducing corruption, increasing transparency, or changing economic strategies); (3) economical concerns, that usually involve changes in taxation, trade policies, investment incentives, or sector-specific regulations. Therefore, a state could aim at enhancing local industries, stimulating job creation, or encouraging foreign direct investment; and (4) health-related issues: this became particularly relevant during the COVID-19 pandemic, where many countries implemented measures such as lockdowns, travel restrictions, and health protocols that directly impacted various sectors and investments, prioritizing safeguarding public health and minimizing the spread of infectious diseases.

still employed in investment agreements, and how they have been enforced by arbitral tribunals.

The pandemic and recent history, in general, have shown that stabilisation clauses and their balance with state sovereignty are a recent and universal topic. Commercial stability is one of the main pillars of contractual relations. However, achieving stability through stabilisation clauses can trigger a clear tension. Scholars[2] say that these clauses limit the regulatory power of the host state of foreign investment, and its capacity to regulate human rights and environmental matters. This article will delve into these topics.

2 Agreements that Typically include Stabilisation Clauses

Stabilisation clauses are basically agreements that are included in contracts or treaties, which seek to ensure that (i) the rights of foreign investors injecting capital into a host country are not affected by regulatory changes, or that (ii) there will be guarantees that those changes will not affect the investment. They are especially useful for attracting foreign investment in developing countries but have the simultaneous consequence of restricting states' regulatory power and other potentially negative effects that will be addressed below.

Although investment protection treaties between states may contain stability provisions, they do not regulate specific projects. Rather, investment protection treaties are typically general in scope and are therefore not intended to include stabilisation clauses on specific investment projects.

On the contrary, stabilisation clauses are more common in direct investment contracts between foreign investors and host states (*e.g.*, concessions, production sharing agreements, licenses, etc.).

A separate question is whether, as some case law discussed below considers, the fact that an investment contract contains a stabilisation clause makes the agreement an instrument of international law governed by international law principles. Although this is an isolated and minority position, it deserves to be highlighted because of the consequences it would entail: applying international law would displace the application of the local law that governs any direct investment contract in any host country.

2 Bernhard Wychera. "Investment Arbitration, Stabilisation Clauses in Investment Contracts – Are They Still Relevant and Will They Be in the Future?" in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration*, vol. 2021, 362-363.

In general, it is considered that even a contract containing a clause stating that international law will govern the contract does not turn the contract into an international agreement or, in the terms of the Vienna Convention on the Law of Treaties, into a treaty.

Although the case law on stabilisation clauses is not abundant (and most of the awards that delve into the subject refer to expropriations, being the analysis of stabilisation clauses scarce) and notwithstanding any criticism of these clauses, we are not aware of any international tribunal that, to date, has decided that a stabilisation clause is invalid or ineffective *per se*. In general, case law analyses these clauses to assess the magnitude of damages to be awarded to a winning investor in an arbitration.[3]

3 Delving into the Stabilisation Clauses Modalities: An In-depth Analysis

Medium or long-term investments in the energy sector usually pose numerous risks, especially for foreign investors. The likelihood that the host state of a foreign investment will change the game rules that were pledged to the investor and prompted its decision to invest, depends on the state in which the investment is made, but is undoubtedly a dormant risk in any project.[4] These investment risks may be commercial (*e.g.* price volatility), technical (*e.g.* malfunction of investment-related facilities), natural (*e.g.* catastrophes), labor (*e.g.* strikes), geological (*e.g.* lack of natural resources) or financial (*e.g.* interest rate volatility).

Thus, it is natural for investors to look for ways to reduce or mitigate the risk or exposure of seeing their investments harmed.

Two ways to achieve this goal are: (i) through safeguards to protect the legal framework promised to the investor in the event of a regulatory change; or (ii) by laying down clear consequences in the unlikely event that the conditions that led to the investment are jeopardised. Furthermore, (iii) reaching an agreement on a neutral dispute resolution mechanism such as arbitration helps offset the danger of seeing the investment destroyed. Commercial or investment arbitration[5] is

3 Alisher Umirdinov, "The End of Hibernation of Stabilisation Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development", in *43 Denv. J. Int'l L. & Pol'y.*, 2015, 456.

4 Klaus Berger, "Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators", in *36 Vanderbilt Journal of Transnational Law*, 2003, 1349.

5 For an analysis on the critics raised against the investment dispute-settlement system, *see* Ignacio Tasende, Federico Achard, "Arbitraje de Inversiones: ¿es necesaria una reforma?", *Revista Uruguaya de Derecho Procesal*, 1-2/2021, 2021.

significantly preferable and safer than resorting to state justice or domestic courts, particularly in countries with a lengthy track record of setting aside awards that are detrimental to their nationals' interests.[6]

Amongst the investment risks, stabilisation clauses address a specific one: political risk. The parties seek to stabilise the legal and economic environment for foreign investment and to eliminate or mitigate political risk.

So, what role do stabilisation clauses play in the pursuit of this purpose? The question will be addressed by distinguishing the different types of stabilisation clauses historically agreed.

A. *Freezing clauses*

The categorisation of a stabilisation clause depends on its wording, which can be more or less broad. The broadness or restriction corresponds to the degree of limitation or impediment on the state to legislate or adopt future regulatory changes.

Freezing clauses have the purpose of ensuring that the law applicable to a contract does not change during the life of an investment project. In a way, what is sought is to "insulate" the investment contract so that the state's legislation does not change throughout the project, even in the case of administrative measures that seek to modify or annul the contractual conditions.

Freezing clauses are naturally not common in practice and, even if they are agreed upon, their effectiveness is questionable, due to the severity of their effects: to restrict the regulatory power of the host state of the investment (general legislative/ regulatory changes or specific measures, such as tax regulations).

As is evident, another problem posed by these clauses is that at some point one investment project will be subject to a different regime than another (for example, in terms of its taxation regime).

The existence of freezing clauses in investment contracts may depend on the type of state receiving the investment. According to OECD reports, most investment contracts signed by non-OECD countries contain freezing clauses or, alternatively, provide for compensation to the investor in the event of new laws affecting its

6 Jorge López Fung, "How useful are stabilisation clauses in international energy arbitration nowadays?", in *2020(39) Spain Arbitration Review*, Club Español del Arbitraje – Wolters Kluwer España, 2020, 113.

project (regardless of the nature of the law). This is not the case with OECD countries.[7]

An example of a freezing clause can be found in the *2004 Tishrine Block Development Contract among Dublin Petroleum International (Syria) Ltd. and the Government of Syria*. It states the following:

> *"[The Contractor] shall be subject to all laws and regulations of local application in force in the S.A.R. (Syrian Arab Republic) provided that [the Contractor] shall not be subject to any laws, regulations or modifications thereof which are contrary to or inconsistent with the provisions of this Contract and which are in effect at any time from the Effective Date and throughout the Term of this Contract."*[8]

B. *Intangibility clauses and Notable Case Law*

By means of intangibility clauses, a state does not expressly waive its right to regulate. On the contrary, these agreements seek to prevent any unilateral change by the host state of the investment with respect to a specific contract.

The effect of intangibility clauses is to prohibit the state from applying regulatory changes specifically to the investor. Unlike freezing clauses, the state is not inhibited from using its regulatory power. Rather, the "freezing" is reflected in the effects of the contract. That is, the contract will be interpreted according to the law in force at the date of its execution. Any regulatory change will not affect the investor's rights under the contract unless the investor agrees to the change.

In this sense, scholarly opinion indicates that an intangibility clause is "[u]*sually short and simple in its construction, it prohibits unilateral changes to the investment agreement and requires the consent of both parties before any changes may be made.*"[9]

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7 Andrea Shemberg, "Stabilisation Clauses and Human Rights", in *IFC/SRSG Research Paper*, 2009, ix. The report states, for example, that "[w]*hile it OECD contracts in the study rarely offered stabilisation for anything beyond discriminatory and arbitrary new laws, a majority of contracts in Sub-Saharan Africa stabilised all social and environmental laws (providing exemptions or compensation to investors for compliance), even if implicitly*" (*see* https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilisation%2BPaper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5a9bba-jqeww2e).

8 *See* "Dublin Tishrine Development Contract Dated 2004 For Development And Production Of Petroleum Among The Government Of Syria and Syrian Petroleum Company and Dublin International Petroleum (Damascus) Limited (Tishrine and Sheikh Mansour Fields), Barrows", in Munir Maniruzzaman, *First Draft of AIPN Research Project on Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O & G Investors*, 2005-6, 18.

9 Peter Cameron, "Stabilisation Clauses: Do They Have a Future?" in Nassib Ziadé (ed.), *BCDR International Arbitration Review*, Kluwer Law International, vol. 7(1), 2020, 113.

The *Production Sharing Contract of Indonesia between Pertamina and Overseas Petroleum Investment Corp. and Treasure Bay Enterprise Ltd.* provides a clear example of an intangibility clause:

> *"This contract shall not be annulled, amended or modified in any respect, except by the mutual consent in writing of the parties hereto."*[10]

In sum, unlike freezing clauses, rather than prohibiting the free exercise of governmental authority, intangibility clauses seek to limit the effects of regulatory change. Potential regulatory changes will only apply to an investment project entered under a contract containing an intangibility clause if one requirement is met: the consent of the investor.

In the *Texaco Overseas Oil Petroleum Co. & California Asiatic Oil Co. v Government of the Libyan Arab Republic* case, there was an intangibility clause that was included in oil concession agreements and stated the following:

> *"The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties […]. This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution […]. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent."*[11]

The case, which concerned oil concessions granted by the Libyan government to the American companies Texaco and Calasiatic, arose as the Libyan revolutionary government began to nationalise its oil sector, including the companies, which consequently took Libya to arbitration. The arbitral tribunal held that the stabilisation clause in the concession agreement did not affect the sovereignty of Libya, which retained its prerogative to issue laws and regulations in the oil sector which apply to natural or juridical persons, national or foreign, with whom it did not have such a commitment. In other words, the clause was valid and, consequently, binding on the state, and the Libyan nationalisations implied a violation of Libya's obligations under the concession agreement.

Accordingly, Libya lost the case. This outcome, however, was different to a similar case in which similar Libyan policies were at issue: the *Libyan American Oil Co.*

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10 Abdullah Al Faruque, "Validity and Efficacy of Stabilisation Clauses, Legal Protection vs. Functional Value" in *Journal of International Arbitration*, vol. 23, Issue 4, 2006, 319.

11 *Texaco Overseas Petroleum Company et al. v The Government of the Libyan Arab Republic*, Award on the Merits, 1977.

(LIAMCO) v Government of Libyan Arab Republic case. In this case, the arbitrator ruled that stabilisation clauses do not affect the sovereign right of a state to expropriate rights granted by a contract. However, the arbitrator emphasised the requirement of granting equitable compensation to the investor for the expropriation to be valid.[12]

A slightly different case is *AGIP Company v People's Republic of the Congo*. In this case, the investor had engaged in oil distribution activities in the Congo. Years later, oil distribution activities were nationalised by the Congolese government and affected all companies except AGIP, which days before the measure had sold 50% of its shares to the government. A stabilisation clause was included in the investment agreement freezing Congolese law.

In violation of the investment agreement, the Congolese government years later nationalised AGIP, which consequently took Congo to arbitration. The tribunal concluded that the stabilisation clause did not affect Congo's sovereignty with respect to persons with whom it had not entered a similar commitment. In relation to AGIP, the legislative changes could not be enforced against AGIP according to the agreement. Accordingly, while upholding the validity of stabilisation clauses and after invoking principles of international law, the tribunal ordered Congo to compensate AGIP in full.[13]

Tribunals have reached similar conclusions in the *Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia* case, and the *Duke Energy International Peru Investments No. 1, Ltd. v Republic of Peru* case.[14]

A decision, that in the authors' opinion is somewhat open to criticism, was reached in the case *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)*. In this case, Aminoil received from Kuwait a concession for oil and gas exploration in 1948, pursuant to a contract containing a stabilisation clause. Over the years, the parties by mutual agreement modified the contract, which was renegotiated more than once due to the lack of economic success reported to the state. This culminated in the nationalisation of the project and unilateral termination of the concession by Kuwait.[15]

An ad hoc arbitral tribunal considered that: (i) the concession was renegotiated many times over several years, so that the stabilisation clause no longer had the

12 *Libyan American Oil Company v The Government of the Libyan Arab Republic*, Award, 1977.
13 *AGIP Company v People's Republic of the Congo*, Award, 1979.
14 *Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia*, Award, 1986. *See also Duke Energy International Peru Investments No. 1, Ltd. v Republic of Peru*, ICSID Case ARB/03/28, Award, 2008.
15 *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)*, Final Award, 1982.

same absolute effect as in the original contract; (ii) stabilisation clauses are valid as instruments to limit a state's right to nationalise assets; (iii) but in order to do so they must expressly stipulate the prohibition, which must apply for a limited period of time; and (iv) this was not the case (there was not an express prohibition with a period of limitation); but, even if it was, if a stabilisation clause is valid and effective, nationalisation must not be confiscatory in nature and, if it is, the investor must be compensated.

The tribunal's criterion is debatable, since the freedom of the parties to agree on the stabilisation clause did not impose any temporal requirement, and that the parties by mutual agreement have renegotiated the contract only implies compliance with the prohibition of unilateral modifications to an investment project but does not necessarily mean that the clause lost its effect.

C. *Equilibrium clauses*

Another type of stabilisation clause is an "equilibrium" or "balancing" clause, which seeks to achieve a certain balance for the investor's business, rather than prohibiting or limiting the state's regulatory powers.

Through equilibrium clauses, the state makes a clear commitment to the investor. This commitment implies that when there is a legal or regulatory change that impacts the investor or its business, the state will place the investor or its business in the position it would have been in the absence of such change. Or, alternatively, it will compensate the investor for any damages. This may be done by renegotiating the contractual terms or by granting the investor the possibility to terminate the contract.

Historically used in the energy sector, where the parties usually make a significant investment at the beginning of the relationship so that the return is reflected in the medium or long term, equilibrium clauses have been considered an effective means of achieving economic balance between the parties.[16]

According to the scholarly opinion, the use of equilibrium clauses "*has been substantially increased in contrast to the freezing clauses. As expected, the reason for its increasing popularity is its greater flexibility and versatility*."[17]

16 Jan Paulsson, Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 3rd ed., Kluwer Law International, 2011, 25.

17 Fabio Núñez del Prado, José Ignacio García Cueto, et al, "Intimate Enemies: Are Stabilisation Clauses and Human Rights Compatible under International Law?", in Gloria María Álvarez, Melanie Riofrío Piché, et al. (eds)., *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International, 2021, 359.

Within these clauses, different subtypes can be identified, each with its own consequences: adjustment, adaptation, and renegotiation clauses.

Adjustment clauses seek to ensure that the impact of any legislative changes that may arise in the future, although applicable to the investor, is compensated by the state to the affected investor.[18]

Adaptation clauses, on the other hand, enable the contractual parties and even tribunals to adapt the clauses of a contract to balance the rights and obligations agreed upon prior to a regulatory change.[19]

Finally, renegotiation clauses, which are more flexible than the other types of equilibrium clauses, impose on the parties a commitment to enter future negotiations aimed at reestablishing the original benefits affected by a regulatory change.[20]

As far as the energy sector is concerned, renegotiation clauses (which pose a variety of challenges for arbitral tribunals) are the most widely used because of their flexibility, and because they do not impose severe restrictions on a state's regulatory powers, and at the same time provide guarantees for investors potentially affected by regulatory changes. However, as the reader may appreciate, they are far from guaranteeing legal certainty or stability to the parties, and their effectiveness is debatable, in the sense of the extent to which an obligation to renegotiate is useful if a party is unwilling to renegotiate.[21]

It is understandable to question how a party could be compelled to renegotiate. Or what "renegotiate" really means. Arbitral practice shows that, in principle, a renegotiation should not alter the initial agreement, and should not benefit or affect any of the parties' rights or obligations. The logic is to adapt the contract to the new circumstances surrounding it, with the parties being as flexible as possible, in due time and not delaying the process.

While there is no requirement under international or under local laws to arrive to a specific result, the parties must carry out a diligent process, negotiating in good faith. Otherwise, damages could be applied to the party unwilling to renegotiate.[22]

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18 Simon Vorburger & Angelina Petti, "Arbitrating Energy Disputes", in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed., Kluwer Law International, 2018, 1277.

19 Piero Bernardini, "Stabilisation and Adaptation in Oil and Gas Investments", in *1(1) The Journal of World Energy Law & Business*, 2008, 98.

20 Zeyad Al Qurashi, "Renegotiation of International Petroleum Agreements", in *22 (4) Journal of International Arbitration*, Kluwer Law International, 2005, 261.

21 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed., 2012, 83.

22 *See* Michael Reisman, James Richard Crawford, Raymond Doak Bishop, *Foreign Investment Disputes: Cases, Materials and Commentary*, 2nd ed., Kluwer Law International, 2014, 270.

An equally relevant issue is whether, with respect to adaptation clauses, arbitrators have the power to adapt contracts. Scholars have asserted that arbitrators, to the extent that they do not rewrite the parties' agreement, may deviate from the original terms to arrive at a fair result and comply with the economics of the original agreement.[23]

A response to this question can be found within the UNCITRAL Model Arbitration Law, an instrument that empowers arbitrators to decide as *ex aequo et bono* when the parties expressly empower them to do so.[24]

While in arbitral practice it is not impossible for arbitrators to adapt a contract, tribunals tend to be particularly careful not to deviate from the parties' initial agreement (to avoid increasing the risk of a nullity of the award).

D. *Hybrid clauses*

As the name suggests, hybrid clauses have features of both freezing and equilibrium clauses. Scholars have stated that "[h]*ybrid clauses* […] *do not exempt an investor from new laws without further conditions. They do, however, foresee such an exemption as one of the methods by which the investor may be compensated or made whole from any financial consequences of such new laws or administrative acts may have*."[25]

Hybrid clauses have emerged mainly for two reasons: firstly, due to growing concerns about the severe consequences of freezing clauses; and secondly, because compensating investors for changes in the terms of the investment can be very costly for states.

In turn, scholars have distinguished two types of hybrid clauses: (i) a *partial freezing clause* closely resembles the traditional freezing clause; and (ii) a *partial economic balance clause* is more like equilibrium clauses.[26]

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23 Gary Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International, 2014, 2614, 2770–2771.

24 *See UNCITRAL Model Law on International Commercial Arbitration*, 1985, with amendments as adopted in 2006, Arts. 28.3–28.4.

25 Bernhard Wychera. "Investment Arbitration, Stabilisation Clauses in Investment Contracts – Are They Still Relevant and Will They Be in the Future?" in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration*, vol. 2021, 370.

26 Fabio Núñez del Prado, José Ignacio García Cueto, et al, "Intimate Enemies: Are Stabilisation Clauses and Human Rights Compatible under International Law?", in Gloria María Álvarez, Melanie Riofrío Piché, et al. (eds)., *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International, 2021, 355.

4 Overview of Stabilisation Clauses in the Energy Sector from an Arbitration Standpoint: Are They Valid?

A. *Yes: stabilisation clauses are valid*

As mentioned, medium and long-term investments in the energy sector usually pose numerous of risks, especially for foreign investors.

Perhaps motivated by this reality, international tribunals have not established, as far as we know, that stabilisation clauses are invalid or ineffective (regardless of the case law inconsistency as to their effects).

Certainly, there are additional reasons to reinforce the validity of these agreements, such as their nature: the (voluntary and free) agreement of the investor with the state. That is, the state believed that the negative consequences of limiting its right to regulate, in cost-benefit terms, represented positive consequences resulting from the effects of the investment.[27] Additionally, it can be expected for the states to respect the expectations aroused when promising investors a specific attractive scenario for them to inject their capital.

The scarce arbitration case law on stabilisation clauses supports this interpretation. In *Liberian Eastern Timber Corporation v Republic of Liberia*, the tribunal ruled:

> *"This clause, commonly referred to as a "Stabilisation Clause", is commonly found in long-term development contracts and, as is the case with notification procedures of the Concession Agreement, is meant to avoid the arbitrary actions of the contracting government. This clause must be respected, especially in this type of agreement. Otherwise, the contracting State may easily avoid its contractual obligations by legislation. Such legislative action could only be justified by nationalisation which meets the criteria described above."*[28]

Similarly, the tribunal in *AGIP S.p.A. v People's Republic of the Congo* stated:

> *"[…] [S]tabilisation clauses, the applicability of which is not the result of the automatic operation of the sovereignty of the contracting State, but of the common will of the parties expressed at the level of the international legal*

27 In sum, one of the main arguments to reinforce stabilisation clauses' validity is the principle of *pacta sunt servanda*. Investors can also rely upon the states' obligation to act in good faith, set forth in Article 26 of the Vienna Convention on the Law of Treaties (notwithstanding an investor-state contract with a stabilisation clause is not, certainly, a treaty).

28 *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case ARB/83/2, 81.

order. These stabilisation clauses, freely entered into by the Government, do not in principle affect its legislative and regulatory sovereignty, since it retains both with respect to those, nationals or foreigners, with whom the Government has not entered into such commitments, and in the present case are limited to rendering unenforceable against its co-contracting party the modifications of the legislative and regulatory provisions contemplated in the agreement."[29]

However, in *The American Independent Oil Company v The Government of the State of Kuwait*, while not concluding that stabilisation clauses are invalid, the arbitral tribunal asserted that, notwithstanding the existence of a contractual prohibition to nationalise, the clause cannot undermine international law, under which it is not possible to limit host state's right to regulate unless an express provision set forth in the contract provides for.[30]

B. *Wait a minute: are all stabilisation clauses valid?*

All of the points mentioned above hold true, but it is important to highlight that criticism has been raised specifically against freezing and intangibility clauses. These provisions are viewed as outdated and, if agreed upon, they may not effectively serve to their intended purpose of freezing the effects of an agreement.

One of the main criticisms directed towards these clauses pertains to human rights, sustainable development, and environmental policies, which are touched by a public interest principle, as will be addressed below. However, it is worth noting that, despite the concerns, one expert report indicates that freezing clauses are still being utilised, particularly within the extractive industry.[31] This ongoing use raises concerns about the potential consequences that may arise from these stringent agreements.

Furthermore, it is crucial to consider the principle of permanent sovereignty of states over their natural resources when evaluating the effectiveness of freezing clauses in limiting a state's regulatory authority. For instance, United Nations General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", explicitly states:

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29 *AGIP S.p.A. v People's Republic of the Congo*, ICSID Case ARB/77/1, 1977, 85–86 (free translation from French).

30 *The American Independent Oil Company v The Government of the State of Kuwait*, Ad hoc Arbitration, 1979.

31 *See* International Finance Corporation (IFC), John Ruggie, "Stabilisation Clauses and Human Rights", *UN Special Representative to the Secretary General on Business and Human Rights*, 2008.

> *"1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.*
>
> *2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities […]."*[32]

Similarly, United Nations General Assembly resolution 3171 (XXVIII) of 17 December 1973, "Permanent sovereignty over natural resources", stated that:

> *"1. Strongly reaffirms the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters […]."*[33]

Additionally, the limiting effect of stabilisation clauses on state regulatory power has raised concerns about their enforceability under domestic law, particularly in common law countries, and their potential contradiction with domestic public policy, particularly in civil law countries.[34]

Furthermore, commentators have highlighted the possibility of allegations of a breach of equal treatment when states apply different systems to investors under a stabilisation clause, potentially favoring certain investors over others.[35]

Looking ahead, the impact of foreign direct investment, on the achievement of Sustainable Development Goals pursued by the United Nations is expected to remain significant,[36] although uncertainties remain due to factors such as the

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32 General Assembly resolution 1803 (XVII) of 14 December 1962.

33 General Assembly Resolution 3171 (XXVIII) of 17 December 1973.

34 *See* Fabio Núñez del Prado, José Ignacio García Cueto, et al, "Intimate Enemies: Are Stabilisation Clauses and Human Rights Compatible under International Law?", in Gloria María Álvarez, Melanie Riofrío Piché, et al. (eds)., *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International, 2021.

35 Thomas Walde, George Ndi, "Stabilizing International Investment Commitments: International Law Versus Contract Interpretation", *31 Tex. Int'l L.J.*, 1996, 215–267, 236.

36 The United Nations passed in 2015 the "Transforming our World: the 2030 Agenda for Sustainable Development" resolution (U.N. Doc. A/RES/70/1). It also established a range of Sustainable Development Goals, that are intended to be achieved by 2030 (*see* https://www.un.org/sustainabledevelopment/sustainable-development-goals/). *See also* Fabio Núñez del Prado, José Ignacio García Cueto, et al, "Intimate Enemies: Are Stabilisation Clauses and Human Rights Compatible under International Law?", in Gloria María Álvarez, Melanie Riofrío Piché, et al. (eds)., *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International, 2021.

pandemic. However, it is also clear that investors still seek stable environments and are more inclined to invest in states known for their commitment to respect the rule of law. Investors still want to have their investments protected, and otherwise require state accountability and compensation for harmful effects on the investment. Therefore, the future will probably demand for investors and states to agree upon reasonable and balanced terms.

As of the date of publication, the authors are not aware of any prediction as to the stabilisation clauses growth or decrease. However, disputes concerning the application of stabilisation clauses have decreased significantly. If that is an immediate consequence of a potential improvement on states' officials and foreign investors' counsels at drafting contracts, it is uncertain. Likewise, it is not clear if the increasing number of investment protection treaties has mitigated the risk of new claims against host states based on breach of a stabilisation clause (an investor could rely upon the fair and equitable treatment or expropriation standards of investment protection, or upon umbrella clauses).

However, despite the need of foreign investors to protect their investments, freezing clauses (those preventing a state from changing the regulatory framework) have been losing space, migrating to more flexible clauses.

In any case, parties to an arbitration could eventually resort to stabilisation clauses to prove a potential breach of the fair and equitable treatment standard of a specific treaty, or of an alleged legitimate expectation. Freezing clauses could show parties' real intentions at the time of contracting, binding states to the scenario promised to the investors, or otherwise incurring in a violation of the fair and equitable treatment. By comparison, some tribunals have followed the approach of understanding that a lack of a freezing clause in a contract implies that the state did not act in breach of a legitimate expectation granted to the investor.[37]

5 What about Human Rights? Limiting Stabilisation Clauses

As discussed, stabilisation clauses have faced widespread criticism for their implications on states' regulatory capacity and their impact on a) human rights, and b) environmental protection matters. Amnesty International, along with other

37 *See* in this regard *Parkerings–Compagniet AS vs Republic of Lithuania*, ICSID Case ARB/(AF)/05/8, 2007, 332, where the tribunal ruled "[i]*t is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power*".

international organisations, has stated that stabilisation clauses prevent states from aligning their legal systems with international human rights and environmental obligations,[38] leading to various manifestations:

Firstly, there is the concept of "regulatory chill." This refers to cases where states refrain from enacting laws to avoid potential claims from foreign investors.

Secondly, there is the issue of selective regulation. This occurs when states implement necessary reforms but exclude their application to existing foreign investments or investments protected by stabilisation clauses. Given that agreements with stabilisation clauses are commonly found in the energy sector, the potential impact on climate is evident.

One notable solution proposed to address the alleged negative impacts of stabilisation clauses specifically targets indigenous communities that may be affected by the inability of states to implement beneficial regulatory changes. The proposal suggests involving indigenous communities in the drafting of contracts that could potentially impact. Various instruments, although classified as soft law, are relevant to this matter, such as the Convention 169 on Indigenous and Tribal Peoples.[39]

Of particular significance is the partially dissenting opinion of Professor Sands in the *Bear Creek Mining Corporation v Republic of Peru* case, which holds that the Convention 169 on Indigenous and Tribal Peoples is an applicable rule of international law. While it may not strictly apply to foreign investors, it does carry significance and legal effects concerning them. Therefore, while some argue that obtaining a "social license" is an obligation on the investor:

> *"It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. It is for the investor to obtain the 'social license',*

38 Amnesty International UK, Human Rights on the Line: The Baku-Tbilisi to Ceyhan Pipeline Project, 2003, https://www.amnesty.org.uk/files/baku_line_0.pdf.

39 *See* Law on the right to prior consultation of indigenous or native peoples, recognised in Convention 169 of the International Labor Organisation, 29785, 2011. *See also* Karol Boudreaux, Yuliya Neyman, *US Agency for International Development, Operational Guidelines for Responsible Land-Based Investment 37*, https://www.landlinks.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated.pdf; and Office of the United Nations of the High Commissioner for Human Rights, *Principles of Responsible Procurement, Guidance for Negotiators*, 2015. *See also* Fabio Núñez del Prado, José Ignacio García Cueto, et al, "Intimate Enemies: Are Stabilisation Clauses and Human Rights Compatible under International Law?", in Gloria María Álvarez, Melanie Riofrío Piché, et al. (eds)., *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International, 2021.

and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license."[40]

In the same vein, some commentators suggest that limitations on stabilisation clauses are starting to be applied in cases concerning the regulation of environmental matters. Simultaneously, there is growing trend to impose obligations on investors in these areas. Therefore, while stabilisation clauses would still be valid, they would not cover issues related to the public interest. As a sort of *quid pro quo*, an obligation would be imposed on the investor. If such an obligation is to be added, it should be made clear to the investor from the outset of the investment.

The truth is that in cases where the wording of a stabilisation clause appears to prevent the state from implementing regulatory changes that may affect a specific investor, the state could argue in arbitration that these clauses, to the extent that they impede its regulatory power with respect to human rights, were not validly agreed upon under international law. Pursuant to Article 46 of the Vienna Convention on the Law of Treaties, the clauses would be deemed invalid.

In parallel, some commentators suggest applying the doctrine of *rebus sic stantibus*, which implies that "*a treaty or contract can be withdrawn or terminated, when there is any fundamental change in the circumstances*."[41] By applying this doctrine, stabilisation clauses could be adjusted to the new circumstances in energy and environmental matters. For example, it could involve mandatory renegotiation of contract terms.

In summary, it does not seem possible for stabilisation clauses to function as an absolute rule that prevents states from adapting their laws to the needs of the people and undermines the primacy of states' right to regulate in the public interest. However, we believe that states must be accountable for their agreements, and justifying regulations solely under the broad and undefined concept of "public interest" could undermine investors' rights protection. Otherwise, states' obligations would be devoid of substance, and any measure impacting the initial investment scenario (which, according to the contract, the state agreed was theoretically unalterable) would be permitted without consequence for the states.

40 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 2017, 37.

41 Mahendra Pratap Singh Shekhawat and Manvendra Singh Shekhawat, "Doctrine of Rebus Sic Stantibus", in *Indian Journal of Integrated Research in Law*, Vol. II, Issue III, 2020, 1.

6 What about Investment Treaties?

What happens if, simultaneously with the existence of a stabilisation clause in an investment contract, there is an investment protection treaty? Does the protection of the treaty add to the protections available under the stabilisation clause? Does breaching the stabilisation clause also constitute a breach of the treaty?

Typical "full protection and security" clauses in investment treaties have been interpreted broadly by case law to encompass the stability of the investment in a secure, commercial, and legal setting.[42] Interpreted this way, the host country should refrain from adopting legal or administrative measures that affect the investment or, in other words, undermine the protection and security provided to the investor.

Additionally, according to the standard of "fair and equitable treatment", the state must protect the reasonable expectations of foreign investors, including the conditions offered at the time of the investment.

Therefore, it has been noted that failure to comply with a stabilisation clause could constitute a breach of an investment treaty if it violates the legitimate expectation of providing a stable legal regime. However, the case law on this point is not uniform. In some cases, tribunals have established that the failure to adhere to the legal framework established in a concession contract, for example, constitutes a breach of fair and equitable treatment by depriving investors of a legitimate expectation.[43] In one case, an investment treaty existed.[44]

It has also been argued in case law that including stabilisation clauses is preferable, despite the existence of a treaty.[45] This is mainly because stabilisation clauses provide potentially more certainty and protection than relying on a general expropriation provision under an investment treaty as a defense to a legal change. Additionally, the duration of the treaty may not align with that of the investment contract, and some states often include exceptions for energy-related projects, especially those involving natural resources, making it safer to have a stabilisation

42 *See Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case ARB/05/22, 2008, 729. *See also Azurix Corp. v Argentine Republic*, ICSID Case ARB/01/12, 2006.

43 For a comprehensive analysis on such cases, *see* Simon Bianchi, "The Role of Investor-State Tribunals in Determining the Scope and Content of the Fair and Equitable Treatment Standard – Legitimate Expectations and Proportionality", in *Columbia Law School – Scholarship Archive – LL.M. Essays & Theses*, 2022

44 *See Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v Argentine Republic,* ICSID Case ARB/03/19, 2015.

45 *See Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case ARB/05/8, 2007. *See also AES Summit Generation Limited and AES-Tisza Eromu Kft. v Republic of Hungary,* ICSID Case ARB/07/22, 2010

clause alongside the treaty. Naturally, the dual combination of a stabilisation clause and investment treaty could significantly affect states, particularly developing countries, as it would limit their dominion over legislative and regulatory power.

Additionally, regarding the question of whether a violation of a stabilisation clause leads to a treaty violation, the presence of umbrella clauses can help resolve the discussion. Stabilisation clauses, when included in investment contracts or foreign investment laws, have the potential to be enforced through umbrella clauses found in investment treaties.

Umbrella clauses, in general, state:

> *"[H]ost States shall 'observe' (or e.g. 'respect', 'comply with', 'fulfil' or 'ensure the observance of') 'obligations' (or e.g. 'undertakings' or 'commitments') they have 'entered into' (or e.g. 'assumed' or 'incurred') with regard to investments. Umbrella clauses cover only undertakings of the host State and not those of foreign investors. Each umbrella clause should be interpreted in accordance with its own particular terms."*[46]

Some case law holds the opinion that the inclusion of an umbrella clause in an investment treaty *"makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments*."[47]

There is debate over whether umbrella clauses encompass breaches of domestic laws, but investors may rely upon an umbrella clause in an international investment treaty to claim a breach of a stabilisation clause included in a contract or domestic law.

7 Final Remarks

Stabilisation clauses are crucial in promoting investment in the energy sector in developing countries. Considering the risk of political instability for foreign investors, states seek to attract foreign capital by compensating for the political risk through stabilisation clauses that will ensure stability or provide compensation, theoretically.

It is equally true that stabilisation clauses, regardless of their modality, limit a state's legislative and regulatory powers. Tax, financial, or commercial concessions, as

46 Benjamin Samson, *Umbrella Clause*, Jus Mundi, 2023.
47 *SGS Société Générale de Surveillance SA v Philippines*, ICSID Case ARB/02/6, Decision on Objections to Jurisdiction, 2004, 128.

well as existing environmental regulations, may remain unchanged for decades due to the long lifespan of energy sector investment projects.

Naturally, a state that has signed a contract containing a stabilisation clause with a foreign investor may unilaterally revise its commitment, but it will expose itself to potential claims for compensation (either provided for in the investment contract or because the investor will have a high chance of success in subsequent arbitration).

However, the need for a stable environment for foreign investors to inject long-term capital should not jeopardise a states' right to regulate in unreasonable terms.

In a changing world where environmental concerns are growing, it is normal for states to respond to climate challenges with legislative or regulatory changes to align their legal systems to new realities.

The existence of severe stabilisation agreements (*i.e.*, freezing clauses) can hinder these efforts.

Additionally, a stabilisation clause that disproportionately favors the investor can be counterproductive and trigger internal conflicts in the host state, leading to the very instability that the stabilisation clause was intended to avoid. This is because the effectiveness of stabilisation clauses is not absolute.

In summary, stabilisation clauses are favorable and key risk management mechanisms in the energy sector, but they must maintain adequate flexibility and adaptability in the face of current realities and global concerns about climate change and human rights. States, however, must remain accountable for their actions and be prevented from justifying any harmful measure under the guise of the "public interest."

Pathological Arbitration Agreements – Interpreting Symptoms and Divining Cures

by Glenn George Cheng Esq • GGCLaw

Part 1 The Nature of An Agreement to Arbitrate

A. *Making the agreement to arbitrate*

1. The heart of arbitration lies in contracts, in respect of which, this article examines the instances in which the heart may well be willing, but the body of an agreement to arbitrate a dispute may yet fail the will of its parties to do so. In the discussion to follow, we examine the theory of so-called "pathological" arbitration agreements, and in the language of diagnosing pathology, we will distinguish the theory's various symptoms, and compare the rationale and methods by which both Courts and arbitrators have sought in cases to cure them in certain cases, whilst avoiding re-inventing the construction of those thought otherwise incurable.

2. In the beginning, as to whether an agreement to arbitrate disputes is encapsulated as a clause, or an article, amongst a suite of other underlying contractual provisions forming a private agreement between parties, or if it is as part of a public treaty between nations – or a mixture of both such elements in public-private partnerships, the essence of the right to arbitrate arises when competent and consenting parties agree as a matter of contract, to refer a scope of their legal disputes to be resolved by a process of arbitration, and in the event to enforce the agreement, and to demand that their disputes be dealt with in such manner.

3. This is a fundamental paradigm which applies seamlessly across both fields of domestic and international arbitration; and with it, and over time and development there now exists alongside a global arbitration infrastructure

established by, and without limitation, the enactment of arbitration[48] sympathetic state laws, the formation of arbitral institutions and specialised[49] courts of arbitration, legislated[50] arbitration laws which govern matters of Tribunal appointment, powers of the Tribunal and parties, as well as standardised rules of procedure (in cases incorporating the UNCITRAL Model Law and vesting its provisions with equivalent force of law alongside the applicable national laws governing arbitration in certain nation states), together with which to support, and in some cases, to supervise contractual choices to arbitrate disputes with the aid of such "default" tools and mechanisms. Nevertheless, without a clearly made (enough) contractual choice to arbitrate at first blush, such default tools and mechanisms could not be properly interposed even where help it may be needed most. The heart of arbitration, thusly, lies in contracts.

4. To further illustrate the point, consider that whereas a judge presiding a state court is appointed by its sovereign and thus being granted the powers of judicial office he or she wields the coercive powers (of that state) over the affairs and actions of the parties whose disputes are brought before the court, the foundation of an arbitrator's powers lies in a different origin. In the words of a colleague and practitioner, the arbitrator is a "rare bloom". The office with the role and the powers that go with it, also known as its jurisdiction, may well be defined in state laws and institutional rules, but it only comes to life only when it is invoked when contracting parties agree, and submit their disputes to be determined in arbitration. Once the disputes are decided and judgment, if you like, is handed down in the form of a written arbitration award, this rare bloom falls away and the arbitrator relinquishes its role and releases jurisdiction over the parties and their case and is consequently rendered *functus officio*.

5. Hence, each of the parties' intentions to arbitrate, as well as the jurisdiction of the arbitrator under which to implement them, is factually and importantly legally inseparable from their agreement to arbitrate. In turn it is fundamental that the construction of an arbitration agreement must be held to be capable of valid, factual, and legal existence.[51]

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48 In the appropriate context, these are national laws referred to in studies and publications as pro-arbitration, or pro-enforcement (of arbitration) laws which legitimise territorial or seat jurisdiction, in supervisory terms, over such matters as the constitution of tribunals, interim measures of recourse (absent, or pending the constitution of tribunals), the recognition and enforcement of wards, as well as a forum of recourse for the challenge of arbitrators and awards, and the annulment and in certain domestic arbitral applications, the appeal of awards.

49 Typically constituted as courts of arbitration within arbitral institutions, or as a designated division, or department within a state's court system.

50 Synonymous with references to "seat law" or the "laws of the arbitration".

51 See: *International Commercial Arbitration* – Gary Born; Third Edition, [2021]; at [5.04](D)(d), at 820; and *The Myth of Pathological Arbitration Clauses: Perfecting Imperfect Arbitration Agreements* - [2.02](C)(1)(b)(i) and [5.04](A)(1) – Born, Angelini and Alcoberra Llivina, [2019].

6. Much literature is available on the discussion of what constitutes a "proper" or valid" arbitration agreement. Deferring for the sake of simplicity towards the numerous modular ("standard") agreement clauses that are available and published in the public domain by arbitral institutions around the world, such as the AIAC, DIAC, ICC, and SIAC to name a few;[52] as well as to note the International[53] Bar Association's (IBA) Guidelines for Drafting International Arbitration Clauses, it is reasonable to observe that many elements make up a valid arbitration agreement; not least amongst which – each of the matters concerned with the scope of disputes that are referrable to arbitration, the governing laws (of the dispute and, or the agreement to arbitrate), the seat of the reference and the applicable rules of procedure; as well as such administrative details as the process of appointment of the Tribunal, the number of arbitrators and the language of proceedings, "ticks" materially against a checklist of seeming "must haves" in the exercise of contractual formation in this context. In equal measure, questions of validity are often also intertwined with issues of legality; namely in terms of the respective competencies of the signing parties, or as to questions of whether legitimate consent had been given to enter into an arbitration agreement.

   [**Writer's Note**: The discourses on the twinned subject matter of validity and legality of arbitration agreements are as broad as they are extensive, and furthermore, where they involve discussions of varying species of arbitration clauses including multi-tiered clauses, arbitration clauses involving multiple parties, so-called "*Arb-Med*"[54] or "*Arb-Med-Arb*" clauses, they deserve in fairness, their own separate analysis and debate in a separate[55] article.]

7. Given the importance of proper contracting, it is remarkable from this writer's[56] experience, to note that the "arbitration agreement", or "arbitration clause" is still waggishly referred to amongst certain circles of (in-house) corporate general counsel as the *"Friday midnight clause"* – describing the peculiar habit of contract draftsmen to relegate the preparation of arbitration agreements to the last order of business – after the preceding main body of commercial terms have been settled. Notwithstanding the inherent cautionary lessons and potential pitfalls associated with "*Friday midnight*" drafting, draftsmen and practitioners will note today that national Courts and arbitral Tribunals

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52 The abbreviations here denote the Asian International Arbitration Centre, the Dubai International Arbitration Centre, the International Chamber of Commerce, and the Singapore International Arbitration Centre.

53 Adopted by a resolution of the IBA Council on 7 October 2010.

54 The abbreviations denote commonly referred hybrid clauses incorporating "*Arbitration-Mediation*" and "*Arbitration-Mediation-Arbitration*" procedures respectively.

55 This article is available upon request to the writer at ggc@ggclaw.sg, or through the website of Glenn G Cheng Law Chambers at www.ggclaw.sg

56 The reference here is meant to be anecdotal, and it is confined to the personal experiences of the writer.

tend in general to incline towards (and to use a phrase from earlier) a "pro-enforcement" posture, whereby claims and challenges have been considered pedantic and thereby rejected where they have been based on an insistence that an arbitration agreement may only be valid if it were possessed of all of the commonly check-listed elements of scope, seat, rules, number of arbitrators *et al*.

8. Indeed, whereas between national Courts of the oft-differing civil and common law traditions, the Italian Corte di Cassazione upheld an arbitration clause involved a 1985[57] case as being sufficient to constitute a binding intention to arbitrate by virtue of the words "….*Arbitration: in London if necessary*…."; a US Court of Appeals, sitting two years later in its Seventh Circuit ruled in a UCC[58] Illinois governed diversity case, would hold that the words "….[A] *ll disputes under this transaction shall be arbitrated in the usual manner*…." were good enough to formulate a legitimate mutual intent to refer the dispute in question safely into arbitration.

9. In another aspect of "pro-enforcement" law-making, numerous national legal systems as I said earlier, have legislated arbitration laws which govern matters of appointment of Tribunal, powers of the Tribunal and parties, as well as standardised rules of procedure. Often than not, these national arbitration laws can serve too as "stop gaps" or "filler" default provisions operating as a matter of applicable seat law, to augment parts of arbitration agreements otherwise left lacking by parties' own hand.

10. The combination of pro-enforcement judicial attitudes, and default national arbitral laws are correctly viewed as being progressive in philosophy, and as a practical consideration, they are furthermore supportive to the practice of global arbitration laws. However, progressive attitudes are not to be mistaken as license to rest on the laurels of light-touch constructions, or the usage of putatively styled, "good-enough-to-pass-for" arbitration agreements.

11. As we shall see below, there are indeed instances in terms of fatally defective drafting of arbitration agreements where the saying "*a bridge too far*" applies toward both the jurisdiction of the Tribunal, as well as to the very factual and legal existence of the arbitration agreement itself.

12. In the case of defective arbitration agreements, the *dicton élégant* for describing a defective arbitration agreement is to call it a "pathological arbitration agreement". In view of the range of categories of symptoms in this form of pathology, I would have thought however, a modified metaphor of "*a bridge too short*" in many cases perhaps better describes the problem.

57 Judgment of 21 November 1983, *X Y.B.* Comm. Arb, 478, (Italia Corte di Cassazione).
58 *Schulze and Burch Biscuit Company v Tree Top, Inc.*; 831 F.2d 709 (7th Cir. 1987).

B. Pathology of a defective agreement

13. Before an analysis of what constitutes a pathological arbitration agreement, the questions of why, and when, an arbitration agreement would be challenged on these grounds, is relevant.

14. There are two scenarios in which this peculiar mode of challenge theoretically occurs: firstly, where one party sues another on the basis of a breach of an underlying contract commences legal action before a national court, and the responding defendant applies to stay the court proceedings in deference to an arbitration agreement applicable between them, and in return the first party elects to challenge the stay (or proceedings) on the grounds of the arbitration agreement being defective; and secondly, where one party – more commonly the respondent – elects after the arbitration has commenced with the constitution of a Tribunal, to challenge the proceedings by contending the pathology, and implying therefore, the voidability of the arbitration agreement. In the former scenario, challenges are typically applied before the national Courts; and in the latter scenario, where a Tribunal is in fact constituted the doctrine of *Kompetenz-Kompetenz* as encapsulated at Article 16 of the Model Law in applicable adoptive jurisdictions puts the matter before the Tribunal for initial determination – and not before the national Courts for interlocutory resolution.

15. Between them, the latter scenario may be thought to present certain moral problems if the complaining party may have negotiated the underlying contact at arm's length, and with the benefit of advice had perhaps been participatory in the construction of the arbitration agreement in the first place. If so, the earnest onlooker may well ask if it should subsequently be allowed to evade, or at least delay liability by technicality. It is, after all, an uneasy situation to be pragmatic, where the canons of construction uphold the primacy of black-letters, and it is trite in the common law tradition for example, that whilst a Court or Tribunal may in the appropriate circumstances imply additional words (or it may consider surrounding facts which ordinarily it would not do so) to clarify the meaning of an ambiguity, it does not rewrite the bargain by "fixing",[59] or "improving"[60] a deficient agreement with new words.

16. The question at the heart of this dilemma is whether the treatment of pathological arbitration agreements ought to be binary in the approach; that

59 This analogy is not meant to exclude the possibility that a party may rely on equity to seek rectification of a contract term tainted by mistake, but recognises the exceptional circumstances required to discharge the necessary burden for this type of relief.

60 This is said without derogation to the writer's own philosophy that in adopting a purposive assessment to the construction, and by examining the obvious or deducible contracting objectives of the parties, it is possible to distinguish an unimpeachable approach so that the remedying (re) interpretation aligns closest to original intentions, without necessarily attracting surprising results.

is to imply, if the thing is doomed from the start should it not simply be left to be voided and thereby to be rationalised as one of the ordinary perils of doing business? After all, absent the right to arbitrate, the residual right to pursue justice before the national courts remains in all events inalienable.

17. Alternatively, one may well ask if the notion of party autonomy in terms of the will to arbitrate ought to be taken at its essence, and therefore respected and upheld to the extent in which a party may be allowed to come to the law to seek a cure to the defects in question and in so doing obtain a declaration from a court or arbitrator that could save the original will to arbitrate? After all, and perhaps also in truth, the parties may well have genuinely elected arbitration specifically because of the desired attributes of privacy and proprietary "know-how" which throughout time have remained the enduring bastions of arbitration.

18. From a high level, it is considered that subjective intentions of the kinds described above may inevitably take a farther second place at the end of the day, to the expectations of "pro-arbitration" judicial policy, and the recognition of parties' autonomy in contracting the will to arbitrate their disputes. If this is the baseline for intervention, the next question must follow:

> *"In how bad a shape must the supposed agreement be in order to justify no further rescue?"*[61]

19. To start with, the idea of a pathological arbitration agreement is a creature of the civil law tradition. An arbitration agreement may be said to be *"pathological'* where the court or an arbitrator is unable to discern in the legal sense, its meaning either in part or entirely. The expression is defined, and in one case, adopted and approved as part of leading authority under the common laws of Singapore as follows:

> *"The expression 'pathological clause' ... denotes arbitration agreements and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration."*[62]

20. The common law standard in terms of disruption of the "….*smooth progress of the arbitration*…." stands in observable contrast to the legislated standard of defectiveness in the arbitration agreement which renders the thing *"inoperative or incapable of being performed*".[63]

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61 This formulation is the writer's own.

62 *Fouchard. Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) at 262. This definition has been accepted by the Singapore Court of Appeal in *Insigma Technology* Co *Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [37].

63 Phrase used in Section 6(2) of the International Arbitration Act and Article 8(1) of the UNCITRAL Model Law.

21. Perhaps fittingly, however, the range in definitions does well to reflect the range of symptoms that comprise the pathology. In broad categories the symptoms of a pathological arbitration agreement may be put as follows:

    (a) Defective by reason of inconsistency of terms: Alongside the category concerned with uncertainty, inconsistent terminology ranks jointly in this writer's opinion, as the more common symptoms of pathology in arbitration agreements.

        (i) As one common example, defects under this category are exhibited in clauses which prescribe both arbitration and (state courts) litigation as equally, or sequentially ranked *fori* for dispute resolution. In one notable English[64] case before the High Court, the clause in question obliged the parties to refer any disputes firstly to "….*Swiss arbitration*…."; failing resolution of which they would then submit the matter to the non-exclusive jurisdiction of the Courts of England and Wales "….[s]*hould a resolution not be forthcoming*….". There, the Court noted that the clause endeavoured on the impossible in its attempt at constructing a multi-tiered arbitration clause by obligating the parties to refer their dispute to one binding form of resolution (by arbitration) followed by another form of binding resolution (in the form of court litigation).

        (ii) More recently in 2022, before the United States[65] ("**US**") District Court for the District of Columbia, an application by the Petitioner (hitherto a successful arbitral Claimant) to confirm an international arbitration award under Article V of the New York Convention was met with several challenges by the Respondent (in both the application and the preceding arbitration). Amongst its dominant contentions, the Respondent argued that the arbitration clause in the underlying Management Contract (that had fallen into dispute) between the parties was "*pathological*" and ought to be struck down as void. This in turn would then oblige the Court to decline enforcement (of the arbitration award) under the provisions of the New York Convention. Between (seemingly) competing segments of the clause naming each of the state court of Equatorial Guinea, and of arbitration under Swiss law under the auspices of the Zurich Chamber of Commerce, in apparent equal footing as forms of recourse for parties' disputes, the Court in that case examined the contended pathology, and rejected various arguments by the challenging Respondent, observing in particular regard to two of the more compelling positions taken there, that there was "….*no textual*

64 *Kruppa v Benedetti* [2014] EWHC 1887.
65 *Marseille-Kliniken AG v Republic of Equatorial Guinea* [2022], in Civil Action No. 1:20-cv-03572

support in the Management Contact…." to contend firstly, that the state court had primacy in disputes *per se*; and secondly, that the arbitration option was otherwise available to parties only as a "*form of appeal*" against an unsatisfactory ruling handed down by the state Courts of Equatorial Guinea.

(iii) In another case before a Swiss Federal Tribunal,[66] the troubled clause in question referred disputes to "….[T]*he American Arbitration Association or to any other US court*…." and that "[t]*he arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500)*." In this case, the *Bundesgericht* (o Swiss Federal Trbunal) determined that the applicable test was whether the wording of the clause was sufficiently clear to exclude referring the dispute to the state court, and that if this was found, the inclination must then be to interpret the clause in a purposive way to support a referral to arbitration as the presumed true intent of the contracting parties. Here unfortunately, the *Bundesgericht* found that the wording of the relevant clause in the underlying Asset Management and Facilitation Agreement had "….*not been sufficiently clear to exclude the jurisdiction of the state courts beyond doubt*." Accordingly, the arbitration agreement was held to be void, and leaving aside the arguable standard (of "*beyond doubt*") applied here, the Tribunal also concluded that it need not decide whether the arbitration clause was in fact incurably pathological or not.

(iv) In comparable commonality are such arbitration clauses which prescribe a reference of disputes to the administration of arbitral institution "A" but cites the application and governance of the procedural rules of arbitral institution "B"; presuming therefore that the incompatibility between a respective institution's governances and the rules of another that were made applicable to the parties, would [67]*prima facie* be disallowed by one or both institutions.

(b) Defective by reason of uncertainty in terms: In this category, the defective elements called into question include the following:

(i) The intriguingly coined "blank clauses"[68] which draw silent on choices of seat, as well in terms of numbers of, or the means of appointment of arbitrators, where the obvious and problematic implication here is that absent a choice of seat, there exists no other feasible means by

66 *ISC Holding v Nobel Biocare*; Decision No. 4A_279/2010 of 25 October 2010.

67 See: *Insigma Technology* Co *Ltd* v *Alstom Technology Ltd* [2009] 3 SLR(R) 936; and further discussion in this article.

68 See: *International Commercial Arbitration* – Gary Born; Third Edition, [2021]; at [5.04](D)(f), at 827.

which parties may, on the face of the arbitration agreement alone, infer the application of arbitration laws of a particular jurisdiction to provide a default mechanism for Tribunal appointment.

(ii) Clauses with "missing limbs",[69] denoting the absences of various requirements such as a choice of arbitral institution (or alternately, clarification that the reference is to be made *ad hoc*); or the absence of a defined scope of dispute to be referred to arbitration, or else the absence of institutional rules of procedure (again, alternatively, clarification that the reference is to be made *ad hoc*); as well as,

(iii) Clauses with misnomers, denoting such clauses that would have included in one notable Singapore case before the country's [70]High Court, a citation of "….*by arbitration as per Singapore Contract Rules*…." as a reference for dispute resolution, and in other instances, such perplexities as [71]"….*all disputes arising under the arrangements contemplated hereunder….will be referred to mutually agreed mechanisms or procedures of international arbitration such as the London Arbitration Association*….", and in this writer's own experience, an encounter with a reference for disputes and "….*all other matters in, or associated with the underlying contract….*" to be governed under "….*the laws of the United Kingdom….*"; and,

(c) Defective by reason of inoperative terms or voided subject matter: In this relatively less commonly encountered category, the defect points to an arbitration agreement which, in the provisions of Article II(3) of the New York Convention, may be observed to be "….*null and void, inoperative or incapable of being performed*."

(i) Examples of such defective clauses comprise those which are barred from operation for reasons of statutory limitation or by reason of a breach of a condition precedent; as well as clauses which are revoked or repudiated by one or both parties, or else they may be tainted for fraud or rendered void for illegality (or non-arbitrability) of its scope or subject matter (in the underlying contract) on public policy grounds; or on grounds of lack of party consent or contracting competency.

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69 Phrase is the writer's own.

70 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32.

71 See: *Redfern and Hunter on International Arbitration;* Seventh Edition (N. Blackaby KC, C. Partasides KC with A. Redfern eds) [2.220](b) at 113. The particular example cited here was deemed defective on two grounds: firstly, the reference to "….*mutually agreed mechanisms or procedures*…." was flawed for uncertainty as it constituted an "*agreement to agree* [something seemingly left to be carried forward to the future]…."; and secondly, the reference to the "*London Arbitration Association*" is arguably on its face, a fiction; but at that, the choice itself was unhelpfully also cited as an indeterminate option.

(ii) A notable recent example of a case which canvassed multiple challenges encompassing both elements of uncertainty (by reason of misnomer), as well as inoperability involved a [72]real estate and mining case between private and state parties campaigned between 2017 and 2023 before both sets of state Courts and an arbitral Tribunal. Due to its inherent complexities, the particulars of this case are better positioned for discussion further below in this article.[73]

Part 2 Preserving the Agreement to Arbitrate

C. *Curing an Agreement Defective for Inconsistency*

22. One of the pragmatic, yet "pro-enforcement" approaches adopted by national Courts and arbitral Tribunals encountered with inconsistently worded clauses is to perform a surgery on the wordings themselves, so as to achieve a result in which, short of "re-writing the bargain" as it were, the part or parts of the otherwise troubled clause that read coherently would be retained and would make legal and commercial sense in the entire reading of an arbitration agreement; whilst the (other) parts deemed problematic or doubtful would effectively be disregarded and expunged from the text of the thing if it proved that by its retainage, it could cause more harm than good because it would, and if left untouched, would return the entire agreement into doubt. Simply put in the theme of pathology, the idea is that by cutting out the bad bits, the aim is then to enable the surviving parts to survive and make the sense that is needed out of the doubted clause.

23. Such was the sensible approach taken by the English High Court in *Kruppa* v *Benedetti*,[74] which I had mentioned earlier as an example in which the clause in question was criticised for inconsistency because it rather duplicitously obliged the parties to refer any disputes firstly to "….*Swiss arbitration*….", failing resolution to which, they would then submit the matter to the non-exclusive jurisdiction of the Courts of England and Wales.

24. Here, the Court may well have been unwittingly aided in its deliberations as the reference to "….*Swiss arbitration*…." was made absent any further necessary reference to the precise canton in which the arbitration must take place; nor had there been any mention of the number of arbitrators to preside the reference. This "gap" rendered the Swiss reference less cogent than

72 *Heirs to the Sultanate of Sulu, namely, each of Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram, Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny KA Sampang and Widz-Raunda Kiram Sampang v Malaysia*; a Preliminary Award on Jurisdiction and Applicable Substantive Law – published on 25 May 2020.

73 See: [81] herein below.

74 [2014] EWHC 1887.

the accompanying reference to the non-exclusive jurisdiction of the English courts because the absence of choice of canton is equivalent to an absence of the choice of seat. Given the further absence of a choice of the number of arbitrators to preside the reference, the parties in *Kruppa* were in the event incapable of pointing to the correct, or if at all, any set of (Swiss) cantonal laws with which to appoint the Tribunal by default. The path was thus cleared for the Court to rule without upset, that the parties could "….*endeavour*…." commencement of the Swiss proceedings, immediately upon which failure they were to refer the matter to the English Courts – a diplomatic "win-win" result by any measure of reasoning.

25. The pragmatism in *Kruppa* is consistent in spirit with an earlier 2009 case before each of the High Court and then the apex Court of Appeal in Singapore. In *Insigma Technology* v *Alstom Technology Ltd,*[75] the Court of Appeal had to consider the validity of the following arbitration agreement:

> *"... [A]ny and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English ..."*

26. Following a dispute between the appellant ("**Insigma**") and the respondent ("**Alstom**"), Alstom commenced arbitration at the SIAC. The Tribunal heard arguments on the fatal uncertainty alleged by Insigma as to the operation of the arbitration agreement. After the hearing, the Tribunal wrote to SIAC to ask if it would be prepared to administer the arbitration under the ICC Rules to the exclusion of the Arbitration Rules of the SIAC ("**SIAC Rules**"), and if so, which bodies within the SIAC would perform the functions assigned to the Secretary-General, Secretariat, and the International Court of Arbitration ("**ICC Court**"). The SIAC responded affirmatively, indicating that the SIAC Secretariat, Registrar and Board of Directors would undertake these respective roles. The Tribunal decided that it had jurisdiction to hear the dispute. Insigma then applied to the High Court in Singapore to set aside the Tribunal's decision, arguing, among other things, that the arbitration agreement was uncertain because the parties' agreement that the arbitration should be administered by the SIAC using ICC Rules could not be fulfilled as the ICC Rules had many unique features which could not be administered by a non-ICC institution. The High Court at first instance rejected Insigma's uncertainty argument and dismissed its application on, among other things, the following bases:

75 [2009] 3 SLR(R) 936.

(a) That the parties had not bargained for an ICC institutional arbitration but for a hybrid *ad hoc* arbitration to be administered by the SIAC, applying the ICC Rules;

(b) That in principle, so long as no significant inconsistency arose, there was no problem with parties' agreement to an arbitration agreement providing for one arbitration institution to administer an *ad hoc* arbitration under the procedural rules of another arbitration institution;

(c) That the substitution by the SIAC of the various actors designated under the ICC Rules with the appropriate corresponding actors in the SIAC to perform their respective functions was within the degree of flexibility allowed by the ICC Rules which respected party autonomy. Party autonomy also meant that the parties were free to decide the conduct of the arbitration and the constitution of the arbitral Tribunal; and,

(d) That it was clear and undisputed where the parties intended to resolve their disputes by arbitration and not litigation, all reasonable efforts should be made to give effect to the parties' intention to arbitrate in an *ad hoc* arbitration.

27. Insigma then appealed upwards to the Court of Appeal, raising similar arguments as before the court below. The Court of Appeal held in agreement almost entirely with the High Court and dismissed the appeal. There, the Court of Appeal held that the fundamental principle in construing an arbitration agreement was to give effect to the intentions of the parties. Where parties had evinced a clear intention to settle any dispute by arbitration, the Court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete, or lacking in particulars. In relation to pathological arbitration clauses, the Court of Appeal held that whether the clause may or may not be upheld depended on the nature or the substance of the defect, or whether the defect was in another sense, curable. In other words, just because an arbitration clause is pathological does not automatically invalidate it as an agreement. On this occasion, the Singapore Court of Appeal found that the arbitration agreement was rendered certain and workable by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules, and to nominate appropriate functional bodies that correspond to the bodies required under the ICC Rules to supervise the arbitration.

28. The enforceability of pathological arbitration clauses came up subsequently for consideration in *HKL Group* Co *Ltd v Rizq International Holdings Pte Ltd,*[76] a first instance decision before an Assistant Registrar of the Supreme Court

76 [2013] SGHCR 5. Case authority before the Singapore courts below the tier of the High Court is relevant study for academic, or illustrative purposes only.

in Singapore. In this case, the defendant applied for court proceedings to be stayed in favour of arbitration. The arbitration agreement that it relied upon was contended in the challenge to the stay application as being defective, or pathological. The clause in question read as follows:

> *"Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed."*

29. It was conceded between the parties that there was no entity in Singapore known as the "*Arbitration Committee*". The plaintiff resisted the application on the ground that, among other things, the arbitration clause was inoperable on account of this defect. The Court concluded that the arbitration clause was workable and stayed the Court proceedings with the condition that "*... parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct* a *hybrid arbitration applying the ICC rules."* In so doing, the Court recognised that with the inherent diversity of pathological arbitration clauses, it was difficult to state with specificity the approach the Court would take to those clauses. However, the Court held that the nature and extent of the pathology may be assessed in terms of its deviation from the essential elements of an arbitration clause, which is that the clause must:

    (a) produce mandatory consequences;

    (b) exclude the intervention of the Courts;

    (c) give powers to the arbitrators to resolve the disputes which have arisen; and,

    (d) permit putting in place a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement.

30. In coming to its decision, the Court referred to decisions from other jurisdictions and recognised that those Courts, in facing a similar problem of uncertainty of the arbitral institution, have generally been able to give effect to clauses which are uncertain. In its deliberations the Court cited the following examples: a Stuttgart[77] Court which read a clause referring disputes "….*without resource to the ordinary court to Stockholm, Sweden….*" to refer to an arbitration designated under the auspices of the Stockholm Chamber of Commerce; and

77 [2006] OLG Report Stuttgart 685.

an [78]Oldenburg Court which read a reference to "….*the International Court of Arbitration (Internationales Schiedsgericht) in Austria*…." to point to the international arbitration centre of the Austrian Federal Economic Chamber.

31. More recently in 2020, the Court of Appeal in Singapore had before it, the case of *BXH v BXI*,[79] which involved an appeal against an unsuccessful application before the Court below to set aside an arbitration award on a complicated matrix of severally layered arguments attacking, amongst other things, the scope and existence of the award in question.

32. The subject matter of the contested award concerned a series of eight agreements, chiefly comprised of a distribution agreement with ancillary, or associated agreements. Issues that were dealt with in the arbitration were compatibly complex, and involved the assignment, novation, and re-assignment (factoring) of debts. The Respondent (in the appeal, and the Claimant in the arbitration) filed its Notice of Arbitration on 1 October 2015 before the Singapore International Arbitration Centre ("**SIAC**"), in response to which the Appellant (then the Respondent in the arbitration) served a Response, raising several objections and challenges to the Notice; amongst which, it contended that the any Tribunal appointed by the SIAC would not have jurisdiction to preside the case. The SIAC nevertheless determined that it was able to proceed to appoint and constitute the Tribunal in terms consistent under the SIAC Rules (previously defined). The Appellant proceeded to file further challenges to both the jurisdiction, as well as the independence of the appointed arbitrator. When its ensuing challenges were heard and dismissed by the Court of the SIAC, the Appellant refused to further participate in the arbitration. The appeal thus represented a "third bite of the cherry" in respect of the Appellants efforts in this context.

33. For the purposes of this article, the relevant parts of the Court's judgment were sub-titled for brevity, under the "*The Repugnancy Agreement*",[80] and dealt with what the Appellant argued to be a pair of mutually conflicting dispute resolution provisions within the (primary) distribution agreement, in the form of a Clause 25.8 and Clause 25.9, excerpts of each appearing below:

    [Clause 25.8]:

    > *"….This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflict of laws. The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall*

78 [2006] Schieds VZ223 (Oldenburg).
79 [2020] SGCA 28.
80 [2020] SGCA 28; at [50] to [62].

be in a court located in Singapore. The 'United Nations Convention on Contracts for the International Sale of Goods' does not apply to this Agreement…."

And [Clause 25.9]:

"….Disputes arising out of or in connection with this Agreement shallbe finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Centre ("SIAC Rules") then in effect. The arbitration award shall be final and binding on the parties, the award shall be in writing and set forth the findings of fact and the conclusions of law…."

34. The Court noted that prior to this case, the prevailing local (Singapore common) law which had dealt with a construction of contract that contained both an arbitration clause as well as an arbitration reference, was that of *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited*;[81] which in turn followed, amongst others noted, the English authority of *Paul Smith Ltd v H&S International Holding Inc*,[82] latterly from which the approach by Steyn J was cited with approval.

35. In *Paul Smith*, when encountered with a similar clause containing both sets of arbitration and (court) litigation referral provisions, Steyn J ruled to widen the Court's interpretation to consider that in a wider reading of the governing law clause alongside the dispute resolution ones, the reference to English litigation simply affirmed that whilst parties there had clearly elected arbitration as a means of resolution, it had also concurrently agreed that the English Courts could exercise supervisory jurisdiction over the arbitral proceedings *per se*.

36. And so, whilst acknowledging that the *Paul Smith* approach to construing arbitration and jurisdiction clauses together is not in any sense fool proof, and thus also recognising that in the present case, the parties had in fact agreed in Clause 25.8 that "….[t]*he jurisdiction and venue for any legal action … arising out of or connected with this Agreement, or the Services and Products furnished hereunder*" shall be the Singapore Courts, the Court of Appeal in Singapore determined that in dealing with the question of whether a dispute over the parties' substantive rights and liabilities under the distribution agreement, in addition to the issue of curial supervision of any arbitration between them could plainly at once be the subject of both litigation and arbitration, a pragmatic solution was to be called for in the circumstances.

81 [2009] SGHC 13.
82 [1991] 2 Lloyd's Rep 127.

37. Hence, the solution was to decide in *BXH v BXI* to adopt the *Paul Smith* approach and hold that the parties had without conflict or irony, intended to resolve substantive disputes in arbitration under Clause 25.9 and to resolve disputes arising out of any such arbitration in the Singapore Courts in the exercise of their supervisory jurisdiction for curial review under Clause 25.8 of the distribution agreement. An optical "win-win" result, it would seem.

D. *Curing an agreement defective for uncertainty*

38. In a different demonstration of a pragmatic, yet "pro-enforcement" approach adopted by national Courts and arbitral Tribunals encountered with clauses flawed for uncertainty, the careful observer could note that in addition to "cutting out the bad bits" (as might have been adopted towards inconsistent wordings in a clause), curing uncertainty implied a further exercise of judicious) discretion in considering the factual matrix and the parties' obvious, deducible contracting intentions, the problematic clause may be construed purposively, and by importing robust inferences where necessary, reinterpreted to derive a plainer, more efficacious meaning to the construction.

39. On 16 December 2014, the Supreme Court of India, in the case of [83]*Pricol Limited v Johnson Controls Enterprise Ltd & Ors* considered and upheld a pathological arbitration agreement. In *Pricol,* the parties entered into a joint venture agreement ("**JVA**"), which contained the following arbitration agreement:

> *"... In case of such failure, the dispute shall be referred to sole arbitrator to be mutually agreed upon by the Parties. In case the parties are not able to arrive at such an arbitrator, the arbitrator shall be appointed in accordance with the rules of arbitration of the Singapore Chamber of Commerce. The arbitration shall be held at (sic) Singapore ..."*

40. The JVA separately provided that the arbitration proceedings would be held in Singapore and that it would be governed and construed in accordance with the laws of India. There was no dispute between the parties that the *"Singapore Chamber of Commerce"* was not an arbitration institution having any rules for appointment of arbitrators. The first respondent ("**Johnson**") construed the reference to the "*Singapore Chamber of Commerce*" to be a reference to the Singapore International Arbitration Centre ("**SIAC**") and moved SIAC for the appointment of an arbitrator. The SIAC then appointed a sole arbitrator. The petitioner ("**Pricol**") challenged this appointment. After hearing parties, the arbitrator ruled that the appointment by the SIAC was valid as parties have expressly agreed that Singapore would be the seat of the arbitration. Pricol

83 Arbitration Case (Civil) No. 30 of 2014.

then applied to the Supreme Court of India under Section 11(6) of the Indian Arbitration & Conciliation Act 1996 to appoint an arbitrator.

41. In support of its application, Pricol contended in the main that the rights of the parties under the JVA are to be governed by the laws of India. Therefore, in the absence of any contrary intention, even the arbitration agreement will be governed by Indian law. Consequently, the phrase *"arbitration proceedings shall be held at Singapore"* should be construed to mean that the seat of the arbitration continues to be India and the Singapore is only the venue of the arbitration. In response, Johnson argued that the arbitration agreement makes it clear that parties have agreed that the seat of arbitration would be Singapore even though the substantive law under the JVA would be Indian law. Johnson further argued that notwithstanding the reference to *"Singapore Chamber of Commerce"* was not an arbitration institution the real intention of the parties was to approach the SIAC for the appointment of an arbitrator in the event of the failure of a mutual agreement by parties to appoint one.

42. The question before the Court related to the construction of the arbitration agreement. In this regard, the Court held that a reasonable and meaningful construction of the arbitration agreement would mean that in case the parties were not able to name a sole arbitrator by mutual agreement, the arbitrator was to be appointed by the SIAC even though the entity contemplated in the arbitration agreement (meaning the *"Singapore Chamber of Commerce")* was not an arbitration institution having its own rules for the appointment of arbitrators. Based on the facts, the Court then went on to hold that the most reasonable construction of the arbitration agreement would be to understand the reference to *"Singapore Chamber of Commerce"* to mean the SIAC.

43. The following year, on 23 January 2015, the Swedish Court of Appeal in the case of *The Government of the Russian Federation clo Federal Customs Office of the Russian Federation v I.M. Badprim S.R.L*[84] upheld a pathological arbitration clause which provided for arbitration to be administered by the Chamber of Commerce and Industry, Stockholm, Sweden ("**SCC**") but using the ICC Rules of Arbitration ("ICC Rules"). The facts were as follows.

44. On 18 July 2007, the respondent ("**Badprim**") and the Federal Customs Office of the Russian Federation ("**Customs Office**") entered into a turnkey contracting agreement for the design and construction of a border crossing post, contained the above-mentioned arbitration clause. On 8 November 2010, Badprim requested arbitration based on the arbitration clause against the Customs Office and the claimant ("Government"), claiming, among other things, compensation for the work done. The Government objected to the jurisdiction of the arbitral Tribunal. On 6 July 2012, the arbitral Tribunal ruled

84 Case No. T 2454-14

that it had jurisdiction to review Badprim's claim. On 21 October 2013, through a final arbitral award, the arbitral Tribunal rejected Badprim's claims against the Customs Office, and ordered the Government to pay Badprim damages.

45. Before the Swedish Court of Appeal, the Government moved that the Court should annul the arbitral award. The Government argued, among other things, that the arbitration agreement with Badprim was unenforceable and thus invalid because:

    (a) The parties had agreed that the arbitration should be administered by the arbitration institute of the SCC, but under the ICC Rules. This was *"not doable in practice"* because the SCC lacked both the required organisational structure as well as experience to carry out vital tasks under the ICC Rules;

    (b) The arbitral Tribunal had failed to apply the ICC Rules in accordance with the parties' agreement; and,

    (c) The parties were informed that the SCC accepted to administer the dispute, provided that the parties agreed to authorise the SCC to adapt the ICC Rules to SCC's organisation. The Government never granted such an authorisation.

46. The Court rendered a split[85] decision. Notwithstanding this, it unanimously upheld the enforceability of the arbitration clause. The majority held that in interpreting pathological arbitration clauses which are not *"practicably doable",* the general principle is that the agreement should, to the extent possible, be interpreted in line with the parties' basic intentions with the arbitration agreement, that is, that disputes between the parties should be settled by arbitration. This means that the Court could disregard a contradicting provision if it was clear that the remainder of the arbitration agreement otherwise represents the parties' actual intentions. The majority concluded that based on the facts, *"the agreement between the parties must be understood* so *that the main purpose* was *that possible disputes between the parties would be resolved by arbitration and that purpose* was *that the arbitration should take place in Stockholm before the* SCC." Further, given that it was undisputed that SCC agreed to and did administer the arbitration, it was clear that the arbitration agreement was enforceable.

47. In the circumstances, the majority found that the arbitration clause was not invalid, and that the arbitral Tribunal cannot be deemed to have disregarded a joint instruction from the parties by adapting the ICC Rules to the organisation of the SCC. The minority held that an arbitration agreement is not invalid

85 The split was due to a dissenting decision that the Government was not covered by the arbitration agreement. This portion of the decision is not relevant for the purposes of this article.

merely because it provides that arbitration shall take place by applying the arbitration rules of one arbitration institute but be administered by another. The minority further held that another conclusion might be reached if the arbitration institute refused to apply the rules of another arbitration institute.

48. Closer to the present day, in 2022, the case of *Marseille-Kliniken AG v Republic of Equatorial Guinea* before the [86]US District Court for the District of Columbia saw an application by the Petitioner (hitherto a successful arbitral Claimant) to confirm an international arbitration award under Article V of the New York Convention, and which was met with several challenges by the Respondent in both the application and the preceding arbitration.

49. Amongst its dominant contentions, the Respondent argued that the arbitration clause in the underlying Management Contract (that had earlier fallen into dispute between the parties) was "*pathological*" and ought to be struck down as void. This in turn would then oblige the Court to decline enforcement (of the arbitration award) under the provisions of the New York Convention.

50. The Respondent argued that between the competing segments of the clause naming each of the state court of Equatorial Guinea, and of arbitration under Swiss law under the auspices of the Zurich Chamber of Commerce, in apparent equal footing as forms of recourse for parties' disputes (both sets of language incidentally which required language translation before the arbitral Tribunal, and in respect of which there also arose an issue between each of the parties that the other side had procured an incorrect or inaccurate translation of terms), the correct interpretation was, in essence, that the option to arbitrate was limited only as a "*form of appeal*" against an unsatisfactory ruling handed down by the state Courts of Equatorial Guinea. The parties therefore had, by the Respondent's contention, only one way to go as far as primary recourse to resolving their substantive disputes was concerned; and that was to submit to the jurisdiction of the local Courts of Guinea.

51. In accordance with the translated German version relied upon in the Tribunal's underlying ruling, the relevant clause reads as follows:

> *"….In the event a dispute should arise from this contract the Parties shall attempt to find an amicable solution prior to calling upon the Courts in Equatorial Guinea. In the event disputes should arise, the Parties agree to engage in Arbitration Proceedings before the Chamber of Commerce in Zurich…."*

52. Acknowledging the parties' agreement that the clause was valid and binding between them, the Court in *Marseille-Kliniken* then examined the contended "pathology" and ruled that the sole application of the option to arbitrate arose

86 [2022], in Civil Action No. 1:20-cv-03572

only "….*if one party disagrees as to the dispute being brought in the courts of Equatorial Guinea*." Hence, from the standpoint of the Court's interpretation, it was only where the parties had originally failed to reach a consensus to refer their dispute to the local courts, that the option to arbitrate be invoked. As the parties had agreed that the arbitration related (parts of the) clause were valid and binding, the Court was able to find that arbitration was the proper course in the circumstances.

53. The Court thus rejected various arguments by the challenging Respondent, observing that there was "….*no textual support in the Management Contact*…." to contend firstly, that the state court had primacy in disputes *per se*; and secondly, that the arbitration option was otherwise available to parties only as a "*form of appeal*" against an unsatisfactory ruling handed down by the state Courts of Equatorial Guinea. The Respondent's pleas to decline confirmation of the arbitral award were consequently dismissed.

54. Also in 2022, the Singapore High Court in *Oilive v Hunan Xiangzhong Mining*[87] considered a case involving two Chinese trading parties in a contract for the sale and purchase of light cycle oil; and encountered the following arbitration clause, within which the phrase "…. [T]*he Tribunal shall consist of a single arbitrator agreed by both Parties, or if not so agreed, by the Chairman for the time being of SIAC*…" fell interestingly into the sharp focus of challenge by the Plaintiff.

55. The Plaintiff was the unhappy Respondent in an underlying arbitration, and applied in this case under Section 10(3) of the International Arbitration Act of Singapore for, amongst other heads of relief, a declaration from the High Court that the appointment of the sole arbitrator was not in conformity with the provisions of the arbitration agreement entered into between the parties, and that as a consequence, the arbitrator did not have jurisdiction to preside the arbitration below. The arbitration clause in question read as follows:

> *"THE CONTRACT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH SINGAPORE LAW, NOT INCLUDING ANY CONFLICT OF LAWS OR RULES.*
>
> *ANY DISPUTE ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING ANY QUESTION REGARDING ITS EXISTENCE, VALIDITY OR TERMINATION*
>
> *SHALL BE REFERRED TO AND FINALLY RESOLVED BY ARBITRATION IN SINGAPORE TO THE EXCLUSION OF ANY OTHER FORUM OR JURISDICTION IN ACCORDANCE WITH THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL*

87 [2022] SGHC 43.

ARBITRATION CENTRE (SIAC RULES) FOR THE TIME BEING IN FORCE WHICH RULES ARE DEEMED TO BE INCORPORATED BY REFERENCE IN THIS CLAUSE. ***THE TRIBUNAL SHALL CONSIST OF A SINGLE ARBITRATOR AGREED UPON BY BOTH PARTIES, OR IF NOT SO AGREED, BY THE CHAIRMAN FOR THE TIME BEING OF SIAC****.*

THE PLACE OF THE ARBITRATION SHALL BE SINGAPORE. THE LANGUAGE OF THE ARBITRATION SHALL BE ENGLISH. THE REASONED ARBITRATION AWARD SHALL BE FINAL AND BINDING UPON BOTH PARTIES WITHOUT RECOURSE TO ANY COURTS. ANY COSTS RELATED TO ARBITRATION, INCLUDING REASONABLE ATTORNEY'S FEES, SHALL BE BORNE BY THE LOSING PARTY.

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE SALE OF GOODS ACT SHALL NOT APPLY TO THIS CONTRACT […]…." (Emphasis added by the writer).

56. For the purposes of this article, the relevant part of the arbitration agreement concerned the appointment of the arbitrator, absent agreement of the parties, by the SIAC (previously defined).

57. The Plaintiff's argument of challenge in this respect contended that the appointment of the sole arbitrator in the arbitration was not in conformity with the arbitration agreement which provided for the "*Chairman*" of the SIAC to make the appointment. It was agreed between the parties that the institutional authority vested in the SIAC to appoint arbitrators changed from prescribing the "*Chairman*" for the role on arbitrations commenced before 1 April 2013, and that the role was subsequently amended from 1 April 2013 to reflect the "*President*" of the SIAC for the role in arbitral references commenced thereafter. The parties had concluded their underlying contract and presumably within it, their arbitration agreement clause) on or about May 2020. The Defendant in this case, who was the Claimant in the preceding arbitration, issued its Notice of Arbitration to refer disputes on 14 September 2020, both activities of which occurred at a time when the appointing role of the "*Chairman*" was relinquished and replaced by the office of the "*President*". Other than in respect of the technical contention that the appointing authority was fo this reason, no loner in existence at the time the arbitration was commenced, the substantive content of the arbitration clause was not contested based on any other form of drafting defect or content-based pathology.

58. The Court noted from the case below, that the arbitrator had paid attention to the 2013 amendment to the SIAC Rules which provided for the President

to make appointments. The arbitrator had observed that any reference to the "*Chairman*" in the older editions of the SIAC Rules was deemed after 2013, to be a reference to the President, whose office it then was to appoint the Tribunal based on nominations by agreement of the parties, or nominations made by a "*third party*" (left undefined).

59. In this connection, the arbitrator had deduced that the parties could not have intended to have incorporated an appointment mechanism from an earlier, and importantly, a superseded edition of the SIAC Rules without having distinguished the role properly. Therefore, he concluded, given the timing for contracting the arbitration agreement, as well as for the commencement of proceedings – both being in 2020, the parties' singular reference to the "*Chairman*" in the arbitration agreement was deducible as a mere reference to a "third party" for the purpose of nominating the sole arbitrator.

60. Taken in totality of context and circumstances, it was thought this had to have been the presumed knowledge of the parties as, in accordance with the express provisions within the correctly applicable SIAC Rules in their 2016 edition (which applied post-2013 and to the arbitration here), there was no question of another party other than the "*President*" being empowered to appoint an arbitrator. All other named parties that could have possibly been involved in the process would have been limited to nominating the arbitral candidate, in respect of whom it would finally fall upon the President to appoint at its discretion.

61. At this juncture, the Court considered that where [88]the parties had evinced a clear intention to settle their disputes by arbitration, the court should give effect to such intention,[89] even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. The Court considered its approach supported in letter and spirit by the "*principle of effective interpretation*" in international arbitration law, which was described in *Fouchard,*[90] *Gaillard, Goldman on International Commercial Arbitration* ("**Fouchard**") as follows:

> *"…. B. – THE PRINCIPLE OF EFFECTIVE INTERPRETATION*
>
> ***478**. — The second principle of interpretation of arbitration agreements is the principle of effective interpretation. This principle is inspired by*

88 This line of *dicta* follows the earlier Singapore case of *Insigma Technology v Alstom Technology Ltd* [2009] 3 SLR(R) 936.
89 See: *Halsbury's Laws of Singapore,* Vol. 2 (LexisNexis, 2003 Reissue, 2003) at [20.017].
90 Kluwer Law International; 1999 (Emmanuel Gaillard & John Savage eds) at 258.

provisions such as Article 1157 of the French Civil Code, according to which 'where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective.' This common-sense rule whereby, if in doubt, one should 'prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical,' is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a 'universally recognised rule of interpretation.' To give just one example of the application of this principle, an arbitral tribunal interpreting a pathological clause held that:

when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.

A subsidiary principle to the principle of effective interpretation is the principle that an arbitration agreement should also not be interpreted restrictively or strictly. An arbitration agreement is not a statute. This was noted in Fouchard at pp 260–261:

D. – REJECTION OF THE PRINCIPLE OF STRICT INTERPRETATION

[T]his principle [that an arbitration agreement should be interpreted 'restrictively'] is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. …."

62. The Court disagreed with the Plaintiff's argument that the sole arbitrator was to have been "*appointed*" by the Chairman. It noted that the parties drafted and agreed upon the words "*agreed upon by*" in the arbitration agreement. The parties had not used words like "*nominate*" or "*appoint*".

63. Thus, the Court determined that the parties did not distinguish between the concepts of "nomination" and "appointment" within the context of the SIAC Rules; within which, it was pointed out that Rule 9.2 and Rule 9.3 stated as follows:

"….[9.2] *If the parties have agreed that any arbitrator is to be* ***appointed*** *by one or more of the parties, or by a third person including by the arbitrators already appointed, that agreement shall be* ***deemed*** *an* ***agreement to nominate*** *an arbitrator under these Rules.*

> [9.3] ***In all cases****, the arbitrators nominated by the parties, or by any third person including by the arbitrators already appointed, shall be* ***subject to appointment by the President in his discretion****…." (Emphasis added by the writer).*

64. The Court ruled that the phrase "….*in all cases*…." effectively provided that all appointments of the arbitrators shall be made by the President in his discretion. This in effect collapsed the Plaintiff's contention that the word "*Chairman*" (used in the arbitration agreement) imputed that the Chairman was to have appointed the sole arbitrator.

65. The Court further ruled that by reading the parties' arbitration agreement together and alongside the relevant portions of the SIAC Rules, in particular, Rule 9.2 and Rule 9.3 within them, the parties were presumed to have intended to agree to nominate a sole arbitrator, or alternatively, to have the Chairman nominate the sole arbitrator, and in each case subject to the eventual and discretionary appointment of the arbitrator by the President of the SIAC's Court of Arbitration. The Court found no difficulty in assigning the "*Chairman*" to the capacity of a "*third person*" within the context of the Rules, and that parties had therefore agreed that the "Chairman" may only nominate the sole arbitrator within the meaning of Rule 9.2 of the applicable SIAC Rules. The uncertainty thus removed and the position under the Rules clarified, the Plaintiff's challenge was dismissed.

E. *Considering an agreement defective for inoperative terms or voided subject matter*

66. To refresh an earlier discussion, the key to this area of pathology lies in the provisions of Article II(3) of the New York Convention, where the essential words "….*null and void, inoperative or incapable of being performed*…." form the basis of defects in this category. I had mentioned that examples of such defective clauses comprise those which are barred from operation for reasons of statutory limitation or by reason of a breach of a condition precedent; as well as clauses which are revoked or repudiated by one or both parties, or else they may be tainted for fraud or rendered void for illegality (or non-arbitrability) of its scope or subject matter (in the underlying contract) on public policy grounds; or on grounds of lack of party consent or contracting competency.

67. In terms of case law, authorities in this category of pathology are less common. Where an allegation of "inoperability" is contended, the meaning of its verb "*inoperative*" imports the notion that the clause must therefore be devoid of, or to be incapable of legal effect. The observation on the part of this writer that each of the three limbs of "….*null and void, inoperative or incapable of being performed*…." under Article 11(3) appear mutually synonymous

is inconsequential for the purpose of this article, save to note the following qualifications:

(a) Firstly, whilst it is correct that each of the first two limbs of "….*null and void,* [and] *inoperative*…." points to a lack of, or a removal of legal effect, the exact wordings contained in the voided arbitration agreement may not of themselves be defective. After all, it is conceivable that a properly constructed, and valid arbitration agreement on its face may otherwise be rendered void or inoperative for reasons (as I have cited earlier) that the agreement may have been revoked or repudiated by one or both parties, or else that it may have fallen foul of statutory or condition precedent based time bar, or alternatively, that it may be tainted for fraud or rendered void for illegality (or non-arbitrability) of its scope or subject matter (in the underlying contract) on public policy grounds; or still further in the alternative, that it may have been rendered inoperative on grounds of lack of party consent or contracting competency; and,

(b) Secondly, that the lattermost and third limb of "….*incapable of being performed*…." could, theoretically speaking, also involve a properly constructed, and valid arbitration agreement on its face, but for reasons of passing time and superseding events, as well as in terms of other obstructive circumstances which have rendered the processes of arbitration, such as the composition of a Tribunal, impossible to perform. Outside of a theoretical scenario in which both the sovereignty of the arbitral seat, as well as its arbitral institutions, have be rendered stateless by reason of war -or has had its state of sovereignty put in suspense following a foreign invasion into its territory, many logistical or practical aspects of the arbitral process are such as they may be capable of cure.

68. Further in terms of caselaw, the category of defective arbitration agreements contemplated under Article 11(3) can in instances, overlap tangibly with issues dealt with in cases concerned with arbitration agreements contended as defective for reasons of uncertainty.

69. Two years following the Russian government's case against *Badprim* and into 2017, a pair of decisions handed down by the Singapore High Court illustrates two contrasting positions taken regarding pathological arbitration agreements which overlap between the uncertain and the inoperative, or impossible to perform.

70. In *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd*[91] one instance, the expansive discretion of a "pro-arbitration" court was demonstrated by reading sense into, and then upholding a "blank clause" arbitration agreement

91 [2017] SGHC 32.

to refer disputes to be resolved by "….*arbitration as per Singapore Contract Rules*…."; from which paucity of terms, the Court in was prepared to breathe life into an otherwise fictional set of alleged arbitration rules, and despite also noting the conspicuous absence of any choice for the seat of the arbitration (and by extension therefore, no choice was made as to the proper law of the arbitration), the Court there was prepared to find in the factual matrix and the evidence before it, sufficient [92]nexus with Singapore to warrant an inference that Singapore was the obvious intended seat.

71. Having established so, *KVC Rice*, which ultimately was a case about the extent, if any, to which the Singapore Courts and the Singapore International Arbitration Centre, in its capacity as default appointing authority under the Singapore International Arbitration Act would in these circumstances be able nevertheless to support proceedings commenced under a "blank clause", ruled affirmatively that the Court was indeed prepared to "step in" and assume the role of default appointing authority to help constitute a Tribunal to preside the parties' case in *ad hoc* arbitration. In making this decision, it is worth noting that the Court had considered the probability that the President of the SIAC would have found its office constrained from acting to appoint given the absence of the choice of Singapore as the seat. The Court felt in the circumstances that as it was vested with an overarching discretion under "*general principles of Singapore law*" to act, the power to intervene in this context was safely afforded.

72. In the same year, the Singapore High Court had before it the case of *TMT v RBS,*[93] which involved disputes between parties which arose from a series of trades based on freight forwarding agreements and options through a clearing house.

73. TMT Co., Ltd ("**TMT**") is a set of Liberian shipowners which registered a trading account with the Royal Bank of Scotland plc ("RBS") in 2007. Trades were cleared by RBS through the London Clearing House, of which RBS was a Clearing Member, but TMT was not. In 2010, TMT commenced proceedings against RBS in England for breach of the trading account agreement (the "FFA Account Agreement") and for other causes of action in torts, from which TMT alleged that incorrect information or negligent misstatements provided by RBS and relied upon by TMT had led to its suffering substantial losses. In 2012, the parties settled their disputes in relation to the FFA Account Agreement, and a Settlement Agreement was drawn up referring all disputes arising from the Settlement Agreement, including the scope of the settlement as such, to the

92 The finding turned on the facts. The contract involved parties based in Thailand and Singapore respectively, and the performance of various parts of the contracts involved, occurred in Thailand and Benin, but the payment obligations were applicable to and did in fact occur in Singapore.

93 [2017] SGHC 21.

exclusive jurisdiction of the English Courts. Seemingly as a "second bite of the cherry", TMT sued again in 2015 before the Courts in Singapore, and on this occasion, the action was again founded in torts of negligence against the Singapore branch of RBS and certain officer, including in this suit, allegations of fraud and conspiracy to defraud. RBS applied successfully for a stay of the second round of court proceedings before the Singapore Courts. Implicitly, RBS's position was that the Singapore-founded suit ought to be stayed and its issues submitted to the English Courts. The Court agreed at first instance and TMT appealed the decision.

74. At the next level, the Singapore High Court reportedly took the view that the arbitration agreement within the FFA Account Agreement did not meet the *prima facie* standard to warrant a stay of court proceedings because it designated an "arbitral" institution which arguably did not exist in terms spelled out on the face of the agreement; and even of it did suffice as an arbitral institution of an acceptable sort, its premises did not apply to, nor did it relate in connection with both the parties. The arbitration agreement, comprised in two parts read collectively within the FFA Account Agreement, read as follows:

> *"….20. Arbitration*
>
> *Any dispute arising from or relating to these terms or any Contract made hereunder shall, unless resolved between us, be referred to arbitration under the arbitration rules of the relevant exchange or any other organisation as the relevant exchange may direct and both parties agree to, such agreement not to be unreasonable [sic] withheld, before either of us resort to the jurisdiction of the Court.*
>
> *….*
>
> *22. … Subject to term 20 above, disputes arising from these terms or from any Contract shall, for our benefit, be subject to the jurisdiction of the English courts to which both parties hereby irrevocably submit, provided however that we shall not be prevented from bringing an action in the courts of any other competent jurisdiction…."*

75. Simply put, the designation of "….*under the arbitration rules of the relevant exchange or any other organisation as the relevant exchange may direct and both parties agree to…."* did not as a matter of act, denote the London Clearing House and even if by some reason howsoever that it did, the arbitration rules of the London Clearing House applied only to clearing house members, which as I have mentioned earlier, RBS was, and TMT was not.

76. Many commentators have suggested to date that the decision is "*surprising*" and out of line with the prevailing judicial policy of upholding arbitration agreements. With respect, I would disagree with this raking point of view. The tension in *TMT v RBS* lay with the question of whether the Singapore

court proceedings could be stayed in favour submitting its cause of action to the English Courts, pursuant to the Settlement Agreement. Based on the particulars of TMT's claims before the Singapore courts, the High Court was satisfied in hearing the appeal, that the issues inherent in TMT's Singapore suit were of such nature as would fall under the scope of the Settlement Agreement; which in turn meant that they ought rightly to be submitted to the jurisdiction of the English Courts.

77. The Court went further to hold that if there was any dispute as to whether TMT's claims fell into the scope of the Settlement Agreement, it too would in terms be subjected to the jurisdiction of the English Courts.

78. The arbitration agreement within the FFA Account Agreement thus featured little more than as a red herring in the circumstances, as the Court acknowledged that there had been no material exchange on the facts which would have brought the precise operation of the arbitration agreement into scrutiny.

79. In *obiter dicta*, the Court further considered that as the provisions of the arbitration agreement at Clause 20 (of the FFA Account Agreement) were sufficiently incongruous as to have been rendered irrelevant to the facts and the parties at hand, the surviving relevancy in Clause 22 would apply in its stead.

80. Hence, the case of *TMT v RBS* draws a timely and distinct line in the sands of judicial policy. It is very well that in championing a "pro-arbitration" stance, many national courts of today strive to walk the talk of progressive policy and Singapore holds a pioneering torch in this regard. However, caution is in order against indiscriminate or overtly liberal interventions of Courts or Tribunals set to enforcing arbitration agreements in spite of supporting circumstances or notably, the lack thereof, as it can lead to a situation of the "tail wagging the dog" in the context of "over-fixing" an otherwise unnecessary cure to an otherwise pathological arbitration agreement.

81. More recently in 2020,[94] and in another notable example of a case which a party canvassed multiple challenges against the provisions of an *ad hoc* arbitration clause which encompassed both elements of uncertainty (by reason of misnomer) and inoperability, a collective set of multiple Claimants from the Philippines (the "**Claimant**") commenced legal proceedings against the sovereign State of Malaysia in July 2019, naming the latter the Respondent and contending entitlement, amongst various other heads of relief, to reparatory damages arising from a breach of an antique deed of grant and cession of land and proceeds of inherent mineral rights in the *Heirs to the Sultanate of Sulu, namely, each of Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram,*

94 *Supra*: [21](c)(ii) herein.

Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny KA Sampang and Widz-Raunda Kiram Sampang v Malaysia. For the purposes of this article, certain parts in the Preliminary Award on Jurisdiction and Applicable Substantive Law published on 25 May 2020, are relevant and will be discussed as follows.

82. On 4 January 1878, a deed of grant and cession was signed between Sultan Mohammed Jamalul Alam and Messrs Alfred Dent and Baron Gustavus de Overbeck, concerning the vesting of rights of occupation and development by the former to the latter parties, of *"…all territories and lands tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the east, and thence along the whole east coast as far as the Sibuku River on the south, and including all territories, on the Pandassan River and in the coastal area, known as Paitan, Sugut, Banggai, Labuk, Sandakan, China – Batangan, Mumiang, and all other territories and coastal lands to the south, bordering on Darvel Bay, and as far as the Sibuku River, together with all the islands which lie within nine miles from the coast…*" (the "**Deed**") Over time, reserves of natural resources were explored, discovered and proven. The Claimant therefore sought recourse to vindicate and (re)claim their commercial rights under the Deed, during which, it was alleged that the Respondent had not honoured its obligations under the Deed, despite the latter having written previously to explain that it was prepared to regularise arrears for the culpable period being called into question.

83. On October 16, 2017, the Claimant notified Sir Ian McLeod, KCMG, the Legal Advisor to the United Kingdom Foreign & Commonwealth Office of the existence of a difference (and potential dispute) under the Deed; and sought from the British Government the appointment of "….[an] *appropriate person or persons to fulfil the Consul-General's role in determining that dispute*…." Mr McLeod, on behalf of the British Government, subsequently declined the request to appoint, citing the reason that "….*the Colony of North Borneo* [had] *ceased to exist in 1963*….[and that] [I]*n these circumstances,* [the Government had] *concluded that it would not be appropriate …. to involve itself in the dispute* …." Nevertheless, the Claimant issued a notice to the Respondent on 2 November 2017, evincing its intention to commence arbitration under the provisions of the Deed (the "**Notice of Intention**"). The applicable *ad hoc* arbitration clause in the Deed read as follows:

> *"….Should there be any dispute, or reviving of all grievances of any kind, between us, and ours (sic) heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…."*

84. The Respondent failed to agree a joint appointment of the arbitrator, and at all material times, rightly pointed out that the entity designated within the Deed to preside the parties' dispute had ceased to exist. The parties' failure to jointly appoint an arbitrator under further or alternate grounds persisted, and eventually exceeded the period ascribed for appointment under the Notice of Intention. On 9 January 2018, the Claimant wrote to the Respondent through Counsel, citing that "…….*Malaysia has no intention to comply with its agreement to arbitrate, which leaves* [the Claimant] *with no other option but to seek judicial intervention to appoint an arbitral tribunal*…."

85. On 1 February 2018, the Claimant filed an application before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid (the "**Spanish Courts**") for the judicial appointment of a sole arbitrator. The Claimant contended that the Spanish Courts were vested with the requisite jurisdiction under the (Spanish) Arbitration Act 60/2003 (dated 23 December 2003) (the "**SAA**") to make the judicial appointment. The Respondent disagreed in terms objecting to both the appointment, as well as the jurisdiction of the Tribunal, where so appointed and constituted; contending that the Claimant's application had been erroneously brought before the Spanish Courts and further arguing that Malaysia, as its own sovereign, was immune from foreign prosecution and would not submit to the jurisdiction and curial review of the Spanish Courts. For these and other reasons the Respondent did not participate in the application before the Spanish Courts.

86. For the purposes of present discussion, it suffices to note that the Respondent (also) contested the validity of the particulars of the arbitration agreement within the Deed, and its overall binding enforceability on each of the parties.

87. On 29 March 2019, the Spanish Courts handed down its judgment acceding to the Claimant's application and appointing a sole arbitrator, subsequently constituting the Tribunal on 22 May 2019. The Tribunal issued its Procedural Order No. 1 on 24 June 2019. The Claimant filed its Notice of Arbitration on 30 July 2019 and contended Madrid to be the seat of the arbitration, the implication thereof being that the SAA would function as the proper curial, or seat law of the arbitration. In its Procedural Order No.9 the Tribunal determined that Madrid would be the seat of the arbitration, alongside the circulation of a Procedural Calendar. At all material times ensuing, the Respondent remained reticent, or non-participatory in the proceedings, and had requested *obiter*, a stay of the proceedings on various stated grounds. Notwithstanding the foregoing the Respondent was invited to file its Memorial on Jurisdiction and Applicable Law by 10 January 2020, which it then failed to comply. On 10 February 2020, the Claimant filed their Counter-Memorial on Jurisdiction. The Tribunal convened a hearing in Madrid on the question of jurisdiction on 21 February 2020, declaring the hearing closed the week following, on

28 February 2020. The Preliminary Award followed from the close of the hearing on jurisdiction and was published on 25 May 2020.

88. Specifically regarding the Respondent's challenges against the arbitration agreement on grounds of alleged pathology, it was noted in the Preliminary Award (at [108] onwards) that the Respondent contended two sets of grounds, which may be put briefly as follows:

    (a) Firstly, the arbitration agreement could not be characterised as such because "….*it does not contain any reference to arbitration and ….its contents fail to demonstrate the Parties' will to arbitrate*." And,

    (b) Secondly, the institution to which the arbitration agreement refers, namely "….(as it then was) *Her Britannic Majesty's Consul General for Borneo*…." had no longer existed as at the time frame of the case in question.

89. Based on the evidence before the Tribunal, it was established that the Respondent had failed to substantively address, and particularly, it had not rebutted the Claimant's position on each of the issues concerning the seat of the arbitration, as well as the applicable curial, or seat law of the arbitration. Left unchallenged in these key respects, the Tribunal was able to rely upon the Spanish law principles in the SAA without hindrance or protest, and thereby to base its findings against the Respondent's challenges, as well as to uphold its determinations on the merits of the case on the jurisdiction in conformity with the rulings handed down by the Spanish Courts in the judgment of 29 March 2019.

90. In response to the Respondent's first set of contentions at [88](a), the Tribunal referred to Article 9.1 of the SAA which provides (in paraphrase) that an arbitration agreement must express the parties' willingness to submit to arbitration, their disputes from or related to their legal relationship. It found that the arbitration agreement in this case contained a submission to the decision of a private neutral party, which can therefore, and plainly be construed as a submission to arbitration. The Tribunal then cited the judgement of the Spanish Courts of 29 March 2019 that, *prima facie*, the Parties *"….unequivocally agreed to submit to arbitration in the following terms:* …[S]*hould there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei*…." Of the latter statement, the Tribunal held that the word "….*submit*…." implied a "….*willingness to accept or yield to a superior force or to the authority or will of another person*…."; thereby to "….*accept the authority, control or greater strength of somebody/something or to allow another person or group to have power or authority over you.*"

91. Foundational intent thus established; the Tribunal went on to consider that the signatories of the Deed may well not have fully understood that the Consul General was "….*not a proper judicial institution*." It opined that in the 19th century, the term "*arbitration*" had a generic import, and was used to denote an institutional idea of bringing about peace. Thus the parties, by referring the resolution of their disputes under the Deed to the judgment of just such a "*peacemaker*" (after a fashion), evinced a meeting of the minds for the purpose of lending context to the present case.

92. The Tribnal noted after all, that whereas the Claimants had filed the Notice of Arbitration affirming the existence of the arbitration agreement, the Respondent, despite having failed to submit its response, had thereafter merely disputed the interpretation and scope of the arbitration agreement, but not of its existence.

93. It was therefore the view of the Tribunal that the signatories of the Deed had indeed evidenced a conscious choice of an alternative method for the resolution to govern the parties' disputes; eventually concluding that on the evidence, the arbitration agreement was indeed properly valid and mutually enforceable between the parties. Accordingly, the Respondent's objections at [88](a) were dismissed, and the correctness of the judgment of the Spanish Courts, accordingly affirmed.

94. In response to the Respondent's second set of contentions at [88](b), the Tribunal recognised that the British Government had previously declined to intervene *in lieu* of the defunct role of "….*Her Britannic Majesty's Counsul General for Borneo*….", an institution rightly confirmed to ave ceased to exist in the context of the present case.

95. Returning to the SAA for guidance, the Tribunal noted in deference to the principle espoused within its tenets of conserving an arbitration agreement where possible, that when faced with an arbitral institution that is "*inaccurately*" named, the "….*inaccuracy may be overcome by reasonable interpretation of its terms that may remedy a pathological aspect by severing what makes it unenforceable, while still retaining enough of the agreement to put the arbitration into operation*…."

96. Thus, the Tribunal considered that "….[the] failure of Malaysia to respect the Arbitration Agreement constitute[d] a denial of justice under International Law and a breach of the *pacta sunt servanda* principle." It was further opined by the Tribunal that: "….*based on the documentary evidence available in the proceedings …. the obstinate silence of Malaysia both with Claimants and in the Application can bear only two possible interpretations: a calculated silence, loaded with ulterior motives and belligerent intentions; or else, quite simply, the silence of acquiescence. This second interpretation is the only appropriate one, that from different viewpoints is the most favourable to*

Parties…. [T]*herefore, it is the only one that can be accepted, as ratified by the contents of the Judgment of March 29, 2019*."

97. In both rejecting the Respondent's second set of objections under [88](b) and upholding the decision of the Spanish Courts to appoint a sole arbitrator, it is unclear to this writer if the Tribunal had needed at any stage of its deliberations to seek to speculate, whether in part or at all, on the possible motivations underlying the Respondent's reticence in the proceedings. After all, if the SAA prescribes an objective approach by which to surgically "cure" a pathology, it ought not to concern the mind of the Tribunal as to the subjective intentions of the party opposing the cure.

98. In this writer's opinion, the matter of substituting the phrase "….*Her Britannic Majesty's Counsul General for Borneo*…." with the terms set out in the Spanish Courts' judgment ought rightly to be viewed as an objectively conceived technical exercise of remedying an otherwise pathological agreement, guided by the factual matrix and the available evidence of the obvious presumed contracting intentions of the parties.

99. It is a wholly separate consideration and in my view, one bordering uncomfortably on irrelevancy, as to whether the Respondent, by its subjective conduct, had acted in such a way as: firstly, to warrant the rectification of the construction of the arbitration agreement at all; and secondly, to deserve the obviously speculative, and from my standpoint, thinly disguised censorious finding of the Tribunal that the Respondent's reticence amounted to silent acquiescence as opposed to belligerent cunning. Neither of these findings are in my submission, relevant for the purposes of enacting the objects of the SAA in this context.

Part 3 Conclusion

"A course more promising
Than a wild dedication of yourselves
To unpathed waters, undreamed shores."[95]

100. In the end, the heart of arbitration lies in contracts. And in the theory of so-called "pathological" arbitration agreements, and the language of diagnosing pathology, case law around the world supported by "pro-enforcement" arbitration-friendly state laws suggests the application of one, or a hybrid application of more than one of the following judicial approaches to the divining of cures under the colour of law:

95 Quote taken from William Shakespeare, *The Winter's Tale*, Act Four, Scene 4.

(a) The "Surgical" approach; in which, short of "re-writing the bargain" the workable part or parts of the otherwise troubled clause are retained to make legal and commercial sense to the entire reading of it as an "arbitration agreement", whilst the un-rectifiable parts deemed as such to be "pathological" are expunged from the text of the thing if it is proved that by its retainage, it could cause more harm than good. In reiterating an earlier metaphor, the idea is that by cutting out the bad bits, the aim is then to enable the surviving parts to subsist and make sense of the arbitration agreement; and,

(b) The "Re-Contextualising" approach; in which, by interpreting the literal construction of the agreement in question outside of the vacuum of plain words alone, and set against the broader factual matrix and surrounding evidence and circumstances, a Court or Tribunal may discern the obvious and presumed contracting intentions for the parties and so, imply such terms or meanings in order to conserve, and to make sense and lend efficacy to the arbitration agreement as a whole.

101. Either approach has, on the face of the cases to which they have been applied, enjoyed certainty of success, in large part due to the support of "pro-enforcement" arbitration-friendly state laws that facilitate the capabilities of Courts and Tribunals to exercise the correct degree of judicial discretion in this regard.

102. They are nevertheless at the end of the day, applied as rescue tools and retrospective "gap-fillers". The surer approach to ensuring a problem free arbitration agreement is invariably to "get it right at first go" – implying an approach to drafting which avoids bad habits like "*Friday midnight*" drafting, and sensibly utilises standard form, or institutionalised arbitration clauses for guidance and in all events, carrying out each drafting task with the benefit of legal counsel on a case-by-case basis.

Maritime Arbitration – A Guide for Arbitrators and Counsel

by Philip Teoh • Azmi & Associates

1 Introduction

Arbitration clauses are commonly found in maritime contracts.[96] The standard form contracts[97] are often used with parties' adaptation of terms to fit their contracts including the arbitration clauses by way of deletion, addition and rider clauses. These terms are sometimes incorporated by reference to another contract containing the arbitration clause eg where bills of lading are issued pursuant to charterparties and the terms of the latter are specifically referred and incorporated.[98]

Singapore has in its International Arbitration Act particularly provided in Section 2(4) that:

> *"A reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading."*

Thus, Arbitration is a common mode of dispute resolution of maritime disputes.

There are specialist Arbitration Centres set up for the specific purpose of Maritime Arbitration. The two prominent ones are the London Maritime Arbitration Association LMAA[99] and the Singapore Chamber of Maritime Arbitration SCMA.[100] Both enjoy a good volume of maritime arbitration cases.

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96 Norwegian Shipbrokers Association SALEFORM 2012, BIMCO Baltime Uniform Time Charter 1939 Revised 2001, ExxonMobilvoy 2012.
97 The forms published by BIMCO are the most commonly used in the Industry.
98 See Charter Parties and Bills of Lading, Roman T. Keenan, Marquette Law Review, Volume 106, Issue 2 (2022) Winter.
99 London Maritime Arbitration Association, <https://lmaa.london/>
100 Singapore Chamber of Maritime Arbitration, <https://www.scma.org.sg/>

AIAC has the same attributes needed to successfully conduct Maritime Arbitrations.[101] Malaysia has a strong Arbitration Act which provides the necessary laws supporting Maritime Arbitration including arrest of Vessels for intended and ongoing arbitration,[102] provisions for appointment of emergency arbitrator, recognition provisions for awards under the New York Convention,[103] a pro Arbitration Judiciary, a specialist Admiralty Court, a mature Admiralty & Maritime Bar.

Nature of Cases

There has been slight slowdown in global maritime trade, expected to grow at 2.1 % annually for 2023–2027 below the rate of 3 % for the past 3 decades.[104] The post 2020 events saw great disruptions caused by the Pandemic, the volatile events disrupting shipping including the Ever Given blocking the Suez Canal and the Ukraine War which is not showing any signs of a conclusion have certainly shone a spotlight on maritime law, an area of law which has sometimes been viewed as a niche specialisation.[105]

Malaysia is the location of many important contributing elements that contribute to the vibrancy of the maritime industry in the region.

MISC is now acknowledged as a key LNG Carrier,[106] Petronas is a key driver of the Country and provides important business to its contracts who are operating vessels and charters in the Offshore Supply Vessel [OSV] support roles.[107] The Oil & Gas business and the OSV are important areas of shipping business and disputes will inevitably follow with the consolidation of the contractors in the OSV supply.[108] Typically, the vessels engaged will be sourced through back-to-back charters and these often contain arbitration clauses.[109]

The Port of Tanjung Pelepas is an important hub of Maersk Line since 2000.[110]

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101 See AIAC Annual Report for 2019 & 2020 at <https://admin.aiac.world/uploads/ckupload/ckupload_20210727102858_34.pdf>.
102 Infra.
103 Infra.
104 The United Nations Conference on Trade and Development (UNCTAD) Review of Maritime Transport 2022. See: https://unctad.org/rmt2022.
105 See the Author's, Maritime Disputes post 2020 and Lessons from Malaysian Courts, (2021) 35 ANZ Mar LJ 59.
106 https://misc.com.my/solutions/gas-assets-and-solutions/.
107 See O & G Consolidation in the Pipeline, The Edge, May 15 2023.
108 The business is very much dependent on the health of the Oil & Gas sector in the Country see: https://mosva.org.my/project/osv-owners-look-to-petronas-lead-in-offshore-support-shake-up-2/.
109 Clause 37 – BIMCO Supplytime 2017. The standard BIMCO Dispute Resolution Clause 2016 provides for Arbitration under LMAA and SCMA but parties can easily provide for AIAC.
110 https://www.ptp.com.my/media-hub/news/ptp-maersk-sealand-deal.

From an economic and strategic perspective the Strait of Malacca is one of the most important shipping lanes in the world, an equivalent of the Suez Canal or the Panama Canal. Over 50,000 ships pass through the Malacca Strait each year, carrying goods such as oil, gas, and manufactured products.[111] The Straits have been the location of several notable ship collisions over the years.

On September 19, 1992 in the Malacca Strait, the Nagasaki Spirit was colliding into the container ship the Ocean Blessing. Engulfed by flames, 46 crew members from both vessels perished, with only two crew members survived, causing major oil pollution[112]. Another collision involving the Evoikos and Orakpin Global in 1997, also caused marine pollution at even a larger scale.[113]

Malaysia is a major exporter of Crude Palm Oil [CPO]. In 2020, Malaysia accounted for 25.8% and 34.3% of the world's palm oil production and exports, respectively[114].

One case that originated from Malaysia was the shipment of Bauxite Ore, which cargo developed into a dangerous phenomenon that endangered the vessel and caused its capsize. The *Bulk Jupiter* was just one of a string of recent incidents involving cargo liquefaction. On January 2, 2015 *Bulk Jupiter* sank off the coast of Vang Tàu, Vietnam. She departed from Kuantan, Malaysia on December 30, 2014 with a cargo of 46,400 tons of bauxite and a crew of 19 Filipinos.[115]

All these concentrates the maritime business in Malaysia and AIAC's Malaysian base makes for a logical choice for parties to provide for AIAC to be Arbitral Centre of choice in the arbitral clauses.

Nonetheless AIAC understands most maritime disputes are resolved by arbitration and has within the cases administered handled maritime arbitration cases[116]. AIAC has also over past years conducted joint programmes and initiatives with bodies such as China Maritime Arbitration Commission (CMAC), and conducted conferences involving programmes involving China's Maritime Silk Road.

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111 Collision Safety in the Malacca Straits and Singapore waters: https://www.skuld.com/contentassets/d0459c5f5be24a1a938a9eece0ebcb15/collisions-in-the-malacca-and-singapore-straits.pdf.

112 See Nagasaki Spirit always remembered at: https://www.teekay.com/blog/2017/09/18/nagasaki-spirit-always-remembered/. There has been cases arising from the incident involving salvors principally in the Singapore and English Courts and as well as marine pollution of the adjacent waters: https://cmlcmidatabase.org/semco-salvage-marine-pte-ltd-v-lancer-navigation-co-ltd.

113 Navigational Hazards in International Maritime Chokepoints: A Study of the Straits of Malacca and Singapore at https://pdfs.semanticscholar.org/cd1a/b7600a64f7e2ea9da4ffbcedfbcff973e56f.pdf

114 https://mpoc.org.my/malaysian-palm-oil-industry/.

115 See the author's The Risk of Cargo Liquefaction, at https://maritime-executive.com/editorials/the-risk-of-cargo-liquefaction#:~:text=Some%20bulk%20cargoes%20can%20cause,when%20the%20ship%20is%20moving.

116 Ibid.

Many maritime cases have contributed to the development of legal principles especially in the area of contract law. Just to name a few, the case of *The Moorcock*[117] introduced the concept of implied terms into English law and established the business efficacy test for implying a term in fact. The case from which the Himalaya Clause takes its name, *Adler v Dickson (The Himalaya)*,[118] which is the case from which the Himalaya clause originates and takes its name, introduced the concept that a contracting party can stipulate an exemption from liability not only for himself, but also for third parties whom he engages to perform the contract or any part thereof.

The English Court of Appeal in *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*[119] established the important distinction between conditions, warranties and innominate terms for the purpose of determining whether a repudiatory breach of contract has occurred to give rise to the right of termination.

Maritime law closely reflects practices of the industry. The sage advice of Lord Mustill should be borne in mind:[120]

> *"The Law and practice of shipping law have always been closely entwined. There can surely be no other branch of commerce where the practical people know, and need to know, so much of the law; and where professionals know, and need to know, so much of the practice."*

2 Maritime Disputes

The range of maritime disputes that are typically resolved by arbitration include:

1. Ship building and Sale and Purchase Disputes;[121]
2. Charterparty Disputes;[122]
3. Marine Hull Insurance;[123]
4. Salvage and General Average;
5. International Sales.

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117 (1889) 14 PD 64.
118 [1954] 3 WLR 696.
119 [1962] 2 QB 26.
120 See London Shipping Law Centre, 'The Rt Hon the Lord Mustill' (*London Shipping Law Centre*, 2015) <https://www.shippinglbc.com/about/news/the-rt-hon-the-lord-mustill/>
121 In the Ship Sale 2022 the Memorandum of Sale and Purchase adopts the BIMCO Law and Arbitration Clause 2020 providing for arbitration under the London Maritime Arbitration Association LMAA.
122 The most common form of Charterparty Dispute is over demurrage. In the BIMCO Baltime Uniform Time Charter 1939 Revised 2001 provides for arbitration in London or in the United States. These venues are often changed to reflect the parties negotiated positions.
123 The most common policy forms are those issued by the Institute of London Underwriters. The choice law is English law but the dispute resolution position will normally be added by the insurers.

Maritime disputes involve unique issues which have no parallel in general commercial disputes. The concepts of the maritime adventure, charter parties, bills of lading[124] and the transfer of title,[125] maritime liens, marine insurance, bunker disputes (such as ship fuel),[126] ship and sister ship arrests, collisions, salvage, in rem actions against the ship or the law of general average (and not forgetting stowaways, of course) are unique to shipping.[127]

Peculiar aspects of maritime law include the principle of no set off against freight[128], general average and salvage.[129]

Many of these disputes involve complex factual or technical questions that require not only the application of legal principles, but also deep knowledge of the customs and workings of the international maritime and shipping business.[130]

The role of certain parties such as marine surveyors in arriving in factual investigations and findings are amongst the crucial parts in maritime arbitration.[131]

Maritime Arbitration may cover Marine Insurance Disputes. The main cover or terms in Marine Hull Insurance essentially adopt standardised industry policy wordings or clauses issued by the following associations:

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124 See the author's article Carriage of Goods by Sea : https://maritime-executive.com/article/carriage-of-goods-by-sea

125 In the case of *The Istana VI* [2011] 7 MLJ 145, the inaugural reported decision of the Malaysian Admiralty Court, the Court had to decide on the transfer of title in bulk goods under the Sales of Goods Act. The author acted for the Plaintiff in this case.

126 Typically bunker disputes may arise due to quality, quantity or contamination claims, these will be referred to arbitration if the bunker supply contract contains an arbitration clause. For case where the clause is incorporated by reference by a hyperlink, see the Malaysian Court of Appeal case of *Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and another appeal* [2022] 6 MLJ 786. Singapore has formulated Singapore bunker claims procedure (SBC Terms) which parties can adopt by contractual adoption.

127 Some bulk cargoes can cause cargo liquefaction if the moisture content exceeds a certain level. Cargo liquefaction occurs when dry bulk cargoes with high moisture content start to behave like liquids when the ship is moving. Such cargoes shift rapidly in the holds of a ship, resulting in free surface effect, making the ship unstable and potentially causing it to capsise. See the author's article, The Risk of Cargo Liquefaction at : https://maritime-executive.com/editorials/the-risk-of-cargo-liquefaction

128 As established by the English House of Lords in *The "Aries"* [1977] 1 WLR 185. The English Commercial Court has confirmed that the rule in The "*Aries*", which precludes set-off against freight, does not extend to sums payable to a freight forwarding agent for arranging carriage under a freight forwarding contract: *Britannia Distribution v Factor Pace* [1998] 2 Lloyds Rep 420. Such an engagement and contract was a contract to arrange carriage and was not subject to the rule against set-off. See also When can you set-off claims against freight? : https://www.incegd.com/en/news-insights/maritime-legal-update-english-law-when-can-you-set-claims-against-freight

129 See below. These establish common law liens unique to maritime law.

130 Global Arbitration Review, "Singapore Chamber of Maritime Arbitration" (*GAR*, 24 May 2019) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2020/article/singapore-chamber-of-maritime-arbitration>

131 See the author's article – The Role of Marine Surveyors to the Judicial Process at : https://maritimefairtrade.org/importance-of-marine-surveyors-to-judicial-process/

- Institute of London Underwriters
- American Clauses
- Nordic Clauses

In many cases there will be Multiple Insurers involved in the risk on co-Insurance basis. The Insurer with the largest share of the risk / insurance called the Lead Underwriter / Insurer will lead in dealing with the claims and disputes, and his decision will bind Co-insurers to the extent of their respective shares.

Under maritime law, there will also be situations that arise which parties or contractors appear to offer services in the course of the voyage ie Salvors and contractors rendering aid in situations that call for salvage of the vessel and cargo or in situations where general average is declared.

Services may be offered by Salvors i.e., SMIT often on contracts on Lloyd's Open Form where the vessel is stranded and cannot continue with its voyage without assistance.

Salvage is defined in Section 65 (2) UK Marine Insurance Act 1906 as follows:

> *""Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred."*

General Average is defined in Section 66 (2) UK Marine Insurance Act 1906 as follows:

> *"There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure."*[132]

A General Average act may result in sacrifice or expenditure or both. It is an action taken to preserve all the interests involved in a maritime adventure when the adventure is threatened by a common peril. Provided that the action is successful,

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132 A similar definition is found in the York Antwerp Rules.
"*There is a General Average act when, and only when, any extraordinary sacrifice or expenditure is intentionally made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure*."

it is required that the owners of the sacrificed property and/or the people who incurred the expenditure shall be reimbursed by all parties involved in the adventure on the grounds that, but for the General Average act, the adventure would have been lost.

The contractors rendering services will be able to detain the cargo for general average services under a General Average lien. Until a general average bond[133] is provided the cargo cannot be released.

The validity and quantum of General Average can be challenged in Arbitration. Where the General Average expenditure incurred by the shipowner was due to an actionable fault in failing to make the vessel seaworthy, the cargo interests will not need to make any contribution.[134]

3 Navigating Laws

Maritime matters involve events or transactions not confined within the borders of any single country. Thus, there will be an interplay of laws of different countries.

Conflict of laws (sometimes called private international law) concerns the process for determining the applicable law to resolve disputes of a transnational nature. Conflict of laws rules allow for some necessary adjustment between these different substantive laws. The Arbitrator must consider the conflict of laws aspects of the dispute.

The Tribunal must understand and properly apply the governing law to the dispute in the reference. If principles are misapplied or ignored this may lead to the issues of Arbitral Misconduct.

There is much uniformity of the maritime law due to the adoption of various international rules and conventions, including the Hague Rules, Hague-Visby Rules and the York Antwerp Rules. These rules are incorporated in most bills of lading as well as Charterparties and other common forms of contracts used in international shipping.

133 This is provided as part of the marine cargo insurance cover eg ICC(A) 1982 Clause 2.

134 See the article General Average Guarantees and the actionable fault defence : https://kennedyslaw.com/thought-leadership/case-review/general-average-guarantees-and-the-actionable-fault-defence/

As stated in *Stage Line Ltd v Foscolo Mango & Co Ltd*:[135]

> *"It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of the foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."*

This need for uniformity in interpreting the Rules and has been endorsed by Justice Ramly in *Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor*.[136]

4 New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on June 10, 1958 and entered into force on June 7, 1959 created a system where state signatories gave effect to recognition of arbitration awards in countries which acceded to the New York Convention. As of June 2020, there are 165 state signatories[137]. Signatories to the New York Convention will recognise and enforce an international or foreign arbitral award under the convention if that arbitral award has been rendered by an arbitral tribunal sitting in a country which is also a signatory to the New York Convention.

The enforceability of Arbitration Awards under the New York Convention is easily one of the clearest benefits of arbitration over litigation. Parties are able to arrest a vessel to obtain security for the later enforcement of the arbitral award, where ever the vessel may be found. By way of contrast, decisions and judgements of local courts have limited enforceability outside the jurisdiction of that court as mutual recognition and enforcement of judgements relies on statutes providing for reciprocal recognition and enforcement of judgements which are limited in scope.[138]

135 [1931] All ER Rep 666, Lord Macmillan (at 677) on interpreting the *Carriage of Goods by Sea Act 1924* (UK).
136 [2007] 5 MLJ 486.
137 Malaysia acceded to the Convention on 5 November 1985.
138 Eg the Malaysian Reciprocal Enforcement of Judgments Act 1958 shows that Malaysia only recognises very few judgements of countries on a reciprocal basis eg UK, Singapore, Hong Kong and certain states of India.

In *Innotec Asia Pacific Sdn Bhd v Innotec GmbH*:,[139] the Malaysian High Court recognised the necessity to grant a stay of Malaysian Court proceedings in favour of arbitration in Germany, to honour Malaysia's treaty obligations under the New York Convention:[140]

> *"… Being the court of the country it is the duty of this court to interpret our laws so as to comply with such Convention where Malaysia is a party, unless expressly prohibited by law. Be it under s 10 of the Arbitration Act 2005 or under the New York Convention 1958, a stay of proceedings is mandatory in order to refer the parties or the dispute to arbitration. This is also in line with the judiciary's efforts to refer disputes to arbitration or other mediation process before the matter is dealt with by the court."*

5 Powers of Tribunal

Arbitral awards are not appealable. The finality of arbitral awards[141] mean that the awards can be set aside on limited grounds.[142] Further Malaysian courts generally adhere to a non-interventionist approach towards arbitral awards.

Section 18(1) of the Arbitration Act 2005 (which mirrors Article 16 of the Model Law) deals with the concept of *Kompetenz-Kompetenz* in Malaysia.[143] The arbitral tribunal can rule on its own jurisdiction (section 18(1), Arbitration Act 2005). The arbitral tribunal's powers to decide on its own jurisdiction or competence or the scope of its authority or the existence or validity of the arbitration agreement has been recognised by the Malaysian courts in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*;[144] *and TNB Fuel Services Sdn Bhd v China National Coal Group Corp*.[145]

A plea that the arbitral tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence.[146]

Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party can appeal to the court within 30 days after having received notice of that ruling.[147] Such a decision of the court is non-appealable.[148]

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139 [2007] 3 AMR 67.
140 Ibid.
141 Section 36 Arbitration Act 2005
142 Section 37 Arbitration Act 2005
143 The principle was confirmed in the Singapore High Court in the case of *Malini Ventura v Knight Capital Pte Ltd & others* [2015] SGHC 225,
144 [2016] 5 MLJ 417
145 [2013] 4 MLJ 857
146 Section 18(3), Arbitration Act 2005
147 Section 18(8), Arbitration Act 2005
148 Section 18(10), Arbitration Act 2005

6 Ship Arrest and In Rem Jurisdiction

An admiralty action *in rem* is an action against the *res* (thing), which is usually a ship but could also include other kinds of maritime properties, like cargo and freight. A ship includes her apparel, tackle, and stores. The action *in rem* is characterised by service of the Writ in Rem and arrest of the *res* by issuance and service of the Warrant of Arrest on Vessels within jurisdiction

The most common invocation of admiralty jurisdiction is the remedy of a ship arrest. Under the Courts of Judicature Act,[149] the Malaysian High Court is empowered to exercise the same Admiralty Jurisdiction of the English High Court as conferred by the UK Supreme / Senior Court Act 1981.

Malaysian Admiralty Court was established in 2010. Accordingly, the invocation of in rem jurisdiction follows the same grounds and criteria as under English Admiralty law. However, the Malaysian Admiralty Court exercises a more extensive subject matter jurisdiction eg for in personam cases marine insurance, marine-related claims, shipbuilding.[150]

Sir George Jessel MR, *The City of Mecca*.[151]

> *"You may in England and in most countries proceed against the ship. The writ may be issued against the owner, and the owner may never appear and you get your judgment against the ship without a single person being named from the beginning to end. This is an action in rem, and it is perfectly well understood that the judgment is against the ship."*

The Arrest is proceeded in a two-stage process:

(i) The Plaintiff's lawyer applies to the Admiralty Court for the issuance of the Warrant of Arrest. In this application, he must satisfy the Court that the grounds for invoking the admiralty jurisdiction have been satisfied;

(ii) Execution of the Warrant. Once the Warrant of Arrest has been issued, the Admiralty Sheriff or Bailiff will serve the Writ in Rem and Warrant of Arrest on board the Vessel.

A unique feature of the Court is that the Warrants of Arrest can be exercised over vessels in Malaysian waters even if located in Sabah or Sarawak. This is often exercised by the Admiralty Sheriff empowering the Bailiffs of the Courts in Sabah

149 Section 24(b) Courts of Judicature Act 1964.
150 Practice Directions 1/ 2012.
151 (1881) 6 PD 106.

and Sarawak to serve both the In Rem Writ and Warrant of Arrest on the vessels in the waters of the local jurisdiction.

At the first stage, a critical issue that arises is what needs to be disclosed and whether in hearing the application, whether the Judge's decision is discretionary.

In the case of *The Ever Concord*,[152] the Admiralty Court ruled that a ship arrest was not a discretionary remedy once the Plaintiff satisfied the criteria for invoking Admiralty Jurisdiction:

> *"The plaintiff had satisfied the court that the requirements under O 70 r 4(6) and (7) of the ROC were complied with, without any further requirement of full and frank disclosure in its request for the issuance of the warrant of arrest. The issue of a warrant of arrest was not a discretionary remedy, but a right for the plaintiff. There was no requirement of full and frank disclosure and the arresting party only had to demonstrate that he had complied with O 70 r 4 of the ROC."*

The Malaysian Court of Appeal in *Majorole Shipping Sdn Bhd v M & G Tankers (L) Pte Ltd*[153] considered whether an in rem claim survived the setting aside of an arrest of the vessel.[154]

In August 2021, the Malaysian Apex Federal Court considered an appeal from the Court of Appeal, in a case that concerned the competing rights of a purchaser of an arrested vessel vis-à-vis the claim of a shipping agent which arrested the vessel and obtained an in rem judgment in default.

After obtaining the judgment, the shipping agent did not proceed with the sale pendente lite. The vessel was under mortgage and if the sale had taken place the rights of the shipping agent would have fallen behind that of the mortgagee in priority.

The arrest was not withdrawn. Some 18 months later, the subsequent buyer found that it could not sail the vessel outside of the port area due to the arrest which was still in place. The buyer could only sail the vessel after it had provided security of the shipping agent's claim.

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152 [2021] 9 MLJ 936 The same proposition had been established earlier by the Court of Appeal in Civil Appeal No. W-02(IM)(ADM)-1327-07/2017 overruling the High Court decision of *Thaumas Marine Ltd v Owners thel 'JHW Sapphire'* [2017] MLJU 2102, which case was argued by the Author. Unfortunately there was no written grounds by the Court of Appeal.

153 Civil Appeal No W-02(IM)(ADM)-1179-06/2019. The author acted for the Appellant in this case.

154 In August 2021, the Federal Court considered the leave application for Appeal from the Court of Appeal. Federal Court Leave Application No: 08(i)-88-03/2020(W), appeal against Court of Appeal decision W-02(IM)-1179-06/2019 dated 23 February 2021. Leave was refused. Leave will only be granted by the Federal Court on meeting the criteria under the Courts of Judicature Act s96(a).

The buyer filed proceedings alleging that the continued arrest was an abuse of the Court process and also applied to set aside the arrest on the ground that the affidavit of service did not reveal the warrant was properly served on board. However, the buyer failed to conduct a search at the Admiralty Registry but still claimed that it was a bona fide purchaser without notice on the ground that the announced website was not set up and when it went on board there was no writ or warrant pasted on board.

The shipping agent filed parallel proceedings contending that it had obtained an in rem judgement which attached to the vessel and the purchaser took subject to the crystallised in rem rights.

The shipping agent also contended that the High Court Judge was functus officio and could not disturb the judgment or fail to give effect to those in rem rights. The High Court Judge gave judgment in favour of the purchaser and ordered the cancellation of the security.

The shipping agent appealed to the Court of Appeal and the Appeal was heard by a Panel of three Court of Appeal Judges over 2 sessions in November 2020 and February 2021.[155] The Court of Appeal overturned the decision of the High Court restoring the shipping agent's claim. In essence the Court of Appeal held that:

> *'[t]he shipping agent's claim against the vessel has crystallised as a judgment in rem after the judgment in default of appearance had been granted and is an in rem claim which is protected and prioritised.'*

The Court of Appeal also found on the facts that there was no abuse of process by the shipping agent in not proceeding with the sale application.[156]

The purchaser failed to obtained leave and the Federal Court noted that the questions of law posed revolved around issues of fact and the questions would not resolve or have the effect of overturning the Court of Appeal decision.[157]

This case realigns Malaysian law with English Admiralty law to the effect that that in rem rights and judgements will bind the whole world.[158] The buyer who recklessly

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155 The appeal was heard over the online platform 'Zoom' and the hearing took a total of 6 hours.

156 The brief grounds were pronounced orally at the 2nd hearing session in February. The practice in appeals in Malaysia is that detailed grounds will only be written after leave is obtained from the Federal Court for the appeal to the Federal Court.

157 Supra.

158 The authorities accepted by the Malaysian Court of Appeal included the statement by the House of Lords in *The Cristina* [1938] AC 485 the House of Lords that 'A judgment in rem is a judgment against all the world' and in *The Ship 'Federal Huron' v OK Tedi Mining Ltd* [1987] LRC (Comm) 254 that 'Rights in rem arising out of a maritime lien travel with the vessel irrespective of ownership and come into existence automatically on the occurrence of the incident giving rise to the lien (per Scott, L.J., in *The Tolten* [1946) 2 All ER 379)'.

fails to conduct due diligence on the encumbrances of the vessel cannot claim to be a bona fide purchaser of the vessel without notice and takes the vessel subject to the crystallised in rem rights of the shipping agent.

The Admiralty Court will readily render its aid to assist Arbitration. Usually, the action for which the arrest is made is framed as a substantive proceedings within the jurisdiction. These actions may have an arbitration clause. Parties can arrest vessels in aid of a pending or ongoing arbitration within or without Malaysia.[159]

The Admiralty Court can also issue in personam orders in support of arbitration:[160]

7 The Characterisation Question

Conflict of laws (sometimes called private international law) concerns the process for determining the applicable law to resolve disputes. Another issue that arises is determining the forum to resolve the dispute.

The conflict of laws questions that can arise in a shipping dispute are:

(1) whether the court has jurisdiction to entertain the case

(2) if so, what system of law, local or foreign, it should apply

There may sometimes be a third question, namely, whether the court will recognise or enforce a foreign judgment purporting to determine the issue between the parties.

Whereas matters of substantive law are governed by the lex causae, namely the law applicable under the local rules for the choice of law, all matters of procedure are governed by the lex fori, namely the law of the country in which the action is brought.

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159 Section 10 Arbitration Act 2005:
(2a) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—
(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or
(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

160 Section 11 Arbitration Act 2005:
Arbitration agreement and interim measures by High Court
11. (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to—
(a) maintain or restore the status quo pending the determination of the dispute;
(b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
(c) provide a means of preserving assets

It is not always easy to classify rules of law into those which are substantive and those which are procedural, but generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced.

For Maritime Arbitration, these conflicts of law issues may be addressed in the Arbitration or Dispute Resolution Clause which provides for the choice of governing law for the contract, the Arbitration Centre. Usually, the Clause will adopt the Rules of the chosen Arbitral Centre.

8 Choice of Law

At common law, where the parties have expressly stipulated that a contract is to be governed by a particular law, that law applies so long as the selection is bona fide and legal and does not contradict public policy.[161]

In the English House of Lords case of *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA*[162] the court considered what was the proper law of the contract in a situation where parties did not express a choice of governing law in their contract. The inquiry must always be to discover the law with which the contract has the closest and most real connection. The mere fact that arbitration was to be in London did not mean that what was in reality a French contract of affreightment had to be governed by English rather than French law. It did not matter at all that English arbitrators would have to apply French law. It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori.

9 Malaysian Jurisprudence

The Admiralty Court was set up with Datuk Nallini Pathmanathan as the first Admiralty Judge and the rationale was that expertise would be concentrated in the Court.[163] While the adoption of the same Admiralty Jurisdiction allowed the application of English cases, the cases heard by the Court soon added to and facilitated the establishment of Malaysian jurisprudence in this area of law.

In delivering the key note address at the International Malaysian Society of Maritime Law Conference in May 2023, Maritime Law & Business Conference

161 Section 30(2) Arbitration Act 2005. See also the decision of the Privy Council in *Vita Food Products Inc v Unus Shipping Company Limited* [1939] A.C. 277.
162 [1969] 1 Lloyd's Rep. 247.
163 The author argued the Inaugural reported decision of the Court in the case of *The Istana VI* [2011] 7 MLJ 145.

2023, Datuk Nallini Pathmanathan, Malaysia's first Admiralty Judge, now Federal Court Judge traced the developments of Maritime law in Malaysia and the volume of cases heard by the Court and sounded an optimistic note as to how the Court is still posed for greater growth.

The appointment of Justice Ong Chee Kwan as the Admiralty Judge in May 2023, just days after the Conference was warmly welcomed by the Malaysian Admiralty & Shipping Lawyers. A named Partner of the Malaysian law firm Christopher & Lee Ong, which is part of the Rajah & Tann Asia network. Justice Ong have handled Shipping & Admiralty cases as part of his practice prior to his elevation to the bench.[164]

In *The Luna Indah*,[165] the Court of Appeal held that the value of security for the release of an arrested vessel cannot be ordered to provide security which is greater than the value of the vessel itself.

In the Inaugural reported decision of the Court in the case of *The Istana VI*,[166] the Admiralty Court reinforced the proposition that cargo must be released against the presentation of the original bills of lading. In coming to its decision, the Court also had to decide on the transfer of title in bulk cargo and the role of letters of indemnity.

10 Dangerous Goods

Carriage of dangerous goods require special care. The transport of dangerous goods, such as ammonium nitrate, is regulated through international standards. The International Maritime Dangerous Goods Code (or IMDG Code) first published in 1965 is an International Maritime Organisation Code which prescribes guidelines for the safe preparation, storage, and handling of transportation and shipment of dangerous goods or hazardous materials. The IMDG Code divides dangerous goods into nine classes, with different attributes and labelling, and each will have their unique UN Number.

The issue transport of dangerous goods and application of the IMDG Code was considered by the Admiralty Court in the case of *The Ing Hua Fu*,[167] a case where the dangerous chemicals were innocuously declared as 'Agrochemicals' which did not reveal its dangerous character. The chemicals exploded and sank the vessel within 20 minutes.

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164 One of the cases which the author acted for the Plaintiff and Justice Ong acted for the Intervener was the case of *Majorole Shipping Sdn Bhd v M & G Tankers (L) Pte Ltd* Civil Appeal No W-02(IM)(ADM)-1179-06/2019.on the effect of In Rem Judgements.

165 [2006] 4 MLJ 296 .The author was one of the 2 Counsels at the Court of Appeal.

166 Ibid.

167 [2013] 9 MLJ 825. The Author acted for the Plaintiff shipowner in this case

The Admiralty Judge Datuk Nallini Pathmanathan considered in detail the scope and application of IMDG Code and the exposition will aid parties in cases involving Dangerous Code.

Malaysia has moved from the Hague to the Hague Visby Rules with effect from 15 July 2021 via amendments to the Carriage of Goods by Sea Act 1950[168].However, the adoption was not a mere adoption of the Hague Visby Rules of 1968 as amended by the SDR Protocol 1979 but rather extended the Rules to cover 'sea carriage' documents.

11 Arbitral Seat

The Seat of the Arbitral Tribunal is the judicial seat of the arbitration, rather than a geographical location or venue where the hearing is conducted.[169] The seat designates the applicable law, procedure and international competence of a national court for the challenge of the award.

Most arbitration statutes and institutional rules recognise the distinction between the seat of the arbitration and the venue in which hearings may be held. It is not necessary for the seat of arbitration and the venue of the arbitration to be the same location (though often they are) and even when hearings take place during the course of the arbitration in several different countries, the chosen seat of arbitration will remain unaffected.

12 Evaluating Evidence

It is often cited that Arbitrators would not insist on strict proof of evidence. This is also contained in the Rules of the Arbitration Centres:

SIAC Rules – Rule 16.2:

> *"The Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law."*

168 See the Carriage of Goods by Sea (Amendment) Act 2020, which came into force on 15 July 2021.

169 Section 2 of the Arbitration Act 2005 provides "seat of arbitration" means the place where the arbitration is based as determined in accordance with section 22;
"22. Seat of Arbitration
(1) The parties are free to agree on the seat of arbitration.
(2) Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."

American Arbitration Association (AAA) – Rule 28:

> *"The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."*

Admissibility is only one part of the rule. Unless the evidence is relevant and material to the issues in dispute, it would be difficult to see how they can contribute to either parties' case.

Equally important would-be legal effect of shipping documents and annotations on those documents.

Maritime Arbitration cases involve shipping documents of various types. Familiarity and knowledge of these documents are important. For instance, the significance of bills of lading and their role,[170] the difference between house and master bills of lading in the dispute between forwarders and shipping lines.

Some of the annotations in the bill of lading may negative their apparent terms.[171] The significance of the types of charter and the effects of terms would also be important.[172] For instance, a berth charter with the inclusion of other terms may convert the charter to be effectively a port charter with great difference in the demarcation of risk in the event of port congestion.[173] Effects of Covid 19 would be another problem.[174]

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170 See the author's article – Why Bills of Lading are issued in sets of three: https://maritime-executive.com/editorials/why-are-bills-of-lading-issued-in-sets-of-three

171 Eg a common annotation on bills of lading is 'shippers load and count' will commonly mean that the carrier will insert the quantity of the cargo as declared by the shipper and does not guarantee the quantity has been loaded. For demurrage claims, the Statement of Facts of both parties would be important evidential documents supporting both parties' positions. In an ongoing case at the Malaysian Admiralty Court in Admiralty Suit No: WA-27NCC-44-10/2022 involving a consignment of cargo of parts of an annealing furnace packed in crates and shipped on deck, from Shanghai to Port Klang, the defendant shipowner raised the rule that the annotation on the bill of lading meant that the carrier took no risk for the cargo as that was shipped at the shipper's risk. The peculiar facts of the case were that the ship sailed directly into the path of a typhoon, typhoon Miufa which was the biggest typhoon to hit Shanghai in recent memory. The issue to be determined by the Admiralty Court was whether the clause negatived the carrier's duty as bailee and the burden of proving duties of the bailee. Another issue with no common law precedent was the carrier's duty to plan the voyage and to have proper weather routing.

172 The strict laycan rule that allows the charterer to cancel the charter if the ship arrives one day late applies only to voyage charters but not contracts of affreightment.

173 Some ports are known to be perennially congested with waiting times of weeks. In a port charter the waiting time would prevent the running of laytime and consequently demurrage and therefore the risk of delay and large demurrage costs will fall on the charterer.

174 An infected vessel, eg crew struck with the pandemic will prevent the ship from obtaining a clear bill of health and thus the health authorities will not declare free pratique and thus will prevent the ship from being an arrived and ready ship to start laytime and consequently demurrage. See the author's article – The Impact of Covid 19 on Shipping: https://maritime-executive.com/editorials/the-impact-of-the-covid-19-pandemic-on-shipping.

If the parties and their counsel are not familiar with the nuances of these, the arbitrator with experience may point these out to them and would be able to guide parties to obtain better evidence to determine the issues in dispute. Thus, parties to Maritime Arbitration would be advised to not only appoint experienced counsel but arbitrators too.

13 Cultural Aspects of International Arbitration

It is inevitable that International Arbitration will involve Arbitrators, Counsel hailing from diverse legal backgrounds. A Russian Lawyer may face an English Lawyer in a Maritime Arbitration before a Panel of 3 Arbitrators with civil and common Law backgrounds. Whilst the parties may have consensus on the governing law, they may have different approaches towards conduct of the hearing.[175] The flexibility of Arbitration as a mode of Dispute Resolution means that the Tribunal will be able to accommodate these differences and often there will not be any problem.

Sometimes it is simply getting to know the Tribunal Members. A retired Judge used to sit in a formal Court setting may be more familiar and comfortable with a setting not dissimilar with his former environs. Similarly, a lay Arbitrator may not be comfortable with too much technicalities and the Counsel should adapt his arguments according to the constitution of the Tribunal.

14 Technology

The disruptions wrought by the Covid-19 virus effectively curtailed movement. Arbitration adapted as with other spheres of business and human activity. Physical hearings were replaced by virtual ones. This adaptation was also adopted by the Courts and online hearings are now commonplace.

AIAC's Protocol on Virtual Arbitration Proceedings (VAP Protocols) and the Protocol on Virtual Mediation Proceedings (VMP Protocols).[176] The Protocols are aimed at providing a user-friendly guideline on the conduct of virtual hearings including taking and presentation of evidence, hearing etiquette.[177]

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175 For some perspectives, see: https://www.aprag.org/2020/11/10/1787/; Looking at Arbitration Through a Comparative Lens, Gu Wei Xia, Associate Professor, Faculty of Law, The University of Hong Kong (November 1, 2018). The Journal of Comparative Law, Vol. 13, No. 2, pp. 164–188, 2018.

176 Asian International Arbitration Centre, "AIAC Protocols on Virtual Arbitration Proceedings (VAP Protocol) and Virtual Mediation Proceedings (VMP Protocol)", (*AIAC*, 25 October 2021) <https://www.aiac.world/news/346/AIAC-Protocols-on-Virtual-Arbitration-Proceedings-(VAP-Protocol)-and-Virtual-Mediation-Proceedings-(VMP-Protocol)>.

177 Ibid. See also ICC Checklist for a Protocol on Virtual Hearings at: https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/.

Where the salient facts in the dispute are found in the documents the maritime arbitration can proceed by way of a documents only arbitration. This method will save time and costs because there will not usually be any need for witnesses[178]. In demurrage claims, where both parties have clear Statement of Facts, the calculation of demurrage by both parties can be presented through documents and the tribunal can decide on the interpretation of the clauses in the charterparty and the documentary evidence presented.

15 Maritime Arbitration at AIAC

There are promising signs that Maritime Arbitration will grow as a key subject matter of arbitration cases handled at AIAC.

After spending more than 3 decades in key teaching positions including his last position as the Professor of Commercial and Maritime Law and Head of Law at the City Law School, University of London. National University of Singapore Law Faculty renowned Shipping Specialist Professor Jason Chuan has returned to Malaysia to helm the Law Faculty of the University of Malaya.[179]

Coupled with the recent appointment of Justice Ong Chee Kwan as the new Admiralty Judge, with the return of Datuk Sundra Rajoo as the Director of AIAC[180] these developments augur well the potential and growth of Maritime Arbitration as key area of growth in both AIAC as a centre of Maritime Arbitration.

178 Documents only Arbitration, Bruce Harris, The International Journal of Arbitration, Mediation and Dispute Management Volume 49, Issue 3 (1983) pp. 221–224.

179 https://www.um.edu.my/news/profesor-jason-newly-appointed-dean-of-faculty-of-law. Professor Chuah also taught shipping at the Centre of Maritime Law at the National Universtiy of Singapore Law Faculty and has authored books and articles on Maritime Law.

180 See https://hsfnotes.com/arbitration/2023/03/17/the-asian-international-arbitration-centre-gets-a-new-director/.

Emergency Arbitration Proceedings in International Dispute Resolution

by Harshitha Ram • Lex Apotheke

1 Introduction

Arbitration is a form of alternative dispute resolution (ADR) that involves the resolution of disputes between parties outside of the court system. It is a popular method of dispute resolution in international commercial contracts due to its flexibility, confidentiality, and enforceability of awards. One of the most significant features of arbitration is its ability to provide expedited relief in urgent situations. Emergency arbitration is a relatively new concept that has gained popularity in recent years due to the increased demand for prompt and efficient resolution of disputes. This article will explore the use of emergency arbitration proceedings in international dispute resolution.

2 Emergency Arbitration Proceedings

Emergency arbitration is a type of arbitration that allows parties to obtain interim relief before the constitution of the arbitral tribunal. Emergency arbitration is typically used when there is an urgent need for relief, and the time required to appoint an arbitral tribunal and conduct a full arbitration would be too long. Emergency arbitration proceedings can be initiated by either party to the dispute, and the arbitrator will be appointed within a specific timeframe, typically 24 to 48 hours. The arbitrator will then consider the application for interim relief and make a decision within a short timeframe, typically within 10 days of their appointment.

Emergency arbitration is a mechanism for obtaining interim relief in urgent situations, such as when there is a risk of irreparable harm or when a party needs immediate protection pending the resolution of a dispute. International emergency

arbitration refers to emergency arbitration proceedings that are conducted in the context of an international dispute, often under the auspices of an international arbitral institution. The types of interim relief that can be granted in emergency arbitration proceedings include injunctions, orders to preserve evidence, and orders for the payment of money. The arbitrator's decision is binding, and the parties are required to comply with it. The decision can also be enforced by courts in the same way as a regular arbitral award.

Emergency arbitration is commonly used in international disputes involving contracts with a high degree of urgency, such as contracts for the sale of goods that require immediate delivery or contracts for the provision of services that involve critical deadlines. Emergency arbitration is also commonly used in disputes relating to intellectual property, where the need for urgent injunctive relief is often critical.

International disputes can arise in various contexts, including commercial agreements, investment treaties, and construction projects. Some common examples of situations in which emergency arbitration may be sought include:

Contractual disputes where one party seeks urgent injunctive relief to prevent the other party from taking certain actions that could cause irreparable harm; Investment disputes where a party seeks urgent interim relief to prevent a state from expropriating its assets or interfering with its operations; Sports arbitration disputes where a party seeks urgent relief to prevent a sports organisation from taking punitive measures against the party or its athletes. Arbitration offers a flexible and confidential forum where parties can resolve their disputes with the assistance of a neutral third party. In some cases, however, parties need urgent relief to safeguard their interests, and the traditional arbitration process may not be able to provide the necessary remedy in a timely manner. This is where emergency arbitration proceedings can be particularly useful.

Emergency arbitration is a relatively new development in international arbitration, having only emerged in the last decade. Emergency arbitration allows parties to obtain urgent interim relief prior to the constitution of the arbitral tribunal, which can take several weeks or even months. Emergency arbitrators are appointed by arbitral institutions to hear urgent applications for interim relief and make determinations within a very short timeframe, typically within a matter of days. Emergency arbitration is typically governed by specific rules or procedures, such as those set out in the rules of various arbitral institutions, including the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), and the American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR) and Asian International Arbitration Centre (AIAC).

The types of interim relief that can be granted by an emergency arbitrator include injunctions, orders for the preservation of evidence or assets, and orders for the

provision of security for costs. Emergency arbitrators can also make determinations on jurisdictional issues and other preliminary matters that may affect the parties' ability to pursue their claims.

One of the key advantages of emergency arbitration is its speed. Emergency arbitration proceedings are designed to be heard and determined quickly, usually within a matter of days. This can be particularly useful in situations where time is of the essence and parties need urgent relief to protect their interests. Emergency arbitration can also be less expensive than traditional arbitration, as the proceedings are typically shorter and involve fewer procedural steps. Emergency arbitration can also be useful in situations where parties need to take swift action to preserve their rights, as the process can be initiated quickly and without the need for a full arbitration hearing.

3 Appointment of Emergency Arbitrators

The appointment of an emergency arbitrator is governed by the rules of the arbitral institution or the parties' agreement. Typically, the emergency arbitrator is appointed within a short period of time after the request for interim relief is made, and the arbitrator's decision is binding on the parties.

The decision of the emergency arbitrator is usually made on an expedited basis, and the arbitrator may conduct a hearing or make a decision based solely on written submissions. The parties may challenge the decision of the emergency arbitrator, but such challenges are usually limited to very narrow grounds, such as lack of jurisdiction or manifest disregard for the law.

The use of emergency arbitrators has become increasingly common in international arbitrations, particularly in cases where speed and efficiency are essential. However, emergency arbitrators are not available in all international arbitration proceedings, and parties should carefully review the rules of the relevant arbitral institution or their arbitration agreement to determine whether an emergency arbitrator is available in their case.

Some of the advantages of emergency arbitration include:

1. Speed: Emergency arbitration can provide parties with interim relief quickly, as an arbitrator can be appointed and a decision can be made within a matter of days or weeks.
2. Confidentiality: Emergency arbitration proceedings can be conducted in confidence, which may be advantageous for parties who wish to keep the dispute and its resolution private.

3. Flexibility: Emergency arbitration can be used to seek a wide range of interim relief, including orders to preserve assets, orders for the production of evidence, and orders to prevent parties from taking certain actions.

Despite these advantages, there are also some limitations to emergency arbitration:

1. Cost: Emergency arbitration can be costly, as parties will need to pay for the arbitrator's fees and expenses, as well as legal fees.
2. Enforcement: Emergency arbitration awards may not be enforceable in all jurisdictions, which can limit the effectiveness of the relief granted.
3. Limited scope: Emergency arbitration is limited to interim relief, and cannot provide a final resolution to the dispute. Parties may still need to engage in a full arbitration proceeding to resolve the underlying dispute.
4. Limited precedent: Emergency arbitration decisions are not always published, which can limit their value as precedent in future disputes.

Enforcement of emergency arbitration decisions

The enforcement of emergency arbitration decisions largely depends on the legal framework of the jurisdiction where enforcement is sought. In some jurisdictions, such as Singapore and Hong Kong, emergency arbitration awards are given the same treatment as final arbitration awards and can be enforced through the courts in the same way as final awards. In other jurisdictions, such as the United States, the enforceability of emergency arbitration decisions may be more uncertain and may depend on the specific facts and circumstances of the case.

In general, to enforce an emergency arbitration decision, the party seeking enforcement must apply to the relevant court or authority in the jurisdiction where enforcement is sought. The applicant will usually need to provide a copy of the emergency arbitration decision and evidence that the decision is binding and enforceable. The court or authority will then review the application and may issue an order enforcing the decision.

It is important to note that enforcement of emergency arbitration decisions can vary depending on the jurisdiction, and parties should seek legal advice on the specific laws and procedures applicable to their case.

Case Study

Here are a few notable cases on international emergency arbitration: These cases demonstrate the importance of emergency arbitration in international dispute resolution and the potential for emergency arbitrators to grant interim relief to

parties in urgent situations. It is worth noting that these are all public international law matters as these tend to get reported whilst general commercial arbitrations tend to remain confidential.

1. *Tza Yap Shum v the Republic of Peru*. In this case, the claimant, Tza Yap Shum, was a Peruvian citizen who owned and operated a fishing business in the Republic of Peru. The respondent, the Republic of Peru, had implemented a new law that prohibited the use of certain fishing methods, which had a significant impact on the claimant's business.

   The claimant filed a request for emergency arbitration under the rules of the International Chamber of Commerce (ICC) seeking an order that would prevent the Republic of Peru from enforcing the new law. The ICC appointed an emergency arbitrator who held a hearing and issued an interim award, ordering the Republic of Peru to suspend the implementation of the new law until the conclusion of the arbitration proceedings.

   The Republic of Peru challenged the interim award in the French courts, arguing that the emergency arbitrator had exceeded his mandate by issuing the interim award. The French courts rejected the challenge, holding that the emergency arbitrator had acted within his mandate and that the interim award was enforceable.

   The case of *Tza Yap Shum v Republic* of Peru is significant because it demonstrates the effectiveness of emergency arbitration in providing parties with immediate relief in urgent situations. It also highlights the importance of having clear and enforceable rules governing emergency arbitration procedures. The ICC rules, which were used in this case, have been widely adopted by international arbitral institutions and are considered to provide a robust framework for emergency arbitration proceedings.

2. *BG Group v Republic of Argentina:* In this case, BG Group, a British gas company, initiated emergency arbitration proceedings against Argentina under the UNCITRAL Arbitration Rules. BG Group sought interim relief to prevent Argentina from taking any action to expropriate its investment in a natural gas pipeline. The emergency arbitrator granted BG Group's request for interim relief, which was later upheld by the tribunal in the main arbitration.

3. *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*: This case involved an emergency arbitration under the ICSID Rules. Tethyan Copper, an Australian company, sought interim relief to prevent Pakistan from taking any steps to enforce a $6 billion penalty imposed by a Pakistani court in connection with a mining project. The emergency arbitrator granted Tethyan Copper's request for interim relief, but the tribunal in the main arbitration later found that it did not have jurisdiction to hear the case.

4. *Chevron Corporation v Republic of Ecuador:* In this case, Chevron initiated emergency arbitration proceedings under the UNCITRAL Arbitration Rules in response to a series of court orders issued by Ecuador that purported to seize Chevron's assets in the country. The emergency arbitrator granted Chevron's request for interim relief, which was later upheld by the tribunal in the main arbitration.

5. *Stati et al. v Republic of Kazakhstan:* In this case, the claimants initiated emergency arbitration proceedings under the SCC Arbitration Rules in response to a series of measures taken by Kazakhstan to freeze their assets in the country. The emergency arbitrator granted the claimants' request for interim relief, which was later upheld by the tribunal in the main arbitration.

6. *Chevron Corporation v Ecuador*: In 2012, Chevron Corporation obtained an emergency arbitration award against Ecuador, which had been ordered by a court to pay $18 billion in damages for environmental contamination. The emergency arbitrator ordered Ecuador to take all measures necessary to suspend the enforcement of the judgment.

7. *Interim Measures in the UNCITRAL Arbitration between Ukraine and the Russian Federation:* In 2014, Ukraine filed an emergency arbitration request against Russia seeking interim measures to prevent further harm to Ukraine's interests as a result of the annexation of Crimea. The emergency arbitrator ordered Russia to refrain from implementing any measures that might aggravate or extend the dispute.

8. *Interim Measures in the ICC Arbitration between RSM Production Corporation and Saint-Petersburg Sea Port:* In 2015, RSM Production Corporation obtained an emergency arbitrator award in an ICC arbitration against Saint-Petersburg Sea Port. The emergency arbitrator ordered Saint-Petersburg Sea Port to immediately release a cargo of petroleum products that had been detained.

9. *Interim Measures in the LCIA Arbitration between the Republic of the Philippines and the People's Republic of China:* In 2016, the Philippines obtained an emergency arbitrator award in an LCIA arbitration against China concerning disputes over maritime rights in the South China Sea. The emergency arbitrator ordered China to immediately stop its activities that were in violation of the Philippines' sovereign rights.

10. *Interim Measures in the SCC Arbitration between Vattenfall AB and the Federal Republic of Germany:* In 2016, Vattenfall AB obtained an emergency arbitrator award in an SCC arbitration against Germany concerning the closure of nuclear power plants. The emergency arbitrator ordered Germany to refrain from taking any measures that might hinder the operation of the plants.

4 Conclusion

Overall, emergency arbitration can be useful for parties involved in international commercial disputes who need urgent relief. However, parties should carefully consider the costs, benefits, and potential risks of emergency arbitration before deciding to use it.

ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC)

(ESTABLISHED UNDER THE AUSPICES OF THE ASIAN-AFRICA LEGAL CONSULTATIVE ORGANISATION)

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