ciarb
Singapore Branch

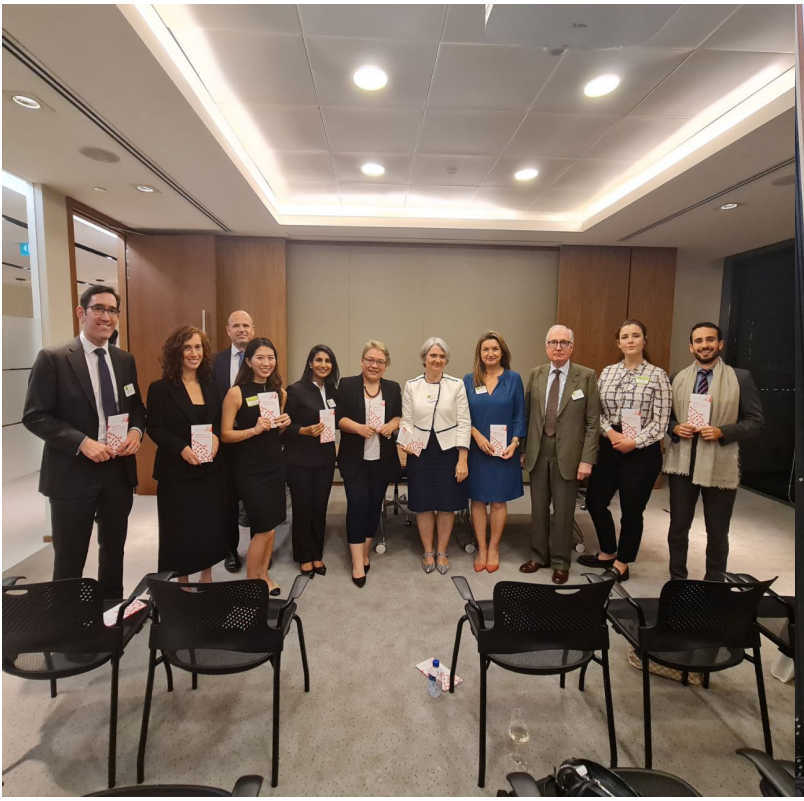
Newsletter | March 2023

Chair's Message

And just like that, another quarter has flown by!

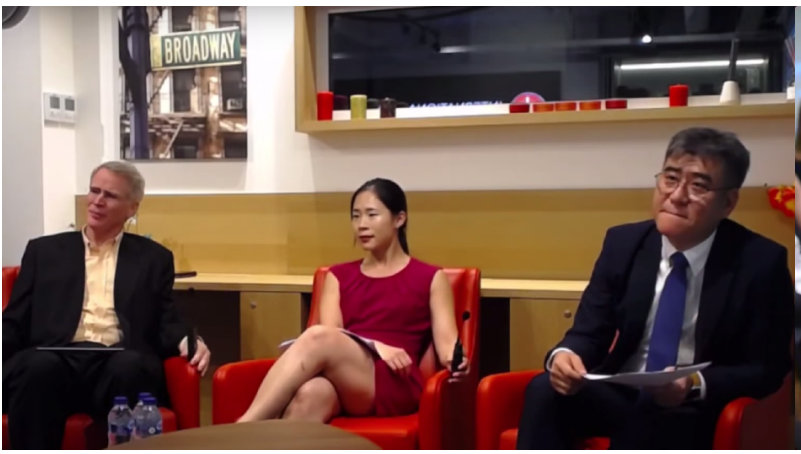
Since we have emerged from Covid restrictions in Singapore, life has moved forward at a frenetic pace. There has been a strong demand for in-person events, courses, and meetings and we at CIArb Singapore have endeavoured to meet that demand, and continue to do so.

In the last quarter, we have had three excellent hybrid events – please see pictures below! Our game-changing thought leadership at those events has spanned discussions on the utility of hot-tubbing witnesses; the mediation of investor-state disputes (and how to encourage parties to take it up); as well as emerging trends and innovations in dispute resolution. The latter two events were our first ever collaborations with the International Law Association (Singapore) and AAA-ICDR, and we hope they will be the first of many.



Hot-tubbing of Expert Witnesses: Can the baby be saved from the bathwater? (12 January 2023)

The Mediation of Investor-State Disputes – What Does the Future Hold? (23 February 2023)



Emerging Trends and Innovations in Dispute Resolution (30 March 2023)

For our next quarter, we have an exciting line-up for you.

Firstly, please join us on 18 April for "Witness statements – worth the paper they're written on?" where our Board member Timothy Cooke will moderate a discussion with Toby Landau KC and Anneliese Day KC on how witness evidence should be presented, and whether prevailing practices in international arbitration need to change. Thanks to the assistance and generosity of FTI Consulting's Trial and Arbitration Support Services, the event will be held both in person and virtually, with a networking reception kindly hosted by Reed Smith for those attending in person. You can sign up through the link immediately below this message:

Register Here

Please save the date for our other upcoming events, registration details for which will be released soon:

11 May (5:00pm SG time):	"Guerrilla Warfare in International Arbitration: The Current State of Play" with Dr Michael Hwang SC, Dr Navin Ahuja, Alastair Henderson and Sarah Grimmer, kindly hosted by HSF
25 May (9:00am SG time):	Our annual "Fireside Chat" in collaboration with the ICC, featuring a virtual interview with the ICC Court President, Claudia Salomon, and the CIArb President, John Bassie
7 June (evening):	"Technical Arbitrators – Do we need them?"

All our upcoming courses are set up below in this newsletter. All our courses are now taking place in person, and we encourage all of you who are not CIArb Fellows to complete your journey to Fellowship!

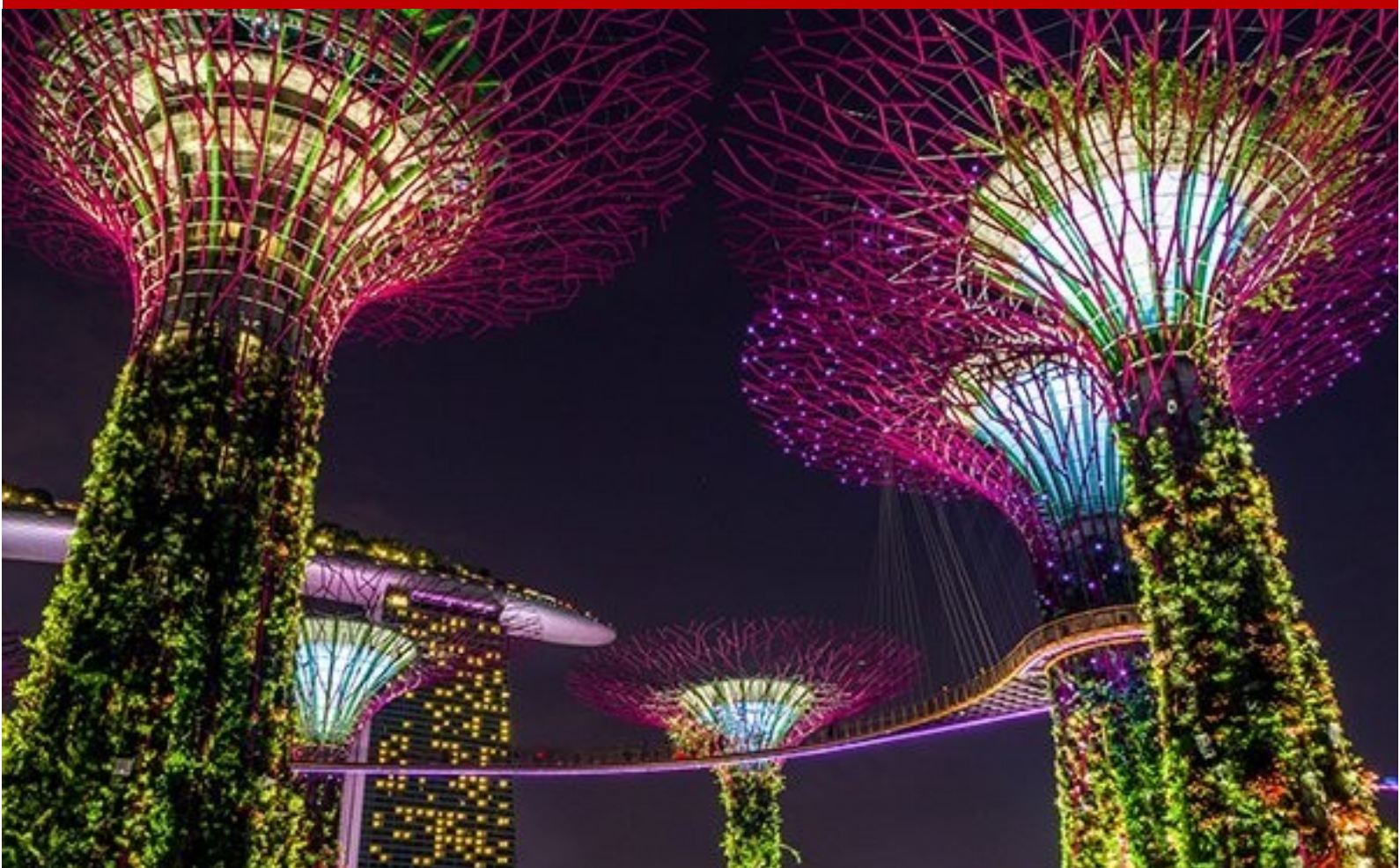
Training Courses	**Month**
Introduction to International Arbitration	June
Module 1 Mediation Training and Assessment	June
Accelerated Route to Membership International Arbitration	July
Module 3 Award Writing International Arbitration Award Writing	August
Module 1 Law Practice and Procedure of International Arbitration	September
Module 2 Law of Obligations	November
Accelerated Route to Fellowship International Arbitration	November

Look forward to seeing many of you in person at our upcoming events and courses.

Sapna Jhangiani KC, FCIArb, C.Arb
Chair, CIArb Singapore

Please click here to read our Chair's messages from previous months.

Events



Upcoming Events

Witness statements – not worth the paper they're written on?
18 April 2023

The idea of parties exchanging written statements in place of evidence-in-chief emerged first in English litigation in the 1980s. The aim of this development was to allow each party to know in advance the case against them and to promote settlement. In international arbitration today, such statements are sometimes lengthy documents that reflect not so much the recollection of a witness, but the industry of the parties' legal teams to leave no evidential stone unturned, unaddressed or unpolished. In some cases, a witness statement is little more than a proxy for advocacy.

Furthermore, it turns out that memory can be fickle. Not only are we not very good at recollecting something, but how we remember (or misremember) events is influenced by the way in which we are asked about them. The steps taken by parties and their legal advisers to prepare a witness's evidence can therefore have a significant impact on what the witness recalls.

Against this background, how should witness statements be prepared? What matters should be covered in them? What directions should arbitral tribunals give with respect to witness statements? Or should we dispense with them altogether?

We will explore these issues and more in an interactive seminar with Toby Landau KC and Anneliese Day KC in Singapore on 18 April 2023 at 5.30pm at NTUC Centre.

This session will be of interest to international arbitration lawyers, arbitrators and in-house counsel involved in disputes.

Please visit our website for more information and/or registration for our Events.

Student Contribution

The international effects at the enforcement stage of the failure to successfully seek annulment of an arbitral award

by Jerome Richter

There is a lot of writing about the enforceability of an award annulled at the seat. However, much fewer people have investigated the opposite hypothesis: what are the effects of the failure to successfully seek annulment of the award? This question encompasses three different situations: first, where the award-debtor had initiated set-aside proceedings at the seat, but his application failed (on the merits); second, where the award-debtor conducted set-aside proceedings, but did not raise an argument he seeks to rely on at the enforcement stage; and third, where the award-debtor failed to initiate set-aside proceedings altogether.

While several domestic laws treat the recognition of foreign judgments,[1] courts rarely refer to them in cases of "non-annulment" decisions.[2] At the same time, Art. V New York Convention only allows for re-litigation but does not demand it.[3]

This leads to a situation where precise positive rules at the enforcement stage on how to treat previously unsuccessful annulment proceedings or lack of such proceedings do not exist. However, both common law (1.) and civil law (2.) jurisdictions have developed approaches that allow to address these questions in practice (3.).

1. Common law approaches

a) Issue estoppel

The concept of issue estoppel forms part of the common law doctrine of *res judicata*.[4] It means in essence that an issue that was decided at one point between the parties should not be trialed again.[5] This doctrine also applies to set-aside and subsequent enforcement proceedings.[6] However, the courts retain discretionary power to not apply issue estoppel if this would lead to an unjust outcome.[7]

Issue estoppel will be limited to cases where the legal issue is identical at the annulment and enforcement stage, which includes grounds of Art. V New York Convention where the relevant standard is one of the law of the seat, or an international one. The grounds of Art. V(2) New York Convention (arbitrability at and public policy of the enforcement state) will therefore generally not fall under the doctrine of issue estoppel.

While the concept of *res judicata* exists in civil law jurisdictions, it does not cover issue estoppel as understood by common lawyers. In most civil law jurisdictions, *res judicata* only applies to the *dispositf*, i.e, the operative part of the judgment.[8]

b) Abuse of process

The doctrine of abuse of process refers to that a party may not raise "in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones".[9] While issue estoppel addresses cases in which the parties have actively pleaded certain facts, abuse of process rather concerns cases in which the parties have conducted proceedings and *not* raised a certain issue, or even have failed to initiate proceedings that were available. Even more than the doctrine of issue estoppel, the doctrine of abuse of process provides the courts with far-reaching discretion as to whether and how to apply it.[10]

For our purposes, this means that under the doctrine of abuse of process, an award-debtor who initiated set-aside proceedings and failed to raise a certain issue as annulment ground, or an award-debtor who abstained from initiating annulment proceedings altogether, might be precluded from raising any issues that it could have raised at the annulment stage.[11]

2. Civil Law approaches

As noted above, there is no equivalent to common law's issue estoppel in most civil law jurisdictions. However, there are concepts akin to abuse of process. In civil law jurisdictions, this concept tends to be called abuse of right[12] or, in Latin, *venire contra factum proprium*.[13] It will apply when a party violates legitimate expectations that arose due to its own behaviour, or when it otherwise contradicts principles of good faith.[14] It comes naturally to this concept to endow the court with a considerable margin of discretion so that its application will be highly fact-specific.

For our purposes, and as with the common law notion of abuse of process, the abuse of rights doctrine may come into play where a party has not sought annulment prior to resisting enforcement or has not raised a certain argument during annulment proceedings.

Both abuse of process and abuse of rights doctrines will generally not be relevant to issues of arbitrability and public policy under Art. V(2) New York Convention, as these exceptions are aimed at protecting public and third party interests and can be raised by the enforcement court *sua sponte*.

3. Practical application

The analysis shows that while there are legal concepts that might address all of the situations in which there was no successful set-aside, none of these concepts allows for a precise determination of the outcome of a case in an abstract way. This is because all of the doctrines are fact-specific and confer considerable discretionary power on the court.

There is a lot of inconsistency in the case-law of the different jurisdictions and even within one and the same jurisdiction. However, the general tendency in both common law and civil law seems to be that:

a) Issue estoppel prevents retrial at the enforcement stage of jurisdictional and procedural issues that were raised and decided during annulment proceedings at the seat. Civil law jurisdictions with broad conception of *res judicata* might arrive at the same result, but even in the presence of a narrower conception of *res judicata*, some civil law courts reach this conclusion.[15]

b) Common law's abuse of process and civil law's abuse of rights doctrines do generally not prevent a party who has failed to seek set-aside at the seat from relying on jurisdictional or procedural defects to resist enforcement, as there is in principle no bad faith in relying solely on this separate leg.[16] However, if a party has conducted set-aside proceedings without raising the relevant objections, then the mentioned doctrines might prevent the party from raising the issues in question to resist enforcement.[17]

c) The grounds of Art. V(2) New York Convention (arbitrability and public policy) are generally never precluded.

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[1] See e.g., the English Foreign Judgments (Reciprocal Enforcement) Act 1933, or section 328 of the German Code of Civil Procedure.

[2] This might be because of general uncertainty of courts treating this subject-matter and also because the recognition of a foreign set-aside decision does not necessarily concern an identical matter as the potential domestic enforcement decision.

[3] *Nazzini*. Enforcement of international arbitral awards: res judicata, issue estoppel, and abuse of process in a transnational context, American Journal of Comparative Law, 66(3), 2018, p. 607 and following.

[4] For this and a summary of the different sub-concepts of res judicata under English law, see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, 03 July 2013, [2013] UKSC 46, paras. 17 and following.

[5] The criteria for issue estoppel, even in a cross-border context, were found to be that the previous judgment was a final decision on the merits by a competent court and that the subject matter of and the parties to the cases were the same, see *Carl Zeiss Stiftung v. Rayner & Keeler, Ltd.* [1967] 1 AC 853 (HL) 919 (Eng.).

[6] This was stated as *obiter* in *Dallah Real Estate & Tourism Holding, Co. v. Ministry of Religious Affairs of the Gov't of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, para. 98; *Gujarat NRE Coke, Ltd. v. Coeclerici Asia (Pte), Ltd*. [2013] FCAFC 109 (Austl.), para. 65: "it will generally be inappropriate for [...] the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration."

[7] See e.g., *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC (Supreme Court of Canada) 44, 2 S.C.R. 460, paras. 62 - 63.

[8] In some civil law jurisdictions, however, *res judicata* might also extend to the necessary parts of reasoning of the decision. See International Law Commission, Berlin Conference (2004), Interim Report: "*Res judicata*" and Arbitration, 71 Int'l L Ass'n Rep Conf, p. 843; *Hovaguimian*, The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or Not to Bind?, Journal of International Arbitration 34, no. 1 (2017), p. 82.

[9] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, 03 July 2013, [2013] UKSC 46, para. 17; see also

Henderson v Henderson (1843) 3 Hare 100, 115.

[10] International Law Commission, Berlin Conference (2004), Interim Report: "*Res judicata*" and Arbitration, 71 Int'l L Ass'n Rep Conf, p. 836.

[11] *Nazzini*. Enforcement of international arbitral awards: res judicata, issue estoppel, and abuse of process in a transnational context, American Journal of Comparative Law, 66(3), 2018, p. 622.

[12] International Law Commission, Berlin Conference (2004), Interim Report: "*Res judicata*" and Arbitration, 71 Int'l L Ass'n Rep Conf, p. 843.

[13] German Federal Court of Justice, Order of 16.12.2010, III ZB 100/09, para. 22.

[14] Ibid.

[15] See, e.g., German courts: Higher Regional Court of Brandenburg, Order of 20 May 2020, 11 Sch 1/19, at II.B.2.b.aa does not give any reasoning; Higher Regional Court of Berlin, Order of 18 August 2006, 20 Sch 13/04 at II.2.a refers to section 328 of the German Code of Civil Procedure ("Recognition of Foreign Judgments"), but the case concerned *successful* set-aside proceedings.

[16] See *Dallah Real Estate & Tourism Holding, Co. v. Ministry of Religious Affairs of the Gov't of Pak.* [2010] UKSC 46, [2011] 1 AC 763, para. 28; *PT First Media Tbk v Astro Nusantara International BV* [2013] SGCA 57, paras. 65 - 74; German Federal Court of Justice, Order of 16.12.2010, III ZB 100/09, para. 22.

[17] See e.g., *G. Born*, International Commercial Arbitration, 3rd ed., 2020, § 26.05 [C][1][j]; a similar idea is expressed in Art. 16(3) of the UNCITRAL Model Law.

Call for Contributions for articles from our Student Members

The Chartered Institute of Arbitrators Singapore branch invites its Student Members to submit written submissions for its e-newsletter.

If you are a Student Member[1] of the Chartered Institute of Arbitrators, the Singapore branch cordially invites you to contribute to our quarterly e-newsletter. The details for the submission are:

What can you submit?

Case analysis/summary of an ADR related case (up to 750 words)

Article on an ADR related topic (up to 1,000 words)

News update on ADR related trends in Singapore (up to 750 words)

Where can you submit?

You can write to secretariat@ciarb.org.sg to submit.

Is there a deadline?

Your submission should reach us by **Friday, 28 April 2023**.

Your submission must be previously unpublished (not yet submitted for publication) as of **28 April 2023** and should include an author's statement of originality. It should use OSCOLA or some other well-established legal citation guide (e.g., Bluebook) and must be in MS word format.

For more information or questions, kindly email secretariat@ciarb.org.sg.

[1] Student membership is free of cost and valid for a maximum of 3 years per application. The application link is accessible at: https://www.ciarb.org/membership/student-membership/

For more information, please visit our website.

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