# ReSolution *in Brief*

## New Zealand and China announce paths to strengthen trade links

In June, high-ranking politicians in New Zealand utilised recent exchanges to commit to the strengthening of trade between New Zealand and China.

The visit of Chinese Premier Li Qiang to New Zealand marked a considerable step in the relations between China and New Zealand. Notably, during his visit, it was announced that China would be removing the need for New Zealanders to obtain a visa for travel lasting under 15 days.

While this was occurring, New Zealand trade minister Todd McClay visited the Chinese minister of commerce, Wang Wentao, in Beijing. The two used the occasion to launch negotiations on service trade. The negotiations will tie into the 2022 New Zealand-China Free Trade Agreement Upgrade Protocol, an upgrade to the original 2008 New Zealand-China Free Trade Agreement.

The 2022 Upgrade sought to create pathways to strengthen cooperation on competition policy, e-commerce, government procurement and the impact of trade on the environment. The negotiations launched by the ministers will work towards updating the rules for trade in services.

Minister McClay also commented on China's recent applications to join CPTPP and the Digital Economy Partnership Agreement (**DEPA**). The minister reaffirmed that China's acceptance into the blocs would rest on the collective decisions of the current member States. DEPA was signed in 2020 between New Zealand, Singapore and Chile with the intention of creating a framework for trade rules in the digital economy.

## RCEP Update: Chile, Hong Kong and Sri Lanka look to join world's largest economic bloc

When the Regional Comprehensive Economic Partnership (**RCEP**) was formed in 2020, it immediately became the largest free trade agreement by population. By 2025, that might expand further with the potential entry of the bloc by Chile, Hong Kong and Sri Lanka.

- **Chile** – In mid-June, Chile's undersecretary for international economic relations, Claudia Sanhueza Riveros, submitted the formal letter of application. If successful, Chile would be the first member State from Latin America and the first from outside the Asia-Pacific region.
- **Hong Kong** – Hong Kong submitted a formal request to join RCEP immediately after it came into force in early 2022.

The secretary for commerce and economic development, Algernon Yau, outlined a portion of Hong Kong's strategy for acceptance, including engaging in meetings with the member States as well as business stakeholders.

- **Sri Lanka** – The Sri Lankan president, Ranil Wickremesinghe, revealed in 2023 that Sri Lanka's application earlier that year had been made to strengthen economic links with China, Japan and South Korea. The move forms part of Sri Lanka's overall pivot to increase trade with East Asia. Sri Lanka has identified the region as having advanced rapidly.

RCEP currently includes New Zealand, Australia, ASEAN, Japan, South Korea and China. New Zealand ratified RCEP in November 2021.

## Equatorial Guinea joins ICSID, Honduras takes a step back

The International Centre for Settlement of Investment Disputes (**ICSID**) has just welcomed Equatorial Guinea as its 166th member. In June, Equatorial Guinea's ambassador to the United States signed the ICSID Convention with the intention of *ensuring strong legal guarantees to foreign investors.*

Once Equatorial Guinea ratifies the ICSID Convention, it will be represented in the Administrative Council. This means that Equatorial Guinea will be able to participate in ICSID's governance, including the approval of rules of procedure for ICSID cases.

In other ICSID news, Honduras has formally announced its decision to leave. In February, Honduras sent the World Bank written notice under Article 71 of the ICSID Convention of its denunciation of the ICSID Convention.

The written notice means that in six months denunciation will occur, releasing Honduras from its obligations to subject itself to ICSID's dispute resolution mechanics. The World Bank has since upheld its duty under Article 75 to notify all ICSID signatory states, including New Zealand.

## Sri Lanka ratifies, and Iraq signs the Singapore Convention

*What is the Singapore Convention?*
The United Nations Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**) entered into force on 12 September 2020. This landmark instrument lays the foundation for effective international trade and commerce across borders, offering a framework for parties to a commercial dispute to enforce and invoke international written settlement agreements resulting from mediation (Article 1). This amicable approach to resolving disputes is consistent with the United Nations Sustainable Development Goal 16 of promoting *peaceful and inclusive societies* and *justice for all.*

Since its enactment, the Singapore Convention has received overwhelming global support. As of 3 July 2024, it has 57 signatories and 14 parties, including some of the world's largest economies, such as the United States of America, China, India and the United Kingdom.

*Sri Lanka*
On 24 February 2024, Sri Lanka ratified the Singapore Convention after the Sri Lankan Parliament enacted the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation (Act No. 5 of 2024) in January 2024. The Act reflects the general principles of the Singapore Convention and adopts a wide interpretation of *commercial* consistent with the UNCITRAL Model Law on International Commercial Arbitration.

*Iraq*
More recently, Iraq signed the Singapore Convention in April 2024. One of Iraq's main justifications for joining is to maintain trade relations and create a more effective business environment.

*New Zealand's position*
Despite being a mediation-friendly jurisdiction, New Zealand has not signed the Singapore Convention. Given its global popularity and the increasing emphasis on using mediation to settle disputes, time will tell whether New Zealand will follow suit.

## New Zealand High Court looks at whether it was *certain and appropriate* to enforce mediation clause

In *Waddell v Jhaveri Holdings Limited* [2024] NZHC 1584, the High Court considered a mediation clause in a lease agreement.
On 17 December 2021, the plaintiff, Waddell Business Trust (**WBT**), leased a unit (the **Property**) to the defendant, Jhaveri Holdings Ltd (**JHL**), for a three-year term beginning on 1 February 2022. Clause 5.1 of the Sixth Edition 2012

(5) of the ADLS form used by the parties states that: *[u]nless otherwise provided in this Agreement*, the parties will endeavour to resolve any dispute that cannot be remedied through mediation.

During 2022 and 2023, JHL defaulted on the rent and outgoings. Despite Mr Jhaveri's guarantees that the defaults would be remedied, these promises were not kept. WBT applied for summary judgment for the unpaid rent and outgoings. JHL claimed a set-off for damages, arguing that WBT breached the lessor's covenants in the lease due to issues with the Property's interior.

The issue of interest is whether WBT was obligated to serve JHL with a notice calling for mediation when the lease was terminated to recover arrears of rent and outgoings rather than proceeding to Court.

Associate Judge Brittain affirmed that the Court may stay proceedings where the parties have agreed to alternative dispute resolution, provided the process is certain and appropriate in the circumstances. His Honour held that the obligation to mediate in clause 5.1 of the agreement was not engaged. First, it was not disputed that JHL had defaulted on payment. Mr Jhaveri recognised the debt and promised to pay it. Second, JHL failed to discharge the evidential onus of a genuine dispute about the Property's interior. JHL did not notify WBT of the issues, and its evidence was insufficient to support the claim. Third, his Honour held that the words: *[u]nless otherwise provided in this Agreement* are determinative. The Agreement was clear. Under clause 1.1, JHL must pay rent without deductions or set-offs. Moreover, clause 43.4 gives WBT the right to bring proceedings to recover any rent or other monies owed under the lease.

## Hong Kong Court of First Instance weighs up whether interim injunction can be considered an award

In *W v Contractor* [2024] HKCFI 1452, an employer in a construction contract sought to appeal a decision made in arbitration regarding a call on a bond. In that decision, the arbitrator had made an interim injunction preventing the employer from calling on a bond for payment. The appeal rested on whether an interim injunction could be considered an award before a point of law could be examined.

The employer appealed the arbitrator's decision on the grounds that the arbitrator had erred in law. Under section 6(4) of Schedule 2 of the Arbitration Ordinance, an appeal on law can only succeed if it was *obviously wrong* or the question is of general importance and the decision is *open to serious doubt*.

The Court noted that the threshold necessary to meet the standard of *obviously wrong* or *open to serious doubt* was high. As the first stage of the appeal is an application for leave, the Court is to look primarily at the arbitrator's award and will limit the submissions by the parties. The Court applied the findings of an earlier judgment:

> What has to be demonstrated to the Court, quickly and easily, without meticulous legal argument, is that the decision of the tribunal simply cannot be right, or that there are serious doubts as to the correctness or reasoning of the Award.

However, before considering whether the applied law met this standard, the Court directed that the fundamental status of the decision be examined. This is because, under section 6 of the Schedule, the Court is only able to consider an appeal on an arbitrator's decision if that decision was an award. The question is, does this include interim injunctions? The Court referred to *G v N* [2024] HKCFI 721 to demonstrate the position that it did not.

The employer noted that in *G v N*, the decision was labelled as an interim injunction. In this case, the decision was called "an award". However, the Court reiterated that it was concerned with the substance of the decision.

After assessing the decision's nature, substance and form, the Court held that despite its name, the arbitrator's decision was not an award. The Court noted that the injunction granted in the decision was interim in nature and was pending the conclusion of the resolution of the substantive dispute in the arbitration. The Court, therefore, found in favour of the contractor.

## *CF v SHK & S Listco* [2024] HKCFI 1493: plain language denies stay of enforcement

*CF v SHK & S Listco* concerned whether the Hong Kong Court of First Instance should exercise its discretion to stay enforcement of an arbitration award originating from a

put option dispute.

On 22 June 2019, CF (the award creditor) sold 80% of its shareholding in CF China to SHK (the award debtor). Three months later, CF, CF China and SHK entered a Shareholders Agreement that included a put option whereby CF could require SHK to purchase its remaining 20% shares in CF China. The initial put price was RMB 1.2 billion (**IPP**). SHK's obligations were guaranteed by S Listco (the second award debtor) in a separate guarantee. Under clause 3 of the Settlement Agreement dated 28 April 2022, SHK agreed to pay CF the IPP in nine instalments *without any withholding, set-off, counterclaim, retention or deduction* (the **Anti-Set-off Clause**).

A dispute arose when CF exercised the put option, and SHK failed to pay the fifth instalment. SHK and S Listco asserted that CF had made *false and misleading* financial misrepresentations and, therefore, suffered loss and damages exceeding the IPP. The arbitrator found in favour of CF. SHK and S Listco were ordered to pay the remaining IPP, interests and costs *without any withholding, set-off, counterclaim, retention or deduction*. SHK and S Listco applied to the Court to stay enforcement of the award until their cross-claims for misrepresentation were heard in a second arbitration.

When considering whether to stay enforcement, the Court applied the principles in *S v G* [2021] 3 HKC 272, upheld by the Court of Appeal in *S v G* [2022] HKCA 383. The starting point is that a judgment creditor is entitled to enforce the judgment it has acquired. There must be *very special circumstances* to justify a stay of enforcement. CF should only be deprived of the award where there is abuse or manifest injustice. Given the plain language of the Anti-Set-off Clause, it was clear that any right of set-off or counterclaim and deduction would be excluded. Therefore, the Court found it would not be unjust for SHK to be bound by the clause.

## Consumer's appeal against English High Court judgment on public policy exclusions backfires

In *ReSolution Issue 38*, we covered *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm), where Ms Zhang applied to the English High Court to set aside a Hong Kong arbitral award on the basis that she was protected by the Consumer Rights Act 2015 (the **Act**).

Central to Ms Zhang's argument was that the relevant contract was signed by her as a consumer and that it had a close connection to the United Kingdom. This being the case, the rights accrued under the Act meant that enforcing the award would run against public policy by way of section 103(3) of the Arbitration Act 1996.

The High Court agreed that Ms Zhang was a consumer but held that the contract did not have a close connection to the United Kingdom, despite Ms Zhang's citizenship. Ms Zhang appealed the judgment.

In *Eternity Sky Investments Ltd v Zhang* [2024] EWCA Civ 630, Ms Zhang argued again that as a citizen and resident of the United Kingdom, the contract in which she had given a personal guarantee for the bond of her deceased husband's business had a close connection to the United Kingdom.

The Court of Appeal (the **Court**) agreed with the High Court. Each aspect of the contract concerned a matter closely related to Hong Kong. Two factors also stuck out for the Court:

a. It was Ms Zhang herself who commenced arbitration in Hong Kong.

b. The contract had not even been signed in the United Kingdom.

Unfortunately for Ms Zhang, the Court disagreed with the High Court that she was a consumer. Ms Zhang had entered into a commercial transaction and had done so to support the business. While Ms Zhang's personal motivation may have stemmed from the marriage, this was not the function of the transaction.

The Court reiterated at [74] that motivation is to be determined objectively by the *sphere of activity* of the transaction. Otherwise, a clearly unworkable situation would arise. Duties regarding fairness attach to contracts when one party is a consumer. This would see parties constantly second-guessing the motivation of their counterparties to ascertain their status.

## *The parties began by playing cricket but then switched to baseball:* English Court of Appeal decides whether reinsurance dispute should be heard in London or New York.

In *Tyson International Company Ltd v Partner Reinsurance Europe*

*SE* [2024] EWCA Civ 363, parties to a reinsurance contract (a Market Reform Contact - **MRC**) and a subsequent agreement (a Market Uniform Reinsurance Agreement - **MURA**) fell into disagreement over whether Partner Reinsurance had provided cover to Tyson International. Making matters worse, the parties could also not agree on where and how the disagreement was to be resolved.

The misalignment stemmed from the fact that the MURA, entered into by the parties a week after the MRC, contained a clause directing that arbitration occur in New York subject to New York law. The original contract had provided for arbitration in London, subject to English law.

Tyson International, the appellant, argued that the MURA was not meant to replace the MRC. Partner Reinsurance argued that it was, and consequently, the underlying dispute about cover should be heard by arbitrators in New York.

The Court first noted that there was *no doubt* the second agreement was valid. The question, rather, was whether the parties had intended it to supersede the original or merely vary it.

The Court found several factors clear:

- The parties were familiar with the terms and nature of the MURA. It was clear on its face what it was intended for. As a result, they would have known that New York would be the natural place of dispute resolution.
- The parties had used language indicating that they knew they were entering into a contractual arrangement rather than simply signing off on an administrative task.
- Partner Reinsurance signed and stamped every page of the MURA.
- The MURA contained a clause stating that the agreement would *supersede all contemporaneous or prior agreements and understandings, both written and oral*.
- Unlike in previous reinsurance agreements between the two, there was no statement in the agreement establishing that the MURA was subject to the MRC.

In the Court's view, the above factors suggested the document looked like a contract generally but also contained the key components of a valid and binding contract of reinsurance. Invoking the *proverbial duck*, if it looked like a reinsurance contract, then it likely was one.

Tyson responded that the arrangement lacked business common sense. The Court accepted that this absence was a considerable factor. However, this was not a situation where either outcome contained business common sense. Agreeing to one jurisdiction so soon after agreeing to another lacked business common sense. Yet, it was equally absent if both parties had intended to agree to English law when Partner Reinsurance was proposing New York law.

The Court found in favour of Partner Reinsurance.