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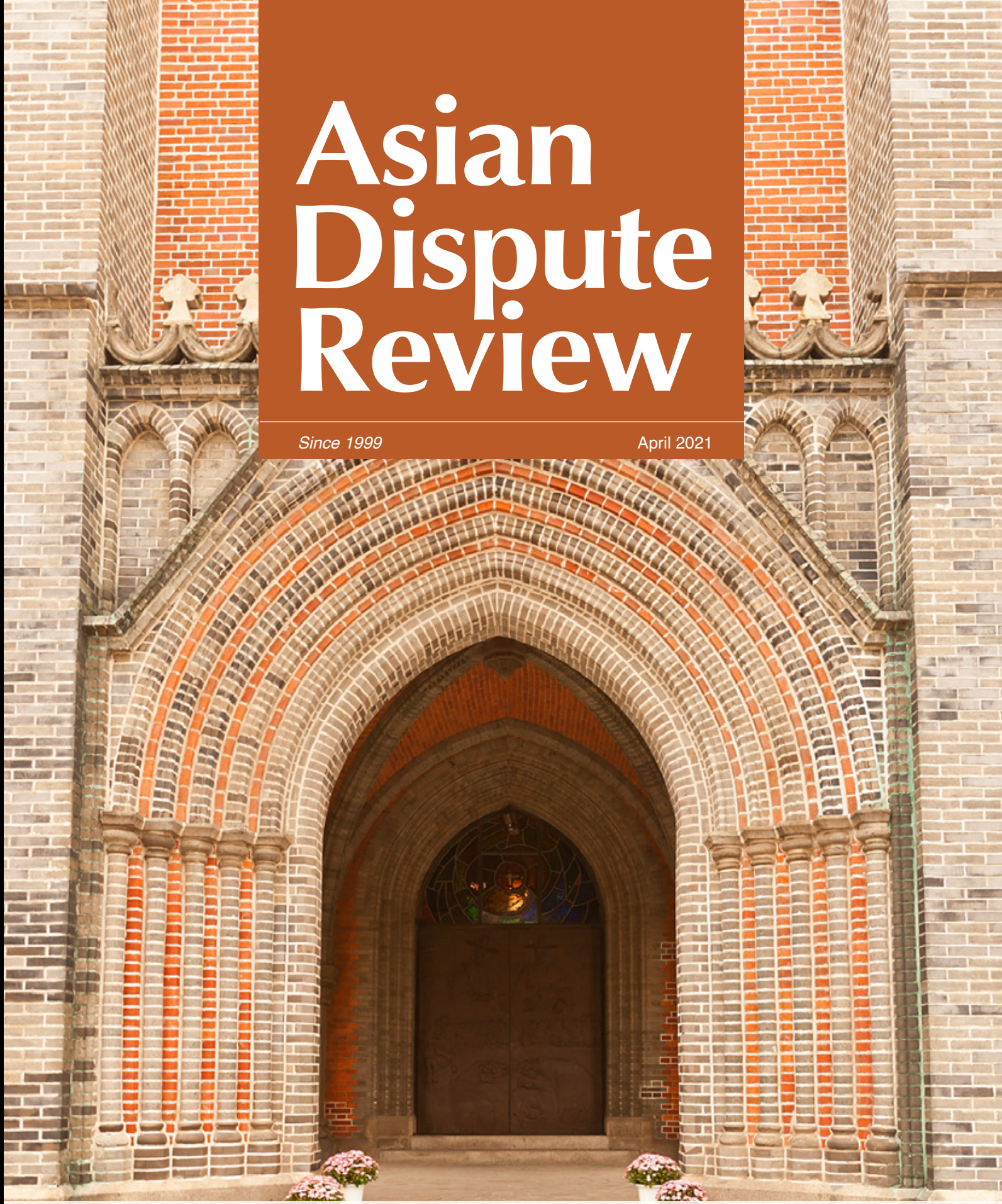

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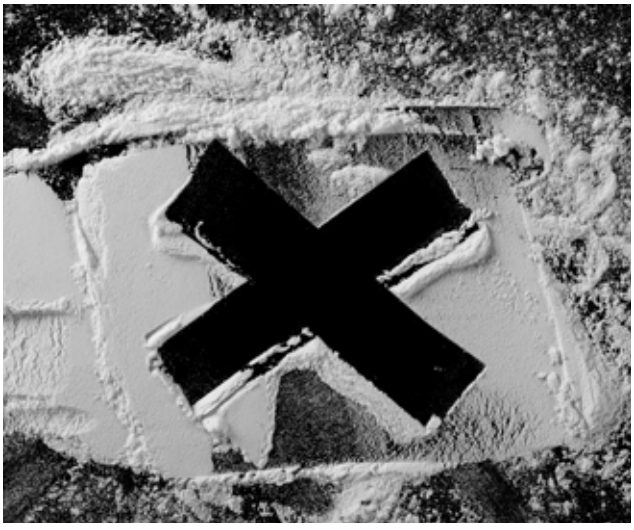

Arbitrator Temperance: David Caron's Rule of X The 25th Goff Lecture 2020

Lucy F Reed

This is an edited version of the 25th Goff Lecture delivered on 27 October 2020.[1] It discusses the late Professor David D Caron's 'Rule of X', an ethics-based benchmark aimed at discouraging acceptance of an excessive number of arbitral appointments and promoting their more equitable and diverse distribution, along with professionalism. The article reflects two 'firsts' in the history of the Lecture series: to have been delivered both online and by a woman - the latter prompting Neil Kaplan QC to comment that the prior absence of female Goff lecturers had been an "egregious error".

I. Introduction

I delivered a keynote address in September 2018 to a University of California School of Law (Berkeley) conference, 'The Elegance of International Law', commemorating the late Professor David D Caron, a giant of international arbitration. The title and content of a lecture he had delivered at the Master in International Dispute Settlement (MIDS) course at the Graduate Institute, University of Geneva Law School in 2017 - 'Arbitrators and the Rule of X'[2] - had intrigued me. David stated at the outset that "this discussion is only starting and … presents a much deeper agenda than [is] currently set out."[3]

In further developing David's 'Rule of X', I had ambitions beyond merely publishing my keynote address[4] - namely, that the 'David Caron Rule of X' should become part of the international arbitration lexicon, like the (Alan) Redfern Schedule, the (Neil) Kaplan Early Opening, and the (less well-known) Reed Retreat.

II. Caron's Rule of X

The objects of David's MIDS topic were "the far-flung array of individuals who serve as international adjudicators, arbitrators, commissioners and judges, … the most difficult group in international courts to predict, to give a logic to."[5] He disagreed with other academics that the primary driver for international arbitrators was reappointment in and of itself, and focused his research on their reappointment "by virtue of their reputation".[6]

> "… '[O]ver-trading'[in arbitral appointments] could make it impossible for tribunals to find available hearing dates …, cause arbitrators to arrive unprepared, depart without time for deliberations and force parties to wait months or even years for awards …"

Contesting the "overstated claim" that international arbitrators were a mafia, club or cartel, David focused on how the "disruptive practice" of over-commitment underlay much current criticism of them. Such 'over-trading' could make it impossible for tribunals to find available hearing dates less than two years hence, cause arbitrators to arrive unprepared, depart without time for deliberations and force parties to wait months or even years for awards lowering the overall quality of international arbitration.

David considered this problem to be "more nuanced and widespread" than simply the packed schedules of particularly busy arbitrators. It applied equally to practitioner and academic arbitrators with only one or two appointments who also had to cope with, respectively, client demands and teaching schedules.[7]

HKIAC, ICC, ICSID and other leading arbitral institutions responded to over-commitment by requiring prospective arbitrators to document anticipated availability or capacity (eg, by disclosing exactly how many cases they had and completing calendars three years in advance). Such external requirements, though important, provided only minimal information to appointors and were not "what arbitrators professionally should demand of themselves and each other."[8] An internal control was, therefore, needed. In David's words (and central to this lecture):[9]

> "[A]rbitrators need to reflect on the amount of appointments they are reasonably able to handle. … [T]he needed internal commitment is gained by what I call the Rule of X."

Thus, all arbitrators should:

> " … set a number - X - as the upper limit of cases that … [they are] capable of responsibly sitting on at the same time."[10]

Its underlying purpose was to establish a benchmark for excellence. There is no uniform number X. As "the individual circumstances and capacities of arbitrators vary tremendously",[11] it is necessarily subjective and varies with individual circumstances: eg, experience, age, energy, full vs part-time arbitrator status, the nature of other work (practice or academic?), legal culture, use of tribunal secretaries. X should vary over time and over a career.

> "[A]rbitrators need to reflect on the amount of appointments they are reasonably able to handle. … [[T]hey should] … set a number - X - as the upper limit of cases that … [they are] capable of responsibly sitting on at the same time."
> (David D Caron)

David identified one critical variable of X: the number of presiding arbitrator appointments, which could exponentially increase the work required. In my Berkeley address, I added:[12]

> " … [N]o doubt [David] would have expressly elaborated on more variables: treaty vs commercial cases, complex vs modest cases, personal factors like family-life balance, intellectual challenge, the sheer fun that can come with sitting with certain other arbitrators and hearing certain counsel."

However many the variables and subjective the exercise, the *consequences* of having an X benchmark are profound. First, it forces arbitrators to assess each prospective appointment more carefully, especially when at X-1:[13]

> "I began to think very seriously about the characteristics of the arbitrations I most seek to be part of - is a state or government agency a party, who are the other arbitrators, the counsel, what is the issue?"

Second, if an arbitrator at X turns down additional appointments, the "good news for arbitration and the parties in the X arbitrations is that [he or she] will have a clear [and] strong incentive to more promptly finish some of the X arbitrations."[14]

> "… [H]aving an X benchmark … forces arbitrators to assess each prospective appointment more carefully, … [and] gives arbitrators "a more robust conception" of their role, thus improving the quality of their arbitration work and international arbitration generally."

Third, a personal Rule of X gives arbitrators "a more robust conception" of their role, thus improving the quality of their arbitration work and international arbitration generally.[15] The true cost of over-commitment was that "over commitment in the number of arbitrations is under commitment to any particular arbitration."[16]

Superficially, the Rule of X may seem relevant only to well-established arbitrators - those approached often enough that they can afford to decline appointments. When arbitrators at X, or close to it, turn down relatively small or less interesting arbitrations, the result should also be "[fewer] cases in the hands of a few, and a few cases in the hands of many, with new arbitrators rising from more diverse backgrounds."[17] It takes more than the Rule of X to achieve greater diversity. I hope that David's optimism proves warranted.

III. Temperance

Caron's Rule of X is one of self-discipline - of restraint and honest self-assessment in responsibly managing a caseload, ideally in balance with life outside arbitration. It is a discipline of restraint. As self-discipline is often overlooked and undervalued in the modern commercial market, I have looked to sources of classical Greek moral and ethical philosophy for its foundation. The main ancient Greek philosophers - Socrates, Plato and Aristotle - questioned what it meant to be 'good' and focused on virtue in reaching *eudaimonia* (roughly translated as 'happiness' or 'well-being'), which involves such virtues as justice, moderation and courage. *Eudaimonia* differs from modern definitions of 'happiness' as it relates to purpose and correctness rather than emotion, requiring one to fulfil one's life in the correct way in accordance with nature.

Aristotle's *Nicomachean Ethics* (c 350 BC/BCE) posits that virtue is essential in and of itself as opposed to a means to an end. "Honor, pleasure, intelligence, and excellence in its various forms" apply both in their own right and in reaching *eudaimonia*.[18]

> "Caron's Rule of X is one of self-discipline - of restraint and honest self-assessment in responsibly managing a caseload, ideally in balance with life outside arbitration. It is a discipline of restraint."

Zeno's Stoic philosophy (c third century BC/BCE), goes further. The central tenet of Stoicism (which also differs from its modern meaning) is that only adherence to moral virtue is necessary for goodness and *eudaimonia*. By contrast with the Stoics, Plato and Aristotle believed that externalities, such as health and wealth, also contributed to happiness. They and Zeno, however, all considered self-control a central virtue. Much Hellenistic moral and ethical philosophy was concerned with the concept of *sophrosyne* (roughly translated as 'temperance' or, in Latin, *temperantia*), in the sense of inner balance or moderation and self-control, not measured against outside responsibilities or compliance with external laws or codes.

Plato's *The Republic* (c 375 BC/BCE), translates *sophrosyne* as "sobriety," a "kind of beautiful order" linked to self-control. Socrates identifies a smaller (good) part and a larger (bad) part within a person's soul and mind: the good part can be and is master over the bad, creating a harmonious balance, resulting in *sophrosyne*.

A passage from Plato's *Charmides* (c 380 BC/BCE) citing Socrates on the significance of self-knowledge in temperance is also relevant.[19] Essentially, temperance means knowing oneself and being able to discern both what one knows and does not know and to judge what others know and think they know. This rings true for the self-aware and humble international arbitrator.

In contemporary perspective, both *eudaimonia* and *sophrosyne* inform Caron's Rule of X on the disruptive practice of over-commitment, underscoring the arbitrator's personal responsibility to determine X as "the upper limit of cases that he or she is capable of responsibly sitting on at the same time."[20]

Temperance also reinforces professionalism. Professionals bear a sense of responsibility to the public, above and beyond material incentives.[21] Unsurprisingly, one discourse on professionalism refers back to the early Dialogues of Plato, holding that "the true professional not only possesses the practical skills and knowledge of his or her trade but is also disciplined in moral excellence."[22]

An accepted legal profession norm requires arbitrators, like judges, to apply reasonable diligence and expedience in discharging their functions, including the timely issuance of awards. Such exhortations appear in ancient Roman and ancient Chinese law, the Old Testament and Islamic law.

> "Greek philosophers … focused on virtue in reaching *eudaimonia (*roughly translated as 'happiness' or 'well-being'), which involves such virtues as justice [and] moderation … Much Hellenistic moral and ethical philosophy was [also] concerned with … *sophrosyne* (roughly translated as 'temperance' …)."

The Bangalore Principles of Judicial Conduct (2002)[23] and similar modern codes echo this norm. Hong Kong's *Guide to Judicial Conduct* provides that judges "should be diligent in

the performance of their judicial duties [and] endeavour to be punctual and to perform their judicial duties with reasonable promptness", and "deliver reserved judgments within a reasonable time, taking into account the complexity of the matter and other work commitments."[24]

Caron's Rule of X is, by analogy, a tool to assist arbitrators in fulfilling their professional responsibilities in general and the norm of expediency in particular.

IV. Implementing the Caron Rule of X

Modern social scientific and behavioural thought assists in analysing why over-commitment happens and developing positive suggestions on implementing the Rule of X.

If, as well as causing delayed hearings and awards, over-commitment leads to reputational risk, why do arbitrators take on too many cases? Frank admissions by colleagues informed David that paranoia often underlay over-trading - reluctance to refuse new appointments for fear of not being asked again, being sidelined and losing not only reputation but also their living. In my experience, however, while I may be asked my reasons for refusing appointments, I am always thanked.

> "… [B]oth *eudaimonia* and *sophrosyne* inform Caron's Rule of X on the disruptive practice of over-commitment …"

Over-trading may also stem simply from a reluctance or inability to say "no", perhaps a habit formed at the early stages of building one's arbitration practice. Journalist Charles Duhigg advises[25] exercising the 'muscle' of willpower to break habits: in our context, to say "no" to arbitration X+1.

> "… [P]aranoia often underlay over-trading - reluctance [by arbitrators] to refuse new appointments for fear of not being asked again, being sidelined and losing not only reputation but also their living. … [I]t may also stem simply from … an inability to say "no" …"

An arbitrator should take concrete steps to calculate a personal X at a specific stage of his or her career and then apply it strictly thereafter. Calculating a personal X requires, for some, accepting fewer rather than further appointments. The Rule of X overlaps with business author Greg McKeown's 'essentialism', described as the pursuit of 'less but better', undertaken in a disciplined way, forcing one "to make decisions by design, rather than default".[26]

Further, "[w]hile we may not always have control over our options, we always have control over how we choose among them."[27] Thus, while arbitrators cannot control which parties, co-arbitrators or institutions seek to appoint them and for which cases, they can control which they should accept and, perhaps, how to communicate that they have/do not have capacity for more appointments.

Unflinching realism is critical in calculating one's own X factor. The 'planning fallacy' heuristic is the human tendency to underestimate how long a task will take - eg, where a new arbitration assumed not to require substantial attention for many months opens with a barrage of emergency interim measures applications. Social scientist Daniel Kahneman and cognitive psychologist Amos Tversky coined the phrase 'planning fallacy' in 1979.[28] Of further relevance is Dr Kahneman's book, *Thinking, Fast and Slow*:[29] for an

arbitrator to apply Caron's Rule of X is to think slow (or, to be grammatically correct, slowly).

Behavioural science posits that humans have two types of cognitive function: 'System 1' - fast, automatic and intuitive; and 'System 2' - slow, calculative and deliberative. Thus, System 1 is an arbitrator who accepts a new case immediately, perhaps thinking that it might be his/her last. System 2 is an arbitrator who thinks carefully about how the new case would fit in with an existing and prospective caseload.

> "Unflinching realism is critical in calculating one's own X factor."

Checklists may provide further aids to decision. Doctor Atul Gawande of Harvard Medical School, building on a 'safe surgery' checklist he developed for the World Health Organization, discusses the proven benefits of checklists in the medical, aviation, construction and financial sectors.[30] He focuses on two of the reasons for human fallibility identified by philosophers: ignorance and ineptitude. The latter embraces instances in which "the knowledge exists, yet we fail to apply it correctly."[31]

Good checklists seem to provide protection against failure because they "remind us of the minimum necessary steps and make them explicit."[32] They are precise, to the point and easy to use, even in difficult situations. They do not spell out everything, but provide reminders of the most critical steps that even experienced professionals may miss. By focusing attention on necessary issues to consider, they instil self-discipline - *viz*, temperance.

Based on Dr Gawande's *Checklist Manifesto*, the following are two illustrative checklists of my own:

	Checklist 1: Factors In Calculating X
1	Overall timeframe: 3 years? 5 years? Retirement?
2	Financial needs and wants
3	Overall amount of time available for arbitrator work
4	Anticipated family and/or other personal commitments
5	Desired balance of presiding and co-arbitrator roles
6	Desired intellectual challenge? Commercial v treaty cases?
7	Desired travel: How much? Where?
8	Risk tolerance: Parties and geography
9	Existing backlog
10	Other

	Checklist 2: Factors In Evaluating New Appointments Against X
1	Presiding or co-arbitrator appointment?
2	Identity of co-arbitrators, including reputation?
3	Identity of counsel? Experts?
4	Commercial or treaty case?
5	Apparent complexity?
6	Amount in dispute, as proxy for complexity?
7	Compensation factors?
8	Intellectual challenge: apparently new or repeat issues?
9	Anticipated calendar?
10	Likelihood of applications for provisional measures?
11	Anticipated level of contentiousness?
12	Drafting backlog?
13	Risk: Legal seat? Likely hearing venue?
14	Overall: Will the case add interest or fun?
15	Other

No doubt many other factors could be added or subtracted. "Admittedly, coming to a value for 'X' is an entirely subjective exercise."[33]

The process of strictly applying the X factor falls roughly into the category of the social scientist's 'nudge'. This derives from the work of economist Richard Thaler and legal scholar Cass Sunstein, authors of the misleadingly titled (for a serious and challenging book written against the backdrop of 'choice architecture': see below), *Nudging: Improving Decisions About Health, Wealth and Happiness*.[34] They are, in fact, not far from Plato and Aristotle's 'health, wealth and

happiness' (*eudaimonia*), though it is expressed more strongly in Professor Sunstein's 2015 article on the ethics of nudging.[35]

> "Good checklists … are precise, to the point and easy to use, even in difficult situations. They do not spell out everything, but provide reminders of the most critical steps that even experienced professionals may miss."

'Nudges' are "interventions that steer people in particular directions but … also allow them to go their own way."[36] Thus, "an intervention must not impose significant material incentives (including disincentives) [and] must fully preserve freedom of choice."[37] 'Choice architecture' means the inevitable (generally regulatory) framework influencing how people make decisions.[38] Caron's Rule of X is closest to a self-initiated "educative nudge," aimed at informing better personal choices of conduct.[39] In David's words:[40]

> "[A]rbitrators that benchmark themselves will be less likely to take on an irresponsible number of appointments, far beyond what they are able to handle, from which they must then dig themselves out."

'Freedom of choice' and 'self-initiation' issues naturally raise the role of external codes of conduct in regulating arbitrator behaviour.

V. External codes of conduct

Largely due to controversies surrounding investment treaty arbitration (such as conflicts of interest and issue conflict), arbitrator conduct is under the microscope. The focus is on repeat party appointments by States and investors; so-called 'double-hatting' by one person as arbitrator, counsel and/or expert; lack of gender and other forms of diversity; civility; and arbitrator availability and timeliness.

Soft codes of conduct for party representatives in international arbitration have influenced the crafting of codes for arbitrators.[41] The most advanced is the *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (Draft ISDS Code),[42] in which there is much to be said about ISDS arbitrators. I focus only on draft art 8.2. This raises the possibility - the text remains in brackets, for comment - of limiting ISDS arbitrators to an absolute number of arbitrations, designated for now as '[X]', explicitly to expedite decisions:

> "[Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions]."

I am firmly against any *fixed* case limit of [X] for all the reasons that I favour Caron's Rule of X. David would undoubtedly have opposed such a proposal: recall his warning that even a practitioner or academic arbitrator with a single appointment may cause as much delay as another arbitrator with many.

> "[A]rbitrators that benchmark themselves will be less likely to take on an irresponsible number of appointments, far beyond what they are able to handle, from which they must then dig themselves out." (David D Caron)

I emphasise again that the algebra of X is individual and subjective. For the legendary Professor Pierre Lalive, X was

five or six cases.[43] In my experience, some arbitrators with more than 20 appointments always respond quickly and in an informed way; others, whether they have few or many other appointments, clearly do not do the hard work themselves; others still are attentive but slow and should have lighter caseloads.

> "For both international arbitrators and arbitration counsel, clear external rules can and should complement self-policing or self-restraint. A rule setting a universal maximum [X] case number is … far too blunt an instrument to correct the disruption caused by arbitrator over-commitment."

Clearly, ISDS arbitration would lose a great deal of expertise by arbitrarily limiting arbitrators to universally fixed numbers of appointments without necessarily opening the door to additional qualified appointees. I am *not* against soft codes of conduct for international arbitrators *per se*. They are perhaps overdue. Arguably, some subset of arbitrators - whether large or small is hard to tell - has brought problems on itself by being notoriously and unconscionably late in scheduling hearings and issuing awards.

Tellingly, Professor Lalive predicted that externally imposed arbitrator responsibility would increase, as " 'irresponsibility' (ie, the lack of legal liability - civil and criminal - of arbitrators and arbitral institutions) would attract more and more attention" in both a narrow juridical perspective and "a broader, ethical or social sense."[44] The late Johnny Veeder QC was among those who warned that international arbitration practitioners would face external regulation if they did not regulate themselves. He deserves great credit for focusing and acting on the need for codes of conduct for counsel, as a lead proponent of the LCIA's pioneering *General Guidelines for the Parties' Legal Representatives* annexed to its Arbitration Rules.[45] Johnny elegantly observed:[46]

> "In the field of international arbitration, like State litigation, there are many fish competing in the same sea. Clear rules and self-policing are an essential part of any solution."

For both international arbitrators and arbitration counsel, clear external rules can and should complement self-policing or self-restraint. A rule setting a universal maximum [X] case number is, however, far too blunt an instrument to correct the disruption caused by arbitrator over-commitment. Far more effective would be arbitrator self-discipline (*sophrosyne* or temperance) in managing individual caseloads and achieving the norm of expedient decision-making. Although the entire international arbitration community would obviously benefit if arbitrators followed Caron's Rule of X, it is, at heart, an individual regime: recall David's hope that its impact would be to expand rather than contract the number and diversity of arbitrators.

VI. Conclusion

I do not intend that Caron's Rule of X should be included in codes of international arbitrator conduct. Unlike the '[X]' factor in the Draft ISDS Code, it is a personal compass, at best complemented by emerging external guidelines. Nor do I intend it to become an international arbitrator norm of practice: this would be not only overly ambitious but also presumptuous. The Rule of X must be self-imposed and self-monitored.

Instead - per my Introduction - my goal is shepherding Caron's Rule of X into the international arbitration lexicon, to encourage the *process* of calculating and applying it. It would then become both a routine part of our role as international

arbitrators and an integral part of our thinking in answering availability and capacity questionnaires posed by appointors. It would, therefore, underlie a personal checklist for appointment evaluation and become a nudge to ourselves.

I must concede that, to an extent, I am describing a norm: a sufficiently sound and shared foundation of temperance (*sophrosyne*) to foster a mutual sense of obligation, appealing to each arbitrator's self-interest and the well-being (*eudaimonia*) of the international arbitral community. Given David's MIDS lecture thesis that most arbitrators seek reappointment "by virtue of reputation", the question affects each of us: "Do I want a reputation as one who accepts any appointment or as one who is selectively exclusive, known not to accept all appointments but to manage a caseload well?" The question answers itself.

> "… [M]y goal is shepherding Caron's Rule of X into the international arbitration lexicon, to encourage the *process* of calculating and applying it."

So, what is *my* X factor? At Berkeley in 2018, speaking as a National University of Singapore professor and Director of the NUS Centre for International Law, my maximum was eight to ten cases, which proved overly ambitious as too many hearings and award drafting obligations came at the same time. As a full-time arbitrator, I now set X at 10-15 cases, at different stages and permutations.

My Berkeley address closed as follows:[47]

> "There may be many permutations for 'X' - but all require the type of self-awareness, self-discipline, and professional pride that David flagged in his lecture. Going forward, I will be raising the 'David Caron Rule of X', in terms, with colleagues. This does not mean asking others for a numerical 'X' - that is understandably variable and private - but instead urging potential arbitrators to identify the relevant factors and run their own 'X' equations. This will be my way to honor David's intentions, expressed in his MIDS lecture, to develop his concept of the 'Rule of X' in international arbitration."

I cannot improve on this in closing this Goff Lecture.

1 The author wishes to thank her daughter, Dr Madeleine Reed Glennon, for research on Greek philosophy and ethics; former student Mr Yiu Kai Tai; for research on modern social science and ethics; and editing assistance by Ms Lindsay Gastrell, senior counsel, Arbitration Chambers. She also thanks Neil Kaplan QC for inviting her to deliver the lecture, and everyone from co-sponsors City University of Hong Kong and HKIAC who made it possible.

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35 Cass R Sunstein, *The Ethics of Nudging*, 32 Yale Law Journal on Regulation 413 (2015) (hereinafter Sunstein).

36 *Ibid*, p 417.

37 *Ibid*.

38 *Ibid*, p 418.

39 *Ibid*, pp 427-428.

40 Caron, p 12.

41 In his 2007 Goff Lecture, Judge Charles N Brower noted the recurring theme in the Goff Lectures of the "ineluctable trend towards a uniformity of rules and laws governing international commercial arbitration." See *W(h)ither International Commercial Arbitration* (2008) 24 Arbitration International 181-198, at 182-183.

42 ICSID and UNCITRAL secretariats, available at https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf and https://uncitral.un.org/en/codeofconduct. *Editorial notes*: (1) See also *New and emerging dispute resolution rules: ICSID and UNCITRAL* [2020] Asian DR 141. (2) The consultation closed on 30 November 2020.

43 *Q&A with Professor Pierre Lalive*, Global Arbitration Review, No 5, p 3 (November 2008) (https://globalarbitrationreview.com/article/1027734/q-a-with-professor-pierre-lalive).

44 1998 Goff Lecture, *Irresponsibility in International Commercial Arbitration* (1999) 7(2) Asia Pacific Law Review 161-176, at p 162 (hereinafter Lalive).

45 See the current edition of 1 October 2020.

46 VV Veeder, Goff Lecture 2001, *The Lawyer's Duty to Arbitrate in Good Faith* (2002) 18 Arbitration International 431-451, at p 439.

47 Reed (note 4 above), p 166 (Berkeley) and pp 14-15 (Ecology).

Levelling the International Arbitration Playing Field: Outcome-Related Fee Structure Reform in Hong Kong and Singapore

Nils Eliasson & Edward Taylor

This article addresses reform proposals presently under consideration in Hong Kong and Singapore to allow lawyers to use outcome-related fee structures for arbitrations. The authors present a case for implementing such reforms to enable Hong Kong and Singapore to compete on a level playing field with other leading arbitration seats that already permit such fee structures.

Introduction

The emergence of Hong Kong and Singapore as world-class arbitration seats owes a great deal to the sophisticated and innovative legal frameworks they have each created in support of arbitration. Both jurisdictions have diligently updated their national arbitration laws over the years to reflect international best practice and the needs of arbitration users with amendments addressing, among other matters, the arbitrability of intellectual property disputes and the enforceability of emergency arbitrator relief. Hong Kong's commitment to creating an attractive environment for arbitration can also be seen from its entry into the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR, which came into force on 1 October 2019. This has been an

undoubted success, with HKIAC processing applications to the Mainland courts seeking to preserve assets worth approximately US$1.9 billion. Thanks to these efforts, Hong Kong and Singapore can legitimately lay claim to having among the world's most advanced legal frameworks for arbitration and, as HKIAC and SIAC's 2020 case numbers demonstrate, both jurisdictions are currently thriving as arbitration hubs.[1]

> "… [L]egal reform is arguably overdue in both Hong Kong and Singapore … in respect of the restrictions that presently prevent lawyers in both jurisdictions from entering into outcome-related fee structures (ORFS) with their clients for arbitrations."

One important area in which legal reform is arguably overdue in both Hong Kong and Singapore, however, is in respect of the restrictions that presently prevent lawyers in both jurisdictions from entering into outcome-related fee structures (ORFS) with their clients for arbitrations. Although both jurisdictions have already taken the positive step of permitting third party funding (TPF) arrangements,[2] restrictions on ORFS (or 'no win, no fee' and 'no win, low fee' arrangements, as they are also known) remain in place.[3] This is unfortunate, since TPF can be difficult for arbitrating parties to obtain and, in any case, will not be suitable for every dispute. In circumstances where there is increasing client demand for flexibility in how disputes are funded, the unavailability of ORFS places Hong Kong and Singapore at a competitive disadvantage to other leading arbitration seats that already allow ORFS.

Fortunately, reform proposals to allow ORFSs are now well advanced in both Hong Kong and Singapore, with public consultations having been completed in March 2021 and October 2019 respectively. The discussion below provides an overview of the different types of ORFS before taking stock of the different paths that Hong Kong and Singapore are presently taking to ORFS reform. The case is then made for implementing ORFS reform in both jurisdictions to enable them to compete on a level playing field with other leading seats of arbitration that already permit such fee structures.

Outcome-related fee structures: an overview

The expression 'ORFS' refers to an agreement between a lawyer and a client that conditions all or part of the former's remuneration on the outcome of the latter's dispute.

While ORFS have traditionally been prohibited in many jurisdictions, including on the basis that they contravened common law doctrines of maintenance and champerty, this is no longer the case. Many major arbitral seats, including London, Paris, Geneva and New York, already allow one form or another of ORFS for arbitrations.[4] Other jurisdictions vying to position themselves as arbitration seats have also reformed their laws to allow ORFS; most recently, the Cayman Islands introduced legislation in January 2021 in respect of contingency fee arrangements.[5]

> "… [Third party funding] can be difficult for arbitrating parties to obtain and, in any case, will not be suitable for every dispute."

This trend reflects growing international acceptance of ORFS' potential to enhance access to justice by enabling parties to enforce their contractual or investment treaty rights through

arbitration when they might otherwise be unable to bear the cost of doing so.[6] Even where parties are not impecunious, ORFS have the potential to promote greater efficiency and risk management between parties and their lawyers by more closely aligning their interests, as well as giving parties greater flexibility in managing their capital. ORFS also promote freedom of contract by respecting the autonomy of arbitrating parties and their lawyers to share the risks and rewards of arbitrations as they see fit.

ORFS take three main forms: conditional fee agreements (CFAs), damages-based agreements (DBAs, also known as contingency fee arrangements), and hybrid damages-based agreements (hybrid DBAs).

> “Many major arbitral seats, including London, Paris, Geneva and New York, already allow one form or another of ORFS for arbitrations. Other jurisdictions vying to position themselves as arbitration seats have also reformed their laws to allow [it].”

CFAs

First, CFAs provide for the lawyer to receive payment of a 'success fee only if the client's case succeeds. CFAs can be structured on a 'no win, no fee' basis: the lawyer receives no payment unless the client's case succeeds, in which case a success fee is due. Alternatively, CFAs can be structured on a 'no win, low fee' basis: the lawyer charges legal fees during the proceedings, typically at a discounted rate, and additionally receives a success fee if the client's case succeeds. Claimants and respondents can both make use of CFAs since the 'success' upon which payment of the success fee is conditioned can be defined in the CFA to reflect the circumstances of the case (eg, a claim against a party being successfully defended).

The success fee can be an agreed flat fee or a percentage 'uplift' on legal fees charged to the client during the proceedings. A key feature distinguishing CFAs from DBAs and hybrid DBAs is that the success fee cannot be calculated as a proportion of any damages awarded to the client.

DBAs

DBAs provide for the lawyer to be paid only if the client's case succeeds. The payment is calculated by reference to the outcome of the proceedings (eg, as a percentage of the sum of damages awarded to or recovered by the client). Although DBAs are most commonly used by claimants, respondents can also conceivably use them even when they are not counterclaiming for damages. This can be achieved by defining 'success' in the DBA as the damages awarded against a client falling below a set threshold.[7] DBAs are a 'no win, no fee' arrangement.

Hybrid DBAs

Hybrid DBAs provide for the lawyer to receive a payment calculated in the same manner as a DBA if the case succeeds. Unlike a DBA, however, the lawyer is also entitled to charge legal fees during the proceedings, typically at a discounted rate, retained irrespective of the outcome of the arbitration. Hybrid DBAs are therefore a 'no win, low fee' arrangement.

> “ORFS take three main forms: conditional fee agreements (CFAs), damages-based agreements (DBAs, also known as contingency fee arrangements), and hybrid damages-based agreements (hybrid DBAs).”

Hong Kong and Singapore's ORFS reform proposals

Hong Kong and Singapore have taken different paths to ORFS reform. Hong Kong's proposal encompasses CFAs, DBAs and hybrid DBAs, while Singapore's proposal focuses exclusively on CFAs.

In Hong Kong, the Secretary for Justice announced the establishment of the Outcome Related Fee Structures for Arbitration Sub-committee of the Law Reform Commission of Hong Kong (the Sub-committee) during Hong Kong Arbitration Week 2019. Following an extensive review of the applicable legal regimes regulating ORFS in other jurisdictions, the Sub-committee published its Consultation Paper (the Hong Kong Paper) on 17 December 2020, setting out its preliminary views on ORFS reform.[8]

The Hong Kong Paper recommends that all three types of ORFS (*viz*, CFAs, DBAs and hybrid DBAs) be allowed for any arbitration, administered or *ad hoc*, seated in or outside of Hong Kong. ORFSs would also be available for emergency arbitrator proceedings as well as court and mediation proceedings under Hong Kong's Arbitration Ordinance.[9] ORFSs could therefore be used for challenges to arbitrators before the Hong Kong courts, as well as applications to set aside or enforce awards. The Hong Kong Paper's public consultation concluded in March 2021. The Sub-committee is expected to issue a report setting out its final recommendations in due course.

> "CFAs provide for the lawyer to receive payment of a 'success fee only if the client's case succeeds. … DBAs provide for the lawyer to be paid only if the client's case succeeds. … Hybrid DBAs provide for the lawyer to receive a payment calculated in the same manner as a DBA if the case succeeds."

In Singapore, the Ministry of Law issued its Public Consultation Paper on Conditional Fee Agreements (the Singapore Paper) on 27 August 2019.[10] The Singapore Paper proposes allowing CFAs for international and domestic arbitrations, certain Singapore International Commercial Court proceedings and mediation proceedings arising out of or in any way connected with such proceedings. It states that DBAs lead to lawyers receiving remuneration with "no direct correlation to the work done" but does not otherwise explain their exclusion from the proposal.[11] In its feedback on the Singapore Paper, the Law Society of Singapore noted that, while the introduction of CFAs would "help to level the playing field" for international arbitration, DBAs should also be allowed "to provide equal opportunities for Singapore lawyers to compete".[12] The results of the public consultation on the Singapore Paper, which was completed in October 2019, have not yet been released, but Mr Edwin Tong SC, Singapore's Second Minister for Law, announced in March 2021 that Singapore was working on "legislative changes" to allow CFAs;[13] DBAs and hybrid DBAs were not mentioned.

> "Hong Kong and Singapore have taken different paths to ORFS reform. Hong Kong's proposal encompasses CFAs, DBAs and hybrid DBAs, while Singapore's proposal focuses exclusively on CFAs."

Levelling the international arbitration playing field

While the reform proposals presented in both the Hong Kong and Singapore papers are laudable, the former's expansive recommendations to allow CFAs, DBAs and hybrid DBAs are particularly welcome. An argument can be made that DBAs are unnecessary if CFAs are available, but the better view is that once a decision is taken to 'cross the Rubicon' by permitting one form of ORFS to be used for arbitration, there is no principled basis for excluding other forms.[14] The Hong Kong Paper's approach also has the practical advantage of providing arbitration users, who are often sophisticated parties, with the freedom to select the specific type of ORFS that best suits their needs.[15]

Putting this aside, the ORFS reforms presented in both the Hong Kong and Singapore papers would help to level the playing field for international arbitration in three key respects.

> "While the reform proposals presented in both the Hong Kong and Singapore papers are laudable, the former's expansive recommendations to allow CFAs, DBAs and hybrid DBAs are particularly welcome."

First, from an access to justice perspective, ORFS enable parties to present their case on an equal footing with better funded opponents where they would otherwise lack the resources to do so.

Second, ORFS would allow Hong Kong- and Singapore-qualified arbitration practitioners to compete for arbitration cases on equal terms with their peers in other jurisdictions that allow ORFS.[16]

Third, ORFS would help to preserve Hong Kong and Singapore's standing as leading international arbitration seats in circumstances where there is significant demand for ORFS from clients and ORFS are already permitted in other major arbitration seats.[17]

> "… [T]he reality [is] that Hong Kong and Singapore's key competitors offer ORFS in addition to strong legal and judicial support, arbitration infrastructure and a New York Convention enforcement regime."

Indeed, the Hong Kong Paper identifies ORFS reform as essential to preserving Hong Kong's continued status as one of the world's leading arbitral seats and to maintaining its competitiveness: "[i]f Hong Kong continues to prevent its Lawyers from sharing that risk through ORFSs, it is likely that clients will simply choose to arbitrate elsewhere".[18] This reflects the reality that Hong Kong and Singapore's key competitors offer ORFS in addition to strong legal and judicial support, arbitration infrastructure and a New York Convention enforcement regime.[19]

Other arguments identified in the Hong Kong Paper for allowing parties to enter into ORFS included supporting freedom of contract and weeding out weak claims since, where remuneration depends on the success of a case, it is not in a lawyer's interest to purse weak cases.[20]

With regard to the potential downsides of reform, ORFS were historically perceived to create risks of conflicts of interest between lawyers and their clients, excessive legal fees and increases in frivolous claims. The Hong Kong Paper convincingly concludes that such concerns are often misplaced in the context of arbitration, particularly given the positive experiences of other jurisdictions where ORFS are permitted, or capable of being mitigated via safeguards in the relevant implementing laws and regulations.[21]

In terms of what form those safeguards could take, the Hong Kong and Singapore papers outline several possibilities, including caps on success fees and uplifts. Any such caps or other restrictions would need to be carefully drawn so as not to have the effect of unduly limiting the circumstances in which ORFS can be used in practice by making their operation cumbersome or uneconomic. Indeed, the Law Society of Singapore's feedback on the Singapore Paper was that CFAs in international arbitration should not be capped since commercial parties have the capability to manage their rights and finances, and caps would only limit the flexibility and ability of lawyers to use CFAs.[22] In circumstances where arbitration users are often sophisticated commercial parties, it is true that the risk of excessive fees and unconscionable arrangements appears relatively low, such that caps may well not be required.

> "… [C]aps on success fees and uplifts … would need to be carefully drawn so as not to have the effect of unduly limiting the circumstances in which ORFS can be used in practice by making their operation cumbersome or uneconomic."

Another possible safeguard identified in the Hong Kong and Singapore papers is the disclosure of the existence of the ORFS to the arbitral tribunal and the other parties. The Singapore paper proposes that lawyers be obliged to disclose the existence of CFAs on the basis that the TPF regime in Singapore also requires disclosure.[23] This is not a convincing justification for disclosure, however, since unlike TPF, there is no potential conflict of interest arising from the involvement of a third party (the funder) warranting disclosure, given that an ORFS is strictly between lawyers and their clients. If the 'success fee' or uplift in the ORFS is not recoverable from the opposing parties in the arbitration, it is difficult to see any reason why disclosure is necessary. Indeed, for these reasons, disclosure is not required in England & Wales.[24]

> “Hong Kong and Singapore are currently flying high as arbitration hubs but, rather than resting on their laurels, it is to be hoped that they implement the proposals quickly.”

Conclusion

ORFSs are a rare example of an area in which Hong Kong and Singapore's legal arbitration frameworks are behind the curve when compared to other leading arbitration seats. While both the Hong Kong and Singapore papers present credible reform proposals that would help to level the playing field, the Hong Kong Paper's more expansive approach of offering arbitrating parties and their lawyers the freedom to use not only CFAs but also DBAs and hybrid DBAs is preferable for its greater flexibility and respect for party autonomy. Hong Kong and Singapore are currently flying high as arbitration hubs but, rather than resting on their laurels, it is to be hoped that they implement the proposals quickly. Such reforms would complement the world-class legal framework that both jurisdictions already provide to arbitrating parties and help to ensure that they remain major arbitration hubs for years to come.

1 Neil Kaplan QC, *A seismic shift towards Asia* (Global Arbitration Review, 31 March 2021) available at https://globalarbitrationreview.com/seismic-shift-towards-asia.

2 See Hong Kong's Arbitration Ordinance (Cap 609), Part 10A (Third Party Funding of Arbitration); Civil Law Act (Cap 43), as amended by the Civil Law (Amendment) Act 2017 and Civil Law (Third-Party Funding) Regulations 2017.

3 For Hong Kong, see s 98O of the Arbitration Ordinance and the Hong Kong Paper (see note 8 below), Chapter 1. For Singapore, see s 5B of the Civil Law Act, s 107(1)(b) of the Legal Profession Act (Cap 161) and rule 18 of the Legal Profession (Professional Conduct) Rules 2015.

4 Hong Kong Paper (note 8 below), para 3.2.

5 Cayman Islands, Private Funding of Legal Services Act 2020.

6 Hong Kong Paper (note 8 below), pp 49-50.

7 *Ibid*, paras 5.73, 5.74(b)(iii) and Recommendation 13(h).

8 Available at https://www.hkreform.gov.hk/en/publications/orfsa.htm.

9 See the Hong Kong Paper's definition of 'Arbitration' in Chapter 6 (Summary of recommendations).

10 Available at https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-conditional-fee-agreements-in-singapore.

11 Singapore Paper, para 2.

12 Law Society of Singapore, *Feedback to the Public Consultation on Conditional Fee Agreements in Singapore* dated 8 October 2019, p 5. Available at https://www.lawsociety.org.sg/wp-content/uploads/2020/02/October-8-2019.pdf.

13 Speech delivered at the 3rd Meeting of the Standing International Forum of Commercial Courts (SIFoCC), 12 March 2021. Available at https://app.mlaw.gov.sg/news/speeches/2021-03-17-speech-by-second-minister-edwin-tong-at-3rd-meeting-of-sifocc.

14 Hong Kong Paper, para 4.74; Lord Justice Jackson, Keynote Speech to the Law Society (England & Wales) conference, *Commercial Litigation: The Post-Jackson World*, paras 3.1-3.20 (available at https://www.judiciary.uk/wp-content/uploads/2014/10/litigation-post-jackson-world.pdf). Cf. Victoria Law Reform, *Access to Justice - Litigation Funding and Group Proceedings: Consultation Paper* (July 2017), para 8.17.

15 Hong Kong Paper, paras 4.20-4.23.

16 *Ibid*, para 4.27.

17 *Ibid*, pp 49-50.

18 *Ibid*, paras 4.4, 4.8-4.10.

19 *Ibid*, para 3.2.

20 *Ibid*, p 51.

21 *Ibid*, paras 4.2-4.3.

22 Law Society of Singapore's *Feedback* (note 12 above), p 5.

23 Singapore Paper, para 15(a).

24 Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (August 2015), pp 100-102. Available at https://www.judiciary.uk/publications/the-damages-based-agreements-reform-project-drafting-and-policy-issues/.

Can Foreign Arbitral Institutions Directly Administer Cases in Mainland China?

Yuan Peihao

This article addresses a number of questions relating to the validity in China of arbitration agreements and arbitral awards made pursuant to them where parties have agreed that an arbitration should be administered by a China-seated foreign arbitral institution. Particular reference is made to recent case law and to a Reply of 7 September 2020 by the State Council of the PRC.

Introduction

On 7 September 2020, the State Council of the PRC issued an *Official Reply of the State Council to the Plan for Deepening the Comprehensive Pilot Program of a New Round of Expanding Opening-up of the Service Sector in Beijing Municipality and Building a National Comprehensive Demonstration Zone for Expanding Opening-up of the Service Sector* (the NPC Reply, or Reply). The NPC Reply expressly permits leading arbitral institutions to establish business offices providing arbitration services in specific areas of Beijing.

Although China does not have a formal tradition or system of case law *per se*, precedents have increasingly played a guiding role in Chinese judicial practice and court judgments have facilitated the gauging of judicial attitudes to particular issues. Taken together with decisions of the courts in the *Daesung*[1] and *Brentwood*[2] cases (discussed below), the Reply sends a more positive signal to foreign arbitral institutions regarding the extent to which they may provide arbitration services in China.[3] In a sense, the Reply reflects the essence of these precedents. Given the tradition that governmental

policies often pave the way for legislation, it clearly expresses the government's attitude on this issue, even though it is not yet part of current law.

Administration of arbitrations in China by foreign arbitral institutions

Introduction: questions arising

A number of questions have confronted the administration of arbitrations by foreign arbitral institutions seated in China.

(1) Many companies investing in China have entered into contracts with dispute resolution clauses providing for arbitration administered by China-seated foreign arbitral institutions. Is such an arbitration clause valid or not? ('Question 1')

(2) Even if such an arbitration clause is valid, may an arbitral award based upon it also be valid? ('Question 2')

(3) What is the legal basis for and judicial approach to the recognition and enforcement of awards rendered by foreign arbitral institutions in China? ('Question 3')

(4) What are the future prospects for the administration of arbitrations in China by China-seated foreign arbitral institutions? ('Question 4')

> "Although China does not have a formal tradition or system of case law *per se*, precedents have increasingly played a guiding role in Chinese judicial practice and court judgments have facilitated the gauging of judicial attitudes to particular issues."

> "Taken together with decisions of the courts in the *Daesung* and *Brentwood* cases … the NPC Reply sends a more positive signal to foreign arbitral institutions regarding the extent to which they may provide arbitration services in China."

Question 1

1. Conclusion

The arbitration clause is valid. In the *Anhui Longlide* case (2013),[4] the Supreme People's Court (SPC) decided that a foreign arbitral institution may be deemed to be the required 'arbitration commission' pursuant to the Arbitration Law of the People's Republic of China 1994 (the Arbitration Law) and that it is valid to stipulate arbitration administered by a China-seated foreign arbitral institution.

2. Analysis

In determining the validity of such an arbitration agreement, it is crucial to determine whether the agreement complies with the requirements set forth in art 16 of the Arbitration Law, which provides that "[a]n arbitration agreement shall include the arbitration clauses stipulated in a contract and any other written agreement for arbitration concluded before or after a dispute occurs. The following contents shall be included in an arbitration agreement: 1. the expression of the parties' intention to submit to arbitration; 2. the matters to be arbitrated; and 3. the Arbitration Commission selected by the parties."

The third of these elements, "the Arbitration Commission selected by the parties", is the major one affecting the validity of an agreement providing for arbitration by a foreign arbitral institution. The meaning of the expression 'arbitration

commission' is not, however, clear, thus leaving it to be clarified by the People's Courts pursuant to the PRC's latest adjudicative criteria and standards.

> "The meaning of the expression 'arbitration commission' is not, however, clear, thus leaving it to be clarified by the People's Courts pursuant to the PRC's latest adjudicative criteria and standards."

Although the SPC had held that foreign arbitral institutions were excluded from the scope of 'arbitration commission' under art 16 of the Arbitration Law in the *Shenhua* case (2010),[5] foreign arbitral institutions were deemed to be an 'arbitration commission' under art 16 in the latest cases, *Anhui Longlide*[6] and *Daesung*.[7] In this regard, therefore, an agreement providing for arbitration administered by a China-seated foreign arbitral institution is valid, so that such an arbitration agreement concluded by civil and commercial subjects in China (including foreign companies) would henceforth be deemed valid.

Question 2

1. Conclusion

Historically, Chinese courts have ruled that awards rendered by China-seated foreign arbitral institutions are 'non-domestic awards' in essence. However, the courts have recently begun to rule that such awards are Chinese 'foreign-related arbitral awards', clearing the legal hurdle to recognition and enforcement of such awards in China.

2. Analysis

On the basis of valid arbitration agreements, foreign arbitral institutions shall make arbitral awards after accepting applications filed by enterprises or individuals in China. Such awards made in China shall be deemed to be foreign-related arbitral awards.

Table 1
The Court's Opinion on the Validity of the Arbitration Agreement

Year	Case Name	Hearing Court	Court's Opinion
2010	*Shenhua Coal Trading v Marinic Shipping Company*	SPC	The 'arbitration commission' under art 20[8] of the Arbitration Law refers to the arbitration commission established under arts 10[9] and 66,[10] which does not include a foreign arbitral institution.
2013	*Anhui Longlide Packaging Co Ltd v BP Agnati SRL*	SPC	This case concerned affirmation of the validity of a foreign-related arbitration agreement. The parties concluded a contract subjecting a dispute arising out of it to ICC arbitration and specified that the "place of jurisdiction shall be Shanghai, China". In the context of the arbitration agreement, "place of jurisdiction shall be Shanghai, China" should be understood as the seat of arbitration being Shanghai. The arbitration agreement in this case expressed an intention to arbitrate, stipulated the matters submitted to arbitration, and selected a specific arbitral institution. The arbitration agreement was therefore valid under art 16 of the Arbitration Law.
2020	*Daesung Industrial Gases Co Ltd & Another v Praxair (China) Investment Co Ltd*	Shanghai No 1 Intermediate People's Court	The arbitration agreement in this case stipulated that the dispute shall be settled by "arbitration in Shanghai by Singapore International Arbitration Center (SIAC)". This arbitration agreement expressed an intention to arbitrate, stipulated the matters submitted to arbitration and selected a specific arbitral institution, namely SIAC. Hence, this arbitration agreement was valid.

There are two criteria for determining the nature of arbitral awards:

(1) *'Location of the Arbitration Institution' standard*: if the nationality of awards is determined by where arbitral institutions are located, all awards rendered by foreign arbitral institutions shall be foreign arbitral awards.

(2) *'Seat of Arbitration' standard*: if the nationality of awards is determined by the actual seat of arbitration, then awards made by China-seated foreign arbitral institutions shall be domestic arbitral awards.

> "[Since the] *Anhui Longlide* and *Daesung* [cases] … an agreement providing for arbitration administered by a China-seated foreign arbitral institution, is valid, so that such an arbitration agreement concluded by civil and commercial subjects in China (including foreign companies) would henceforth be deemed valid."

Neither the Arbitration Law nor relevant legislative or judicial interpretations of it have made clear provision on determining the nationality of awards, nor have they included corresponding provisions on the seat of arbitration. Pursuant to early judicial practice, Chinese courts adopted the 'location of the arbitration institutions' standard in determining the nature of awards. In the *Notice of the Supreme People's Court on Issues concerning the Execution of Hong Kong Arbitral Awards in the Mainland* 2009 (2009 Notice),[11] the SPC stipulated that where a party applies to a Chinese court to enforce an *ad hoc* arbitral award made in the Hong Kong

Special Administration Region (HKSAR) or one made by an ICC tribunal seated in Hong Kong, the People's Court should examine the application pursuant to the provisions of the *Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* 1999 (Arrangement).[12] Where an award does not fall within the circumstances prescribed by art 7 of the Arrangement, it may be executed in the Mainland. In its 2009 Notice, the SPC identified the arbitral awards made in the HKSAR by foreign arbitration institutions, switching the standard from the 'location of the arbitration institution' once adopted by the SPC to the 'seat of arbitration' standard. Under the latter, an award made by a China-seated foreign arbitral institution shall be a domestic arbitral award. In the *Brentwood* case,[13] the Guangzhou Intermediate People's Court held that an arbitral award made by a China-seated foreign arbitral institution shall be deemed to be a foreign-related arbitral award.

> "Neither the Arbitration Law nor relevant legislative or judicial interpretations of it have made clear provision on determining the nationality of awards, nor have they included corresponding provisions on the seat of arbitration."

Table 2
The Court's Opinion on the Nature of Arbitral Awards

Year	Case Name	Hearing Court	Court's Opinion
2004	*Zueblin Int'l GmbH v Wuxi Woco-Tongyong Rubber Engineering Co Ltd*	Wuxi Intermediate People's Court	The arbitral award that was sought to be enforced was rendered by an ICC tribunal and confirmed by the seal of its Secretariat. It should therefore be regarded as a non-domestic award.
2008	*Dufercos SA v Ningbo Arts & Crafts Import & Export Co Ltd*	Ningbo Intermediate People's Court	The Court confirmed that the arbitral award rendered by an ICC tribunal in Mainland China (with Beijing as its seat) was a non-domestic award. There were no reasons for refusing recognition and enforcement of the award. Recognition and enforcement ordered.
2010	*DMT Limited Company (DMT SA) v Chaozhou City Huaye Packing Materials Co Ltd & Chaoan County Huaye Packing Materials Co Ltd*	SPC	This case concerned an application to recognise and enforce an arbitral award rendered by an ICC tribunal seated in Singapore. As both China and Singapore are parties to the New York Convention 1958, recognition and enforcement of the award should be decided in accordance with it.
2020	*Brentwood Industries Inc (USA) v Guangdong Fa Anlong Mechanical Equipment Engineering Co Ltd & Guangzhou Sunrise Trade Co Ltd*	Guangzhou Intermediate People's Court	The arbitral award was rendered by a foreign arbitral institution in Mainland China and may be regarded as a Chinese foreign-related award. If the respondent fails to comply with the award, the claimant may apply for enforcement to the Intermediate People's Court where the respondent's domicile or property is located, per art 273 of the PRC Civil Procedure Law 1991 (as amended in 1997) (Civil Procedure Law).

> "In the *Brentwood* case, the Guangzhou Intermediate People's Court held that an arbitral award made by a China-seated foreign arbitral institution shall be deemed to be a foreign-related arbitral award."

Question 3

1. Conclusion

As stated previously, the People's Courts have come to regard arbitral awards made by China-seated foreign arbitral institutions as foreign-related awards in the latest cases. Thus, PRC lawyers are not required to apply for recognition of such awards and may apply directly for enforcement to the Intermediate People's Court where the respondent is domiciled or its properties are located, in accordance with art 273 of the Civil Procedure Law.

2. Analysis

Table 3

Laws and Regulations	Provision	Content
Civil Procedure Law 1991, as amended	Article 273	Upon ruling by a foreign-related arbitration organisation of the People's Republic of China, the parties concerned shall not file a lawsuit with a People's Court. Where a party concerned does not perform the arbitral award, the counterparty may apply to an intermediate People's Court at the location of the respondent's residence or the location of the properties for enforcement.

3. Illustrative case

Case name: *Brentwood Industries Inc (USA) v Guangdong Fa Anlong Mechanical Equipment Engineering Co Ltd & Guangzhou Sunrise Trade Co Ltd*

Hearing court: Guangzhou Intermediate People's Court

Date of decision: August 2020

Facts: Article 16 of a Sales Contract (the Contract) entered into by the parties provided: "Any dispute arising from or in connection with this Contract shall be settled by the two parties through amicable negotiation. In case no settlement can be reached, the case in dispute shall then be submitted to ICC Arbitration Commission at the locality of the project in accordance with international practice." On the issue of governing law, art 17 of the Contract provided: "The governing law of this Contract shall be the laws of the People's Republic of China". The place for performance of the Contract was Guangzhou, China.

Held: The disputed arbitral award was issued by a foreign arbitral institution in the PRC, which award can be deemed to be a foreign-related award in China. Under art 273 of the Civil Procedure Law, the claimant may apply for enforcement to the Intermediate People's Court in the place where the defaulting respondent is domiciled or its properties located.[14]

Question 4

In addition to judicial policy and practice supporting China-seated foreign arbitral institutions and awards of their tribunals, Chinese government departments and institutions have, since 2014, issued a series of guidance documents to clarify further the determination and attitude of the Chinese legal services and arbitration markets to open up gradually to China-seated foreign arbitral institutions.

"… Chinese government departments and institutions have, since 2014, issued a series of guidance documents to clarify further the determination and attitude of the Chinese legal services and arbitration markets to open up gradually to China-seated foreign arbitral institutions."

Table 4			
Date	**PRC Institution**	**Document/Event**	**Effect**
2014	Shanghai International Arbitration Center	*Arbitration Rules for China (Shanghai) Pilot Free Trade Zone*	The first introduction in China of an open roster of arbitrators, emergency arbitration, amiable arbitration and other systems highlights the institutional innovation of the FTZ and the guiding role of arbitration rules for legislation.
8 April 2015	State Council of the PRC	*Notice of the State Council on Promulgation of the Plan on Deepening Reform and Opening-up in China (Shanghai) Pilot Free Trade Zone* (Guo Fa [2015] No 21)	Article 11 "supports the entry of well-known international commercial dispute resolution institutions" and intends to build Shanghai into an "Asia-Pacific arbitration center facing the world".
November 2015	Hong Kong International Arbitration Centre	Shanghai Representative Office established in Shanghai FTZ	This is the first 'foreign' arbitral institution to have been established in the Shanghai FTZ. Other prominent international arbitral institutions (eg, the Singapore International Arbitration Centre, the International Court of Arbitration of the ICC and the Korean Commercial Arbitration Board) subsequently established representative offices in the FTZ.
7 August 2019	State Council of the PRC	*Notice of the State Council on Issuing the Overall Plan for the Lin-gang Special Area of the China (Shanghai) Pilot Free Trade Zone*	This clearly confirms the PRC's intention to "allow overseas renowned arbitration and dispute resolution institutions to register with the judicial administration department of the Shanghai Municipal People's Government and report to the judicial administration department of the State Council for the record, and establish business institutions in the new area." In addition, it also makes clear that such institutions can "carry out arbitration services for civil and commercial disputes in areas such as international commercial, maritime, and investment."
8 November 2019	Shanghai Municipal Bureau of Justice	*Measures for the Administration of Overseas Arbitration Institutions Setting up Business Organizations in the Lin-gang Special Area of the China (Shanghai) Pilot Free Trade Zone*	Since 1 January 2020, non-profit arbitral institutions legally established in foreign countries, the Hong Kong and Macao SARs and Taiwan regions that meet prescribed conditions, as well as institutions that carry out arbitration business established by international organisations that China has joined, can apply to the Shanghai Municipal Bureau of Justice by filing an application to register and establish a business organisation in the Lingang New Area of the Shanghai FTZ to carry out foreign-related arbitration business. The scope of such business includes (1) case acceptance, trial, hearing and adjudication; (2) case management and services; and (3) business consultation, guidance, training and seminars.
13 December 2019	SPC	*Opinions of Supreme People's Court on the Provision of Judicial Services and Guarantee by People's Courts for the Development of China (Shanghai) Pilot Free Trade Zone Lin-gang Special Area* (Fa Fa [2019] No 31)	This expresses strong support for arbitration conducted by foreign arbitral institutions in the new area. It states that domestic arbitration by foreign arbitral institutions will be judicially guaranteed and that "judicial review of arbitration awards will be conducted in accordance with the law".
7 September 2020	State Council of the PRC	*Official Reply of the State Council on the Work Plan for Deepening a New Round of Comprehensive Pilot Program for Expanding Opening up in the Service Sector and Building a National Comprehensive Demonstration Zone for Expanding Opening up in the Service Sector in Beijing* (Guo Han [2020] No 123)	This represents a further breakthrough against regional restrictions in the Shanghai FTZ and introduces overseas arbitral institutions to Beijing. It clearly states that it "'allows renowned overseas arbitration institutions and dispute resolution institutions to be registered with the Beijing Municipal Judicial Administration and reported to the Ministry of Justice to establish business institutions in specific areas of Beijing to provide services for civil and commercial disputes in areas such as international business and investment. Arbitration services, supporting and guaranteeing the application and execution of interim measures such as property preservation, evidence preservation, and conduct preservation of Chinese and foreign parties before and during arbitration in accordance with the law" are also permitted. The Reply allows foreign arbitral institutions to carry out arbitration activities in specific areas of Beijing, expanding access areas to foreign arbitral institutions.

Conclusion

A dispute resolution clause providing for arbitration administered by a China-seated foreign arbitral institution is valid in the PRC. An arbitral award rendered by such an institution pursuant to this clause is a Chinese foreign-related award. Chinese lawyers representing a claimant can apply to the Intermediate People's Court where the respondent's domicile or property is located for enforcement, pursuant to art 273 of the Civil Procedure Law.

At the same time, it can be seen from judicial practice and policy documents in recent years that Chinese administrative and judicial agencies hold a positive attitude toward the entry of foreign arbitral institutions' into the Chinese arbitration services market. Judicial policy and dynamics in this regard are likely to be translated into legislation amending the Arbitration Law. Foreign arbitral institutions are therefore expected to penetrate further into the Chinese market.

> "… [J]udicial practice and policy documents [show] … that Chinese administrative and judicial agencies hold a positive attitude toward the entry of foreign arbitral institutions' into the Chinese arbitration services market. … [Such] institutions are therefore expected to penetrate further into the Chinese market."

1 *Daesung Industrial Gases Co Ltd & Another v Praxair (China) Investment Co Ltd. Editorial note*: For further commentary, see James Kwan, Zoe Dong & Phoebe Yan, *Choosing a Foreign Arbitral Institution in China: Is the China Arbitration Market Finally Opening up?* [2021] Asian DR 26-34.

2 *Brentwood Industries Inc (USA) v Guangdong Fa Anlong Mechanical Equipment Engineering Co Ltd & Guangzhou Sunrise Trade Co Ltd* (2020).

3 'China' refers to Mainland China only in this article, excluding Hong Kong, Macao and Taiwan.

4 *Anhui Longlide Packaging Co Ltd v. BP Agnati S.R.L. Editorial note*: For further commentary, see Cao Lijun, *China Country Update* [2017] Asian DR 138-143 at 140-141; Kwan *et al* (note 1 above).

5 *Shenhua Coal Trading v Marinic Shipping Company.*

6 Note 4 above.

7 Note 1 above.

8 Arbitration Law, art 20 of which provides: "If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling. If one of the parties requests for [*sic*] a decision from the arbitration commission, but the other party applies to a people's court for a ruling, the people's court shall give the ruling. If the parties object to the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitration tribunal."

9 *Ibid*, art 10 of which provides: "Arbitration commissions may be established in municipalities directly under the Central Government, and cities where the people's governments of provinces and autonomous regions are located or in other cities divided into districts according to needs. Arbitration commissions shall not be established at each level of the administrative divisions. The people's governments of the municipalities and cities specified in the above paragraph shall organize the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration commission shall be registered with the judicial administrative department of the relevant provinces, autonomous regions or municipalities directly under the Central Government."

10 *Ibid*, art 66 of which provides: "A foreign-related arbitration commission may be organized and established by the China International Chamber of Commerce. A foreign arbitration commission shall comprise one chairman, several vice-chairmen and several committee members. The chairman, vice-chairmen and committee members may be appointed by the China International Chamber of Commerce."

11 No 415 [2009] of the SPC.

12 *Editorial note*: As now amended by the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region: see *Regional dispute resolution instruments* [2021] Asian DR 44 and at p 97 below.

13 Note 2 above.

14 Article 273 of the Civil Procedure Law.

Electronic Games and Intellectual Property Disputes in Asia

Kellie Hyae-Young Yi

This article discusses (1) trends in intellectual property dispute resolution in the Asia-Pacific region with particular reference to disputes involving electronic games, (2) the advantages and key concerns of arbitrating such disputes, and (3) arbitrating these matters in Hong Kong.

Introduction: the Asia-Pacific electronic games industry and its potential for disputes

In spite of COVID-19 having taken a toll of most businesses in major industries, the global electronic games industry is seen to be one of the few that have received a boost from the pandemic. This is demonstrated by increasing numbers of users and continued growth in the profits of games companies. According to one mobile application market analyst, consumer spending on mobile games rose by five per cent in the first quarter of 2020, while downloads of game applications increased by 30% in the final week of March 2020 alone by comparison with the fourth quarter of 2019.[1]

Given that China, Japan and South Korea account for three of the top four countries in the worldwide electronic games market, it is quite apparent that the Asia-Pacific is a key region in the global games industry. In particular, Chinese games companies achieved sales of US$11.59 billion in overseas markets in 2019, with Japan as the second largest export market and South Korea as the third.[2]

Increases in these cross-border transactions also imply the potential for disputes, involving such issues as copyright infringement and violation of licensing terms. With regard to game software and intellectual property (IP) more generally,

the terms of a licensing agreement entail taking the distinctive features of the original products and developing a secondary avenue for their distribution, granting permission to use labels or trademarks for that purpose. A licensing agreement has an expansionary quality. in that it enables the use of the derivative product through the use and transfer of a unique aspect of the original product. Such agreements largely cover copyrights and trademarks but can also include such matters as visual display, background, story, rules, layout, 'look and feel' or anything that the user can identify with the unique quality of an IP right. It is advisable both to make clear provision as to the obligations arising from the use of IP that is the subject of the licensing agreement and to include measures addressing situations in which the counterparty violates those obligations, specifying not only monetary compensation but also other appropriate rights and remedies.

> "Given that China, Japan and South Korea account for three of the top four countries in the worldwide electronic games market, it is quite apparent that the Asia-Pacific is a key region in the global games industry. … [I]ncreases in … cross-border transactions also imply the potential for … copyright infringement and violation of licensing terms [disputes]."

In the race to provide cheaper options that attract users, licensors and IP creators face substantial risks when they enter into licensing agreements with competitors. Such agreements may slash profits either by adopting a very similar characteristic of the established product or by 'piggybacking' on to the image of the product.

> "[Licensing] agreements largely cover copyrights and trademarks but can also include such matters as visual display, background, story, rules, layout, 'look and feel' or anything that the user can identify with the unique quality of an IP right."

IP dispute trends in the Asia-Pacific region

There are two notable aspects of IP disputes in the Asia-Pacific region. First, with a large consumer base in related industries such as the games industry, Asia-based innovations have prompted a spike in international patent applications and IP disputes which reflects a "historic geographical shift of innovative activity from West to East", to quote Francis Gurry, Director General of the World Intellectual Property Organization (WIPO) from 2008 to 2020.[3] In 2018, WIPO received more than half of its international patent applications from the Chinese telecom company Huawei. Six of the top ten applicants for patent applications were Asian companies.[4] In terms of IP disputes. the number of first instance civil IP cases filed in the Chinese courts in 2017 increased by 47% from 2016, according to a white paper from the Supreme People's Court of China.

Second, given the complexity and time-sensitive nature of IP disputes, parties look to international arbitration as a means of resolving them. IP disputes involving electronic games were traditionally dealt with through litigation because they mainly concerned compensation for damage. However, arbitration essentially involves both a contract between the

parties and an agreement to resolve any dispute through this process. The licensor-licensee relationship is, therefore, one in which the functions of litigation and arbitration overlap. Under a contract, royalties are paid to the licensor for a popular IP right and alterations or modifications to it can also be made in the process of distributing the IP to the public. Violations occur where a licensee, while remaining subject to a licensing agreement, considers ways in which to reap the benefits of the IP without having to continue paying for it.

> "Violations [of IP rights] occur where a licensee, while remaining subject to a licensing agreement, considers ways in which to reap the benefits of the IP without having to continue paying for it."

Resolving games and IP disputes through international arbitration: advantages and key concerns

The reasons underlying party preferences for arbitration over litigation are ever more relevant where IP disputes are concerned. To begin with, in resolving disputes in an industry as specialised as electronic games, professional and technical expertise is paramount to saving time and costs. In international arbitration, it is possible to appoint an expert arbitrator who is more accustomed to handling disputes between foreign parties and who has a high level of understanding regarding the relevant area of law. The biggest international IP companies have a global customer base and supply game products across all jurisdictions. Such a company would assume a substantial risk if it were to leave a dispute to be decided by a judge sitting in a court anywhere among the multiple jurisdictions in which users are located. This is also important when considering the 'precedent-like' effect held by an arbitral decision on an issue that is decided for the first time. Parties therefore benefit from selecting their own arbitrators from among those with relevant expertise.

HKIAC provides a searchable database of potential arbitrators arranged by specialised categories, such as an IP panel.[5] The HKIAC Panel of Arbitrators for Intellectual Property Disputes comprises arbitrators with extensive experience and expertise in IP matters including licensing issues, copyright infringement, FRAND (fair, reasonable and non-discriminatory) licensing disputes, patent registration issues, trademarks and designs.

Another advantage of arbitration is, of course, privacy. The litigation process is generally open to the public, making it likely in many cases that company secrets may be made publicly available. At the very least, a company must take measures to ensure that information will not be leaked. By contrast, arbitration is designed to maintain the confidentiality of private information and details of the proceedings. Parties to an arbitration may also reach a separate agreement to keep any submissions to the arbitral tribunal strictly confidential and inaccessible by the public, in addition to details of discussions concerning damages or amounts in dispute.

> "The HKIAC Panel of Arbitrators for Intellectual Property Disputes comprises arbitrators with extensive experience and expertise in IP matters including licensing issues, copyright infringement, FRAND (fair, reasonable and non-discriminatory) licensing disputes, patent registration issues, trademarks and designs."

Finally, arbitration can be used as a single forum for deciding multiple IP disputes, and so can result in widely enforceable awards. This is possible if the scope of an arbitration agreement is broadly drafted and multi-party or multi-contract provisions (such as joinder and consolidation) are incorporated. Arbitral awards are currently enforceable in 167 jurisdictions (and a number of sub-statal entities of those jurisdictions, such as Hong Kong and Macao) under the New York Convention 1958, which provides an important legal framework for recognising and enforcing arbitral awards globally. By contrast, it would be impractical for a party to litigation to prepare a case in the courts of every possible jurisdiction under each jurisdiction's own sets of rules, standards and regulations, given the wide range of countries and actors that may potentially be involved in an international IP dispute. Inexpert courts may decide a case differently (or wrongly) and there is no widely applicable international treaty that facilitates the enforcement of court judgments in the same manner as the New York Convention.

As with all other mandated methods of dispute resolution, however, arbitration can also result in significant time and expense, depending on the jurisdiction concerned, issues in the case and the conduct of parties and arbitrators. Parties must be strategic in their choice of dispute resolution, and there are some advisable approaches to be considered in that regard, starting with the arbitration agreement.

(1) Does it only refer to matters of breach of contract, or is it broad enough to include claims for damages resulting from the breach?
(2) How different courts are likely to interpret the agreement. For example, there is a default assumption in Singapore that even where the arbitration clause may limit the agreement to a breach of contract claim, it may be interpreted such that the parties intend to resolve all matters arising from that breach. It is important to scrutinise the wording of the arbitration clause carefully and ascertain the position of the courts in the relevant jurisdictions.
(3) Further, it is important to look at the parties' obligations under the agreement. As mentioned previously, what may have been characterised as 'prohibitions' under the traditional lawsuit framework may now be labelled as a 'positive' contractual obligation that brings it within the arbitration framework. These obligations should ideally be clearly spelled out, so that parties may maximise the advantages that arbitration provides.

> "Inexpert courts may decide a case differently (or wrongly) and there is no widely applicable international treaty that facilitates the enforcement of court judgments in the same manner as the New York Convention."

Arbitrating IP disputes in Hong Kong

Hong Kong International Arbitration Centre (HKIAC) has handled a range of disputes with IP elements, most of which have arisen under licensing agreements.

With the rise in IP disputes since 2016, and especially in light of the pandemic, the growing prevalence of these types of dispute in Asia and around the globe is to be expected. However, in some countries, it remains unclear whether an IP dispute may be resolved through arbitration, because IP has long been considered the domain of the government (and therefore the courts) of the country in which an IP right is registered. Hong Kong became the first Asian jurisdiction to clarify the arbitrability of IP disputes when amendments were passed to its Arbitration Ordinance (Cap 609) in 2017.[6] These state expressly that IP disputes may be arbitrated in Hong Kong, and any aspect of an IP dispute may be 'arbitrable'. The amendments also provide that it would not be contrary to Hong Kong's public policy to enforce arbitral awards concerning IP disputes. Further, the Hong Kong courts have established that parties that have unsuccessfully challenged or opposed enforcement of arbitral awards will be ordered to pay costs on an indemnity basis unless special circumstances exist. It should, however, be noted that arbitral awards in IP-related cases are not binding on the world at large, third parties or or IP right registrars in Hong Kong, so limitations on arbitrability do exist.

It is also worth noting that Mainland China treats IP disputes as administrative disputes and interprets arbitration agreements quite narrowly. In *AMSC Ltd v Sinovel Wind Group Co Ltd*,[7] for example, China's Supreme People's Court held that infringement claims are not considered as disputes arising from the execution of or in connection with the contract, despite an arbitration clause which provided that "all disputes from the execution of, or in connection with this contract … shall be submitted to arbitration". Arbitration agreements should therefore, when being drafted, also address choice of law issues and specify the law under which infringement and validity issues are to be determined.

Hong Kong has strict and robust confidentiality provisions in respect of arbitral proceedings and awards as well as related court proceedings and judgments, as set out in ss 16-18 of the Arbitration Ordinance. Article 45 of the HKIAC Administered Arbitration Rules 2018 includes similar provisions in relation to arbitral proceedings and awards. Furthermore, Hong Kong became an especially important seat of arbitration for IP disputes with the conclusion of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong SAR 2019 (the Interim Measures Arrangement).[8]

> "… [A]rbitration can be used as a single forum for deciding multiple IP disputes, and so can result in widely enforceable awards. This is possible if the scope of an arbitration agreement is broadly drafted and multi-party or multi-contract provisions (such as joinder and consolidation) are incorporated."

Timing is essential in IP disputes involving electronic games, so preservation orders from a court may be necessary to ensure adequate relief. Prior to the Interim Measures

Arrangement, one issue that arose in arbitrations involving Mainland Chinese parties was that the Mainland courts were not empowered to issue interim relief in relation to an arbitration seated outside the Mainland. As a result, even with a valid arbitration agreement, parties requiring interim relief in respect of breaches in Mainland China had no recourse other than to file a copyright violation lawsuit in Mainland China. The Interim Measures Arrangement allows parties in Hong Kong-seated arbitrations administered by a qualified arbitral institution (such as HKIAC) to seek preservation orders from the Mainland courts, thus making Hong Kong a particularly attractive seat for parties to IP disputes. The Interim Measures Arrangement empowers Mainland courts to issue orders to preserve assets and evidence, and as to conduct. Orders as to conduct under Chinese law are equivalent to injunctions in common law jurisdictions and are particularly useful for preventing infringing conduct in IP disputes.

Since the entry into force of the Interim Measures Arrangement on 1 October 2019, HKIAC has processed 37 applications made to the Mainland courts under the Arrangement, 34 of which were made for the preservation of assets, two for the preservation of evidence and one relating to conduct. The total value of assets sought to be preserved across all applications was RMB 12.5 billion or approximately US$ 1.9 billion.

Global IP companies, many of whom undoubtedly hold assets and evidence in Mainland China, have obvious benefits to gain through this mechanism.

Conclusion

In relation to IP disputes involving electronic games, and particularly where IP has been developed in one country but consumed and popularised in another, the parties' interests are best served through a dispute resolution method that can provide a clear and informed result which is reached and delivered in a timely manner. Further, increasing governmental recognition of the importance of protecting IP rights makes the enforcement of arbitral awards more reliable, while the benefits of arbitration make it a more viable alternative for IP disputes than litigation.

While IP disputes in the Asia-Pacific are expected to gain traction in the near future, legal developments in Hong Kong and the wider region will certainly play an important role in resolving parties' disputes effectively through arbitration.

"While IP disputes in the Asia-Pacific are expected to gain traction in the near future, legal developments in Hong Kong and the wider region will certainly play an important role in resolving parties' disputes effectively through arbitration."

1 L Sydow, *Mobile Minute: Social Distancing Accelerates Multiplayer Mobile Gaming*, App Annie Blog (1 April 2020), available at https://www.appannie.com/en/insights/mobile-gaming/social-distancing-accelerates-multiplayer-mobile-gaming/.

2 See Chinese Game Publishers Association Publications Committee, *2019 Report*.

3 China, India and the Republic of Korea contributed to Asia-based innovators' filing more than half of all international patent applications in 2018. *WIPO 2018 IP Services: Innovators File Record Number of International Patent Applications, With Asia Now Leading*, PR/2019/830 (19 March 2019), available at https://www.wipo.int/pressroom/en/articles/2019/article_0004.html.

4 *Ibid*. WIPO notes that Huawei Technologies was the top corporate filer, with a record-breaking 5,405 patent applications. China is "expected to surpass the US within the next two years on current trends" in terms of the greatest number of patent applications.

5 HKIAC, *Panel & List of Arbitrators*, available at https://www.hkiac.org/arbitration/arbitrators/panel-and-list-of-arbitrators.

6 *Editorial note*: Part 11A (ss 103A-103J) of the principal Ordinance as amended.

7 *Editorial note*: [2013] Min Ti Zi No 54, Supreme People's Court decision of 26 January 2014.

8 HKIAC, *Arrangement on Interim Measures*, available at https://www.hkiac.org/arbitration/arrangement-interim-measures.

The 'Pay As You Go' Principle in Deciding Costs: A Powerful Tool in the Arbitral Tribunal's Case Management Arsenal

Denis Brock & Aditya Kurian

In this article, the authors propose that the 'pay as you go' principle should be better utilised by arbitral tribunals when awarding costs in relation to substantive and/or procedural applications arising during the course of arbitrations. In particular, it should be deployed, in preference to reserving costs until the end of the arbitration. The article is neither claimant- nor respondent-biased but is written in the interests of the most important users of arbitration: the parties, not arbitrators or counsel.

Introduction

When dealing with costs on substantive or procedural applications, arbitral tribunals follow one of two approaches, *viz.* either reserving their decisions on costs until the final award or awarding costs immediately by applying the 'pay as you go' approach. The latter is an effective tool that is available to arbitrators to address two user-perceived shortcomings of arbitration - costs and lack of effective sanctions during the arbitral process.

The worst characteristics of arbitration

The Queen Mary University of London School of International Arbitration/White & Case *International Arbitration Survey 2018* (the Survey)[1] questioned its respondents on what they perceived to be the worst characteristics of arbitration. An overwhelming 67% of respondents said that they were most discontent with the "costs" of arbitration. Consequently, this was the worst characteristic of arbitration perceived by the respondents.

> "… [T]he 'pay as you go' approach … is an effective tool that is available to arbitrators to address two user-perceived shortcomings of arbitration - costs and lack of effective sanctions during the arbitral process."

The second worst characteristic of arbitration, as perceived by 45% of respondents to the Survey, was a "lack of effective sanctions during the arbitral process". In particular, respondents complained about the various dilatory tactics employed by counsel (presumably upon their clients' instructions) that go unsanctioned, because arbitrators are either reluctant to order appropriate sanctions or they do not possess the right instruments to so do.

In light of these two major criticisms by users, it is incumbent on arbitral tribunals to address these concerns effectively when conducting arbitrations. By so doing, arbitrators would play an important role in improving the arbitral process, strengthening confidence in the system and thus making arbitration more attractive as a cost-effective and efficient mode of dispute resolution.

Arbitrators are mandated to conduct arbitrations efficiently

The rules of the major arbitral institutions in relation to the conduct of arbitrations, such as those of the HKIAC, SIAC, ICC and LCIA, impose an express obligation on arbitrators to do so in an expeditious and cost-effective manner. These institutional rules vest arbitrators with wide discretion in determining suitable procedures to be applied to the conduct of arbitrations pursuant to this purpose. In this regard, tribunals have wide latitude to determine the appropriate procedure when awarding costs.

While it is expected that tribunals would discharge their obligations by applying the most cost effective tools in conducting an arbitration, the Survey results provide evidence to the contrary. The fact that "costs" and the "lack of effective sanctions during the arbitral process" are the worst characteristics of arbitration perceived by respondents strongly suggests that tribunals are not sufficiently utilising the 'pay as you go' principle in awarding costs for substantive or procedural applications during the course of an arbitration.

The unfortunate reality is that it has become fairly common for arbitral tribunals to issue interim decisions reserving costs until the final award without providing any reasons. This can be frustrating and unfair to the prevailing party, particularly where it would have been possible and appropriate for the arbitral tribunal to deal with costs at that stage in accordance with the 'pay as you go' principle.

> "An overwhelming 67% of respondents to the Survey said that they were most discontent with the "costs" of arbitration. … The second worst characteristic …, as perceived by 45% of respondents …, was a "lack of effective sanctions during the arbitral process".

The obvious inference where no reasons or no justifiable reasons are provided by arbitral tribunals in not applying the 'pay as you go' principle when awarding costs, could be one of lethargy. Such conduct by tribunals can rightly be characterised as unfortunate, to put it mildly. It runs contrary to the mandate imposed upon them by the institutional rules agreed between the parties. The bane of arbitration is precisely such conduct, which has contributed to warranted criticisms with regard to its two worst aspects as revealed by the Survey.

> "While it is expected that tribunals would discharge their obligations by applying the most cost effective tools in conducting an arbitration, the Survey results provide evidence to the contrary. … This can be frustrating and unfair to the prevailing party …"

In the interests of transparency, the parties have a right to know what motivates tribunal decision-making in awarding costs. Tribunals therefore have a duty to provide them with justifiable reasons when deciding not to apply the 'pay as you go' principle. More widely, tribunals must remedy the 'norm' of departing from this principle, particularly without justifiable reasons. Such a course correction is required so that tribunals may reform the basis on which costs are awarded and thus effectively address user concerns.

Negative consequences of reserving costs until the final award

The following discussion sets out the shortcomings of reserving costs until the final award, while contrasting it with the benefits of the 'pay as you go' principle.

Parties often incur significant legal costs during arbitral proceedings, a large portion of which are the fees of their lawyers. These costs can escalate rapidly where a party makes or defends a number of applications, as it would constantly have to pay substantial legal fees for prosecuting or defending them.

In this context, an approach whereby an arbitral tribunal reserves the costs of the application to the final award could open the door to unmeritorious or frivolous applications, with the undesirable consequence of:

(1) significantly delaying the progress of the arbitration;
(2) substantially increasing the costs of the arbitration; and
(3) risking the stifling of a party's claims or defences.

Where a tribunal adopts this approach, the prevailing party is not reimbursed for its costs incurred in prosecuting or defending the application at the time of the decision on it. Rather, that party is awarded its costs at the conclusion of the arbitration. This could mean that party having to wait, at the very minimum, a year or so (or, in complex cases, a couple of years) before being awarded its costs.

This approach presents an opportunity for mischief, as a party may strategically consider filing a number of unmeritorious or frivolous applications with the aim of substantially racking up costs to cause the impecuniosity of the prevailing party. Impecuniosity would affect a prevailing party's ability to prosecute its claims or defences in the arbitration. Such an outcome would be an abuse of the arbitral process and one that would be unfair and prejudicial to the prevailing party. It is the possibility of such an undesirable outcome that arbitral tribunals should heed and prevent.

> "In the interests of transparency, the parties have a right to know what motivates tribunal decision-making in awarding costs. Tribunals therefore have a duty to provide them with justifiable reasons when deciding not to apply the 'pay as you go' principle."

Even if this approach does not result in stifling a party's claims or defences *per se*, the very prospect of racking up substantial costs and causing significant delays to the progress of the arbitration make it all the more justifiable for tribunals to avoid adopting it.

> "… [Reserving awards of costs until the end of the arbitration] presents an opportunity for mischief, as a party may strategically consider filing a number of unmeritorious or frivolous applications with the aim of substantially racking up costs to cause the impecuniosity of the prevailing party."

It follows that when considering reserving the costs of the application to the final award, the tribunal must exercise caution and weigh the consequences before making its decision.

Advantages of applying the 'pay as you go' principle in awarding costs

When an arbitral tribunal applies the 'pay as you go' principle, it awards costs to the prevailing party at the time it renders its decision on the substantive and/or procedural application. The costs, if not agreed between the parties, are determined by the tribunal itself and made payable by the losing party immediately. The merits of this approach are as follows:

(1) it would compel the losing party to reimburse the prevailing party for the latter's costs expended on prosecuting or defending the application at the time the application is decided; and

(2) it would act as a strong deterrent to the filing of any further unmeritorious or frivolous applications by the losing party

It follows that the 'pay as you go' approach operates as an effective sanction to achieve the following results:

(1) to prevent a party from stifling the other party's claims or defences through vexatious applications;

(2) to prevent delays to the progress of the arbitration by deterring the filing of unmeritorious or frivolous applications;

(3) to prevent an abuse of the arbitral process by forcing parties to 'put their money where their mouth is' and approach the arbitration in a focused and disciplined manner. The sanction of immediate reimbursement of costs to the prevailing party would make the losing party think twice before making an application; and

(4) to contribute toward addressing the user concerns about costs and the lack of effective sanctions during the arbitral process expressed in responses to the Survey.

> "… [T]he'pay as you go' approach to awarding costs … operates as an effective sanction … [in] addressing user concerns as to costs and the lack of effective sanctions during the arbitral process expressed in user responses to the Survey."

Despite the benefits of the 'pay as you go' approach, the question may arise as to whether its application would be burdensome to the parties and to the arbitral tribunal from a procedural perspective. It is submitted that applying the approach would not be onerous to either. Since the bulk of the parties' costs would comprise the fees of their counsel, these costs can be clearly identified, particularly where lawyers bill their clients on an hourly basis and issue monthly invoices. As these costs would relate to an individual application, it would not be cumbersome and time-consuming for the parties to work out the costs when compared to assessing them at the end of the arbitration.

Conclusion

The authors do not advocate the 'pay as you go' principle as a 'one size fits all' approach. However, given its benefits and the relative ease of application, it is submitted that arbitral tribunals, when awarding costs, should strongly consider applying it unless there are compelling reasons to the contrary.

> "… [I]t is submitted that arbitral tribunals, when awarding costs, should strongly consider applying … [the 'pay as you go' principle] unless there are compelling reasons to the contrary."

1 *Editorial note*: Available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

Country Update: Thailand

Kay Kian Tan & Bhavish Advani

This article discusses several salient issues and recent developments in arbitration in Thailand. It focuses on public policy challenges to arbitral awards and their enforcement, the effect on arbitrators of laws preventing foreigners from providing legal services, virtual hearings and the beginnings of a debate on whether the Thai public policy bar on third party funding should be removed for arbitration.

Introduction

Thai courts have increasingly come to uphold and enforce arbitral awards.[1] The Thailand Arbitration Centre (THAC) has reported that, in 2019, 75% of enforcement applications succeeded, while awards were set aside in 18% of cases.[2]

Recent research[3] has also concluded that, between 2016 and 2020, of the 101 award-related cases before the commercial courts, 77% resulted in enforcement. Of these cases, the vast majority (96%) concerned domestic awards. This is a substantial improvement when compared with pre-2016 statistics. The research has also pointed to an improvement in timeframes: 28% of arbitration cases were concluded within one year. Another 70% of cases concluded within one-three years, with only two per cent lasting longer than three years.

This is a positive trend overall, but one that is subject to specific departures and challenges, some of which are considered below.

> "Thai courts have increasingly come to uphold and enforce arbitral awards. … [I]n 2019, 75% of enforcement applications succeeded, while awards were set aside in 18% of cases."

The *Hopewell* Saga

In what has been dubbed the '*Hopewell* Saga', Thailand's Supreme Administrative Court (SAC) has affirmed that prescription[4] remains a basis for setting aside and resisting enforcement of arbitral awards on public policy grounds under ss 40, para 3(2)(b) and 44 of the Arbitration Act 2002 as amended.[5] These sections provide for an award to be set aside or refused enforcement where it would be "contrary to public order or good morals."

The *Hopewell* case ostensibly drew to a close in July 2020, but in a twist truly befitting its label, a recent decision by Thailand's Constitutional Court has upended what many assumed was the final word on the case. Notwithstanding this development, the SAC's reasoning and analysis provide substantial insight into the public policy ground.

It is important to note that Thailand is a civil law jurisdiction that does not apply the principles of case precedent or *stare decisis*. Subsequent cases touching on similar issues may not necessarily be decided the same way. That said, the SAC and the Supreme Court have the final say on administrative cases and commercial cases respectively. Their decisions and findings are therefore highly indicative of how Thai courts will approach future cases.

Background and issues in contention

The following brief summary of the case history assists an understanding of the issues that arose in the *Hopewell* case.

(1) On 9 November 1990, the Ministry of Transport (MOT) and State Railway of Thailand (SRT) entered into an agreement with Hopewell (Thailand) Co Ltd (HCL) (the Agreement) for the construction of an elevated railway in Thailand. Such contracts with governmental bodies are categorised as 'Concession Agreements'. The Agreement was governed by Thai law and provided for disputes to be resolved by arbitration at the Thailand Arbitration Institute (TAI).

(2) At the time the Agreement was entered into, the prescription period for Concession Agreements was the same as that for commercial contracts, *viz* 10 years from the date the cause of action accrued.

(3) Disputes arose between the parties and, in January 1998, HCL's causes of action against the MOT and SRT accrued.

(4) On 5 October 1999, the Thai Parliament enacted legislation[6] (the ACA) which established a separate branch of the judiciary - the Administrative Courts - to hear administrative cases. Under this legislation, a one-year prescription period was fixed for "administrative contracts": this included Concession Agreements. No transitional provisions were enacted. On 9 March 2001,[7] the Administrative Courts commenced hearing cases.

(5) On 24 November 2004, HCL commenced arbitration proceedings against the MOT and SRT. Among other things, the MOT and SRT argued that HCL's claims were time-barred, based on the one-year prescription period under the ACA.

> "Thailand's Supreme Administrative Court … has affirmed that prescription remains a basis for setting aside and resisting enforcement of arbitral awards on public policy grounds …"

(6) On 28 February 2008, the one-year prescription period under the ACA was amended to five years.

(7) On 30 September 2008[8] and 15 October 2008,[9] the arbitral tribunal issued awards upholding HCL's claims and dismissing counterclaims brought by the MOT and SRT. It decided that HCL's claims were not time-barred, on the basis of a 10-year prescription period.

(8) `The MOT and SRT applied to set aside both awards. Meanwhile, HCL sought enforcement

(9) On 13 March 2014,[10] the Central Administrative Court (CAC) set aside both awards and refused enforcement on the basis that HCL's claims were time-barred five years from the date the causes of action accrued. HCL appealed the CAC's decision to the SAC.

> "From an arbitration perspective, the SAC's decisions [in the *Hopewell* case] still provide an insight into how Thai courts approach challenges under ss 40, para 3(2)(b) and 44 of the Arbitration Act. … Prescription … under Thai law clearly raises a matter of public policy that will … result in awards being set aside and refused enforcement."

(10) On 21 March 2019,[11] the SAC reversed the CAC's decision. While agreeing that a five-year prescription period applied, the SAC found that time only began to run after the Administrative Courts commenced hearing cases. The arbitration had therefore been commenced within the applicable prescription period and enforcement would not contravene public policy.[12] Other public policy arguments based on termination of administrative contracts were also dismissed.

(11) On 18 July 2019, the MOT and SRT sought a retrial. One of the bases relied on was alleged new evidence[13] on impermissible foreign ownership interests in HCL.[14] The MOT and SRT argued that this raised a capacity issue precluding enforcement on public policy grounds. The CAC rejected the application on 21 August 2019,[15] with the SAC affirming that decision on 3 July 2020.[16]

On 27 December 2020, the Ombudsman made a reference to the Constitutional Court about the SAC's conduct of the case. The conduct in question was ruled unconstitutional on 18 March 2021.[17] It is as yet unclear what impact this will ultimately have on HCL's award.

Public policy as a ground for challenging awards

Although the latest developments leave the fate of HCL's award hanging in the balance, these developments largely relate to matters of domestic civil and commercial law. From an arbitration perspective, the SAC's decisions still provide an insight into how Thai courts approach challenges under ss 40, para 3(2)(b) and 44 of the Arbitration Act.

Significantly, compliance with prescription periods under Thai law clearly raises a matter of public policy that will, in appropriate cases, result in awards being set aside and refused enforcement.[18] While the SAC prioritised substance over form in reaching its conclusions, its review of prescription afresh makes it unambiguous that prescription is an area in which errors of law by a tribunal are not permissible as matter of Thai public policy.

On the other hand, even though the SAC disagreed with parts of the tribunal's decision on termination which touched on public policy issues, it did not disturb the tribunal's findings. Following from this aspect of the case, even if a tribunal has made errors of law on issues engaging public policy, this alone will not suffice to challenge an award on public policy grounds.

The SAC's conclusions on capacity are more tentative. This part of its decision was premised on how the underlying facts were always known to the MOT and SRT. Additional criteria, such as whether the evidence would have materially altered the outcome, were not considered, though observations were made on the foreign ownership issue. This leaves open the possibility that a capacity issue may, if substantiated, qualify as a basis for challenging an award on public policy grounds.

Pre-arbitration protocols

The MOT and SRT also raised HCL's non-compliance with a pre-arbitration 'conciliation' provision as a ground for challenge. The SAC ultimately found that the provision had been complied with, based on HCL's attempts to negotiate with the MOT and SRT at the time. The issue was dealt with cursorily but does suggest that Thai courts will take cognisance of such pre-arbitration protocols.

Performance of legal services by foreigners

In 2019 and 2020, Thailand's laws concerning foreigners performing arbitration-related legal services witnessed significant developments.

> "The [SAC's decision in *Hopewell*] … suggest[s] that Thai courts will take cognisance of … pre-arbitration protocols [requiring conciliation]."

Overview

The performance of legal services by foreigners in Thailand has historically been the subject of substantial restrictions under Thailand's labour laws, which govern the nature of work that may be undertaken by foreigners. These restrictions have gradually eased down the years, most recently in 2020.

Under laws dating from 1979,[19] legal services could not generally be performed by foreigners. In 2000, exemptions were created to allow them to perform legal services as arbitrators and to act as legal representatives in arbitrations.[20]

(1) The exemption for legal representatives was, however, limited to disputes in which the applicable law was not Thai law and enforcement in Thailand was not contemplated.
(2) In 2020, the restrictions on legal representatives were further eased by removing the preclusion on enforcement in Thailand.[21] However, the restriction on applicable law remains in place.

Work permits for foreign arbitrators

Although the exemptions created in 2000 permitted foreigners to hear cases as arbitrators in Thailand, a gap existed in the process for issuing the Work Permit enabling them to do so. The process required paperwork issued by the foreigner's employer in Thailand – which, however, overlooked the unique position of an arbitrator, who was not 'employed' in the traditional sense. In 2019, therefore, the Thai Arbitration Act was amended to designate entities responsible for issuing such documentation.[22]

(1) Under the amendments,[23] arbitration-related governmental agencies, such as the TAI or THAC and other arbitration-related organisations[24] ('Designated Entities') are now empowered to issue the required permit documents.
(2) While it is unclear whether an arbitration must be administered by a Designated Entity, engaging the support services of one should suffice in practice. This has effectively filled the gap that had existed.

Prior to obtaining the Work Permit, a foreign arbitrator still needs to apply for a Non-Immigrant Business Visa (Work Visa) from the relevant Thai overseas mission. The arbitrator will then be permitted to enter Thailand for work purposes and may commence work while awaiting issuance of the permit.

SMART Visa for specialist arbitration work

In a separate development pursuant to Thailand's economic development initiatives, an entirely distinct type of visa (the SMART Visa) became available from 2019 onward to those engaged in specialist alternative dispute resolution (ADR) work. Such persons include, for example, arbitrators, tribunal secretaries, mediators and transcribers, but do not include legal representatives.

The SMART Visa was introduced in 2018 to attract foreign talent to work in Thailand within targeted growth industries.[25] In 2019, the list of industries was expanded to include ADR.[26]

> "[T]he SMART Visa became available from 2019 onward to those engaged in specialist … ADR work. Such persons include … arbitrators, tribunal secretaries, mediators and transcribers, but do not include legal representatives."

(1) The key privilege of the SMART Visa is exemption from both the Work Permit and Work Visa[27] requirements.
(2) Other privileges attached to the SMART Visa include a four-year duration, exemptions from reporting requirements, permission for spouses and children to reside and work in Thailand, as well as access to fast-track lanes at international airports in Thailand.

Comparison and impact

The traditional combination of a Work Visa and Work Permit may seem a poor offering by comparison with the SMART Visa with its extensive privileges. Practically speaking, however, the Work Visa-Work permit route was better suited to the needs of foreign arbitrators.

(1) The SMART Visa, while attractive to a foreign arbitrator seeking to be based in Thailand, offers little practical benefit in the majority of situations.
(2) Given the limited use of Thailand as a location for international arbitration by comparison with places such as Singapore or Hong Kong, most foreign arbitrators need temporary entry into Thailand for the purpose of conducting hearings in Thailand-seated international arbitrations.
(3) The Work Visa-Work Permit process, being a known commodity to government departments, could be

approved within a short timeframe, in many cases within days. The approval process for the SMART Visa, on the other hand, is far more open-ended and requires at least 30 days, if not more.

(4) As a result, making Work Permits available to foreign arbitrators had a greater impact.

With the shift to virtual hearings and 'working-from-anywhere', however, the SMART Visa may now end up being the more significant development.

Firstly, with location increasingly irrelevant, proceedings that would otherwise have been conducted physically in other arbitration centres can now be conducted from anywhere in the world. Holding a SMART Visa, foreign arbitrators can base themselves in Thailand to take advantage of the comparatively lower real estate costs and cost of living without any impact on the matters they conduct.

Secondly, in similar vein, the SMART Visa provides an opportunity for chambers of international arbitrators to extend their presence to Thailand with ease.

> "… [T]he SMART Visa provides an opportunity for chambers of international arbitrators to extend their presence to Thailand with ease."

Virtual hearings

Due to the current pandemic, major global arbitral institutions have issued protocols for the conduct of virtual hearings under their arbitration rules. Assuming that arbitrating parties have adopted rules of these institutions, the virtual hearings themselves, as well as the evidence given in those hearings, would satisfy the requirements of s 25, para 1 of the Thai Arbitration Act[28] which provides parties with an opportunity to adduce evidence and present their case. This follows from s 6, para 1, read together with s 25, para 2 of the Act, which upholds the parties' agreed choice of arbitration rules.

> "… [T]he Thai courts have issued detailed protocols for virtual hearings … Together, the 2013 and 2020 regulations [under the Code of Civil Procedure, which is applied by [s] 25, para 3 [of the Arbitration Act] constitute a significant adaptation of Thai civil procedure to technology."

Although s 25, para 2 of the Arbitration Act provides that an arbitral tribunal may conduct the proceedings as it deems fit, if such protocols have not been issued (as, for example, in the case of an *ad hoc* arbitration seated in Thailand), an obstructive party could theoretically attempt to challenge procedures and awards on the basis that a virtual hearing does not satisfy the requirements of s 25, para 1 of the Act.

Now that the Thai courts have issued detailed protocols for virtual hearings,[29] such arguments will have difficulty succeeding.

(1) Section 25, para 3 permits a tribunal to "apply the Civil Procedure Code on evidence mutatis mutandis".

(2) Under the Code of Civil Procedure,[30] two regulations address virtual hearings.

   (i) The first dates back to 2013[31] and deals with testimony given remotely.

(ii) The second was issued in 2020[32] and provides a more comprehensive framework, dealing with matters such as how documentary evidence submitted electronically would comply with the evidentiary requirements of Thai civil procedure.[33]

(iii) Very importantly, the new regulation expressly states that hearing of evidence electronically cannot be denied just because it is in electronic form.[34]

Together, the 2013 and 2020 regulations constitute a significant adaptation of Thai civil procedure to technology.

Third party funding (TPF)

The Thai courts have been emphatic that an agreement whereby a third party takes an interest in the outcome of litigation will be "contrary to public order or good morals".[35] Recently, however, a former justice of the Constitutional Court has suggested that the law in this area should be reviewed in the context of international arbitration.

In a 2019 interview with the TAI[36] and in a 2018 journal article,[37] the former justice opined that TPF of international arbitration in Thailand should not raise public policy concerns and that the law should be reformed on this front.

Although the preclusion of TPF in the context of domestic litigation is clear, the courts have not actually considered situations in which arbitration has been involved. This has certainly been the case where Thai parties to arbitrations seated outside Thailand have been concerned. In such cases, it could be argued that Thai public policy would not be engaged so long as the parties' agreed seat permits TPF (absent, of course, any extenuating circumstances, such as pressure being exerted on the Thai party).

While there is undoubtedly a long way to go before TPF in Thailand moves in the direction it has in Singapore and Hong Kong over recent years, we are seeing the beginnings of a conversation which many in the industry have been awaiting for some time now.

At the same time, given the tone of case decisions to date and the difficulties posed by the absence of a distinction between domestic and international arbitration under current laws, any progress will have to be initiated at the governmental level.

Conclusion

With Thailand's push toward a more services-oriented economy, there is cause for optimism that it will become a more important centre for international arbitration in due course. While progress may seem slow, it has been steady. Assuming continued efforts by all stakeholders, there are significant growth opportunities to be had in this space.

"While there is undoubtedly a long way to go … [for] TPF in Thailand[,] … we are seeing the beginnings of a conversation which many in the industry have been awaiting for some time now."

> "With Thailand's push toward a more services-oriented economy, there is cause for optimism that it will become a more important centre for international arbitration in due course."

1 Thailand is a party to the New York Convention 1958.

2 Thailand Arbitration Centre, *Annual Report on Arbitration* (2019), pp 8-9, available at https://thac.or.th/wp-content/uploads/2020/11/The-Annual-Repot-on-Arbitration-was-Estrablished-in-2019.pdf.

3 Rabi Bhadanasak Research and Development Institute, *Research on Recognition of Arbitral Awards by the Courts of Justice* (12 March 2021), available at https://rabi.coj.go.th/th/content/category/detail/id/39/iid/235829.

4 The civil law equivalent of limitation or time-bar.

5 Thailand's primary arbitration law, the Arbitration Act BE 2545 (2002), derives from the 1985 version of the UNCITRAL Model Law.

6 Act on Establishment of Administrative Courts and Administrative Court Procedure BE 2542 (1999).

7 Supreme Administrative Court Decision Nos Aor. 221-223/2562 (2019) (SAC Decision), para 104.

8 *Ibid*, para 100.

9 *Ibid*, paras 9 and 100.

10 Central Administrative Court, Black Case No 107/2552 (2009); Red Case No 366/2557 (2014): Black Case No 2038/2551 (2008); Red Case No 367/2557 (2014); Black Case No 1379/2552 (2009); and Red Case No 368/2557 (2014).

11 SAC Decision, para 92-119.

12 Other grounds were also dismissed: SAC Decision, paras 102-104 and 109-110.

13 Other grounds under s 75 of the ACA were raised.

14 The SRT also commenced proceedings against the Department of Business Development of the Ministry of Commerce for permitting HCL to be incorporated. These proceedings were later voluntarily suspended.

15 Central Administrative Court Application Nos 327/2562 (2019), 328/2562 (2019) and 329/2562 (2019).

16 Supreme Administrative Court Decision Nos 241-243/2563 (2020), paras 13-23.

17 Constitutional Court Decision No 5/2564 (2021).

18 Similar decisions have been reached in a commercial context: see Supreme Court Decision Nos 6741/2562 (2019) and 13570/2556 (2013).

19 Item 39 of List (FPO List 1980) under the Royal Decree Prescribing Occupation in which a Foreigner is Prohibited to Engage BE 2522 (1980), s 4 pursuant to the Foreigners' Working Act BE 2521 (1979) (FWA), s 6.

20 Item 39 of FPO List 1980 (as amended) under the Royal Decree Prescribing Occupation in which a Foreigner is Prohibited to Engage (No 3) BE 2543 (2000) (as amended), s 3 pursuant to FWA s 6.

21 Item 27 of List 1: Occupations Strictly Prohibited to Foreigners under Announcement of the Ministry of Labour on Prescribing Occupation in which a Foreigner is Prohibited to Engage BE 2563 (2020), art 2, pursuant to the Emergency Decree on Foreigners' Working Management BE 2560 (2017) (as amended) (EDFWM), s 7.

22 Arbitration Act BE 2545 (2002) (as amended).

23 *Ibid*, Chapter 2/1, s 23/2.

24 It is unclear what organisations make up this category, but it may include local chapters or branches of international arbitral institutions or arbitration-related professional bodies.

25 Cabinet Resolution, 16 January 2018, Investment Promotion Act BE 2520 (1977) (IPA), s 13 and the Announcement of the Office of Board Investment on Qualifications, Criteria, and Conditions for Smart Visa (1 February 2018), No Por. 4/2561.

26 Cabinet Resolutions, 16 January 2018 and 6 November 2018, IPA, s 13 and Announcement of the Office of Board Investment on Qualifications, Criteria, and Conditions for Smart Visa (18 December 2018), No Por. 12/2561 (BOI Announcement Por. 12/2561).

27 BOI Announcement Por. 12/2561, art 4 and EDFWM, ss 4(7), 6 and 14, read with the Notification of Ministry of Labour Re: Permissions for Foreigners to Work in the Kingdom with Exemption not to Comply with the Emergency Decree for Highly Skilled Professionals, Investors, Executives and Start-up Business Operators BE 2562 (2019), art 3 and Immigration Act BE 2522 (1979) (as amended), s 5, read with the Announcement of the Ministry of Interior on Permission for Foreigners Entering the Kingdom under Special Circumstances for Highly Skilled Professionals, Investors, Executives and Start-up Business Operators BE 2562 (2019), art 4.

28 Arbitration Act BE 2545 (2002).

29 The Electronic Transactions Act BE 2544 (2001) ensures that writing and signature requirements are met notwithstanding use of electronic means.

30 Civil Procedure Code BE 2477 (1937), as amended.

31 Regulation of the President of Supreme Court on Procedures concerning the Taking of Evidence and Witness Outside the Court by Virtual Meeting BE 2556 (2013).

32 Regulation of the President of Supreme Court on the Electronic Procedures BE 2563 (2020) (2020 PSC Regulation).

33 *Ibid*, cl 9.

34 *Ibid*, cl 15.

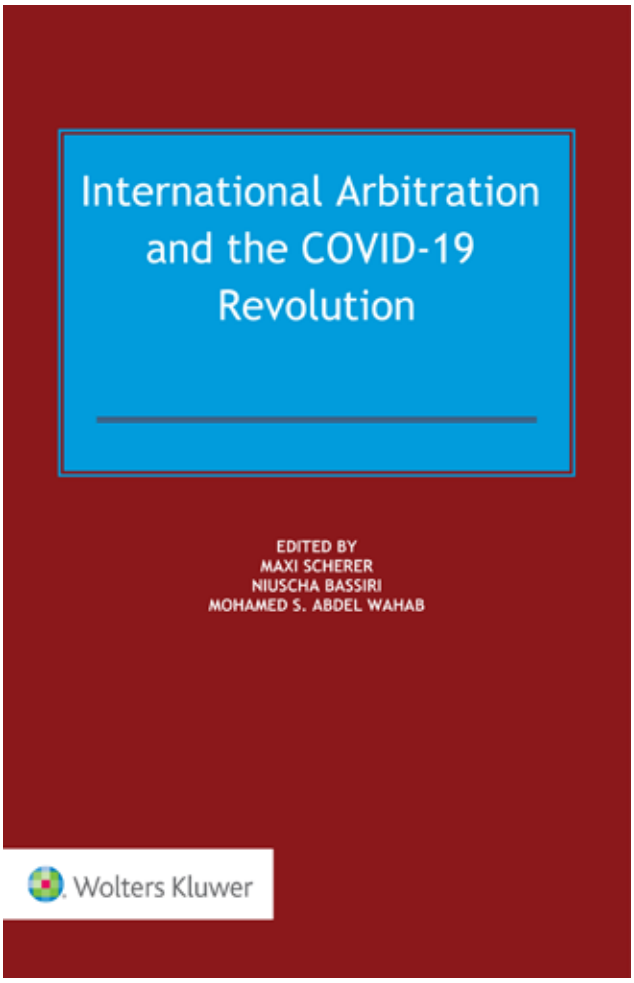
35 Supreme Court Decision No 690/2492 (1949) and Supreme Court Decision No 5567/2555 (2012); s 150 of the Civil and Commercial Code.

36 TAI interview dated 23 July 2019 with Professor S Asawaroj, a former Judge of the Constitutional Court and a former Member of the Committee of the Law Reform Commission.

37 Saowanee Asawaroj, *Third Party Funding in International Commercial Arbitration*, 65(2) Dulapaha Journal (2018)(in Thai), available at https://jla.coj.go.th/th/file/get/file/20190508e37f870ea9e2090d979704b3e97b4639152641.pdf.

International Arbitration and the COVID-19 Revolution[1]

Reviewed by Robert Morgan



"The past is a foreign country; they do things differently there."[2]

Initiatives to alter dispute resolution processes and procedures are not normally known for their turns of speed. Change is inherently conservative and incremental and is only made on an 'as required' basis when need is identified by governments or by dispute resolution institutions. Evolution, not revolution, is the order of the day; its pace is characterised by some as sedate and stately, and by others as glacial. Rarely does a serious external crisis necessitate an immediate and urgent response by the dispute resolution system, requiring it to change its character fundamentally to stay both competitive and relevant to users - and all the more so where the underlying threat is literally existential.

This is the challenge to dispute resolution that has been posed worldwide by the COVID-19 pandemic. For some 30+ years, the idea of information technology-facilitated arbitration and mediation had been gaining currency, though not with any perceptible sense of urgency or detailed attention to the technological implications and requirements. Developments were incremental and tended to apply to specialised high-profile sectors, such as domain name dispute resolution, rather than generally.

The pandemic has changed all that almost overnight, illustrating the aphorism that necessity is the mother of invention and leading to what has come to be called the 'new normal'. By any standard, the change has been seismic. Since early 2020, institutions offering dispute resolution services have, in common with the courts, had to develop new offerings in terms of rules, procedures, the protocols necessary to ensure their proper and efficient application, and appropriate technological mechanisms to implement them at ground level.[3]

International Arbitration and the COVID-19 Revolution is the first commentary to address specifically both the existing and likely effects of the pandemic on international commercial and investor-State arbitration. The book's purview is very wide: its cast of 31 contributors offer perspectives on such subjects as dispute management and prevention, initiating arbitration remotely, the appointment of arbitrators and e-signature of arbitral awards. The big ticket item is, however, remote hearings, a subject considered in great detail over several chapters and covering a wide range of practice and legal topics, *viz* (1) the legal framework of remote hearings; (2) their planning, organisation and conduct, in particular with regard to natural justice challenges; (3) practical tips on remote advocacy, witness preparation and cross-examination; (4) challenges to and opportunities for third party funding of arbitration; and (5) the setting aside and enforcement of awards made in remote proceedings. Several chapters focus specifically on the impact of COVID-19 in construction, energy, aviation, technology, telecommunications, finance and insurance disputes.

Of particular practical interest and utility are the following chapters.

(1) Chapter 4, on the legal framework of remote hearings (Maxi Scherer), which discusses hard and soft law instruments, guidelines and protocols and focuses on the power of arbitral tribunals to order remote hearings in the absence of party agreement, a question that is currently before the Swedish courts.[4]

(2) Chapter 5, on planning and preparing for remote hearings (Niuscha Bassiri), which discusses (*inter alia*) software, hardware and internet connection requirements and issues that may arise from them.[5] This chapter also provides a sample procedural order.

(3) Chapter 7, which sets out the results of an empirical study of users' views on remote hearings (Gary B Born, Anneliese Day QC and Hafez Virjee). The survey found that, although respondents considered remote hearings on a par with in person and partly remote (or hybrid) hearings in certain respects, overall they considered remote hearings to be less effective than the alternatives.[6]

(4) Chapter 11, on the future of international arbitration (Emma Vidak Gojkovič and Michael McIlwrath), in which the authors describe "a wave of evolution" while noting (with surprise) "how quickly and easily … new methods are becoming standard practice" and at the same time concluding that changes will be permanent and that new avenues of innovation beyond remote hearings *simpliciter* will be sought out.

This reviewer has only two criticisms. Firstly, some discussion of mediation would have been desirable. Mediation is addressed not generally[7] but only in relation to technology and telecommunications disputes. Secondly and more seriously, the surprising absence of an index from a commentary of such detail, breadth and depth is surprising.

These criticisms apart, this book is timely and highly recommended. It is an invaluable aid to practitioners in getting up to speed with the inevitable, exponential and inexorable advances in remote hearing practice and related issues, both present and future.

1 *International Arbitration and the COVID-19 Revolution*, by Maxi Scherer. Niuscha Bassiri & Mohamed S Abdel Wahab (Contributing Eds), (2021, Wolters Kluwer), xxx+371pp, casebound, ISBN: 978-94-035-2845-8.

2 LP Hartley, *The Go-Between* (1953).

3 See, for example, Robert Morgan, *Dispute Resolution and the COVID-19 Pandemic* [2020] Asian DR 137-140 and updates at [2020] Asian DR 187-190 and at p 98 below; Robert Morgan, 'Mediation, the Courts and COVID-19', in *Hong Kong Civil Procedure 2021 - Special Release* (2020), pp 23-42; Noble Mak & Martin Rogers, 'Remote Hearings', *ibid*, pp 1-21; Eric Ng, *Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption* [2020] Asian DR 173-178.

4 Case T 7158-20 (Svea Court of Appeal). The Svea Court of Appeal has already dismissed a request for a preliminary injunction to render the award unenforceable on the grounds of excess of mandate and procedural irregularities. The Appendix to the book sets out a useful comparative table on how arbitration laws worldwide may affect conducting remote hearings against a party's wishes.

5 Scherer (ch 4) also deals with these matters at pp 93-94.

6 See also, in a similar vein, Baker McKenzie/KPMG joint survey and report, *The Future of Disputes: Are Virtual Hearings Here to Stay?* (January 2021), available at https://www.bakermckenzie.com/-/media/files/insight/publications/2021/01/future-of-disputes-campaign-brochure.pdf.

7 Cf Morgan, note 3.

New and emerging dispute resolution rules

International Bar Association

On 17 December 2020, the IBA adopted the third edition of its Rules on the Taking of Evidence in International Arbitration (the 2020 Rules),[1] pursuant to changes recommended by the IBA Rules of Evidence Review Task Force. The 2020 Rules were published on 17 February 2021 but apply to all arbitrations commenced after 17 December 2020 where parties so agree. The new edition does not implement wholesale changes to the IBA Rules but makes adjustments to (1) reflect the need for remote hearings in light of procedural responses to the COVID-19 pandemic, and (2) fine-tune a number of provisions of the IBA Rules. The 2020 edition does not set out to compete with the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration 2018 with regard to arbitrations conducted under the civil law tradition.

The changes are as follows.

(1) A procedure whereby an arbitral tribunal may order an evidentiary hearing (including a hybrid hearing) to be conducted pursuant to a Remote Hearing Protocol agreed between the tribunal and the parties.
(2) The tribunal may consult the parties on issues in cybersecurity and data protection, including pursuant to 2020 guidance by ICCA-IBA[2] and by ICCA-New York Bar Association-CPR.[3]
(3) New provisions on document production, including that (i) a party may respond to a counterparty's objection to the former's request for document production if the tribunal so orders, and (ii) the tribunal may rule on Requests to Produce without having to consult the parties.
(4) Parties may submit 'second round' witness statements and expert reports addressing new factual developments not previously addressed.
(5) Clarification that a tribunal-appointed expert may not resolve disputes between the parties over information or access to information.
(6) A tribunal may order an evidentiary hearing (including a hybrid hearing) to be conducted as a remote hearing either at a party's request or on its own motion.
(7) A tribunal may, at a party's request or on its own motion, exclude evidence that has been illegally obtained.

DIFC-LCIA Arbitration Rules

Updated DIFC-LCIA Arbitration Rules 2021 came into effect on 1 January 2021.[4] The rules, which apply in the separate Dubai International Financial Centre law district of the United Arab Emirates, deal with (*inter alia*) the following matters.

(1) Case management, including expedited proceedings, early dismissal of claims, dispensing entirely with hearings, limiting the length of pleadings and limiting oral and written testimony of any witnesses.
(2) Electronic communications and virtual hearings.
(3) Broadening the power of the LCIA Court and DIFC tribunals as to consolidation and concurrent conduct of separate arbitrations.
(4) Reduction from 35 days to 28 for a default appointment of a tribunal by the LCIA Court where a respondent fails to file a Response.
(5) A requirement on tribunals to use best endeavours to hand down awards within three months of final submissions.

Consultation on new PRIME Finance Arbitration Rules

A public consultation on a new set of PRIME Finance Arbitration Rules to replace those of 2016 ended on 22 March 2021.[5] These rules, which closely follow the UNCITRAL Arbitration Rules and likewise provide for the administration of arbitrations by the Permanent Court of Arbitration, provide a specialist platform for complex banking and financial disputes. Matters proposed to be dealt with under the new provisions include (1) efficiency and expedition; (2) transparency; (3) emergency arbitration; (4) joinder and consolidation; (5) early determination; (6) disclosure of third party funding arrangements; and (7) encouraging publication of awards.

ICC Note to Parties and Arbitral Tribunals

On 1 January 2021, contemporaneously with the coming into force of the ICC Rules of Arbitration 2021,[6] the ICC published the 2021 edition of its *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*.[7] By contrast with the 2021 Rules, which make a minimum number of changes, the 2021 Note makes an extensive number of changes, both by way of new provisions and expanding on, restating or clarifying guidance previously given in a number of areas. Among the matters so dealt with are (1) electronic communications and submissions; (2) joinder and consolidation; (3) arbitral impartiality and independence; (4) how the ICC constitutes arbitral tribunals; (5) transparency of the decisions of the ICC Court; (6) virtual hearings; and (7) tribunal encouragement of parties to consider settlement possibilities.

Accessions to international dispute resolution instruments

New York Convention

Malawi became the 167th State party to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 after depositing its instrument of ratification with the United Nations on 4 March 2021 (effective from 2 June 2021). In addition to applying the Convention's reciprocity and commercial reservations, a third (non-retroactivity) reservation stipulates that the Convention applies only to arbitration agreements concluded and awards rendered on or after the date of accession.

Iraq will become the 168th State party to ratify the New York Convention when it deposits its instrument of ratification with the United Nations. This instrument is the Law on the Accession of the Republic of Iraq to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was passed by the Iraqi Parliament on 4 March 2021. Iraq will apply the reciprocity, commercial and non-retroactvity reservations, The dates of deposit of the instrument of ratification and of the coming into force of the Convention in Iraq will be reported in due course. Awards will no longer be enforced in Iraq pursuant to the Riyadh-Arab Agreement for Judicial Co-operation 1983 and agreements between Iraq and individual States.

Regional dispute resolution instruments

Texts of arbitration instruments concluded between the HKSAR and the PRC

(1) Enforcement of awards

The text of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (1999) will be published as amended by the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (2020)[8] in the forthcoming 2021 update to the 'Hong Kong SAR' report in the ICCA *International Handbook on Commercial submissions* by Michael J Moser and Robert Morgan. The text of the amended instrument will appear in Annex IV to the report.

(2) Interim measures

The text of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (2019) will appear in Annex VII to the ICCA HKSAR Report.

Arbitration in the People's Republic of China

(1) SPC report on arbitration-related cases

On 23 December 2020, the Supreme People's Court published its inaugural *2019 Annual Report on Judicial Review of Arbitration Cases in China*.[9] The key highlights of this bilingual report include (1) the operation of the 'reporting system' for enforcement of awards in Mainland China; (2) figures on the results of recognition and enforcement of foreign arbitral award applications; (3) the operation of the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (2019);[10] (4) declaration of six principles emphasising the pro-arbitration approach of Chinese courts; and (5) an update on arbitration practice, including in relation to the Belt and Road Initiative.

(2) Opening up to foreign arbitral institutions in Beijing

On 7 September 2020, the State Council issued a *Work Plan for Deepening Comprehensive Pilot* [*sic*] *and New Round of Opening-Up of Services Sectors and Building Comprehensive Demonstrative Area* [*sic*] *of Opening-Up of State Services Sectors*.[11] This policy paper announces that foreign arbitral institutions will be permitted to set up "business organisations in [a] designated area of Beijing … to provide arbitration services in relation to civil and commercial disputes arising in the areas of international commerce and investments … [and] to support and secure the application and enforcement of interim measures before and during the arbitration proceedings, such as asset preservation, evidence preservation and action preservation".[12] For the purposes of the *Work Plan*, the phrase 'foreign arbitral institution' includes institutions established in Hong Kong, Macao and Taiwan.

It is not, however, clear (absent a definitive ruling by the Supreme People's Court) whether such institutions will be permitted to perform regular arbitral functions, such as administering arbitrations under their own rules.[13]

(3) Shenzhen Special Economic Zone

In October 2020, the PRC central government announced reform measures for the Shenzhen Special Economic Zone (SEZ).[14] These will include (1) construction of an international arbitration centre for the Guangdong-Hong Kong-Macao Greater Bay Area, (2) support for construction of a joint international investment arbitration centre (in both cases modelled on similar institutions in other SEZs), and (3) in co-operation with international organisations and world-renowned arbitral institutions, permit entry to international mediation organisations and mediators.

Resources on international dispute resolution and COVID-19

Global Coronavirus Toolkit

The Practical Law Global service of Thomson Reuters has introduced a free to access Global Coronavirus Toolkit[15] to assist counsel in Australia, Canada, China, New Zealand, the UK and the US working in cross-border arbitration and mediation. Key practice guidance resources in the Toolkit include the following:

(1) a form of *Procedural Order for Video Conference Arbitration Hearings*;
(2) a practice note on COVID-19 developments from arbitral institutions and organisations;
(3) checklist - COVID-19, comparison of institutional arrangements and virtual services;
(4) checklist – tips for arbitrating during the pandemic;
(5) *International Arbitration Pre-Hearing Checklist*; and
(6) *Practice note: Virtual Mediation: Key Issues and Considerations*.

The Toolkit also contains a number of articles and blogs relating to COVID-19

and international commercial and investment treaty arbitration, as well as giving free access to Practical Law COVID-19 global legal updates.

Reports

ICC: Probative value of witness evidence

The ICC's Task Force on Maximising the Probative Value of Witness Evidence (the Task Force) published in November 2020 the *ICC Commission Report: Accuracy of Fact Witness Testimony in International Arbitration*.[16] The initiative for the Task Force's investigation lay in work done by Toby Landau QC on the science and psychology of human memory in dispute resolution, in particular as to the fragility, malleability and distortion of memory, the ease with which memory could unwittingly become corrupted (eg, through error, unconscious bias or the reception of misleading or *ex post facto* information) and whether common practices in collecting, preparing, presenting and examining fact witness testimony contribute to that corrupting effect.[17] The Task Force, while emphasising the critical place of fact witness evidence in merits hearings, does not propose fundamental changes to these practices (such as the role of counsel in helping to prepare witness statements). Rather, it urges the taking of practical cautionary measures to (1) reduce distorting influences and their effects, and (2) allow parties and arbitral tribunals to identify and weigh any distorting influences that may be present.

1 The text of the 2020 Rules (albeit still currently in draft form, enabling direct comparison with the 2010 Rules) and an IBA commentary on the Rules (January 2021) may be accessed at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

2 See ICCA-IBA *Roadmap to Data Protection in International Arbitration* (2020), available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/roadmap_28.02.20.pdf.

3 See ICCA-New York Bar Association-CPR *Protocol for Cybersecurity in International Arbitration* (2020), available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_electronic_version.pdf. See also *Practice guidance for international arbitrations: Protocol on cybersecurity in international arbitration* [2020] Asian DR 47.

4 Available at http://www.difc-lcia.org/arbitration-rules-2021.aspx.

5 The Draft Revised Rules are available at https://primefinancedisputes.org/page/review-of-p-r-i-m-e-finance-arbitration-rules-1.

6 See *New and emerging dispute resolution rules: International Chamber of Commerce* [2021] Asian DR 44.

7 Available at https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.

8 See *Hong Kong-People's Republic of China: supplemental arrangement on recognition and enforcement of arbitral awards* [2021] Asian DR 45.

9 *Sources*: Herbert Smith Freehills, 'Arbitration Notes' (8 January 2021), *China's top court publishes its first annual report on judicial review of arbitration-related cases*, available at https://hsfnotes.com/arbitration/2021/01/08/chinas-top-court-publishes-its-first-annual-report-on-judicial-review-of-arbitration-related-cases/; Winston & Strawn LLP, *PRC Supreme People's Court Releases Its Inaugural Annual Report Of [sic] Judicial Review of Arbitration in China*, available at https://www.winston.com/en/thought-leadership/prc-supreme-peoples-court-releases-its-inaugural-annual-report-of-judicial-review-of-arbitration-in-china.html. The report is not currently available online.

10 As to which, see *Mainland-Hong Kong Arrangement on court-ordered interim measures* [2020] Asian DR 44.

11 *Source*: Herbert Smith Freehills, 'Arbitration Notes' (14 September 2020), *Beijing to open to foreign arbitral institutions*, available at https://hsfnotes.com/arbitration/2020/09/14/beijing-to-open-to-foreign-arbitral-institutions/. See also Yuan Peihao, *Can Foreign Arbitral Institutions Directly Administer Cases in Mainland China?* at pp 67-74 above.

12 As to interim measures, see note 13 above.

13 See, in this regard, James Kwan, Zoe Dong & Phoebe Yan, *Choosing a Foreign Arbitral Institution in China: Is the China Arbitration Market Finally Opening up?* [2021] Asian DR 26-34.

14 *Source*: Pinsent Masons, 'Out-Law News' (23 October 2020), *China announces reform measures for Shenzhen economic zone*, available at https://www.pinsentmasons.com/out-law/news/china-announces-reform-measures-for-shenzhen-economic-zone.

15 Available at https://uk.practicallaw.thomsonreuters.com/Document/id/812ff-2f5e2711eaadfea82903531a62/View/Full%.

16 Available at https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf.

17 Toby Landau QC, *Unreliable Recollections, False Memories and Witness Testimony*, a paper delivered in October 2015 to the ICC Commission on Arbitration and ADR. This paper was, in turn, developed from the author's 2010 Kaplan Lecture, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration* (available at https://static1.squarespace.com/static/5fc4c63ed27ff856c265d945/t/5fd03d52ab2d482295d7e0a2/1607482708302/2010+-+Toby+Landau+QC+%E2%80%93+Tainted+Memories%EF%BC%9AExposing+the+Fallacy+of+Witness+Evidence+in+International+Arbitration+.pdf).

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