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EDITORIAL

This issue of *Asian Dispute Review* commences with a commentary by Vijayendra Pratap Singh, Abhijnan Jha & Abhisar Vidyarthi on guerrilla tactics employed by parties in international arbitrations seated in India. Alex Potts QC then discusses the enforcement in the Cayman Islands of international arbitral awards in arbitrations administered by HKIAC, SIAC, and CIETAC.

This is followed by an article by Matthew Townsend and Tim Robbins, in which they explore the feasibility of adopting a set of Asian Digital Dispute Resolution Rules to meet the demands of the digital economy. The next article, by Sima Ghaffari, discusses important issues of gender diversity and equal representation in the Iranian arbitration community, a subject of wider application and relevance worldwide.

With regard to alternative modes of dispute resolution, Eric Hong Ying Ngai discusses the pros and cons of adjudication and their application to the Hong Kong construction industry. Sophie Zhao Yue then follows with a discussion of the Chinese perspective on pre-arbitration alternative dispute resolution requirements.

For the In-house Counsel Focus article, Dantes Leung, Flora Ng & Davis Hui discuss recent developments relating to arbitrators' duty of disclosure, as well as the recourses available to parties in the event of non- or incomplete disclosure.

Finally, this issue concludes with the News section written by Robert Morgan.

General Editors

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The More Things Change, the More They Stay The Same: Guerrilla Tactics in Arbitration in India

Vijayendra Pratap Singh, Abhijnan Jha & Abhisar Vidyarthi*

This article discusses the evolving and extensive nature of guerrilla tactics and litigation strategies adopted by recalcitrant parties to disrupt and derail arbitration proceedings seated in India. Suggestions are made on the possible approaches that Indian courts and tribunals may adopt to prevent such parties from interdicting the autonomy of arbitral proceedings and ensuring that arbitrations come to fruition expeditiously.

Introduction

It is not uncommon for recalcitrant parties to resort to guerrilla tactics before, during and after the commencement of an arbitration in an attempt to render it ineffective. Such tactics include exploiting procedural rules to gain undue advantage, raising unmeritorious and technical objections to derail arbitration proceedings, adopting dilatory tactics to cause inordinate delays and frustrating the arbitration by seeking anti-arbitration injunctions. There is no limit to the imagination and ingenuity of recalcitrant parties. Mindful of their bleak odds of winning on the merits, and as soon as an arbitration agreement is invoked against them, they begin their search for guerrilla tactics and strategies through which they can either avoid or frustrate the arbitration, or render the final award incapable of enforcement. In their endeavours, they often seek undue assistance from domestic courts to challenge collaterally the jurisdiction of tribunals or to interfere with their autonomy.

> … [Guerrilla] tactics include exploiting procedural rules to gain undue advantage, raising unmeritorious and technical objections to derail arbitration proceedings, adopting dilatory tactics to cause inordinate delays and frustrating the arbitration by seeking anti-arbitration injunctions.

If domestic courts fall prey to such tactics and allow recalcitrant parties to abort arbitrations, the effectiveness and legitimacy of the arbitration process is called into question. Such was the state of affairs in India not very long ago. The tendency of domestic courts to accept refractory pleas for untimely, unwarranted and disruptive interference in arbitration proceedings was historically seen as a significant downside of arbitrating in India. Indian courts were infamous for adopting inconsistent standards to interfere with arbitration proceedings, grant anti-arbitration injunctions and set aside or deny enforcement of awards. This made parties, particularly foreign investors, wary of choosing India as their seat of arbitration.

Recognising the need to remedy the situation, the Indian legislature and courts have engineered a significant change in the country's arbitration landscape over the past decade. The Arbitration and Conciliation Act 1996 (the 1996 Act) has undergone several pro-arbitration amendments[1] aimed at enhancing the expediency and efficiency of arbitration and limiting the scope of judicial interference in arbitration proceedings. Indian courts have reciprocated these favourable legislative developments by steadfastly upholding a rule of priority in favour of arbitration, requiring parties to an arbitration agreement to honour strictly the undertaking to submit any dispute covered by it to arbitration.[2] In so doing, the courts have consistently applied a 'hands off' approach during arbitration proceedings as well as at the pre- and post-arbitration stages.[3] They have also adopted a strict approach against anti-arbitration injunctions being sought by unscrupulous parties to elude or obstruct the agreed arbitration mechanism, and have upheld tribunals' power to rule on their own jurisdiction via the universally accepted principle of *Kompetenz-Kompetenz*.[4]

Having said that, despite these pro-arbitration advancements in India, a number of recent cases demonstrate that the Indian arbitration framework remains susceptible to an imaginative array of procedural guerrilla tactics and litigation strategies devised to undermine arbitral proceedings and prejudice opposing parties. With anti-arbitration injunctions now facing reduced chances of success in India, recalcitrant parties seem to have found other ways of serving their purpose of rendering arbitrations ineffective. Courts and tribunals in India must deal effectively with guerrilla tactics to ensure the legitimacy of arbitration.

> [India's arbitration legislation is] aimed at enhancing the expediency and efficiency of arbitration and limiting the scope of judicial interference in arbitration proceedings. Indian courts have reciprocated these favourable legislative developments by steadfastly upholding a rule of priority in favour of arbitration …

Guerrilla warfare in the Amazon.com-Future Group dispute

An ongoing tussle between Amazon.com (Amazon) and Future Group,[5] both in arbitration as well as before

constitutional courts and statutory regulators in India, has become a paradigm case depicting the evolving nature of guerrilla tactics adopted by recalcitrant Indian parties to wriggle out of arbitrations in India.

> "… [D]espite these pro-arbitration advancements in India, a number of recent cases demonstrate that the Indian arbitration framework remains susceptible to an imaginative array of procedural guerrilla tactics and litigation strategies devised to undermine arbitral proceedings and prejudice opposing parties."

Amazon initiated arbitration against Future Group on 5 October 2020 for breach of certain composite agreements entered into between them. Since then, both parties have been entangled in proceedings before various fora.[6] As the saga has unfolded, a variety of guerrilla tactics and litigation strategies to render the arbitration ineffective have come to light.

Having suffered an unfavourable emergency award on 25 October 2020 under the then applicable SIAC Rules (6th Edn, 2016), Future Group adopted the strategy of not recognising the award as having any validity under Indian law.[7] Before several domestic courts and regulators, Future Group made self-styled declarations that the emergency award was a nullity or *coram non judice* under Indian law.[8] The issue was finally settled on 6 August 2021 when the Supreme Court emphatically held emergency awards to be legal, valid and enforceable under the 1996 Act.[9] Deprecating the conduct of Future Group, the Supreme Court noted that —

> "[N]o party, after agreeing to be governed by institutional rules, can participate in a proceeding before an Emergency Arbitrator and, after losing, turn around and say that the award is a nullity or coram non judice when there is nothing in the Arbitration Act which interdicts an Emergency Arbitrator's order from being made."[10]

The sanctity accorded to orders passed in arbitration proceedings is the hallmark of any arbitration-friendly jurisdiction. The guerrilla tactic of treating an emergency award as a nullity under Indian law was an extreme measure, contrary to the rule of law and correctly rejected by the Supreme Court.

> "[N]o party, after agreeing to be governed by institutional rules, can participate in a proceeding before an Emergency Arbitrator and, after losing, turn around and say that the award is a nullity or coram non judice when there is nothing in the Arbitration Act which interdicts an Emergency Arbitrator's order from being made." (*Amazon.com Investment Holdings LLC v Future Retail Ltd*, 2022 1 SCC 2019, at [46])

Collateral challenges to arbitral orders

Despite significant efforts to limit judicial intervention in arbitrations only to specified instances prescribed under the 1996 Act, recalcitrant parties continue to find innovative ways of challenging arbitral orders by means of collateral proceedings. The example of the Amazon-Future Group saga also serves well in this regard. Based on its strategy of labelling the emergency award a nullity, Future Group filed a

suit for tortious interference against Amazon before the Delhi High Court with which to mount a collateral challenge to the emergency award.[11]

Future Group argued that Amazon was erroneously relying on the emergency award to interfere with its transaction with the Mukesh Dhirubhai Ambani Group (this transaction was found to be *prima facie* in breach of Amazon's rights under the agreements entered into between the parties, and was enjoined by the emergency award).[12] In so doing, Future Group collaterally challenged the merits of the emergency award and secured certain favourable *prima facie* observations from the Delhi High Court in an order dated 21 December 2020,[13] which it then relied upon to represent to courts and statutory authorities that the emergency award had been vitiated.[14]

To strengthen the perception of India as a pro-arbitration jurisdiction, it is essential that its courts keep up with, and practise strict resistance against, such camouflaged and innovative guerrilla tactics to challenge orders made in arbitration proceedings collaterally. Courts must examine the underlying intentions and objectives of parties filling such suits and, if their underlying nature is anti-arbitration, they must be dismissed at the threshold.

Attacking the underlying contract

An old but still relevant guerrilla tactic adopted by recalcitrant parties in India is to argue that the underlying contract is void or vitiated by fraud, and thus that the arbitration agreement is incapable of performance. Recently, in *Devas Multimedia Pvt Ltd v Antrix Corporation*,[15] the Supreme Court upheld an order issued by the national company law tribunal for the winding up of Devas on the basis of a petition filed by Antrix, which is the commercial arm of the Indian Space Research Organisation. Antrix had moved its winding up petition on 18 January 2021, alleging fraud in the formation and the conduct of the affairs of Devas.[16]

Interestingly, Antrix had moved this petition after having suffered an adverse award in an ICC arbitration initiated by Devas against Antrix for wrongful termination of an agreement entered into between the parties on 28 January 2005. The ICC award was rendered on 14 September 2015, directing Antrix to pay Devas a sum of US$ 562.5 million with simple interest at the rate of 18% per annum.[17] The Government of India had also suffered similar awards in two investment treaty arbitrations instituted by Mauritian and German investors of Devas.[18]

"An old but still relevant guerrilla tactic adopted by recalcitrant parties in India is to argue that the underlying contract is void or vitiated by fraud, and thus that the arbitration agreement is incapable of performance."

The Supreme Court rejected the argument that the motive behind Antrix seeking the winding up of Devas was to deprive the latter of the benefits of the ICC award issued in its favour, and that such attempts on the part of a corporate entity wholly owned by the Government of India would send the wrong message to international investors. In so doing, the Supreme Court held -

> "If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud, coming up with a petition for winding up, is of no relevance… We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message[,] namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores [approx. US$75,663,257] the investors can hope

to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores [approx US$63,771,450]."[19]

Without delving into the correctness of the judgment of the Supreme Court, it is curious that no allegations pertaining to fraud were raised against Devas before the tribunal in the arbitration proceedings. The fraud allegations were raised for the first time only after adverse awards were issued against Antrix and the Government of India. This is despite the fact that State agencies had initiated investigations into Devas when the arbitration proceedings were ongoing.[20] It is likely that Antrix and the Government of India will now rely on the Supreme Court's decision to challenge the enforcement proceedings, which are pending before courts in a number of overseas jurisdictions.

> "It is imperative that disguised and ill-motivated attacks on the underlying contract to wriggle out of either arbitrations or binding awards should not be countenanced by Indian courts or tribunals."

It is imperative that disguised and ill-motivated attacks on the underlying contract to wriggle out of either arbitrations or binding awards should not be countenanced by Indian courts or tribunals. In fact, where State parties are involved, regulatory investigations subsequent to the initiation of arbitrations or the issuance of adverse awards to unravel the underlying transactions are detrimental to India's attractiveness as an arbitration-friendly jurisdiction. Further, the universally accepted principle of separability of the arbitration agreement, which provides that it is independent of the main contract, must be strictly enforced and any objections pertaining to illegality of the main contract must be decided by the tribunal itself.

Filing complaints before statutory regulatory authorities

On 25 March 2021, in the midst of the Amazon-Future Group arbitration proceedings, Future Group filed a complaint with the Indian antitrust regulator, the Competition Commission of India (CCI), seeking revocation of the approval that was granted to Amazon on 28 November 2019 for its investment in Future Group.[21] In its complaint, which relied on certain documents disclosed by Amazon in discovery during the arbitration, Future Group alleged that Amazon had misrepresented the nature of its investment in its filings before the CCI seeking approval for its investment.[22] In this regard, it is open to question whether such a high-stakes filing for approval before the CCI would have been undertaken by Amazon without the involvement or assistance of Future Group. In fact, Future Group, being the counter-party in the transaction, approached the CCI to revoke the approval given to the transaction at a time when arbitration proceedings for the alleged breach of that very transaction by Future Group were under way.

Despite the questionable timing of the complaint, Future Group was successful in its endeavour before the CCI. On 17 December 2021, the CCI issued an order holding in abeyance the approval granted to Amazon for its investment and directing Amazon to re-apply for the approval pursuant to fresh filings within 60 days.[23] Thereafter, pursuant to CCI's order, Future Group moved applications in the arbitral tribunal for termination of the arbitration proceedings under s 32(2)(c) of the 1996 Act.[24] The basis of the application was that in the absence of an existing CCI approval, the underlying agreements, which were the subject-matter of the arbitration proceedings, were rendered incapable of performance under Indian law.[25] As discussed below, the applications have not yet been decided, on account of a stay of the arbitration proceedings granted by the Delhi High Court.

Without delving into the correctness of the CCI's order, against which an appeal is currently pending, it is important to state that statutory authorities should examine the underlying motivations of complainants in such cases. Depending on the factual matrix, statutory authorities may consider whether

such complaints against a transaction ought to be barred by estoppel where a complainant has not only participated in and benefited from the transaction, but is also facing arbitration proceedings for breach of the transaction. Unless statutory authorities deal with collateral complaints with utmost caution and seriously examine the motivations of complainants, the floodgates would be opened to recalcitrant and ill-motivated requests for investigations into the subject-matter of arbitration proceedings with the intention of derailing or nullifying them. This would be disruptive to the legitimacy of arbitration in India.

"Unless statutory authorities deal with collateral complaints with utmost caution and seriously examine the motivations of complainants, the floodgates would be opened to recalcitrant and ill-motivated requests for investigations into the subject-matter of arbitration proceedings with the intention of derailing or nullifying them."

Using the constitutional powers of the High Court to derail arbitration proceedings

Article 227 of the Constitution of India *inter alia* empowers India's High Courts to exercise supervisory jurisdiction over arbitral tribunals in India. Through a consistent line of decisions, the Supreme Court has held that High Courts must exercise this jurisdiction in extremely exceptional circumstances, *viz* only where orders are issued by arbitral tribunals patently lacking inherent jurisdiction going to the root of the matter.[26] However, recalcitrant parties still habitually file petitions under art 227 against orders of arbitral tribunals in the hope of obtaining some relief or beneficial observations from the court. The sole purpose of filing such petitions is often to delay the arbitration proceedings, which is achieved even when the petitions are dismissed.

Again, the example of the Amazon-Future Group saga shows how the constitutional powers of the High Court can be misused to disrupt arbitration proceedings. As mentioned previously, Future Group filed before the arbitral tribunal applications to terminate the arbitration proceedings. Having filed these applications, it then sought an order by the tribunal to suspend the quantum evidentiary hearing, which had been scheduled for 5-7 January 2022.[27] Future Group instead urged the tribunal to utilise these dates to address their request to terminate the arbitration on the basis of the findings of the CCI.[28]

"… [R]ecalcitrant parties still habitually file petitions under art 227 [of the Constitution of India] against orders of arbitral tribunals in the hope of obtaining some relief or beneficial observations from the court. The sole purpose of filing such petitions is often to delay the arbitration proceedings, which is achieved even when the petitions are dismissed."

After several rounds of case management correspondence, the tribunal decided to continue with the quantum evidentiary hearing on 5-7 January 2022 and to hear Future Group's termination applications on 8 January 2022.[29] Aggrieved by the tribunal's decision not to suspend the quantum evidentiary hearing and conclude the arbitration proceedings

expeditiously, Future Group impugned the tribunal's case management orders before the Delhi High Court under art 227 of the Constitution of India. On 4 January 2022, a single judge of the Delhi High Court issued an order declining to interfere with the tribunal's procedural orders.[30] On appeal, however, a division bench of the Delhi High Court overturned the single judge's decision and directed a stay of the arbitration proceedings on the basis of the CCI's findings.[31] The division bench's decision was open to question on several levels, including on the ground that the court did not accord due deference to the discretion accorded to arbitral tribunals in relation to procedural and case management matters.

> "While a certain degree of judicial oversight is essential in the arbitration framework, judicial intervention must not be contrary to the basic tenets of arbitration law and practice."

While a certain degree of judicial oversight is essential in the arbitration framework, judicial intervention must not be contrary to the basic tenets of arbitration law and practice. This can be ensured by articulating a paradigm in which judicial intervention is confined to specific, restricted circumstances that are carefully defined and spelled out in the 1996 Act. The discretionary constitutional powers to interfere with arbitration proceedings must be exercised with extreme circumspection, *viz* only where an order is perverse on its face.

Combating guerrilla tactics adopted before tribunals

Guerrilla tactics adopted by recalcitrant parties are not limited to proceedings before domestic courts or regulatory authorities. Such tactics are regularly adopted before tribunals with the intention to delay dealing with certain issues or simply to disconcert the tribunal as to the merits of the case. Parties often attempt to capitalise on the 'due process paranoia' of tribunals, which has been defined as the perceived reluctance by tribunals to act decisively in certain situations for fear of the final award being challenged.[32] They also seek to use to their undue advantage s 18 of the 1996 Act, which provides that parties must be provided a full and equal opportunity to present their case. Relying on this provision, they often practise dilatory tactics, such as (*inter alia*) seeking unwarranted extensions of time for submissions, producing new pleas and evidence at late stages, requesting the postponement of hearings and meetings at the last moment, seeking unnecessarily broad disclosure in discovery, making tactical or unfitting procedural requests and filing repeated or late challenges to arbitrators.

Finding a balance between efficiency, expediency and due process is of utmost importance. There is no gainsaying that due process cannot be compromised. It is, however, essential that s 18 of the 1996 Act is not given such an overly broad interpretation as to enable the adoption of guerrilla strategies that are detrimental to procedural efficiency.

> "Guerrilla tactics adopted by recalcitrant parties are not limited to proceedings before domestic courts or authorities … [but] tactics are regularly adopted before tribunals with the intention to delay dealing with certain issues or simply to disconcert the tribunal as to the merits of the case … [or[to capitalise on the 'due process paranoia' of tribunals ..."

While there may be situations which cause tension between efficiency and due process, the tribunal must exercise its discretion to find the right balance between the parties' positions to allow the arbitration to proceed in an efficacious manner.

Tribunals may utilise case management conferences to a greater extent to reach agreements between the parties on procedural and administrative matters. These allow tribunals to avoid encountering unexpected housekeeping matters before the actual hearing commences. Without giving in to guerrilla tactics adopted by recalcitrant parties, tribunals should seek to offer solutions to the competing demands of the parties in order to meet in substance the concerns raised by them. The tribunal's decision should be guided by the need to manage the case effectively, so that all disputes can be resolved efficiently.

> "Finding a balance between efficiency, expediency and due process is of utmost importance. There is no gainsaying that due process cannot be compromised. It is, however, essential that s 18 of the 1996 Act is not given such an overly broad interpretation as to enable the adoption of guerrilla strategies that are detrimental to procedural efficiency."

Similarly, when domestic courts are faced with challenges on the ground of lack of due process, they must examine whether the tribunal was prepared and tried to accommodate the concerns of each party to the extent possible. This should be the defining approach of Indian courts to judicial intervention, thus protecting the sanctity of the country's arbitration framework.

** This article is written in the authors' personal capacities.*

1 By virtue of the Arbitration and Conciliation (Amendment) Acts 2015, 2019 and 2021.

2 *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

3 Nishith Desai Associates research paper, *International Commercial Arbitration: Law and Recent Developments in India* (April 2021), p 1, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf.

4 *Nalco Ltd v Subhash Infra Engineers Pvt Ltd* (2020) 15 SCC 557.

5 Amazon NV Investment holdings LLC (Amazon) initiated arbitration against Future Retail Ltd (FRL) and Future Coupons Pvt Ltd (FCPL), two companies in the Future group of companies in India. The promoters of the Future group are also parties to the arbitration. FRL, FCPL and their promoters are collectively as well as interchangeably referred to as 'Future Group' in this article. The authors are representing Amazon in this dispute.

6 Shruti Mahajan, *Amazon vs Future: Here's the lowdown on India's biggest legal case right now* (Moneycontrol, 26 January 2021), available at https://www.moneycontrol.com/news/trends/legal-trends/amazon-vs-future-heres-the-lowdown-on-indias-biggest-legal-case-right-now-7988041.html.

7 *Amazon.com Investment Holdings LLC v Future Retail Ltd,* 2022 1 SCC 2019, at [2.7].

8 *Ibid.*

9 *Ibid,* at [46].

10 *Ibid,* at [45].

11 *Future Retail Ltd v Amazon.com NV Investment Holdings LLC,* 2020 SCC OnLine Del 1636.

12 *Ibid,* at [4].

13 *Ibid,* at [167].

14 *Future Coupons Pvt Ltd v Amazon.com NV Investment Holdings LLC*, Civil Appeal Nos 859-860 of 2022, at [7] and [42]; *Amazon.com NV Investment Holdings LLC v Future Coupons Pvt Ltd*, 2021 SCC OnLine Del 1279, at [55] and [174].

15 *Devas Multimedia Pvt Ltd v Antrix Corporation Ltd*, Civil Appeal No 5766 of 2021.

16 *Ibid*, at [3.14].

17 *Ibid*, at [3.11].

18 *Ibid.*

19 *Ibid*, at [13.5].

20 *Ibid*, at [3.13]. See also Pushkar Anand, *Will the SC Order on Antrix-Devas Help India Fend off Attempts to Seize the Country's Assets?* (The Wire, 26 January 2022) available at https://thewire.in/political-economy/will-the-sc-order-on-antrix-devas-help-india-fend-off-attempts-to-seize-the-countrys-assets.

21 *Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act 2002*, Competition Commission of India (17 December 2021), at [10].

22 *Ibid.*

23 *Ibid*, at [80].

24 *Future Retail Ltd v Amazon.com NV Investment Holdings LLC*, CM(M) 2/2022 & CM No 176/2022, at [6].

25 *Ibid*, at [14].

26 *Bhaven Construction v Sardar Sarovar Narmada Nigam Ltd* (2022) 1 SCC 75.

27 *Future Retail Ltd. v Amazon.com NV Investment Holdings LLC, supra* (note 24).

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Future Retail Ltd v Amazon.com NV Investment Holdings LLC*, LPA 6/2022.

32 Queen Mary University of London/White & Case *2015 Survey: Improvements and Innovations in International Arbitration,* available at https://arbitration.qmul.ac.uk/research/2015/.

The Enforcement of International Arbitral Awards in the Cayman Islands

Alex Potts QC

This article discusses the rules applicable to the enforcement of international arbitral awards in the Cayman Islands pursuant to the Arbitration Law 2012 and related legislation with particular reference to Asia-seated awards involving Cayman entities and Cayman law.

Introduction

The year 2022 marks the tenth anniversary of the enactment of the Cayman Islands' Arbitration Law 2012 (the 2012 Law). The 2012 Law is based on the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration. Its enactment brought arbitration law and practice in the Cayman Islands into line with internationally recognised standards. It is more than just coincidence, therefore, that the Cayman Islands, as a major jurisdiction for international business, is witnessing an increasing number of *ad hoc* international arbitrations.

> "The 2012 Law … brought arbitration law and practice in the Cayman Islands into line with internationally recognised standards."

Asian arbitral institution statistics demonstrate that an increasing number of arbitrations are likely to be held in Asian jurisdictions before such institutions as HKIAC, SIAC and CIETAC, and to involve Cayman Islands entities and law.

Even more significantly, the courts of the Cayman Islands are now handling a significant number of applications for the recognition and enforcement of international arbitral awards against Cayman Islands entities or against assets held or located there. There are also an increasing number of court applications for interim relief or assistance in aid of foreign arbitrations or arbitral enforcement proceedings.

Hong Kong International Arbitration Centre's recent case statistics reveal that, of the 514 cases submitted to it for resolution in 2021, corporate entities established in the British Virgin Islands and the Cayman Islands respectively made up the third and fourth groups of users by geographical origin.

Cayman Islands law is, in turn, reported to be the fifth most commonly selected governing law for the resolution of those disputes, with Hong Kong law and English law being the two most commonly selected governing laws respectively.

> "Asian arbitral institution statistics demonstrate that an increasing number of arbitrations are likely to be held in Asian jurisdictions before such institutions as HKIAC, SIAC and CIETAC, and to involve Cayman Islands entities and law."

Singapore International Arbitration Centre's case statistics for 2020 reveal, in turn, that corporate entities established in the Cayman Islands now rank in the top 20 user groups of SIAC's dispute resolution facilities.

The China International Economic and Trade Arbitration Commission (CIETAC) 2020 *Work Report* does not list user groups by geographical origin, but an increasing number of CIETAC cases are described as 'foreign-related cases' and, in practice, an increasing number of CIETAC arbitrations involve Cayman Islands entities as well as the governing law of the Caymans.

One reported example is *La Dolce Vita Fine Dining Co Ltd v. Zhang Lan, Grand Lan Holdings Group (BVI) Ltd and Qiao Jiang Lan Development Ltd (formerly named as South Beauty Development Ltd).*[1] The CIETAC arbitration tribunal in that case awarded sums in the region of US$142 million in favour of two Cayman Islands companies. The awards handed down have resulted in enforcement proceedings in the courts of Hong Kong, China and the United States.

The enforceability of HKIAC, SIAC and CIETAC arbitral awards in the Cayman Islands

The basic requirements for enforcement of international arbitral awards in the Cayman Islands' Foreign Arbitral Awards Enforcement Law 1975 (1997 Rev Ed, the Enforcement Law), as well as s 72 of the Arbitration Law and Order 73 of the Grand Court Rules 1995 (2003 Rev Ed). These instruments set out the main substantive and procedural requirements for enforcing foreign arbitral awards in the Cayman Islands.

The Enforcement Law and the Arbitration Law both give effect in the Cayman Islands to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Their principles will therefore be familiar to any lawyer or arbitrator with an understanding of that convention.

Section 5 of the Enforcement Law provides that foreign arbitral awards are enforceable in the Cayman courts in the same manner as domestic arbitral awards. They will therefore be treated as binding for all purposes on the persons in respect of whom they were made, and accordingly may be relied upon by way of defence, set-off or otherwise in any legal proceedings.

Under section 7(1) of the Enforcement Law, and in accordance with art V of the New York Convention, enforcement of a foreign arbitral award "shall not be refused" by the Cayman Islands courts except in cases where it is proved that:

(1) a party to the arbitration agreement was under some incapacity under the law applicable to it;
(2) the arbitration agreement was invalid under the law applicable to it;
(3) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
(4) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the

scope of the submission to arbitration;

(5) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;

(6) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made; or

(7) the award is in respect of a matter which is not capable of settlement by arbitration, or it would be contrary to public policy to enforce the award.

Recent case law on the enforcement of foreign arbitral awards in the Cayman Islands

On 8 and 9 March 2022, the Judicial Committee of the Privy Council heard an appeal from the Cayman Islands Court of Appeal in *Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v MatlinPatterson Global Opportunities Partners (Cayman) LLP and others*. The Privy Council's judgment has been reserved, but it is eagerly awaited by arbitration lawyers in both the Cayman Islands and jurisdictions with similar enforcement legislation based on the New York Convention.

The issues in the appeal also engage a long-standing debate between 'common law' and 'civil law' jurisdictions regarding the circumstances in which arbitral tribunals can apply the civil law principle of *iura novit curia* (the court knows the law) without hearing full argument from all of the parties or their lawyers.

> "The basic requirements for enforcing international arbitral awards in the Cayman Islands are contained in the Cayman Islands' Foreign Arbitral Awards Enforcement Law 1975 (1997 Rev Ed, the Enforcement Law), as well as s 72 of the Arbitration Law and Order 73 of the Grand Court Rules 1995 (2003 Rev Ed). [The applicable rules and] principles will therefore be familiar to any lawyer or arbitrator with an understanding of [the New York Convention."

The *Gol Linhas* appeal relates to the Cayman Islands Court of Appeal's decision to enforce a multi-million dollar ICC award in the Caymans in favour of a Brazilian airline, despite the fact that the arbitral tribunal had decided the case on a ground not argued by the parties (and despite the first instance Cayman Islands judge's decision not to enforce the award there). The Brazilian Court of Appeals had already refused to set aside the award as a matter of Brazilian law, on the basis that the arbitral tribunal had the power to determine issues as it saw fit, having regard to the *iura novit curia* principle.

A final appeal to the Brazilian Supreme Court was pending at the time the Cayman Islands Court of Appeal came to consider the enforceability of the award in the Caymans. The Court of

Appeal therefore ordered a stay of enforcement pending the Brazilian Supreme Court's final judgment.

Although the Cayman Islands Court of Appeal acknowledged that the *iura novit curia* principle does not sit comfortably with common lawyers' perceptions of fairness, it held that enforcement of the award was, on balance, in accordance with Brazilian law and not contrary to Cayman Islands public policy and due process. The Court noted, in particular, that the *iura novit curia* doctrine was widely accepted in a number of civil law jurisdictions and was not, in and of itself, contrary to public policy, due process or natural justice. The Privy Council will have to reconsider these issues in its judgment in due course.

Recent Cayman case law on interim relief in aid of foreign arbitrations

The Cayman courts have repeatedly demonstrated their willingness to grant interim relief in aid of foreign arbitrations and arbitration enforcement proceedings in appropriate circumstances in a number of recent judgments. Two recent examples from the Grand Court are particularly noteworthy.

> "The Cayman courts have repeatedly demonstrated their willingness to grant interim relief in aid of foreign arbitrations and arbitration enforcement proceedings in appropriate circumstances in a number of recent judgments."

Firstly, in *ArcelorMittal North America Holdings LLC v Essar Global Fund Ltd*,[2] Kawaley J declined to set aside a *Norwich Pharmacal* order that had previously been granted by the Grand Court in aid of the enforcement of an ICC arbitral award, and which had been upheld by the Cayman Islands Court of Appeal.[3]

Secondly, in *In the matter of the Kuwait Ports Authority*,[4] Parker J gave directions under the Cayman Islands' Confidential Information Disclosure Law 2016 that the Kuwait Ports Authority was at liberty to disclose a variety of confidential documents relating to the affairs of a Cayman Islands exempted limited partnership to the State of Kuwait for use by the latter in evidence in an ICSID arbitration under a Bilateral Investment Treaty with an individual, Maria Lazareva.

> "The courts of the Cayman Islands courts remain ready and willing to assist award creditors with the recognition and enforcement of Asian-seated arbitral awards in the Caymans in appropriate circumstances …"

Conclusion

As mentioned previously, an increasing number of Cayman Islands-related arbitrations are likely to be held in Asian jurisdictions and before Asian arbitral institutions. The courts of the Cayman Islands remain ready and willing to assist award creditors with the recognition and enforcement of Asian-seated arbitral awards in the Caymans in appropriate circumstances, having regard to the provisions of the 2012 Law, the Enforcement Law and the case law summarised above.

1 CIETAC Case No S20150473.
2 FSD 2 of 2019,
3 CICA Civil Appeal No 15 of 2019.
4 FSD No 18 of 2021,

The Case for a Set of Asian Digital Dispute Resolution Rules

Matthew Townsend & Tim Robbins

This article discusses the impact of digitalisation of international commerce with particular regard to the application of decentralised ledger technology (DLT), the challenges faced by dispute resolution mechanisms in handling DLT-related disputes and the attempts made thus far to tackle them. In this regard, the authors propose and argue the case for a set of 'home-grown' Asian Dispute Resolution Rules specifically formulated for Asian conditions.

Introduction

Asia is leading a process of global digital transformation. It should also provide thought leadership on how to resolve digital disputes. Rapid innovation and investment will change the way business is conducted. Disputes, when they arise, will raise novel questions and new demands from users.

Both the common law and international arbitration are remarkably adaptable and can accommodate technological change. The 'once in a generation' scale of digitalisation, however, justifies a concerted response. In Asia, a home-grown non-binding set of dispute resolution rules would be a valuable catalyst to adaptation in this area.

Asia and digitalisation

Since commercial Bitcoin mining took off in China in the mid-2010s, Asia has been at the front and centre of the revolution in distributed ledger technology (DLT).[1] The continent drove 28% of global transactions volume in the first half of 2021.[2] Asian States comprised six of the top 15 countries named by Chainalysis in its 2021 Global Crypto Adoption Index.[3]

While China issued an absolute ban on cryptocurrency trading in May 2021,[4] Other Asian governments and regulators have voiced support for DLT as a driver of innovation and growth. Singapore and Hong Kong, the latter a Special Administrative Region of China with its own common law system, have each

either implemented or mooted regulations aimed at realising blockchain's potential. In East Asia, regulators in Thailand, Vietnam and South Korea also have a generally crypto-friendly outlook.

> "… [E]xperience has not yet borne out the vision of some early crypto adopters of a wholly self-contained and self-governing system operating outside of traditional legal and regulatory frameworks."

On the one hand, East Asia's financial and disputes hubs of Hong Kong and Singapore are already DLT investment centres. These cities are home to leading crypto exchanges[5] as well as leading developers and funders of crypto use cases. On the other hand, Asia's large 'un-banked' population also offers a potential user-base for disintermediated cryptoassets. Even Chinese nationals still reportedly hold enormous crypto wealth, which is deployed outside of Mainland China.[6]

These factors, coupled with the global prominence of Asian dispute resolution centres and continuing growth in the region, all mark out Asia as a future leader for innovation in DLT and related disputes.

The nature of DLT disputes

Commercial disputes arising from digitalised businesses or investments are simultaneously similar to, and different from, disputes in other sectors.

On the one hand, experience has not yet borne out the vision of some early crypto adopters of a wholly self-contained and self-governing system operating outside of traditional legal and regulatory frameworks. In fact, even in DLT's automised and disintermediated ecosystem, 'off-chain' disputes arise and require resolution. DLT protocols may have bugs or coding errors; participants may conduct themselves in a manner uncontemplated by the developers; natural language contracts may differ from deployed execution protocols; and attack vectors may arise from 'input oracles' which allow 'on chain' recognition of 'off-chain' data.[7]

Two illustrations can be found in the gaming and decentralised finance sectors respectively. In the Dark Forest saga, participants in the play-to-earn space game of the same name used controversial tactics to win.[8] While these tactics were not expressly prohibited and were subsequently even ratified by the developers themselves, they nonetheless generated controversy in the gaming community and accusations of system exploitation. Separately, in the Indexed Finance case, that centralised protocol lost US$15.8 million after a user allegedly used borrowed assets to execute a series of trades in order to distort the algorithm and set trading prices. While the Dark Forest controversy appears to have generated no formal legal proceedings, the Indexed Finance case is currently being litigated in the Canadian courts.[9]

'Off chain' digital dispute resolution gives rise to at least three novel issues. First, in a dispute over decentralised services and diffused participants, which country's laws should apply, and what process should be adopted to enforce digital rights? Second, how should on-chain and off-chain performance, determination and remedies interrelate? Third, how can a dispute resolution process accommodate industry expectations regarding an adjudicator's expertise, speed and participant pseudonymity?

Common law frameworks, litigation and particularly international arbitration procedures are adaptable and flexible. Indeed, in jurisdictions such as England & Wales, Hong Kong and Singapore, there is already a small but growing body of case law addressing DLT disputes, including decisions recognising crypto-currencies as property.[10] Nonetheless, given the sheer pace of change in this area, the authors consider it important to address these points proactively.

> "… [E]ven in DLT's automised and disintermediated ecosystem, 'off-chain' disputes arise and require resolution. DLT protocols may have bugs or coding errors; participants may conduct themselves in a manner uncontemplated by the developers; natural language contracts may differ from deployed execution protocols; and attack vectors may arise from 'input oracles' which allow 'on chain' recognition of 'off-chain' data."

The UK Digital Dispute Resolution Rules

One example of such an initiative is the Digital Dispute Resolution Rules 2021 (DDRR) produced by the UK Government-backed UK Jurisdiction Taskforce (UKJT) at LawtechUK. The stated purpose of the DDRR is –

> "to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications".[11]

While the DDRR must be incorporated by party agreement, and their scope limited on that basis, they do offer a framework within which to resolve three key issues raised when it comes to digital disputes.

First, with regard to substantive and procedural law, the DDRR provide that the seat of any arbitration under them shall be England & Wales and, in the absence of an agreement to the contrary, disputes shall be resolved in accordance with English law.[12] This means that the resulting award is issued within a national State, in principle ensuring ready access to the cross-border enforceability mechanism in the New York Convention 1958.[13]

Second, the DDRR balance 'on-chain' and 'off-chain' dispute resolution in several respects. They accommodate alternative on-chain dispute resolution procedures that have been agreed upon, such as the automated selection of a decision-maker, which may include an "artificial intelligence agent". They also provide for the possibility of "on-chain" enforcement for the decision(s) of the arbitrator or agent.[14] The tribunal has "the power at any time to operate, modify, sign or cancel any digital asset relevant to the dispute using any digital signature, cryptographic key, password or other digital access or control mechanism available to it", or to direct any interested party to do any of these things.[15] These powers are aimed at providing the tribunal with the authority to award the necessary relief, and to be confident in its authority to exercise such powers.

> "[With regard to 'off-chain' dispute resolution] … how can a dispute resolution process accommodate industry expectations regarding an adjudicator's expertise, speed and participant pseudonymity?"

Third, the DDRR attempt to grapple with some of the specific demands or expectations DLT participants might have when it comes to dispute resolution. For example, it is essential that

arbitrators appointed in DLT-related disputes have sufficient knowledge of the technologies in question, including the types of issue that may arise and how to award appropriate remedies. Such lawyers are hard to find, and the profession in general appears slow to adopt digital technology. By nominating as appointment body the Society for Computers and Law, the UKJT has given users comfort that the appointing body has expertise across both the technology and legal industries. Time will tell whether this body is able to perform its role with the same efficacy as arbitral institutions which have decades of experience in vetting and appointing arbitrators as well as rendering decisions on arbitrator challenges and actively administering cases until the case files are transmitted to the tribunal.

> "Common law frameworks, litigation and particularly international arbitration procedures are adaptable and flexible. … [I]n jurisdictions such as England & Wales, Hong Kong and Singapore, there is already a small but growing body of case law addressing DLT disputes, including decisions recognising crypto-currencies as property."

All in all, the DDRR is a welcome attempt to establish a dispute resolution mechanism for this growing industry and asset class. The drafters have also wisely avoided buzzwords, which are rampant in this sector, and preserved arbitrator flexibility. The DDRR's drafting and publication have also prompted vital thinking and debate as to the procedures, arbitrator expertise and powers required to meet user needs.

The case for a set of Asian Digital Dispute Resolution Rules

The dispute resolution community has an unfortunate tendency to generate unnecessary rules, procedures and other soft law. International arbitration procedures and common law systems are at their core already flexible and adaptable, making them well-placed to resolve disputes in new and emerging sectors.

> "[Asian Dispute Resolution Rules] would invigorate and connect the Asian legal and technology communities[,] … foster innovation[, discussions] and adaptation[,] … and develop Asia-specific practices and protocols."

That said, there are in this case at least three primary arguments for a set of Asian Digital Dispute Resolution Rules.

First, the rules would invigorate and connect the Asian legal and technology communities. The DDRR were clearly successful in drawing in representatives from the digital world and entrepreneurs focused on 'on-chain' dispute resolution protocols.[16] A project led by an Asian institution or jurisdiction might go even further, given the extent of change the sector has seen in the intervening months. Both Hong Kong and Singapore have strong legal and technology communities with which to do so. With 2022 looking to see increasing regulation and acceptance of these classes of asset, an Asian DLT disputes community is sorely needed.

Second, the rules would foster innovation and adaptation. DLT is developing at an eye-watering pace. Asian Digital Dispute Resolution Rules would prompt welcome discussion and innovations, including by reference to other rules such as

the DDRR, which are in 'version 1.0', and were published in 2021, when digital adoption was at an earlier stage. It remains to be seen whether the DDRR strike the right balance when it comes to procedural timeframes, appointment mechanism and scope to resolve larger disputes. A plurality of initiatives would foster evolution and know-how sharing for all involved.

Third and finally, such rules would develop Asia-specific practices and protocols. In recent years, for example, much has rightly been made of the shortage of arbitrator candidates coming from developing countries and possessing the requisite cultural and linguistic fluency demanded by the circumstances. This scarcity is yet more pronounced when accounting for understanding of new technology such as DLT. It is hoped that an Asian Digital Dispute Rules initiative, perhaps with a dedicated online dispute resolution platform, would help identify and cultivate such specialists.

> "[Asia] has all the ingredients to become a leader in dispute resolution for DLT and related technologies. Not only does it enjoy an energetic home-grown industry in this exploding sector, but it can also draw on the intellectual and legal capital of global dispute resolution centres like Hong Kong and Singapore."

Conclusion

Asia's opportunity is clear. It has all the ingredients to become a leader in dispute resolution for DLT and related technologies. Not only does it enjoy an energetic home-grown industry in this burgeoning sector, but it can also draw on the intellectual and legal capital of global dispute resolution centres like Hong Kong and Singapore. An Asian Digital Dispute Resolution Rules project would drive further expertise and understanding in this area. It should be implemented sooner rather than later.

1 'DLT' refers to the technological infrastructure and protocols that allow simultaneous access, validation and record updating in an immutable manner across a network that is spread across multiple entities or locations.

2 Chainalysis, *2021 Geography of Cryptocurrency Report* (October 2021), available at https://go.chainalysis.com/2021-geography-of-crypto.html (hereinafter Chainalysis report).

3 Chainalysis report, p 7. Non-Chinese Asian entries include Vietnam (ranked 1), India (ranked 2), Pakistan (ranked 3), Thailand (ranked 12) and the Philippines (ranked 15). China ranked 13.

4 State Council of the People's Republic of China, *China Steps up Financial Regulation To Address Risks* (accessed 27 December 2021); State Council of the People's Republic of China, *China Doubles Down Efforts on Virtual Currency Regulation* (25 May 2021); People's Bank of China, Circular on *Further Preventing and Disposing of Speculative Risks in Virtual Currency Trading* (15 September 2021), para 1(2), available at http://english.www.gov.cn/news/topnews/202105/25/content_WS60ac3689c6d0df57f98da07f.html (accessed 18 March 2022).

5 By trading volume, according to Coinmarketcap.com. This includes Bitfinex (headquartered in Hong Kong), Kucoin (headquartered in Singapore), and FTX (formerly headquartered in Hong Kong).

6 People's Government of Fujian Province. *Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China*, Chapter 21, section III (accessed 27 December 2021).

7 Decentralised Finance (or DeFi) is a prime example. A decentralised finance application might require inputs such as (*inter ala*) commodity prices and interest rates. Generally, each type of oracle involves some combination of fetching, validating, computing upon and delivering data to a destination, each stage of which could involve a breakdown.

8 The full story was set out in a Twitter thread by user 'willchnang.eth' at https://twitter.com/wiiichang/status/1503751768286633989.

9 *Dillon Kellar and Laurence Day v Andean Medjedovic* (see 'Day & Kellar vs Medjedovic' - Google 雲端硬碟).

10 See, for example, the English case of *AA v Persons Unknown* [2019] EWHC 3556 (Comm) (re Bitcoin), and the Singapore case of *CLM v CLN and others* [2022] SGHC 46.

11 DDRR, art 1.

12 *Ibid*, art 16.

13 Note that the recognition and enforcement mechanism under the New York Convention requires the arbitration agreement to be "in writing" (art II), which could in turn pose questions for parties seeking to rely upon coded application of these rules.

14 DDRR, arts 2(c) and 4.

15 *Ibid*, art 11.

16 Including representatives from Jur, Mattereum and Kleros.

Gender Diversity in the Iranian Arbitration Community: Time for a Change?

Sima Ghaffari

This article is the first piece of research on the issue of gender diversity in arbitration and ADR in Iran. It attempts to obtain a clearer picture of the current state of gender diversity and how this may be achieved by analysing how women fare, both as arbitrators and as arbitration practitioners, in achieving parity with their male counterparts with regard to appointments in *ad hoc* and institutional arbitration in Iran.

Introduction

The debate on gender diversity in arbitration is gaining momentum worldwide and many scholars have opened up new perspectives on this subject in the dispute resolution arena. In Iran, however, very limited attention has been paid to this issue.

Diversity, as a catch-all term, includes a number of different characteristics. These including gender, national origin, age, sexual orientation, disability, geography and ethnicity. Among these characteristcs, gender diversity has received considerable attention over the past decade.

In many jurisdictions including Iran, a significant majority of arbitrators tend to be senior Caucasian men. As a class, therefore, they are considered to be the typical or ideal arbitrator, making the"masculinity of arbitration"[1] a challenge in those jurisdictions. This phenomenon has deep roots in the socio-cultural, economic and historical backgrounds of different communities insofar as they affect unconscious bias. There is 'invisible stigmatisation' of female practitioners in international arbitration: within this framework, female lawyers, even after training and continuing personal and professional development, still face a number of barriers that

impact upon "their ascent to international arbitration's highest echelons".[2]

> "In many jurisdictions including Iran, a significant majority of arbitrators tend to be senior Caucasian men. As a class, therefore, they are considered to be the typical or ideal arbitrator …"

Gender diversity is indispensable to the legal profession. The importance of the leadership of women and, in particular, equal representation, are enshrined as human rights in the United Nations (UN) Sustainable Development Goals (SDGs).[3] In relation to alternative dispute resolution (ADR), commentators have noted that "gender diversity can improve the arbitral tribunal process and outcome and also can enhance legitimacy."[4]

There has been increasing interest in recent years in initiatives advocating greater diversity in the context of ADR. The launch of several worthy initiatives aimed at promoting diversity demonstrate the global concern voiced by arbitration practitioners as well as the necessity of fostering awareness of the lack of diversity. For example, the Equal Representation in Arbitration Pledge (ERA Pledge), Arbitral Women (AW), Arbitrator Intelligence (AI), Racial Equality for Arbitration Lawyers (REAL), the Rising Arbitrators Initiative (RAI) and Women Way in Arbitration (WWA LATAM) are some of the recognised global efforts that implement the Equal Representation in Arbitration Pledges.[5]

Recent years in Iran have seen the gender gap in the legal profession significantly narrow, in light of the vast number of women who have completed their professional legal studies and become litigation attorneys. Nonetheless, when it comes to the representation of women in ADR, whether serving as arbitrators or as senior practitioners, their under-representation or under-inclusion in arbitral tribunals is apparent. This calls for further literature on gender diversity in Iran.

With this in mind, it is of interest to discuss gender diversity in the Iranian arbitration community: firstly by determining the current status of gender diversity through data-driven analysis in that community by comparison with elsewhere, and secondly, by addressing a number of practical solutions aimed at translating gender diversity into practice in the Iranian arbitration market.

Gender diversity in the Iranian arbitration market: Where are we?

Firstly, it is important to know the extent to which female practitioners are being included in lists of arbitrators for consideration and then to what extent they are selected or shortlisted for appointment. Given that "what gets measured gets done",[6] publishing detailed data regarding diversity can improve inclusivity.

> "There is 'invisible stigmatisation' of female practitioners in international arbitration: within this framework, female lawyers, even after training and continuing personal and professional development, still face a number of barriers …"

Data measurement aimed at gaining clarity about the extent of diversity is difficult enough, but accessing such data raises questions as well as answers.[7] In order to measure the extent of diversity quantitively, demographic statistics and a more explicit characterisation of this concept are required.[8] In this regard, the current status of gender diversity in *ad*

hoc arbitrations and in arbitral institutions in Iran and in a number of leading international institutions is briefly analysed below.

> "… [W]hen it comes to the representation of women in ADR, whether serving as arbitrators or as senior practitioners, their under-representation or under-inclusion in arbitral tribunals is apparent."

(1) The current status of diversity in the Iranian arbitration community

This article is the first piece of research on the diversity issue in Iran. With regard to *ad hoc* arbitration, a number of women lawyers in law offices are appointed as arbitrators. Yet, data on the appointment of female arbitrators by parties is absent and it seems that parties usually appoint male arbitrators. As such, it is time to take a number of steps to increase the proportion of female party appointments by implementing new policies for diversification of arbitral tribunals: this is discussed in the next section.

With regard to Iranian institutional arbitration, two major arbitral institutions provide ADR services. The Arbitration Center of the Iran Chamber of Commerce (ACIC), which was established in 2002, is the first institution to have incorporated institutional arbitration rules into the Iranian legal system.[9] The Tehran Regional Arbitration Centre (TRAC) is an independent international arbitral institution which commenced its activities in 2005.[10]

To date, however, no data on diversity has been reported by Iranian arbitral institutions. The author has, however, collected basic information as to the number of female arbitrators included in the panels of arbitrators of ACIC and TRAC from the lists of arbitrators accessible at their websites.[11]

At the time of writing, out of 195 of the *Iranian* arbitrators included in ACIC's list, 19 (9.74%) are female. As to those included in TRAC's list, only five out of a total of 62 arbitrators (8.06%) are women. What this data reveals is that women make up around 10% of arbitrators on the lists of Iranian arbitral institutions. Moreover, the majority of counsel at the ACIC are women. There is, however, no precise data and ACIC is currently working on updating the data on arbitrators and counsel published on its website.

It should be noted that the gender diversity gap has recently been narrowing as a number of female arbitrators whose profiles are yet to be posted on arbitral institutions' websites have already received their first appointments. It may therefore be estimated that females make up more than 10% of arbitrators in arbitral institutions in practice.

> "Data measurement aimed at gaining clarity about the extent of diversity is difficult enough, but accessing such data raises questions as well as answers."

With regard to initiatives advocating diversity in arbitral tribunals, there is no specific domestic pledge in Iran that addresses the need to improve diversity in either the legal profession or the ADR market. The head of TRAC is an ambassador of REAL (*supra*), an international network established to highlight the absence of racial diversity in arbitration.[12] Moreover, ACIC recently (October 2021) launched the ACIC Association of Young Arbitrators (AYA), aiming to promote understanding of arbitration in Iran and to enable young practitioners (those under the age of 40)

to acquire skills. These initiatives can pave the way toward addressing the diversity-related issues in terms of both age and gender.

(2) Comparative analysis of gender diversity in arbitral tribunals

There has, by contrast, been marked progress in the presence of women in international arbitral tribunals over the past five years. There is, however, still room for further improvement. Leading international arbitral institutions, including the ICC, the LCIA and the SIAC, have begun releasing statistics related to gender diversity in recent years.

As reflected in the recent report of the International Council for Commercial Arbitration (ICCA),"since 2015, the proportion of female arbitrators has almost doubled (from 12.2% in 2015 to 21.3% in 2019)".[13] Notably, the Hong Kong International Arbitration Centre (HKIAC) reports that "[t]he percentage of women appointed by HKIAC has nearly tripled in the past three years, from 6.8% in 2016, to 20.5% in 2019".[14] In 2020, out of 143 arbitrators appointed by the SIAC, 46 were female (32.2%).[15]

The data collected by the ICCA Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (the ICCA Task Force)[16] reflects improvements in institutional commitments to ensuring gender diversity. Consideration should, however, be given as to whether or not the progress made so far is sufficient.

In 2015, the average percentage of total arbitral appointments of women in CAS, DIS, HKIAC, ICC, ICDR, ICSID, LCIA, PCA, SCC and VIAC proceedigs was only 12.2% overall, which is close to the current percentage in Iran. This clearly shows that the last few years have witnessed considerable progress as result of creating awareness and publishing statistics. It is, therefore, time for stakeholders in the Iranian arbitration market to draw lessons from recent measures implemented by international arbitral institutions in moving toward diversification of arbitral panels.

> "At the time of writing, out of 195 of the *Iranian* arbitrators included in ACIC's list, 19 (9.74%) are female. As to those included in TRAC's list, only five out of a total of 62 arbitrators (8.06%) are women."

Practical suggestions for improving gender diversity: Where to go next?

From an analysis of the data discussed above, it can be understood that there is a distinct need for improvement. To this end, some practical suggestions are made below with a view to ensuring that female arbitrators are given a fair opportunity to succeed in the arbitration market.

While this article has focused on the diversity issue as it arises within the Iranian arbitration community, many of the recommendations made below can, practically speaking, also be adopted in other jurisdictions. Thus, there follow suggestions as to some general measures that need to be taken by ADR stakeholders and as to the integral role of arbitral institutions in promoting gender diversity.

(1) General suggestions

In order to achieve the fair representation of women in arbitral tribunals, collaborative efforts by different groups, including existing arbitral institutions, co-arbitrators, chambers, bar associations, counsel, law firms, governmental bodies and universities, are essential. The importance of ensuring diversity in the Iranian arbitration market has rarely been discussed. First and foremost, recognition of inequality and creating room for dialogue on the need for diversity are the key steps that players in the arbitration community must take.

One barrier to achieving greater diversity of appointees is unconscious bias. Concerted efforts will need to be made to

overcome gender biases and implicit gender stereotyping by addressing the necessity of building parity for female arbitrators. Broadening the dialogue around inclusivity can be done through such simple steps as holding workshops and conferences.

> "It is … time for stakeholders in the Iranian arbitration market to draw lessons from recent measures implemented by international arbitral institutions in moving toward diversification of arbitral panels."

Arbitral institutions and universities can take advantage of the COVID-19 pandemic restrictions by holding online courses and technical workshops related to ADR and starting a successful career in arbitration. The ACIC has conducted different training courses for hundreds of young practitioners based in different provinces over the past five years.

It is important to provide opportunities for young female professionals to connect with senior practitioners and to learn how to improve their profile and credentials. Free mentoring programmes can be designed exclusively for upcoming female arbitrators to gain practical guidance from experienced female arbitrators living in their own jurisdiction. Remarkably, Arbitral Women, ITA and ICCA provide international mentorship programmes.[17] Perhaps such programmes could also be designed for delivery in Iran.

Further, female practitioners need to be able to build their profiles and showcase their credentials and specialisations, enabling them to take advantage of increasing opportunities to achieve their first appointments. Concrete steps should be taken to improve the exposure of newer entrants. It is recommended that ACIC, TRAC, the Iranian Bar Association, chambers of commerce and universities be mindful of diversity by including women as speakers in conference and seminar panel discussions. Providing opportunities for young arbitrators to serve as tribunal secretaries[18] is also suggested; this would provide younger generations of practitioners seeking their first appointments with opportunities to assist panels of arbitrators and sole arbitrators and learn more about the process.

Informal initiatives advocating gender equality could also create platforms to address the importance of diversity in the arbitration context. Such networks are considered "value providers" who offer guidance.[19] As mentioned previously, there exist a number of international pledges recognising the value of diversity. It appears that establishing specialist networks in Iran could be helpful in focusing on the challenges faced by female Iranian arbitrators. Like the HKIAC Women in Arbitration (WIA) initiative, the Swedish Women in Arbitration Network (SWAN) and the ABA's Women in Dispute Resolution (WIDR), similar initiatives with titles like Iranian Women in Arbitration could be designed to develop the next generation of female arbitration practitioners.

> "In order to achieve the fair representation of women in arbitral tribunals, collaborative efforts by different groups, including existing arbitral institutions, co-arbitrators, chambers, bar associations, counsel, law firms, governmental bodies and universities, are essential."

The Arbitration Center of the Iran Bar Association[20] could also contribute to promoting diversity. Counsel usually advise

clients on the process of selection of arbitrators and recommend arbitrators to their clients. The importance of counsels' role is undeniable. To this effect, the Bar Association could organise free ADR-related workshops for female trainee lawyers.

> "One barrier to achieving greater diversity of appointees is unconscious bias. Concerted efforts will need to be made to overcome gender biases and implicit gender stereotyping by addressing the necessity of building parity for female arbitrators."

(2) The role of arbitral institutions

The prominent role of arbitral institutions should be taken into consideration when navigating the challenges to first appointments of female arbitrators. By adopting clear policies for a structured selection process, institutions could suggest the best candidates for each case. In examining growth in gender diversity in in arbitral institutions,[21] the ICCA Task Force considered (*inter alia*) the impact of increased numbers of female staff in lead positions, training on unconscious bias, mentoring for female practitioners and other gender inclusivity initiatives, publication of statistics on female practitioners and related matters, and the equal representation of male and female panelists at events and in coaching and hosting moots.

As Lucy Greenwood has stated, inaccessibility of information and lack of transparency in the method of appointment of arbitrators makes it hard to address diversity issues.[22] In light of the principle of party autonomy, parties are able to choose their own decision-makers to serve as arbitrators. Arbitral institutions should take proactive measures by rethinking their lists of arbitrators to ensure that they are more diverse and that the lists should be made available to parties.

Publishing detailed data identifying diversity methods practised by arbitral institutions in the appointment process can help measure progress in this field. This would improve data management and transparency through standardised reporting. It is recommended that ACIC and TRAC review their entire arbitrator lists and make the information publicly and readily available for consumption by users.

Furthermore, the lack of objective information about the backgrounds of candidates makes it hard for parties to make informed decisions. The process of nomination of appropriate arbitrators is multi-faceted and it is important to provide a comprehensive list of arbitrators together with necessary details related to their legal background, language skills and professional experience. Accordingly, female arbitrators could be rendered more visible and parties could better nominate the best potential candidates.

Obviously, if the parties fail to appoint arbitrators themselves, arbitral institutions should provide them with some proposed choices.[23] Their secretariats would increase diversity by proposing candidates to sit on tribunals and by checking the ongoing appointments of male arbitrators. With regard to institutional appointments, the institutions should systematically reconsider and modify their internal decision-making processes for appointing arbitrators.

Last but not least, organising arbitration-related moot court competitions can provide practical experience and opportunities for less experienced female arbitrators to enhance their written and oral advocacy skills. TRAC organised the first Iranian arbitration moot in 2016 with the contribution of the

ACIC.[24] Such events can provide recruitment opportunities for young practitioners as they are enabled to connect with arbitrators and academics. TRAC schedules pre-moots for the Willem C Vis International Commercial Arbitration Moot each year. ACIC will also organise a pre-moot for the first time for the 2022 Vis moot.

> "What is still lacking in Iran is precise data on the appointment of women both in *ad hoc* and institutional arbitration. It is time for all stakeholders in the Iranian arbitration community to rethink the position of women in the arbitrator's selection process."

Concluding remarks

The issue of continued under-representations of women in arbitral tribunals can be seen in many jurisdictions. There are some signs of improvement. Nonetheless, female arbitrators' voices still need to be heard and there is a long way to go. What is still lacking in Iran is precise data on the appointment of women both in *ad hoc* and institutional arbitration. It is time for all stakeholders in the Iranian arbitration community to rethink the position of women in the arbitrator's selection process.

The action measures proposed above are considered fertile ground for enhancing gender diversity. Arbitral institutions, in particular, can bring about change in international arbitration fora. As discussed previously, focused discussions on the need to ensure diversity is a key element in acknowledging unconscious bias and much remains to be done. The author sees this article as the starting point for further initiatives to reinvent the future with a more diverse arbitration community in Iran.

1 T Clay, 'Qui sont les arbitres internationaux? Approche sociologique', in Centre français de droit comparé, *Les arbitres internationaux* (2005, Paris: Editions de la Société de législation comparée), p 27.

2 See U Sharma, *The invisible stigmatisation of female practitioners in international arbitration*. (2021) 17 International Journal of Law in Context 371–389, available at https://doi.org/10.1017/S1744552321000446 (accessed 20 December 2021).

3 Goal Number 5 of the UN SDGs concerns gender equality: see https://sdgs.un.org/goals, See also the *World Survey on the Role of Women in Development 2014: Gender Equality and Sustainable Development*, UN Doc A/69/156 (18 July 2014), available at https://www.womenforwater.org/uploads/7/7/5/1/77516286/un_women_world_survey_gender_equality_and_sustainable_development_2014.pdf (accessed 20 December 2021).

4 *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings,* ICCA Reports No 8 (2020), pp 12-14, available at https://arbitration-icca.org (accessed 20 December 2021).

5 See http://www.arbitrationpledge.com/, https://www.arbitralwomen.org/, https://arbitratorintelligence.com/, https://letsgetrealarbitration.org/ and https://risingarbitratorsinitiative.com/.

6 Per management theorist Peter Drucker.

7 See Maria R Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 Pepp Disp Resol LJ 201 (2019), available at https://digitalcommons.pepperdine.edu/drlj/vol19/iss2/3.

8 *Ibid*.

9 ACIC'S Arbitration Rules 2007 are available at http://arbitration.ir/En/Pages/Details/The-Rules-of-Arbitration (accessed 20 December, 2021).

10 TRAC's Arbitration Rules 2018 are available at https://trac.ir/rules-of-arbitration/ (accessed 20 December, 2021).

11 The ACIC list of arbitrators is available at http://arbitration.ir/Referees. The list for TRAC is available at https://trac.ir/list-of-arbitrators/ (accessed 20 December, 2021).

12 https://letsgetrealarbitration.org/real-ambassadors/.

13 Note 4 above, at p 16.

14 *Ibid*, p 23.

15 SIAC *Annual Report 2020*, available at SIAC_Annual_Report_2020.pdf.

16 Note 4 above.

17 See the links related to the following mentoring programmes: https://www.arbitralwomen.org/mentorship/, https://www.cailaw.org/media/files/ITA/young-ita-mentorship-pkg.pdf, and https://www.youngicca.org/mentoring-programme.

18 See *ICCA Reports No 1: Young ICCA Guide on Arbitral Secretaries*, available at http://www.arbitration-icca.org.

19 E Gaillard, *Sociology of International Arbitration* (2015) 31 Arb Int'l 1-17, at 7.

20 See http://icbar.ir/.

21 Note 4 above, Appendix H.

22 Lucy Greenwood, *Tipping the balance - diversity and inclusion in international arbitration* (2017) 33 Arb Int'l 99-108.

23 Articles 9-11 of the TRAC Arbitration Rules (note 9 above) and arts 10-14 of the ACIC Arbitration Rules (note 10 above) regarding the nomination of arbitrators.

24 See TRAC, Iran Commercial Arbitration Moot Court, https://trac.ir/iran-moot-court/.

Do those Textbook Examples of the Pros and Cons of Adjudication Necessarily Apply to the Hong Kong Construction Industry?

Eric Hong Ying Ngai

This article discusses the underlying advantages and disadvantages of construction adjudication identified by leading commentators by reference to (1) the key characteristics of the construction industry and dispute resolution in Hong Kong that make adjudication relevant, (2) a literature review of 'textbook examples' of the pros and cons of adjudication, and (3) interviews with distinguished industry practitioners. Based on his findings, the author critically evaluates the extent to which those 'textbook examples' apply to Hong Kong.

Introduction

Since early since 2001, when the *Report of the Construction Industry Review Committee* (commonly known as the Tang Report) was published, adjudication has been a prominent mechanism for resolving payment disputes in Hong Kong's construction industry.

The meaning of "adjudication", as Professor Edwin Chan *et al* have succinctly put it, is –

> "a particular dispute resolution method where an independent tribunal appointed under the contract renders a decision that is binding until it is received [*sic*] by another tribunal, usually an arbitrator or a court of law".[1]

Adjudication may be divided further into (1) 'contractual adjudication', in which terms specified in the parties' contract provide that they may refer contractual disputes to adjudication, and (2) 'statutory adjudication', *viz*, a mandatory regime of dispute resolution for dealing with certain types of dispute as stipulated by law.[2] Many commentators favour

the latter because it mandates disputants to resolve their differences without delay and adjudicators' decisions are bound to be recognised and enforced by the courts.[3, 4]

> "… [M]any commentators favour … [statutory adjudication] because it mandates disputants to resolve their differences without delay and adjudicators' decisions are bound to be recognised and enforced by the courts."

Over the last few decades, many foreign jurisdictions have been one step ahead of Hong Kong in embracing the use of adjudication (both contractual and statutory) as their prevailing dispute resolution mechanism for construction.[5] Despite the Development Bureau (DEVB) having demonstrated an intention to implement statutory adjudication in its proposed Security of Payment Legislation for the construction industry (SOPL) in 2015,[6] SOPL has yet to be adopted in the Hong Kong SAR, owing to its mixed reception by the construction industry. However, just as it was widely thought that this proposal had been aborted in the SAR, the latest DEVB Technical Circular, DEVB TC(W) No 6/2021 - *Security of Payment Provisions in Public Works Contracts*[7] (which, in essence, implements the spirit of SOPL in all new public works contracts exceeding certain contract values), has reignited interest by academia and the industry in favour of adopting statutory construction adjudication.

Characteristics of the construction industry in Hong Kong

(1) Extensive use of the sub-contracting system

It is well known that the system of sub-contracting has been extensively used by Hong Kong's construction industry, with the Main Contractor usually given an over-dominant role over its various sub-contractors without the presence of a third party neutral acting as contract administrator.[8] At the same time, there have also been highly dominant or overpowering upper tiers of parties from the Employer down and parties in the comparatively weak lower tiers, both financially and, as to contractual understanding and literacy, cognitively.[9] This has resulted in considerable imbalances of bargaining power down the chain of sub-contractors.

(2) Payment disputes are commonplace

Given the widespread use of the sub-contracting system in Hong Kong construction, it is said that cashflow management is key to contractors' survival, which in turn depends on a 'chute' of payments from employers down to main contractors and sub-contractors.[10] Unfortunately, as Teresa Cheng *et al* state vividly –

> "getting paid [in Hong Kong] is not always easy and the construction industry stands as an illustration on how much effort may be needed to achieve this and how adverse impacts can escalate from payment problems."[11]

Over the past few years, many employers have been facing tightened budgets and ever more complicated accountability issues, while at the same time the value, complexity and size of the contracts awarded by them have soared.[12]

Compounded by the fact that many widely-adopted standard forms of construction contract[13] only allow parties to commence arbitration (or litigation) to deal with disputes (including payment disputes) at the conclusion of the works,[14] it is sadly quite often the case that, as well as the aforementioned great imbalances of bargaining power, contractual literacy and financial capability along the chain of sub-contractors, smaller sub-contractors are unable to survive until the end of the works.

(3) Highly international teams of industry players

Another interesting feature of the Hong Kong construction industry is that many large-scale projects involve not only local construction companies but also those from different parts of the world. For example, many consortia or developers from Mainland China have been involved in developing high-end residential flats in Hong Kong, employing well-known architects, landscape architects and designers from overseas. As such, it is clear that the construction industry in the SAR is by no means a 'purely local' market. By contrast, there have been growing international and inter-cultural elements in the industry, such that there is a need for it to keep up with its foreign counterparts with regard to their practices, particularly when it comes to dispute resolution.

> "… [T]he latest DEVB Technical Circular, DEVB TC(W) No 6/2021 - *Security of Payment Provisions in Public Works Contracts* (which, in essence, implements the spirit of SOPL in all new public works contracts exceeding certain contract values), has reignited the interest of academia and the industry in favour of adopting statutory construction adjudication in Hong Kong."

The pros and cons of adjudication

The oft-cited pros and cons of adjudication may be summarised as follows.

(1) Textbook examples of the advantages of adjudication

Adjudication is said to be advantageous from the following standpoints.

Firstly, many commentators believe that it is speedy[15] and highly efficient, "as it is designed to ensure the smooth running of any agreement under which a dispute arises and to enable the dispute to be quickly and efficiently resolved".[16] In particular, the relatively short timeframe for disputants to submit their respective cases, as well as the tight schedule for adjudicators to render their decisions, have helped to shorten the entire dispute resolution process.[17]

Secondly, since the mechanism of adjudication allows a party to "voice out [*sic*] their concerns" during the interim stage, rather than waiting until the end of the entire project, it is believed that it can "nip disputes in the bud at the point of dispute", thereby preventing the happening of arbitration or litigation later.[18]

Thirdly, parties are given the freedom to select their preferred adjudicators on the basis of the candidates' characteristics and attributes; they are usually experts in the subject-matter in question and have the requisite legal qualifications to understand legal concepts and rules.[19] This may be achieved, for example, by the parties (1) designating a named adjudicator in the contract itself; (2) consenting to a proposed appointee in advance; (3) agreeing to an appointee after a dispute has arisen; or (4) designating an agreed nominating body to make an appointment.[20]

Fourthly, adjudication usually does not adopt the rigid format of court procedure. For example, lengthy oral arguments are rarely allowed and parties may not necessarily have to follow exactly the rules of evidence in relation to witness examination.[21] As such, it is not a 'must' for disputants to engage lawyers in the process, thereby saving a considerable amount in time and legal fees.

Fifthly, disputants in adjudication can enjoy the benefit of confidentiality, as matters discussed and raised in the process are private.[22] The reputations of the parties can therefore be better protected. This is particularly important for employers and large contractors that are listed companies, as any

publicity regarding their involvement in lawsuits would most likely lead to regulatory disclosures or even a drop in their share prices.

Finally, as adjudicators render their decisions in written form, disputants are provided with a higher degree of clarity and certainty in terms of the reasoning and rationale behind those decisions.[23] Theoretically speaking, this may help the 'losing party' to perform better in the future and so avoid the risk of getting into further rounds of adjudications during the performance of the contract.

(2) Textbook examples of the disadvantages of adjudication

Despite the advantages discussed above, three major shortcomings of adjudication have also been commonly cited by commentators.

Firstly, adjudication has been criticised for the 'rough justice' that it offers. Within the short and tight timeframe involved, it is quite difficult for adjudicators to test all the evidence and assertions placed before them.[24] Worse still, as illustrated in the well-known English case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*,[25] the adjudicator had been found to have made errors in procedure, fact and even law. Yet, the court held that these were insufficient to prevent enforcement of the adjudicator's decision by summary judgment because he had not acted in an *ultra vires* manner but had merely given a wrong answer to the question referred to him.[26] As such, the disgruntled disputant still had to honour the decision until the matter was referred later to arbitration or litigation, thereby creating additional risk of cash flow problems to that disputant.[27]

Secondly, while the applicant has plenty of time to prepare well for its own case before commencing an adjudication, it can also take the other side by surprise by adopting the so-called 'Christmas ambush' strategy, such as by bombarding its opponent with a heavy load of documents before long holidays, such that the latter's personnel would have less time to prepare their reply submissions to the adjudicator.[28]

Thirdly, as mentioned at the outset of this article, adjudication without statutory backing is said to be undesirable because it would be extremely difficult to compel the unco-operative disputant to adhere to the directions of the adjudicator.[29]

> "Despite rigid court-type procedures not normally applying in adjudication, parties from different legal cultures may prepare their cases and respond to those of their opponents in quite different ways. Adjudicators must therefore take cultural factors into consideration and give corresponding procedural directions so that natural justice may be properly observed."

Whether these 'textbook examples' necessarily apply in Hong Kong

Following discussions with a number of prominent local construction dispute resolution practitioners,[30] the author came to realise that three of the 'textbook examples' mentioned may not necessarily apply in Hong Kong.

Firstly, it is said that one key advantage of adjudication is that parties can 'choose' (or ask an appointing body to choose) an adjudicator with expertise to determine their dispute. It is equally true, however, that the construction industry involves highly-specialised professionals in multiple fields. For example, an adjudicator whose education and professional background is in quantity surveying may not necessarily have the requisite

experience and expertise to deal with programming issues. If he or she is 'chosen' (somewhat accidentally) to decide a programming dispute, an adjudicator may be unlikely to have the luxury of relying on expert evidence (which is rarely adduced in adjudication cases). It is inevitable that an adjudicator placed in this position would either have to resign from the role or to make a decision that may not be 'technically correct'. In fact, the Hong Kong SAR government does not maintain a centralised accreditation system for adjudicators, whereas a variety of disputes resolution centres (such as HKIAC), non-governmental organisations and adjudication societies maintain their own panels of adjudicators. In these circumstances, disputants may have difficulties in identifying the right candidates to adjudicate their disputes.

Secondly, although the process of adjudication can effectively be shortened by virtue of the tight timeframe, the costs involved may not necessarily be lowered. Echoing the aforementioned argument regarding adjudicator candidacy, it may be noted that most panel adjudicators in Hong Kong[31] also practise as arbitrators or construction lawyers. These busy professionals normally charge their professional work on an hourly-rate basis and it would be quite difficult to persuade them to charge a lower rate for providing adjudication services. More importantly, as the pool of candidates for construction adjudicators in Hong Kong is rather small, it is possible that the most highly sought-after candidates would demand even higher fees for their services.

Thirdly, as the Hong Kong construction industry is quite 'internationalised', parties to adjudications may come from different legal cultures. Despite rigid court-type procedures not normally applying in adjudication, parties from different legal cultures may prepare their cases and respond to those of their opponents in quite different ways. Adjudicators must therefore take cultural factors into consideration and give corresponding procedural directions so that natural justice may be properly observed.

> "… [T]he introduction of DEVB's Technical Circular really is a timely move to test the waters before re-proposing SOPL."

Conclusion

Although most of the oft-cited pros and cons of adjudication do apply to the construction industry in Hong Kong, this discussion demonstrates that some caveats also exist. As such, the introduction of DEVB's Technical Circular really is a timely move to test the waters before re-proposing SOPL.

1 Edwin HW Chan, Charles KL Chan & Martyn J Hills, *Construction Industry Adjudication: A Comparative Study of International Practice* (2005) 22(5) J Int'l Arb 363-374.

2 Honic Ip, Harrison Cheung, Oscar Tan & Vincent Li, 'An Overview on Construction Alternative Dispute Resolution', in Gary Soo (Ed), *Construction Contract Essentials in Hong Kong* (2017, Hong Kong University Press), pp 148-149.

3 For example, it has been observed that for contractual adjudication, "questions necessarily arise in relation to the extent to which it will actively be utilised by the parties involved in those contracts": Peter J Turner, *Adjudication in the Hong Kong Construction Industry* [2005] Asian Dispute Review 13-14, at 14.

4 For other examples of reservations about contractual adjudication, see Peter Coulson, *Coulson on Construction Adjudication* (2019, 4th Edn, Oxford University Press), p 356; Ip *et al* (*op cit*, note 2), p 148.

5 Examples of these jurisdictions include the United Kingdom, Malaysia, New Zealand and Singapore: see Gary Soo, *Construction Law and Practice in Hong Kong* (4th Edn, 2018, Sweet & Maxwell), pp 705-706. See also Ip *et al* (*op cit*, note 2), p 148.

6 Douglas Jones, *Ten Years of Construction Law in the Asia Pacific Region* [2017] 12(3) Construction Law International 20 at 26. See also the DEVB Consultation Document, *Proposed Security of Payment Legislation for the Construction Industry* (June 2015). *Editorial notes*: see *Consultation on Statutory Construction Adjudication* [2014] Asian DR 215 and *Adjudication in Hong Kong* [2015] Asian DR 166.

7 *Editorial note:* see *New and emerging dispute resolution rules: HKSAR Development Bureau* [2022] Asian DR 50-51.

8 Simon Chee, 'The Market Trend', in Simon Chee & John Campbell (Eds), *Construction Dispute Prevention and Resolution in Hong Kong* (2016, Sweet & Maxwell), para 2-2.

9 *Ibid.*

10 Oscar Tan, 'Trends and Overview in Construction Contract Procurement', in Soo, *op cit* (note 2), p 10.

11 Teresa Cheng, Gary Soo, Mohan Kumaraswamy & Wu Jin, *Security of Payment for Hong Kong Construction Industry* [2008] 2008(4) Building Journal 60; (2010) 163(1) Management, Procurement and Law (February 2010), 17-23 at 17.

12 Alan Donnet, 'The Contractors' Perspectives', in Chee & Campbell, *op cit* (note 8), para 1-32.

13 An example of these contracts is the Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region, First RICS (HK Branch) Edition 1986 (with quantities) incorporating up to the Second amendments published in July 1999.

14 Christopher To & Simon So, *ADR in Hong Kong* (2018, Sweet & Maxwell), p 50.

15 Soo, *op cit* (note 5), p 708.

16 To & So, *op cit* (note 14), p 50.

17 Darryl Royce, *Adjudication in Construction Law* (2015, 2nd Edn, Routledge), p 24.

18 Richard Anderson, *A Practical Guide to Adjudication in Construction Matters* (2000, Sweet & Maxwell), p 940.

19 To & So, op cit (note 14), p 50.

20 Anderson, *op cit* (note 18), p 941.

21 To & So, *op cit* (note 14), p 50.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 [2000] BLR 522 (Court of Appeal, England & Wales).

26 Soo, *op cit* (note 5), p 708.

27 Anderson, *op cit* (note 18), p 921.

28 Royce, *op cit* (note 17).

29 To & So, *op cit* (note 14), p 50.

30 The author engaged in a number of face-to-face discussions during lectures at the Hong Kong Polytechnic University with Dr Simon Chee (adjudicator), Mr King Wong (adjudicator) and Mr TT Cheung (adjudicator); with Mr Rix Chung (arbitrator and construction lawyer) at work; and with Mr Patrick Chaplin (Director of an international consultancy firm) at the Society of Construction Law Hong Kong's one-day International Conference 2021, to gauge their views toward the adoption of statutory construction adjudication in Hong Kong. The author would like to thank Professor Edwin Chan and Dr Simon Chee for their guidance and encouragement. All errors in this article are entirely the author's own.

31 As to the Hong Kong International Arbitration Centre Panel of Adjudicators, see https://www.hkiac.org/adjudication/panel-of-adjudicators.

Pre-arbitration ADR Requirements: A Chinese Perspective

Sophie Zhao Yue

This article discusses pre-arbitration ADR requirements in Mainland China, focusing on court decisions as to the enforceability of these requirements and the legal consequences of non-compliance. Conflicting approaches of Mainland Chinese courts to the characterisation and reviewability of compliance-related objections at the annulment and enforcement stages are given particular attention. A comparative case study evaluates (1) different approaches to the problem under Chinese law (including the current Draft Revision of the Chinese Arbitration Law) and Swiss law, and (2) an alternative approach in England & Wales, Hong Kong and France.

Introduction

In international transactions, arbitration clauses are frequently drafted in a multi-tiered or 'escalation' format. They provide alternative dispute resolution (ADR) mechanisms, such as negotiation, mediation, conciliation and expert determination, as mandatory processes to be fulfilled prior to the commencement of an arbitration. Pre-arbitration ADR is considered a commercially attractive dispute resolution method, as it gives the parties a chance to settle disputes amicably and, therefore, avoids the concomitant costs and delays of arbitration, relaxes confrontation between the parties and preserves their business relationships.

However, multi-tiered arbitration agreements, which are ultimately aimed at facilitating dispute resolution, may themselves generate a considerable number of disputes in arbitration proceedings and lead to challenges of arbitral awards at the annulment and enforcement stages. Their benefits are tainted by the uncertainties surrounding a number of questions. A non-exhaustive list of these includes: (1)

whether pre-arbitration ADR requirements are binding and enforceable; (2) whether compliance with these requirements constitutes a condition precedent to the formation of arbitration agreements; and (3) whether objections based on non-compliance with such requirements are reviewable in the context of annulment and enforcement of arbitral awards and, if the answer is 'yes', the ground(s) on which court review is exercised.

Recent years have seen increasing numbers of cases concerning multi-tiered dispute resolution clauses in Mainland China. Court decisions can largely clarify Mainland Chinese courts' standing as to questions (1) and (2) above, yet they may further animate debate about question (3).

> "… [M]ulti-tiered arbitration agreements, which are ultimately aimed at facilitating dispute resolution, may themselves generate a considerable number of disputes in arbitration proceedings and lead to challenges of arbitral awards at the annulment and enforcement stages."

The binding effect and enforceability of pre-arbitration ADR requirements

For an agreement on pre-arbitration ADR to be binding and enforceable, it must first be clear that the parties have expressed their will to be bound by the obligations involved in going through this process. The agreement must therefore be drafted in mandatory terms. Further, recent Mainland Chinese court decisions indicate that pre-arbitration ADR requirements must be equipped with measurable procedural guidelines. A mere stipulation of "amicable negotiations" has been regarded as imposing no obligation to attempt to negotiate in good faith.

The *Chenya* case[1] arose from the following multi-tiered dispute resolution clause:

> "Any dispute arising out of the performance of the contract shall be settled amicably by the parties through negotiations. In case the negotiations fail, it shall be submitted to the Beijing Arbitration Commission (BAC) for arbitration."

After an arbitral award was rendered, the applicant sought annulment on the basis of the other party's alleged failure to complete the negotiation step. The Beijing No 4 Intermediate People's Court denied this application, holding that the other party's request for arbitration was proof of the failure of negotiations that triggered the arbitration process. Notably, the court did not examine whether the parties had actually attempted to settle the dispute through good faith negotiations.

In the *Leshi* case,[2] the same court drew a clearer line between a requirement for preliminary negotiation with and without a specific time limit. It underscored that only the former stipulated a mandatory negotiation tier and necessitated the inquiry into whether the period for negotiation had lapsed before the commencement of arbitration.

These decisions are in line with the opinion of the Supreme People's Court (SPC) in a much earlier case, *Runhe*.[3] The SPC held in that case that where the dispute resolution clause provides for amicable negotiation without a fixed time limit and arbitration when negotiations fail, a party's request for arbitration is sufficient to trigger the arbitration process. This indicates that a certain degree of procedural precision is necessary for an agreement on pre-arbitration ADR to be binding and enforceable. Parties are therefore advised to include a time limit and other measurable procedural guidelines, such as institutional mediation rules, for the pre-arbitration tiers.

Compliance with pre-arbitration ADR requirements and the validity of arbitration Agreements

Assuming that a pre-arbitration ADR requirement is mandatory, the next matter for consideration is the legal consequences of non-compliance with it. This entails addressing the question whether compliance with this requirement is a condition precedent to the formation of an arbitration agreement.

Several Mainland Chinese courts have answered this question in the negative. In the *Dianbai Erjian* case,[4] the parties agreed to resolve disputes through, sequentially, negotiation, mediation and arbitration. In its application to the Guangdong High People's Court to invalidate the arbitration agreement, the applicant submitted that the arbitration agreement had not entered into effect owing to non-completion of the mediation process. The court dismissed this application, reasoning that the impugned arbitration agreement contained the three essential factors stipulated by art 16 of Arbitration Law of the People's Republic of China 1994 (the Arbitration Law), namely (1) expression of an intention to arbitrate; (2) the matter(s) to be arbitrated; and (3) selection of an arbitration commission. It may be inferred from this decision that, in the court's view, the parties' intention to elect arbitration as the final dispute resolution method is clear and unequivocal, irrespective of whether or not the pre-arbitration requirements have been satisfied.

The *Dianbai Erjian* decision is a welcome development. Indeed, a contrary view would have led to the revival of national courts' jurisdiction over substantive claims and allowed a recalcitrant party to avoid arbitration by filing claims in the national courts before the fulfilment of pre-arbitration ADR conditions.[5] This would be particularly arbitration-hostile in the Chinese arbitration setting, considering that art 20 of the Arbitration Law allows a party to request a ruling from a national court declaring the invalidity of an arbitration agreement without raising substantive claims. The same article further provides that if the other party has already requested an arbitral tribunal to decide on this issue, the national court's decision takes precedence. Should completion of pre-arbitration ADR be deemed a condition precedent to the existence or validity of an arbitration agreement, a recalcitrant party would be incentivised to flout the arbitration clause by seeking declaratory relief.

Post-award review: inconsistent decisions of the courts

The third and final question is the reviewability of objections based upon non-compliance with pre-arbitration ADR requirements in the context of annulment and enforcement proceedings. Overall, Mainland Chinese courts consider this issue to be reviewable but have been divided as to the grounds for review on the basis of whether objections raised procedural or jurisdictional matters.

"Should completion of pre-arbitration ADR be deemed a condition precedent to the existence or validity of an arbitration agreement, a recalcitrant party would be incentivised to flout the arbitration clause by seeking declaratory relief."

(1) The procedural approach

Under Chinese law, procedural irregularities constitute a ground for setting aside or refusing to enforce an arbitral award.[6] In an early case, *Pepsi*, the Chengdu Intermediate People's Court refused to recognise and enforce a foreign award on the basis of the claimant's failure to exhaust the 45-day period for negotiations set out in the arbitration agreement. The court held that this non-compliance resulted in deviation from the procedure specified in the arbitration agreement, which constituted a procedural irregularity per art V.1(d) of the New York Convention. This decision was approved by the Supreme People's Court.[7]

In the *Leshi* case,[8] the applicant sought annulment by alleging that the other party's failure to exhaust the 30-day period for amicable negotiations constituted a procedural irregularity. The Beijing No 4 Intermediate People's Court did not expressly characterise the pre-arbitration requirement, but did grant the review on the procedural ground relied on by the applicant. The annulment application was finally dismissed as the negotiation requirement had been fulfilled.

Nevertheless, the same court denied the procedural approach in a more recent case, *Jiang Qingfeng*.[9] Quite similar to the situation in *Leshi*, the parties agreed to engage in negotiations for 30 days before submitting disputes to the Beijing Arbitration Commission (BAC). The applicant averred that the other party did not negotiate before commencing arbitration and thereby violated the parties' agreement on "procedural matters" defined in art 2 of the then applicable BAC Rules 2014 (now the 2022 edition). This article reads:

> "The Rules shall apply where the parties have agreed to submit their dispute to the BAC for arbitration. Where the parties have agreed on certain *procedural matters* [emphasis added] or the application of a different set of arbitration rules, their agreement shall prevail, unless the agreement is unenforceable or in conflict with the mandatory rules of law of the seat of arbitration. […]"

The Beijing No 4 Intermediate People's Court stated that the term "procedural matters" referred to the procedure during the arbitration proceedings and could not encompass the negotiation stage prior to commencement of the arbitration. Curiously, the court did not further specify how the matter should be characterised, yet proceeded to conduct the review. Based on its finding that the 30-day period had elapsed, the court dismissed the setting aside application.

In the most recent development, the SPC stated, in the minutes of a symposium of Mainland Chinese courts,[10] that non-compliance with the pre-arbitration negotiation requirement should not be considered to be a procedural irregularity under art V.1(d) of the New York Convention. This meant that the SPC effectively reversed the approach it had adopted in the *Leshi* case.

> "Overall, Mainland Chinese courts consider … [non-compliance with pre-arbitration ADR requirements] to be reviewable [at the annulment and enforcement stages] but have been divided as to the grounds for review on the basis of whether objections raised procedural or jurisdictional matters."

(2) The jurisdictional approach

In other cases, Chinese courts have considered objections relating to non-compliance with pre-arbitration ADR requirements to be a jurisdictional matter. An illustrative example is the *Tit Fook* saga, which comprised three cases concerning (1) the invalidity of the arbitration agreement, (2) annulment of the arbitral award and (3) enforcement of the award respectively. All three cases arose from a multi-tiered dispute resolution clause that provided for certain preliminary processes prior to the BAC arbitration.

After the parties ran into a substantive dispute, the claimant submitted a request for arbitration to the BAC. In response, the respondent applied to the Beijing No 4 Intermediate People's Court for a ruling invalidating the arbitration agreement on the ground of the claimant's failure to go through the agreed preliminary process. The court declined to examine this issue, reasoning that it would involve the merits and that the parties had other remedies.[11] At the post-award stage, the respondent filed an application with the same court for annulment.

It submitted that non-compliance with pre-arbitration requirements constituted a violation of the process agreed by the parties. Instead of following this characterisation, the court reviewed the pre-arbitration requirement under the rubric of excess of jurisdiction. The application was dismissed for lack of objection by the respondent during the arbitration.[12] The respondent subsequently moved in another intermediate people's court to resist the recognition and enforcement of the award on the procedural ground. The second court also opined that this objection was targeted at the arbitral tribunal's jurisdiction rather than the arbitral procedure. The court finally granted enforcement, reasoning (*inter alia*) that the opposing party should not be allowed to resist enforcement on the same ground it had unsuccessfully relied on at the annulment stage.[13]

In summary, Mainland Chinese courts have not developed a consistent approach to reviewing objections grounded on non-compliance with pre-arbitration ADR requirements. Decisions handed down thus far have been split between procedural irregularity and jurisdictional flaws. While the courts recently seem to have been inclining toward the jurisdictional approach, they have not reached a definitive consensus at the time of writing.

> "… [T]he crux is how to preserve to the maximum parties' intentions to resolve disputes through out-of-court methods on the one hand and, on the other, to ensure *pacta sunt servanda* that consensual pre-arbitral requirements shall be respected."

Evaluation of the approaches in light of Chinese arbitration law and comparative jurisprudence

The issue of pre-arbitration ADR requirements confronts arbitral tribunals and national courts. For both fora, the crux is how to preserve to the maximum parties' intentions to resolve disputes through out-of-court methods on the one hand and, on the other, to ensure *pacta sunt servanda* that consensual pre-arbitral requirements shall be respected. Nevertheless, arbitral tribunals and national courts have distinct roles in arbitration. While the former may address a pre-arbitral flaw without specifying its characterisation, the latter must be explicit about characterisation, as this correlates with the reviewability of this flaw. For Mainland Chinese courts, it is, primarily, sensible to characterise pre-arbitration ADR requirements consistently, be they matters of jurisdiction, procedure or otherwise.

Between the two approaches followed by Mainland Chinese courts, the procedural approach is less favoured. The arbitration rules of the HKIAC, BAC and ICC all stipulate that an arbitration is deemed to commence on the date on which the "notice of arbitration" (also referred to as the "request" or "application for arbitration") is received by the arbitral institution concerned.[14] As the court held in *Jiang Qingfeng*,[15] arbitration procedure does not encompass pre-arbitration sessions. Non-compliance with the agreed pre-arbitration process therefore cannot be equated with deviation from the arbitration procedure agreed by the parties. The SPC's latest opinion also suggests that this approach is not an apposite solution.

The jurisdictional approach appears to be the stronger and more favoured one. A comparative case study shows that it has been adopted in Switzerland. In a case filed to set aside an award assuming jurisdiction, the Swiss apex court, the Federal Tribunal, concluded that a challenge based on non-compliance with a preliminary conciliation requirement should be deemed to be a jurisdictional issue.[16] The Tribunal explained that this characterisation was a "default" choice because a party's non-compliance must be "sanctioned in one way or the other", and yet could not be connected to any other ground for annulment under Switzerland's Federal Act on Private International Law 1987 (No 291) as amended (PILA). In terms of remedies, the

Tribunal decided to annul the award on jurisdiction and stay the arbitral proceedings until completion of the conciliation. The stay of arbitration ordered by the Tribunal was a pragmatic solution that saved the parties effort and costs of repeating the arbitration proceedings. Be that as it may, however, the viability of this approach depended largely on the peculiarity of the case, in that the arbitration proceedings were still ongoing when the Tribunal's decision was rendered. This scenario can occur frequently in Swiss arbitration settings because art 186(3) of the PILA sets out a general rule for bifurcation of jurisdiction from merits and, by virtue of art 190(3), provides for the annulment of awards as to jurisdiction. Yet, the differences between the Chinese Arbitration Law and the PILA beg the question whether the jurisdictional approach would have equivalent significance in China by enabling Mainland courts to stay arbitrations.

The Arbitration Law does not provide for court review of arbitral decisions dealing separately with jurisdiction. Nor does practice supply a definite certain answer as to whether such awards could be challenged in annulment proceedings: the cases discussed above indicate that Mainland Chinese courts ordinarily intervene only by reviewing final awards. At this stage, an arbitration is closed, so that staying arbitration proceedings is no longer available. All that remains to the court is either to set aside or refuse to enforce final awards. While this remedy does sanction a party for breaching a pre-arbitration ADR agreement, it comes at the price of denying wholesale the binding force of arbitration and undermines the policy aims of finality and efficient dispute resolution in commercial activities. The annulment or non-enforcement of final awards comes too late and is too costly as a remedy.

By contrast, arbitral tribunals are able to make a closer analysis of all relevant factors and remedy a non-compliance at an earlier stage with more flexible methods, such as (*inter alia*) dismissal of claims, stay of arbitration proceedings and cost reallocation. It is therefore evident that arbitral tribunals are better placed to address objections pertaining to pre-arbitration requirements.

> "Between the two approaches followed by Mainland Chinese courts, the procedural approach is less favoured. … The jurisdictional approach appears to be the stronger and more favoured one. A comparative case study shows that it has been adopted in Switzerland."

The jurisdictional approach may acquire more practical relevance after the proposed amendments to the Arbitration Law take effect. The proposed art 28 of the Draft Revision of the Chinese Arbitration Law[17] (Draft Revision) provides:

> "If the parties have any objection to the validity of the arbitration agreement, whether it is valid or not, or the jurisdiction of the arbitration case, it shall be raised within the time limit for defence as stipulated in the arbitration rules, and the arbitral tribunal shall make a decision.
>
> […]
>
> "If the parties disagree with the validity of the arbitration agreement or the jurisdiction decision, they shall submit the decision to the intermediate people's court at the place of arbitration for review within ten days from the date of receipt of the decision. If the parties are dissatisfied with the ruling on invalidity of the arbitration agreement or lack of jurisdiction, they may apply for reconsideration to the people's court at the next higher level within ten days from the date of receipt of the decision.
>
> "The review by the people's court does not affect the conduct of the arbitration."

Should the proposed art 28 of the Draft Revision be adopted, the jurisdictional approach would allow a Mainland Chinese court to intervene, upon a party's request, before the closure of the arbitration proceedings and to order remedies promptly and flexibly.

"Should the proposed art 28 of the Draft Revision [of the Arbitration Law] be adopted, the jurisdictional approach would allow a Mainland Chinese court to intervene, upon a party's request, before the closure of the arbitration proceedings and to order remedies promptly and flexibly."

Even in the context of the Draft Revision, however, one must reassess whether the jurisdictional approach is effective. Strictly speaking, if non-compliance with pre-arbitration ADR requirements is considered to be a jurisdictional flaw, the arbitral tribunal lacks jurisdiction *ab initio* and is therefore incompetent to cure the flaw by, for example, staying the arbitration proceedings.[18] The Swiss solution of reviewing this issue as a jurisdictional matter and ordering a stay strikes one as a contradiction in terms.

A third approach: admissibility

Courts in other jurisdictions have therefore followed a third approach of characterising pre-arbitration ADR requirements as a matter of admissibility. Distinguished from jurisdiction, which refers to the existence and scope of an arbitral tribunal's competence, admissibility addresses whether legal impediments or flaws in a claim prevent it from being heard. To put it more straightforwardly, if a claim cannot be brought to arbitration but can be raised in other fora, the issue goes to jurisdiction, but if "the claim should not be heard at all (or at least not yet)", the issue is one of admissibility.[19] This distinction is pertinent to national courts, since they are ordinarily allowed to review the jurisdictional aspects of awards but may not second-guess issues of admissibility.[20]

In both civil and common law jurisdictions, the latest court decisions manifest a subtle tendency toward the admissibility approach. In *Republic of Sierra Leone v SL Mining Ltd*,[21] decided on 15 February 2021, the English Commercial Court opted for the admissibility characterisation, holding that the issue was not whether a claim was arbitrable but whether it had been presented too early. On 24 May 2021, the Court of First Instance of the Hong Kong SAR reached the same conclusion in *C v D*.[22] One day later, the Paris Court of Appeal decided that failure to complete pre-arbitration mediation was a matter of inadmissibility.[23]

Comparative jurisprudence is enlightening as to the characterisation of pre-arbitration ADR requirements. For a multi-tiered dispute resolution clause which provides for arbitration as the final tier, the parties' intention to arbitrate is ordinarily clear and unambiguous. The conundrum is therefore not whether the arbitral tribunal or a domestic court should hear the case but whether the claim is temporarily barred from being seized by the arbitral tribunal owing to non-completion of the mandatory pre-arbitration stage, affecting the juridical maturity of a particular claim rather than the jurisdiction of the arbitral tribunal.

From a pragmatic standpoint, characterising pre-arbitration ADR requirements as a matter of admissibility allows the arbitral tribunal to assume its jurisdiction and address the non-compliance problem flexibly and in a timely manner. In this context, post-award court review is of limited necessity and the trade-off between the finality of arbitration and supervisory control by national courts leans toward the former.

> “From a pragmatic standpoint, characterising pre-arbitration ADR requirements as a matter of admissibility allows the arbitral tribunal to assume its jurisdiction and address the non-compliance problem flexibly and in a timely manner.”

To summarise, in light of the above discussion and in the context of the existing Arbitration Law and its Draft Revision, the present approaches to characterising and reviewing objections based on non-compliance with pre-arbitration ADR requirements deserve further reflection and improvement.

Conclusion

In Mainland Chinese arbitration settings, the binding force of pre-arbitration ADR requirements is contingent on mandatory wording and reasonably measurable guidelines for procedure. The parties are therefore recommended to include a specific time limit for the pre-arbitration tier(s). As things stand, arbitral awards made in violation of requirements for negotiation, conciliation and other preliminary procedures are susceptible to challenge only at the post-award stage. If an arbitration is seated within Mainland China or the enforcement forum is envisaged to be there, the arbitral tribunal is strongly advised to examine the parties' compliance with pre-arbitration ADR requirements with great caution. Even though a stay of arbitral proceedings is considered a lenient solution, it may be safer to dismiss premature claims.

Meanwhile, Mainland Chinese courts have not developed a coherent approach to reviewing objections based on non-compliance with pre-arbitration ADR requirements. Looking beyond Mainland China, there is a subtle trend of characterising this issue as one of admissibility and a matter for determination by arbitral tribunals. In developing a consistent approach, it is sensible to re-evaluate the necessity of court review and acknowledge the distinction between jurisdiction and admissibility.

1 (2021) Jing 04 Min Te No 186 (the arbitration clause cited was translated from Chinese by the author). For similar instances, *see* (2020) Qiong 96 Min Te No 14; (2020) Yue 03 Min Te No. 507; (2018) Jing 04 Min Te No 408.

2 (2018) Jing 04 Min Te No 439.

3 (2008) Min Si Ta Zi No 1

4 (2019) Yue 01 Min Te No 1180. For similar decisions, see, for example, (2018) Yue 01 Min Te No 796, (2018) Xiang 10 Min Te No 14.

5 Ewelina Kajkowska, *Enforceability of Multi-tiered Dispute Resolution Clauses* (2017, Hart Publishing) p 175.

6 Arbitration Law of the People's Republic of China 1994, art 58(1)(c); Civil Procedure Law of the People's Republic of China 1991 as amended, arts 237(2)(c) and 274(1)(c); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V(1)(d).

7 (2007) Min Si Tai Zi No 41.

8 *Supra* (note 2).

9 (2019) Jing 04 Min Te No 310.

10 Minutes of the National Courts' Symposium on Foreign-related Commercial and Maritime Trials, 24 January 2022, Item 107.

11 (2018) Jing 04 Min Te No 324.

12 (2019) Jing 04 Min Te No 179.

13 (2019) Yue 03 Min Te No 825.

14 HKIAC Administered Arbitration Rules 2018, art 4.2; Beijing Arbitration Commission Arbitration Rules 2022, art 9(3); Rules of Arbitration of the ICC 2021, art 4(2).

15 *Supra* (note 9).

16 4A_628/2015, s 2.4.4.

17 *Editorial notes:* see (1) Yihua Chen, *Revision of China's Arbitration Law: A New Chapter* [2021] Asian DR 156-163; and (2) *New and emerging dispute resolution legislation: Amendment of the PRC Arbitration Law* [2021] Asian DR 204.

18 Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, University of Cambridge Paper Series No 9/2014, p 67.

19 Jan Paulsson, 'Jurisdiction and admissibility', in Gerald Aksen *et al* (Eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber amicorum in honour of Robert Briner* (2005, ICC Publishing), pp. 616-617; Fabio G Santacroce, *Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern the Characterisation of Preliminary Issues in International Arbitration* (2017) 33 Arb Int'l 539-570, at 546.

20 Waibel, *supra* (note 15), p 69; Santacroce, *supra* (note 16), pp 540-541.

21 [2021] EWHC 286 (Comm), para 18.

22 [2021] HKCFI 1474, at [53].

23 *Etat de Libye c/ Gengiz Insaat Sanayi ve Ticaret AS*, (Paris Court of Appeal (1ère Ch C), 25 May 2021), RG 18/27648. The Paris Court of Appeal decided the same way in an earlier case, *Société Nihon Plast Co c/ Société Takata-Petri AG* (Paris Court of Appeal (1ère Ch C), 4 March 2004), (2005) Revue de l'arbitrage 143.

The Arbitrator's Duty of Disclosure: A Duty Without a Remedy?

Dantes Leung, Flora Ng & Davis Hui

This article examines critically the UK Supreme Court's reasoning on the legal duty of disclosure by arbitrators in the English *Halliburton* case by reference to the *ubi jus ibi remedium* maxim and analyses its implications for Hong Kong as an UNCITRAL Model Law jurisdiction. The authors argue that a failure to disclose should always disqualify an arbitrator and that no aggrieved party should be left without an appropriate remedy.

"Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty; but merely the application of the principle *ubi jus ibi remedium*."

- *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, per Lord Scarman (House of Lords).

Introduction

Ubi jus ibi remedium - the maxim that where there is a right, there is a remedy - is a fundamental legal principle underpinning the justice system: the Court should provide an effective remedy where a right is infringed or where a corresponding duty is breached. It represents the responsibility and flexibility of

the law to redress any injustice. Any exception to this general principle should be properly justified.

Under section 25 of the Hong Kong Arbitration Ordinance (Cap 609),[1] an arbitrator has an express duty to disclose circumstances that are likely to give rise to justifiable doubts as to his or her impartiality, whereas in England & Wales this duty is implied in contract. One would expect the law to give an effective remedy in either jurisdiction where an arbitrator breaches this duty. In an English case, *Halliburton Co v Chubb Bermuda Insurance Ltd*,[2] however, the UK Supreme Court surprisingly opined otherwise: not only that the arbitrator who failed to observe this duty of disclosure should not be removed, but also that the innocent party should receive no remedy at all. *Quaere* whether this case sits well with the *ubi jus ibi remedium* maxim.

> "*Ubi jus ibi remedium* - the maxim that where there is a right, there is a remedy - is a fundamental legal principle underpinning the justice system: the Court should provide an effective remedy where a right is infringed or where a corresponding duty is breached. … Any exception to this general principle should be properly justified."

Background to the *Halliburton* case

The factual background of the *Halliburton* case is complicated, but for the purpose of this article, the essentials are as follows. The destruction of the Deepwater Horizon drilling rig as a result of an oil well blowout in the Gulf of Mexico in 2010 resulted in two separate arbitrations under which two companies, namely Halliburton and Transocean, claimed against a common insurer, Chubb, under their respective liability insurance policies containing the same material policy terms. Kenneth Rokison QC was first appointed as arbitrator in the Halliburton arbitration. He subsequently accepted Chubb's nomination as arbitrator in the Transocean arbitration, without first disclosing this to Halliburton.

Mr Rokison's appointment in the Transocean arbitration was discovered by Halliburton, which then applied to the High Court to remove him as arbitrator on the ground of apparent bias. In particular, it was argued that Mr Rokison's failure to disclose his proposed appointment in the Transocean arbitration, which concerned an overlapping subject-matter with only one common party (ie, Chubb), gave rise to justifiable doubts as to his impartiality.

The reasoning of the UK Supreme Court

It should be noted at the outset that, by contrast with the position in Hong Kong pursuant to the Arbitration Ordinance (Cap 609) (the Ordinance), which adopts the UNCITRAL Model Law (the Model Law), there is no express provision in the English Arbitration Act 1996 (the 1996 Act, which mirrors but has not adopted the Model Law) that imposes a duty on an arbitrator to disclose circumstances which might give rise to justifiable doubts as to his or her impartiality. Halliburton's challenge to the arbitral appointment in the Transocean case on the ground of apparent bias arising from non-disclosure presented an acute issue.

> "Halliburton's challenge to the arbitral appointment in the Transocean case on the ground of apparent bias arising from non-disclosure presented an acute issue."

The UK Supreme Court recognised that impartiality is a cardinal duty of an arbitrator.[3] While the objective test of the fair-minded and informed observer applies equally to judges and arbitrators, the Court noted the distinction between the judicial and arbitral determination of disputes.[4] Specifically, arbitral decisions, whether on issues of fact or law, are often not subject to appeal.[5] Coupled with the fact that arbitrations are private and confidential with very limited public oversight, there are legitimate causes for concern where, in multiple references of overlapping subject-matter in which the same arbitrator is appointed, the party who is not common to the overlapping references has no means of being informed of the evidence and legal submissions made before that arbitrator, thereby not being placed on the same level playing field.[6] Also of importance is that allegations of apparent (conscious or unconscious) bias are difficult to establish and to refute.[7]

“The duty of disclosure seeks to avoid, by employing a ‘sunshine device’ (ie, one that will expose any potential bias issue to the light of day), what could arguably give rise to a real possibility of bias. This enables the parties to consider the circumstances disclosed, obtain the necessary advice and decide upon such action as may be appropriate.”

It was against these observations that the Supreme Court held that there is a legal duty on the arbitrator under English law to disclose circumstances that would or might give rise to justifiable doubts as to his or her impartiality. This duty of disclosure is implied into the contract of appointment between the arbitrator and the parties and reinforced by the overriding statutory duty on arbitrators under s 33(1)(a) of the 1996 Act to act fairly and impartially in conducting arbitral proceedings.[8] The duty seeks to avoid, by employing a ‘sunshine device’ (ie, one that will expose any potential bias issue to the light of day), what could arguably give rise to a real possibility of bias. This enables the parties to consider the circumstances disclosed, obtain the necessary advice and decide upon such action as may be appropriate.[9]

That said, a failure of disclosure is only one factor to consider in determining whether an arbitrator is acting impartially. In other words, a failure to disclose may not necessarily be sufficient to establish bias and justify removal.[10] It was on this basis that the arbitrator in *Halliburton* was not removed even though he was held to have breached the duty to disclose his appointment in overlapping arbitrations, which might reasonably have given rise to the real possibility of bias. Applying the test of the fair-minded and informed observer, however, the Court was not persuaded that there was a real possibility of unconscious bias.[11]

A paper tiger spotted

Indeed, the risk of potential bias or injustice arising from the appointment of a common arbitrator in multiple arbitrations with overlapping subject-matter should not be underestimated. As demonstrated in the recent Hong Kong case of *W v AW*,[12] under appropriate circumstances a common arbitrator may be bound by the decision of another tribunal (of which he or she is a member) in a related arbitration, and inconsistent findings in related arbitrations between different arbitral tribunals with a common arbitrator may be set aside. The ‘sunshine device’ referred to earlier is useful in reducing the risk of potential injustice facing the non-common parties in that situation.

What is disappointing in the *Halliburton* case, however, is the net outcome that the arbitrator who defaulted in complying with the duty of disclosure walked away scot free, with no effective remedy being afforded to the innocent party and

seemingly contravening the *ubi jus ibi remedium* principle. A duty of disclosure that carries no legal consequences is meaningless in practice. If it is just a sub-test within the broader traditional bias test, it is unnecessary if not totally redundant for the court to take pains to expound its principles.

> "… [A] failure of disclosure is only one factor to consider in determining whether an arbitrator is acting impartially. In other words, a failure to disclose may not necessarily be sufficient to establish bias and justify removal. (*Halliburton*, per Lord Hodge)"

The duty of disclosure as currently formulated by the UK Supreme Court has degenerated into a paper tiger. This is highly unsatisfactory: the absence of serious legal consequences is likely to encourage non-compliance with the duty and create a mischief by running completely contrary to the need for transparency.

The UK Supreme Court was aware of this issue but categorically denied that there was no legal sanction for breach of the duty of disclosure.[13] Lord Hodge argued that non-disclosure itself *could* justify the removal of the arbitrator on the basis of justifiable doubts as to impartiality, and the arbitrator might be required to bear the costs of an unsuccessful challenge and his or her own defence costs.[14] Obviously, none of these arguments justify the anomaly.

Where non-disclosure does not lead to removal, it follows that there can be no legal sanction for the breach. It is not a good answer to say that the duty of disclosure has been taken into account in this circumstance. On the other hand, an award of costs in any challenge proceedings, properly conceived, is purely an exercise of judicial discretion, rather than a full-blown legal remedy to respond to and redress the breach itself.

The logical contradiction

Just as one might think that the duty of disclosure is not going anywhere, interestingly, Lord Hodge for the majority, with Lady Arden agreeing but adding further observations, unanimously opined that an arbitrator would *have to* decline the second appointment where he or she owes the parties a duty to disclose but cannot do so because of the duties of privacy and confidentiality owed to parties to the first appointment.[15] It follows logically that if the arbitrator accepts the second appointment in breach of the duty of disclosure, he or she should be removed since he or she would not have acted validly in the first place. This is significant because it directly contradicts the proposition that non-disclosure is but one factor to consider in the broader analysis of bias, which factor alone may *not necessarily* lead to the removal of an arbitrator.

> "… [T]he arbitrator in *Halliburton* was not removed even though he was held to have breached the duty to disclose his appointment in overlapping arbitrations, which might reasonably have given rise to the real possibility of bias. Applying the test of the fair-minded and informed observer, however, the Court was not persuaded that there was a real possibility of unconscious bias."

Taking the matter further, if an arbitrator should not act where he or she cannot make the mandatory disclosure in any event, it seems a *fortiori* that one who can disclose but fails to do so should also not act. In summary, what therefore matters appears not to be whether certain pre-existing privacy and confidentiality obligations prevent mandatory disclosure, but the failure to make the mandatory disclosure for whatever reason - which, in and of itself, would be sufficient to disqualify an arbitrator from acting, and lead to removal if he or she has so acted.

> "… [T]he risk of potential bias or injustice arising from the appointment of a common arbitrator in multiple arbitrations with overlapping subject-matter should not be underestimated."

Breathing life into the paper tiger

By contrast with the English 1996 Act, s 25 of the Hong Kong Ordinance, in adopting art 12(1) of the Model Law, expressly imposes a duty of disclosure on arbitrators. Thus, there is an even stronger argument that there should be an effective legal remedy to redress a breach of the duty of disclosure under Hong Kong law.

It is unfortunate that the *Halliburton* case was very much focused on the ground of bias. Applying the *ubi jus ibi remedium* principle in both jurisdictions, two legal remedies avail to put right an arbitrator's wrong: removal under sections 24(1)(a) and (b) of the 1996 Act and s 25 of the Ordinance, or contractual remedies under the common law.

The Ordinance provides an exclusive regime for intervention by the court in arbitration matters.[16] Any challenge to an arbitrator's appointment shall be in accordance with section 25, pursuant to which art 12(2) of the Model Law provides two gateways for removing an arbitrator: (1) on the ground of bias, or (2) for non-possession of qualifications agreed to by the parties.[17] Even accepting the UK Supreme Court's analysis that the fair-minded and informed observer would not necessarily conclude actual or apparent bias on the ground of non-disclosure, the second gateway may be applicable to remove an arbitrator who does not possess required qualifications.

The word "qualifications" in s 25 is not statutorily defined. It could arguably extend beyond professional qualifications and be interpreted to include a quality expected of an arbitrator. It is submitted that, by agreeing to submit their dispute to arbitration, the parties have implicitly agreed that an arbitrator shall possess the quality of performing all applicable duties, including the duty of disclosure. By failing to comply with the duty of disclosure, an arbitrator should be removed for not possessing this implicitly agreed qualification.

On the other hand, as hinted by Lady Arden in the *Halliburton* case, the breach of the duty of disclosure is a contractual breach which carries such consequences as contract law prescribes.[18] Regrettably, without elaborating on the potential consequences, her Ladyship quickly corrected herself by saying that arbitrators may incur no liability as a result of the breach.[19] Lord Hodge also "respectfully questioned" whether there is a basis in English law to claim damages relating to non-disclosure, particularly in light of the arbitrator's immunity under s 29 of the 1996 Act.[20]

With respect, there is no justification for the Court to jump to the conclusion that arbitrators incur no liability for non-disclosure. The immunity of arbitrators only applies to the exercise, performance and discharge of the arbitral function. It is important to note that the duty of disclosure attaches to any candidate arbitrator even *before* his or her appointment,[21] and hence arbitral immunity cannot exempt any liability arising from non-disclosure that is unrelated to any arbitral function that is (or is not) to be exercised, performed or discharged.

An award of damages against an arbitrator for non-compliance with the duty of disclosure is not unprecedented in other jurisdictions. In a French decision,[22] for example, the court held that the relationship between the arbitrator and the parties was contractual in nature and that this justified his liability being assessed on the basis of breach of contract. Apart from damages, there is no good reason why termination of the contract with an arbitrator should not be available as a remedy for breaching a statutorily implied duty of disclosure. The remedy of rescission should also be available where non-disclosure constitutes an implied misrepresentation on the part of the defaulting arbitrator.

> "… [Section] 25 of the Hong Kong Ordinance, in adopting art 12(1) of the Model Law, expressly imposes a duty of disclosure on arbitrators. Thus, there is an even stronger argument that there should be an effective legal remedy to redress a breach of the duty of disclosure under Hong Kong law."

Regardless of how the contract with the arbitrator is discharged, it may not automatically terminate the arbitrator appointment *per se*, because of the *sui generis* nature of the office.[23] This would be analogous to where the office of a director may not automatically vacate even though his or her contract of service has been terminated.[24] The significance of a discharge of the contract with an arbitrator is perhaps that a defaulting arbitrator may not claim his or her fees and may even be required to return fees already paid. Theoretically, it is up to the defaulting arbitrator to retain the appointment, but there may be moral obligations to consider resignation or to justify how the appointment could be retained without apparent bias in that situation.

> "Understandably, courts are generally supportive of arbitration and would not wish to intervene lightly. Where, however, confidence in arbitration could be undermined by non-disclosure, the courts should not hesitate to step in to maintain the structural integrity of the arbitration regime as a whole."

Conclusion

Paul Stanley QC argues that a rule which mandates disclosure of matters that would not disqualify is a fool's gold.[25] The UK Supreme Court's judgment in *Halliburton* unjustifiably contravenes the *ubi jus ibi remedium* principle, in that it gives no effective remedy for a breach of a legal duty. It appears that the Court has been overly protective of arbitrators in having jumped to the conclusion that they incur no liability or are exempt from liability for non-disclosure. Understandably, courts are generally supportive of arbitration and would not wish to intervene lightly. Where, however, confidence in arbitration could be undermined by non-disclosure, the courts should not hesitate to step in to maintain the structural integrity of the arbitration regime as a whole. As illustrated above, there exist remedies that could strike a fine balance between giving an effective remedy and non-intervention in arbitration. It is to be hoped that the courts will demonstrate flexibility in constructing remedies to redress any injustice arising from an arbitrator's breach of duty.

1 Which adopts art 12 of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration.

2 [2021] AC 1083.

3 *Ibid*, [49], per Lord Hodge.

4 *Ibid*, [55].

5 *Ibid*, [58].

6 *Ibid*, [56], [61].

7 *Ibid*, [70].

8 *Ibid*, [76]. *Editorial note*: Section 33(1)(a) of the 1996 Act does not contain a requirement as to disclosure: *ibid*, [29].

9 *Ibid*, [70].

10 *Ibid*, [117], [120], [155]-[157].

11 *Ibid*, [149].

12 [2021] HKCFI 1707.

13 *Halliburton*, *supra* (note 2), [111], per Lord Hodge, and [169], per Lady Arden.

14 *Ibid*, [111].

15 *Ibid*, [88], per Lord Hodge, and [188], per Lady Arden.

16 Section 12 of the Ordinance, which adopts art 5 of the Model Law, provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law." Cf section 1(c) of the 1996 Act.

17 Section 25 of the Ordinance, in adopting art 12(2) of the Model Law, provides that "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties." Cf s 24(1)(a) and (b) of the 1996 Act., pursuant to which the High Court may remove an arbitrator on these grounds.

18 *Halliburton, supra* (note 2), [169], per Lady Arden.

19 *Ibid,* [169].

20 *Ibid*, [106]. Section 29 of the 1996 Act stipulates that "an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith." Cf s 104 of the Ordinance.

21 *Halliburton, supra* (note 2), [79]. In this regard, s 25 of the Arbitration Ordinance, in adopting art 12(1) of the Model Law, provides that "when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

22 Gary B Born, *International Commercial Arbitration* (3rd Edn, 2020, Wolters Kluwer), [13.04A3]; *Judgment of 12 May 1993*, 1996 Rev Arb 411, at 411 (Paris Tribunal de Grande Instance).

23 *Ibid*, [13.03A].

24 Paul Kwan, *Hong Kong Corporate Law* (24th Edn, 2019, LexisNexis Hong Kong), [1853].

25 Paul Stanley, *Halliburton Company v Chubb Bermuda Insurance Ltd*, (2018), available at https://files.essexcourt.com/wp-content/uploads/2018/05/08152814/hburton.pdf (accessed 11 March 2022), p 16.

New and emerging dispute resolution legislation

Hong Kong: success fee Bill gazetted

The Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 was gazetted on 25 March 2022.[1] The Bill seeks to enact provisions on conditional fee agreements (CFAs), damages-based agreements (DBAs) and hybrid DBAs along the lines foreshadowed in the December 2021 report on success fees by the Law Reform Commission of Hong Kong.[2] In addition to those provisions, the Bill seeks to (1) enable more detailed regulation of success fees by subsidiary legislation, and (2) save in exceptional circumstances, debar an arbitrator from ordering a losing party to pay the costs of a successful opponent that exceed the amount for which the former would have been liable had the latter not entered into an outcome-related fee agreement with its lawyers.

Singapore: conditional fee arrangements

On 12 January 2022, the Legal Profession (Amendment) Act 2022 was passed by the Singapore legislature.[3] Gazetted on 22 February 2022, the legislation, which will permit Conditional Fee Arrangements (CFA), has yet to come into force. Like the success fee proposals recently proposed for Hong Kong,[4] it is broadly aimed at aligning Singapore with other leading arbitral seats and dispute resolution centres. Together with third party funding, CFA will be available in international and domestic arbitration proceedings, related court and mediation proceedings and proceedings in the Singapore International Commercial Court. By contrast with the proposed position in Hong Kong, however, contingency fee or damages-based agreements will continue not to be permitted, on the basis that they are champertous.

New and emerging dispute resolution rules

Beijing Arbitration Commission (BAC)

On 27 November 2021, the BAC promulgated its Arbitration Rules 2022,[5] which replaced the 2019 edition with effect from 1 February 2022 and apply to BAC arbitration proceedings commenced on or after that date. The main revisions made by the 2022 Rules are as follows.

(1) In accordance with the circumstances of the case, the tribunal may (i) determine the mode of hearing (oral or virtual), and (ii) adopt an appropriate mode of service of documents, including electronic service (the BAC may also rule on service before the tribunal is constituted).

(2) In accordance with the circumstances of the case (including the sum in dispute, the complexity of the case and the arbitrators nominated by the parties), the Chairperson of the BAC may decide that the presiding arbitrator shall be jointly appointed by the party nominees, and shall be the default appointor if the party nominees fail to agree.

(3) Clarification that parties shall provide the underlying arbitration agreement as part of the application for arbitration.

(4) A party may apply to commence a single arbitration concerning disputes arising out of or in connection with multiple contracts.

(5) Further provision for international commercial arbitration cases is made with regard to (i) the powers of the BAC and the tribunal regarding service of documents, and (ii) the time limit for submitting a defence where a claim or counterclaim is amended.

(6) Clear division of BAC arbitration fees into institutional administration fees and arbitrators' fees. Administration fees are capped in accordance with a sliding scale based on the amounts claimed.

The Rules are accompanied by an *Explanatory note on revisions to the Arbitration Rules of Beijing Arbitration Commission/Beijing International Arbitration Center* (24 December 2021).[6] Annex II to this document sets out a comparative table of the 2019 and 2022 rules with regard to the changes made.[7]

Dubai International Arbitration Centre (DIAC)

Following the transfer of the assets, rights and obligations of several United Arab Emirates-based arbitral institutions to the DIAC in September 2021 by virtue of UAE Decree No 24 of 2021,[8] the DIAC published new Arbitration Rules on 2 March 2022.[9] These replaced the DIAC Rules 2007 with effect from 22 March 2022 and reflect (1) global developments in arbitration practice, particularly with regard to expedited and emergency proceedings, virtual hearings and third party funding (TPF), and (2) provisions of draft DIAC Rules of 2017 that were never implemented.

Key features of the 2022 Rules include (1) application to arbitration agreements entered into after 21 March 2022; (2) that the Dubai International Financial Centre (DIFC) shall be the arbitral seat, though the arbitral tribunal may rule otherwise; (3) that the 2022 Rules shall supersede

provisions of the arbitration agreement in cases of inconsistency; (4) implementation of the joinder and consolidation provisions of the draft 2017 Rules; (5) provision for the use of TPF, with an ICC-type obligation on the funded party to make disclosure; (6) application of expedited procedures where (i) sums claimed and counterclaimed are ADE 1 million or less, or (ii) the parties agree, or (iii) the case is of exceptional urgency; (7) provision for virtual hearings and a shift away from paper filings; (8) provision for the appointment of emergency arbitrators; (9) a non-exhaustive list of interim measures that may be granted, broadly aligning with those set out in UAE Federal Arbitration Law (No 6 of 2018); and (10) that recoverable costs of the arbitration include the fees and expenses of legal representatives and experts.[10]

It should, however, be noted that the DIAC and the LCIA have entered into an agreement whereby all existing cases commenced and registered under the DIFC-LCIA Rules on or before 20 March 2022 will be administered by the LCIA in London.[11]

Delos Dispute Resolution

Delos Dispute Resolution, an international arbitral institution established in 2014 at the initiative of international arbitration practitioners, has issued its Rules of Arbitration 2021. The first revision of the Delos procedures since 2014, the new Rules took effect on 1 November 2021.[12] Their key features, which are aimed at aligning Delos procedures with international practice, include provisions on (1) the applicable law of the arbitration agreement; (2) wider choices of language of arbitral proceedings; (3) dismissal of claims; (4) joinder and consolidation; (5) pausing the procedural timetable for settlement discussions (whether or not as part of a mediation); (6) *ex parte* interim and conservatory measures by arbitral tribunals; (7) remote hearings; (8) the costs implications of settlement offers; (9) obligations on legal representatives to disclose the identity of non-parties from whom they are taking instructions; and (10) consent awards. Unusually, however, the 2021 Rules contain no provisions on emergency arbitration.

A novel feature of the 2021 Rules is the non-mandatory Delos Compliance Reinforcement Mechanism. Award creditors who choose not to opt out of it may, following the lapse of time limits for challenging awards or their enforcement, request Delos to publish on its website a Compliance Failure Notice. Such a notice - which may be requested whether or not the award to which it relates was rendered in a Delos arbitration - has no judicial effect but serves as notice to the world at large of a party's failure to abide by the terms of an award.

Parties should also have regard to the Delos *Guide to Arbitration Places* (2018),[13] which sets out a list of preferred 'safe seats'[14] that they may consider in seat selection.

ICSID

Comprehensively updated sets of ICSID rules and regulations for investor-State arbitration, conciliation and mediation were approved by the majority of member States through the ICSID Administrative Council on 21 March 2022.[15] These provisions (which, at the time of writing, have yet to be uploaded to the ICSID website) will take effect on 1 July 2022 and be accompanied by a number of sets of guidance notes to be published by ICSID over the coming months. The salient changes made to ICSID arbitration by the reforms, which broadly reflect general international practice, include the following:

(1) new rules on expedited arbitration for smaller value and less complex cases;
(2) shortened time limits for rendering awards;
(3) power for arbitral tribunals to bifurcate proceedings and non-exhaustive criteria for doing so;
(4) new rules on consolidation and co-ordination of separate arbitrations;
(5) provisions clarifying the scope of and standard for the grant of provisional measures;
(6) new provisions on third party funding;
(7) new provisions on costs, including (i) a non-exhaustive list of factors to be considered by tribunals when (a) allocating liability for costs, and (b) ordering security for costs, and (ii) a requirement for tribunals to give reasons for costs orders;
(8) new timeline provisions aimed at streamlining decision-making on the disqualification of arbitrators and by whom such decisions may be made;
(9) transparency provisions, including as to (i) publication of awards, (ii) a presumption in favour of open hearings, and (iii) non-exhaustive criteria for allowing participation by non-disputing parties;
(10) broadened access to the ICSID Additional Facility Rules; and
(11) a requirement that all filings be made electronically.

Reports

International Chamber of Commerce

On 18 February 2022, the ICC Arbitration and ADR Commission published a report entitled *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings*.[16] Aimed at assisting arbitrators, counsel and parties, this updates the 2017 edition of its *Report on Information Technology in International Arbitration* in light of the responses to a survey by over 500 arbitration practitioners on information technology (IT) tools and solutions and the need to modernise practices against the exigencies of the COVID-19 pandemic. The following are the main points:

(1) the use of IT tools will increase in the future and result in a break from old practices, such as hard copy filings;
(2) arbitrator selection should be governed by (*inter alia*) expectations of technological competence and literacy;
(3) there should be no presumption in favour of physical, virtual or hybrid hearings, Arbitral tribunals should decide what is appropriate in accordance with the circumstances of each case;
(4) IT requirements for effective case management should be considered and integrated into the arbitral process at the earliest possible stage;
(5) regard needs to be had both to practical considerations and potential pitfalls related to the use of IT in facilitating evidentiary hearings, particularly with regard to the organisation of virtual and hybrid hearings; and
(6) no particular developer, product or service is endorsed but general information is provided to assist parties and tribunals in making informed decisions about platforms and their operation.

The report also assesses the most regularly employed state of the art IT solutions worldwide and provides (1) an overview of the results of the user survey; (2) sample language relating to IT tools and solutions; (3) five organisational checklists for virtual hearings; (4) a template procedural order for the conduct of evidentiary hearings via videoconferencing; and (5) a checklist of issues to consider in selecting an online case management platform.

Dispute resolution in the People's Republic of China

New guidance on cross-border commercial and procedural legal issues

In January 2022, the Supreme People's Court (SPC) of the PRC issued a Conference Summary (the Summary, or 'Meeting Minutes') of the National Symposium on Foreign-Related Commercial and Maritime Trial Work held in June 2021.[17] While such documents do not have the status of judicial interpretations and cannot be cited in Chinese courts, they are nevertheless important to Chinese and foreign legal professionals seeking an understanding of judicial policies applicable to cross-border legal issues between China and the rest of the world and are more quickly made available than judicial interpretations.

The 2022 Summary deals with the following issues: (1) foreign-related cases and cases related to Hong Kong, Macao and Taiwan; (2) maritime cases; and (3) judicial review of arbitration. This is done in a manner akin to 'codification' of principles arising in court decisions. Significant examples of this concern bringing certainty to the enforcement in China of arbitral awards made by Mainland-seated overseas arbitral institutions[18] and the application of international treaties and conventions by Chinese courts.

Greater Bay Area judicial assistance and judicial policy

The Supreme People's Court issued a number of Guangdong-Hong Kong-Macao Greater Bay Area-related documents relating to its policy on developing civil judicial assistance with the Hong Kong and Macao Special Administrative Regions.[19] These include (1) a Mutual Assistance Arrangement between the SPC and the Macao SAR on Arbitration Procedures, and (2) a decision to consider (i) the introduction of a united qualification recognition system for Hong Kong and Macao mediators to practise in the Greater Bay Area and (ii) whether limiting qualifications to Chinese citizens (in a manner akin to the lawyer qualification system), would disadvantage Hong Kong mediators who are not Chinese citizens.

International construction dispute resolution

Revised FIDIC Green Book

The International Federation of Consulting Engineers (FIDIC) has published the 2021 version of its *Green Book*.[20] An alternative to the *Red Book* and the *Yellow Book*, it is intended to cater for larger projects than its predecessor and provides for the appointment of engineers to administer contracts governed by it. The *Green Book* makes shorter and simpler provision for parties wishing to avoid committing significant resources to contract administration, either generally or where the perceived level of risk is low. With regard to dispute resolution, (1) disputes may be referred to a single adjudicator, in a manner similar to Dispute Avoidance and Dispute Adjudication Boards under other FIDIC contracts; (2) the adjudicator's decision is binding and may be enforced by an order made in arbitration proceedings; and (3) disputes can be escalated to arbitration for final settlement, the proceedings to be conducted by a sole arbitrator and under the ICC Expedited Procedure Rules.

Delos arbitrator database

Delos Dispute Resolution[21] has created an open access database of arbitrators.[22] Free of charge to users, it is aimed at increasing the pool of arbitrators, fostering diversity in appointments and giving parties, counsel and other arbitral institutions a straightforward tool to help them create lists of candidates for *ad hoc* and institutional arbitrations, in all seats, under all procedural rules and across a wide range of areas of expertise.

Dispute resolution research and practice tools and resources

ICC compendium of awards

The *Collection of ICC Arbitral Awards 2016-2020*, edited by Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher, has been published by Wolters Kluwer.[23]

Arbitration clauses

International law firm Debevoise & Plimpton has published the 2022 edition of its International Dispute Resolution Group's *Debevoise International Arbitration Clause Handbook*.[24] It provides advice and drafting suggestions on arbitration and escalation clauses that may be used both at the contract drafting stage and after a dispute has arisen.

Quick reference guide to arbitration across jurisdictions

Herbert Smith Freehills has published a quick reference guide enabling side by side comparison of arbitration processes across 34 jurisdictions. The features compared include (1) applicable laws, (2) conventions and treaties, (3) leading local arbitral institutions, (4) arbitration agreements, (5) constitution, jurisdiction and competence of arbitral tribunals, (6) arbitral proceedings, (7) interim measures and sanction powers, (8) awards, (9) post-award proceedings, (10) influence of local legal traditions on arbitrators, (11) professional and ethical rules, (12) third party funding, and (13) regulation of activities. This guide, which is part of the Lexology 'Getting the Deal Through' (GTDT) series, enables users to build a customised comparative database of jurisdictions.

The Asian and Asia-Pacific jurisdictions featured in the guide are Australia, Canada, China, Hong Kong, India, Japan, Macao, New Zealand, Pakistan, Russia, Singapore, South Korea, Sri Lanka and the United States.

1 *Gazette* Notice, Legal Supplement, Vol 26, No 12 (25 March 2022), available at https://www.gld.gov.hk/egazette/pdf/20222612/es3202226127.pdf.

2 See *Success fees in Hong Kong Arbitration* [2022] Asian DR 52.

3 Available at https://sso.agc.gov.sg/Bills-Supp/40-2021/Published/20211101?DocDate=20211101. For useful commentaries, see (1) Wei Ming Tan & Asya Jamaludin, *Conditional Fee Agreements Regime in Singapore – Liberalisation of Singapore's Legal Landscape and Lessons Learned from Other Jurisdictions*, in CMS International Disputes Digest (December 2021), pp 35-37, available at https://cms.law/en/media/international/files/publications/publications/2021-winter-edition-international-disputes-digest?v=3; (2) Herbert Smith Freehills, *Singapore to allow conditional fee arrangements*, available at https://hsfnotes.com/arbitration/2021/11/09/singapore-to-allow-conditional-fee-arrangements/; (3) Clyde & Co, *Proposed Amendments to the Singapore Legal Profession Act to Permit "No Win, No Fee" Agreements Between Lawyers and Clients in Certain Types of Proceedings*, available at https://www.clydeco.com/en/insights/2021/11/proposed-amendments-to-the-singapore-legal-profess; and (4) Allen & Gledhill, *Bill setting out framework for conditional fee agreements in Singapore passed*, available at https://www.allenandgledhill.com/perspectives/articles/20120/sgkh-bill-setting-out-framework-for-conditional-fee-agreements-in-passed.

4 See *Reports - Success fees in Hong Kong arbitration* [2022] Asian DR 52.

5 Available at http://www.bjac.org.cn/english/page/zc/guize_en2022.html.

6 Available at http://www.bjac.org.cn/english/news/view?id=4123.

7 Available at https://www.bjac.org.cn/page/data_dl/Comparison%20Table%20of%20the%20Revisions%20in%20the%20New%20Rules.pdf.

8 See *International arbitration in Dubai* [2022] Asian DR 51.

9 Available at http://www.diac.ae/idias/resource/Rules2022.pdf.

10 A detailed analysis of the 2022 Rules may be found in the Herbert Smith Freehills publication, *Middle East E-Bulletin - DIAC Arbitration Rules 2022* (March 2022), available at https://sites-herbertsmithfreehills.vuturevx.com/196/27733/compose-email/diac-publishes-new-rules-to-come-into-force-on-21-march-2022.asp.

11 Source: Joint DIAC/LCIA press release (29 March 2022), available at https://www.lcia.org/News/update-difc-lcia.aspx. See also Herbert Smith Freehills Arbitration Notes, *DIAC and LCIA announce agreement regarding existing DIFC-LCIA cases*, available at https://hsfnotes.com/arbitration/2022/03/28/diac-and-lcia-announce-agreement-regarding-existing-difc-lcia-cases/.

12 Available at https://delosdr.org/rules/. For discussion of the changes made by the 2021 Rules, see Rebecca Zard & Marina Mayer, *Nudging Better Arbitrations: An Introduction to the Revised 2021 Delos Rules of Arbitration*, Kluwer Arbitration Blog, 25 February 2022, available at http://arbitrationblog.kluwerarbitration.com/2022/02/25/nudging-better-arbitrations-an-introduction-to-the-revised-2021-delos-rules-of-arbitration/.

13 Available at https://delosdr.org/gap/jurisdiction-analysis/.

14 See https://delosdr.org/gap/overview-methodology/.

15 For a detailed commentary, see Wilmer Hale, *Member States Approve Amendments to ICSID Rules and Regulations*, available at https://www.wilmerhale.com/en/insights/client-alerts/20220322-member-states-approve-amendments-to-icsid-rules-and-regulations.

16 Available at https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/.

17 Source: Susan Finder, *Supreme People's Court Issues New Guidance on Cross-Border Commercial & Procedural Legal* Issues, Supreme People's Court Monitor (January 2022), available at https://supremepeoplescourtmonitor.com/author/susanafinder/.

18 See *Brentwood Industries Inc v Guangzhou Fa'Anlong Machinery Engineering Co Ltd*, (2015) Sui Zhong Min Chu Si Zi No 62 (Guangzhou Intermediate People's Court), discussed in *PRC court clarifies enforcement of Mainland award made by foreign institution*, Herbert Smith Freehills Arbitration Notes, available at https://hsfnotes.com/arbitration/2020/09/21/prc-court-clarifies-enforcement-of-mainland-award-made-by-foreign-institution/.

19 Source: Susan Finder, *Greater Bay Area Judicial Assistance and Judicial Policy*, Supreme People's Court Monitor (March 2022), available at https://supremepeoplescourtmonitor.com/author/susanafinder/.

20 For commentaries, see Lalive, *New FIDIC Green Book short form of contract explained* (Lexology, 10 February 2022), available at https://www.lexology.com/library/detail.aspx?g=ee630f0b-e507-4615-974a-70f2a5c84b71, and CMS Law-Now, *New FIDIC Green Book Released: a rival to the First Edition Red and Yellow Books?*, available at https://www.cms-lawnow.com/ealerts/2022/02/new-fidic-green-book-released.

21 See pp 104-105 above.

22 http://www.delosdr.org. See also Herbert Smith Freehills, *Delos launches open access arbitrator database to improve diversity*, available at https://hsfnotes.com/arbitration/2022/02/23/delos-launches-open-access-arbitrator-database-to-improve-diversity/.

23 Available at https://law-store.wolterskluwer.com/s/product/collection-of-icc-arbitral-awards-20122015-volume-viii/01t4R00000OjevOQAR.

24 Available at https://www.debevoise.com/news/2022/01/debevoise-releases-2022-edition.

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