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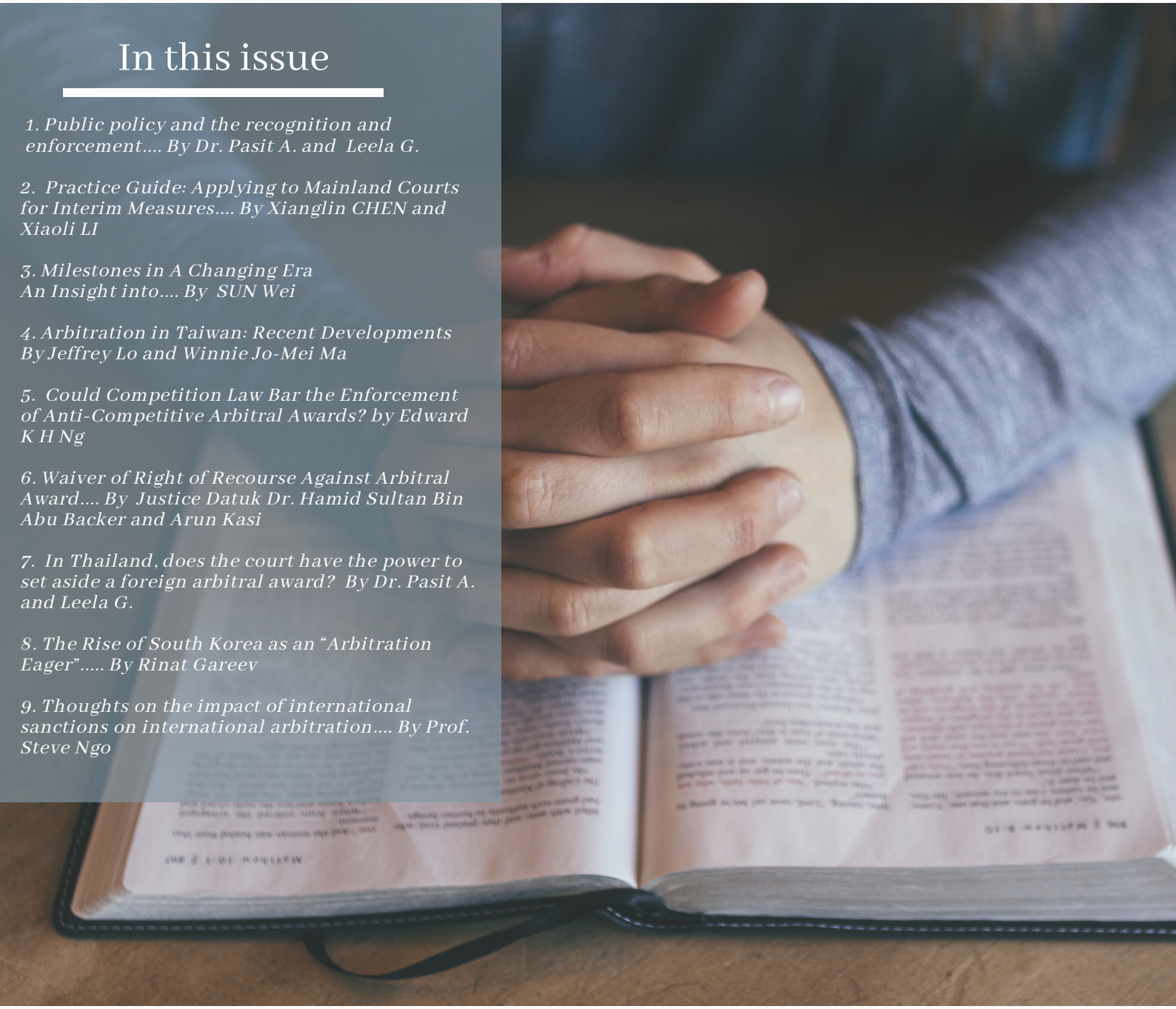
Asia Pacific Regional Arbitration Group

## In this issue





# APRAG E-JOURNAL

FIRST EDITION

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Asia Pacific Regional Arbitration Group

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# Preface

We are living in the age of technology. The advances of technology have impacted on our livelihoods and society in many different ways. However, amidst the power of change, one of the inevitable consequences is that conflict between people in international transactions continue.

Alternative Dispute Resolution (ADR) plays an essential role in commercial and business transaction. A dispute relating to commercial and international trade usually concern persons from different countries. This gives rise to a lot of commercial and legal complexities. Any country that is able to strengthen its ADR pillars effectively, rapidly, and equitably will increase its attractiveness and stability to businessmen and investors and will lead to an enhanced economy.

This journal is the first edition published by APRAG and forms part of APRAG's objectives in academic development and sharing ideas. It is published to commemorate the 17th anniversary of the establishment of APRAG. It contains many interesting articles on ADR and other legal issues that should be interesting to both arbitration practitioners as well as those in the legal profession. It features a range of topics on ADR. I am extremely honoured that we have managed to elicit interesting concepts, original thinking and viewpoints from arbitrators, experts, lawyer academics, and arbitration practitioners from many jurisdictions within the Asia-Pacific. I like to thank all the authors for devoting their time in making these valuable contributions in making this first edition of this journal possible. My thanks go out to our amazing Editorial Board and all staff for spending their valuable time in going through and commenting on the drafts of the articles. Their hard work and dedication has made it possible to successfully complete the first edition of this journal. The Editorial Boardhas recognised that English is not the first language of many of the authors. They have encouraged the latter to express themselves in their own words which has made the editing process more challenging. However, this journal cannot be published without the committee of APRAG's support, so I would like to take this opportunity to express my deep appreciation to all national committees for their assistance and co-operation.

Any comments and good suggestions for interesting topics for future editions are most welcome!

*Dr. Pasit Asawawattanaporn*

*President of asia pacific regional arbitration group (APRAG)*

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# Public Policy and the Recognition and Enforcement of a Foreign Arbitral Award

*Pasit Assawawattanaporn*[1]

*Leela Gedkhuntod*[2]

## Abstract

In Thailand, the ground for refusing or setting aside an arbitral award related to the term "public policy" in New York Convention is stipulated in the Thai law as "peace and good morals of people". Similar to the term "public policy", the term "peace and good morals of people" is undefined and is interpreted by the Thai courts on a case by case basis. It is found that in several cases, the Supreme court and the Supreme administrative court interpreted the term in a broad manner, and it could intervene the process of arbitration. This article proposes that it is essential for national courts to interpret the public policy narrowly. Such an approach would help to increase the use of arbitration as a method for dispute resolution in Thailand.

Arbitration proceedings conclude in the publication of an award that is final and binding on all parties. The expectation is that the losing party would and should comply with the decision. However, in most cases, the losing party will inevitably attempt to challenge the award rather than comply. Typically, the losing party would apply to oppose to challenge the recognition and enforcement of the award at the court of the place where the enforcement is sought. The grounds for setting aside an award or rejecting its enforcement are specified firstly in the New York Convention and also in the national law of arbitration of each country. The limited grounds for challenging or setting aside the award are designed to promote arbitration as an effective tool to solve international commercial disputes.

Among the many grounds for refusing the enforcement of an award, there is the public policy of a country. In Thailand, this ground is stated in Section 40, paragraph 3.2.b and Section 44 of the Arbitration Act 2002 that courts have the power to refuse the recognition and enforcement of a foreign arbitral award when its recognition and enforcement is contrary to Thailand's public policy.

The Sections of the Arbitration Act 2002 just mentioned, restate the content of Art. V paragraph 2.b.1 of the New York Convention of the Recognition and Foreign Arbitral Award 1958. The

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term "public policy" is not defined in the Convention and its meaning is interpreted differently in each jurisdiction. Accordingly, national courts have broad discretion in interpreting public policy. As in the New York Convention, Art. 34.2 of the UNCITRAL Model Law similarly does not define "public policy". It is important to note that under Thai law, the ground to challenge an arbitral award based on public policy need not be raised by a party as such. The court can do so ex officio.

In Thai law, public policy is defined as "peace and good morals of people". As can be seen, the definition is vague and leaves room for either a broad or narrow interpretation, at the discretion of the courts. However, the Supreme Administrative Court, has issued guidelines to the interpretation of the public policy ground. According to these guidelines, public policy aims to protect the common interest of the country[3] and parties cannot derogate from public policy in favour of their interests otherwise it could endanger the security of the nation's economy and the society[4].

Based on an analysis of the past decisions of the Supreme Court and the Supreme Administrative Court in relation to the refusal of recognition and
enforcement of arbitral awards on the public policy ground makes it is possible to make the following observations:

(1) The rules applicable to the appointment of the arbitrators as agreed by the parties and the whole process[5] or the arbitrator's impartiality and independence in performing his/her duties[6] may be reviewed based on 'public order and good morals of people';

(2) Starting a new arbitration on the same issue between the same parties once the final award is rendered in the first arbitration proceeding may also be examined based on the public policy ground[7];

(3) The public policy ground may also be relied upon to review an arbitral award made based on a contract, the subject matter of the dispute referred to arbitration, which is illegal;

(4) When arbitrators wrongfully apply the law or misinterpret the provisions applicable[8]or apply a law that is no longer in force[9], the public policy exception may also be engaged;

[3] Supreme court judgement no. 840/2561
[4] Supreme court judgement no. 8265/2559
[5] Supreme court judgement no. 8714/2554

[6] Supreme court judgement no. 2557/2559

[7] Supreme court judgement no. 13535-13536/2556

[8] Supreme court judgement no. 2503/2562

[9] Supreme Administrative court judgement no. อ.1259/2559

(5) When the contract from which the dispute arose is, in principle legal, but the purpose parties ascribe to that contract is illegal[10], again the public policy exception may apply Examples can be found in the case of a loan contract with a prohibited

rate of interest[11], contraction contracts breaching building law[12], the wrongful application of prescription[13], violation of the law regulating bankruptcy[14], the participation of private companies in state-own business[15], violation of the law governing telecommunications[16]and when the arbitrators' decision favours the losing party.[17]

It is submitted that the guidelines and the Supreme Court's decisions do not seem to permit a clear understanding of what exactly is meant by the phrase the "peace and good morals of people". In the result, public policy has to be considered on a case by case basis. 'Peace and good morals of people' are fluid concepts. The meaning to be given to the phrase and how it is to be interpreted must, ultimately, depend on the context in which the inquiry is undertaken. The context is in turn, dependent on the prevailing state of the economy, social conditions and the era. What was considered acceptable in the past may not be acceptable today. For example, ,previously it was possible to pay to 'win'

at a public auction. Today, this is considered bribery and is forbidden by the law. Such contracts are against the 'good morals of people' as it is presently understood and accepted by society. So, such contracts would have to be considered null and void. The challenge of interpreting 'public policy' under Thai law may seem difficult. However, it is argued that it is no more difficult than trying to define the scope of 'public policy' in international cases. Indeed, in those cases, the challenge may be even greater since each jurisdiction may have a different view of 'public policy' within their own borders. It is possible that at the international level,

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[10] Supreme Administrative court order no. อ.18/2558

[11] Article V (2) of New York Convention 1958 states that

"(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that :….
(b) The recognition or enforcement of the award would be contrary to the public policy"

[12] Article 34 (2) An arbitral award may be set aside by the court specified in article 6 only if:
(b) the court finds that :
(ii) the award is in conflict with the public policy of this state

[13] Supreme Administrative court order no.48/2555

[14] Supreme Administrative court order no. อ.1054/2558

[15] Supreme court judgement no. 2231-2233/2553

[16] Supreme court judgement no. 1273/2543

[17] Supreme court judgement no. 11102/2551

'public policy' may be understood differently depending on the jurisdiction and the jurisdiction's own national interests.

The lack of clarity and consistency in the interpretation of 'public policy' appears to have given rise to the phenomenon of some national courts using public policy as an excuse to refuse the award's enforcement. Indeed some of these cases suggest that the courts involved may have relied upon reasons that do not normally fall within the scope of public policy y to reject the award or to create the opportunity to review the merit of the same[18].

In the circumstances, in view of the 'undefined boundaries' of the public policy exception, we would argue that it is essential for national courts to interpret the public policy in the narrowest way possible. Doing so, courts will help to reduce the abuse of the public policy exception to undermine arbitral awards. The net result, then, would be a signal to encourage the use of arbitration as a method for dispute resolution, as parties opting for arbitration to resolve their disputes would then, have the assurance that their choice of dispute resolution would be honoured.

[18] Supreme court judgement no. 1985/2541, Supreme court judgement no. 11454/2555, Supreme Administrative court judgement no. ๐ . 824/2556 and Supreme Administrative court judgement no ๐ . 698-699/2558, Supreme court judgement no.1985/2541, Supreme court judgement no. 11454/2555, Supreme court judgement no. ๐ . 824/2556 Supreme Administrative court judgement no ๐.698-699/2558

# Practice Guide: Applying to Mainland Courts for Interim Measures during Hong Kong Arbitral Proceedings

Xianglin CHEN
Xiaoli LI

## Abstract

This article, based upon the practice experience of Han Kun Law Offices, summarizes several key issues regarding how to apply to Beijing courts for interim measures by parties to Hong Kong arbitral proceedings under the *Arrangement of the Supreme People's Court of the People's Republic of China Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region*.

### Practice Guide: Applying to Mainland Courts for Interim Measures during Hong Kong Arbitral Proceedings

Hong Kong is one of the jurisdictions that are most closely connected with the arbitral practice in Mainland China. However, parties of arbitral proceedings in Hong Kong had always faced great difficulties when dealing with interim measures in China due to the absence of any formal mechanism by which Mainland courts could grant preservation orders supporting arbitrations seated outside of Mainland China[1]. The situation has changed since 1 October 2019, when the *Arrangement of the Supreme People's Court of the People's Republic of China Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "**Arrangement**") came into force. The Arrangement fills the gap in legislation and is widely

[1] Interim measures in Mainland China include preservation of property, evidence and conducts. Preservation of conducts is a type of interim measures having an effect of compelling or prohibiting a party to perform certain actions.
For preservation of property and evidence, see Article 28 and Article 46 of *Arbitration Law of People's Republic of China* (2017 Amendment) (the "PRC Arbitration Law"). Available at: http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624.htm (Accessed: 27 December 2020)
For preservation of conduct, despite the absence of relevant provision in PRC Arbitration Law, there is a judicial interpretation which entitles the parties to an arbitration concerning intellectual property dispute to apply for preservation of conduct. See *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Reviewing the Injunction Cases involving Intellectual Property Disputes*, Fa Shi [2018] No. 21. Available at: http://www.court.gov.cn/fabu-xiangqing-135341.html (Accessed: 27 December 2020)
In addition, there is a precedent in which the First Intermediate People's Court of Hainan Province granted an order of conduct preservation to a party to a CIETAC arbitration on non-intellectual property dispute, based upon Article 100 of Civil Procedure Law of People's Republic of China (2017 Amendment). See (2019) Qiong 96 Xing bao No.1. Available at: https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=8486dc72a1a548189801ab330185ac50 (Accessed: 27 December 2020)

deemed as a landmark in the development of judicial cooperation between the two jurisdictions.

Supplementary to the Arrangement, the Research Office of the Supreme People's Court promulgated the *Understanding and Application of the Arrangement of the Supreme People's Court Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "**Understanding and Application**"). Based upon the Understanding and Application as well as the practice experience gained by Han Kun Law Offices in the more than one year of the Arrangement's implementation, this article summarizes the key issues regarding applying to Beijing courts for interim measures by parties to Hong Kong arbitral proceedings under the Arrangement.

## 1. To which intermediate people's court should an application for interim measures be submitted during a Hong Kong arbitral proceeding?

According to Article 3 of the Arrangement, applications for interim measures should be submitted to a single Mainland court having jurisdiction. Specifically, a party to a Hong Kong arbitral proceeding should submit the application to the "**[i]ntermediate people's court of the place of residence of the party against whom the application is made ("respondent") or the place where the property or evidence is situated**… If the place of residence of the respondent or the place where the property or evidence is situated fall within the jurisdiction of different people's courts, the applicant shall make an application **to any one of those people's courts but shall not make separate applications to two or more people's courts**" [2] (emphasis added).

Despite the above stipulations, uncertainty remains in practice whether applications for interim measures made in overseas arbitral proceedings are subject to the provisions on centralized jurisdiction applicable in Beijing municipality.

According to the *Provisions of the Beijing High People's Court on the Jurisdiction of Cases of the Fourth Intermediate People's Court of Beijing* (the "**Provisions**") promulgated in 2018 by the Beijing High People's Court, foreign-related arbitration judicial review cases in Beijing are subject to the centralized jurisdiction of the Beijing Fourth Intermediate People's Court. Items 2, 3 and 4 of Article 1 of the Provisions provide that:

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[2] *Arrangement of the Supreme People's Court of the People's Republic of China Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "Arrangement"), Fashi [2019] NO.14. Available at: http://gongbao.court.gov.cn/Details/512d83a54880609e30b96321df3899.html (Accessed: 27 December 2020).

"The Beijing Fourth Intermediate People's Court (Beijing Railway Transport Intermediate Court) has jurisdiction over the following cases: ... (2) commercial cases of the first instance where the subject matter under the jurisdiction of this municipal people's court is no more than 200 million RMB which are foreign-related or involve the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; (3) cases under the jurisdiction of this municipal people's court which apply to confirm the validity of arbitration agreements, or to revoke arbitral awards (excluding cases applying for revocation of labour dispute-related arbitral awards); (4) review cases under the jurisdiction of this municipal people's court for applications to recognize and enforce foreign arbitral awards, or to recognize and enforce arbitral awards made by arbitral institutions in the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; review cases under the jurisdiction of this municipal people's court for applications to recognize and enforce judgments made by foreign courts, courts of the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan Region; ..."[3]

According to the Beijing Fourth Intermediate Court, its centralized jurisdiction in connection with foreign-related arbitration is limited to the types of cases listed above, i.e., cases on (i) validity of arbitration agreements, (ii) revocation of arbitral awards, (iii) recognition and enforcement of arbitral awards made by foreign arbitral institutions, and (iv) recognition and enforcement of arbitral awards made by arbitral institutions in Hong Kong, Macao, and Taiwan. Therefore, applications for interim measures made in overseas arbitral proceedings are not subject to the centralized jurisdiction of the Beijing Fourth Intermediate Court, and shall be submitted to a competent court designated according to the Arrangement.

## 2. Should an application for interim measures be submitted directly to a Mainland court or be forwarded by the overseas arbitral institution?

According to paragraphs 2 and 3 of Article 3 of the Arrangement, applications for interim measures fall into two categories and are handled differently.

**Category A** – the application is made before the arbitral proceeding commences in Hong Kong. In this case, the application may be submitted directly to the Mainland court, provided that a letter certifying acceptance of the case by the Hong Kong arbitral institution is submitted to the court within 30 days.

[3] *Provisions of the Beijing High People's Court on the Jurisdiction of Cases of the Fourth Intermediate People's Court of Beijing*. Available at: http://bjgy.chinacourt.gov.cn/article/detail/2018/02/id/3199003.shtml (Accessed: 27 December 2020).

**Category B** – the application is made during an ongoing arbitral proceeding in Hong Kong. In this case, the party should first submit the application for interim measures to the arbitral institution or its permanent office, which will in turn forward the application to the Mainland court.

However, the Understanding and Application points out that submission of an application through the arbitral institution or its permanent office will cause delay in the process, which means rigid implementation of paragraph 2 of Article 3 of the Arrangement could weaken the effectiveness of interim measures. Thus, the Understanding and Application further stipulates that "the parties to an arbitral proceeding in Hong Kong shall be permitted to submit an application for interim measures together with a transmittal letter from the arbitral institution or its office to the people's court of the Mainland; the people's court of the Mainland may confirm the circumstances by contacting the relevant arbitral institution or its office according to the contact information provided by the Department of Justice of the Hong Kong Special Administrative Region."[4]

Based on our practical experience, Beijing courts have accepted the methods described above in the Understanding and Application. That is, applications for interim measures can be filed directly with the Beijing courts without being forwarded by the arbitral institution or its permanent office in Hong Kong for forwarding, even if arbitral proceedings have been initiated in Hong Kong.

### 3. What serves as proof that the Hong Kong arbitral institution has accepted an arbitration case?

According to what we have learned in practice, the arbitral institution needs to issue a special letter certifying the acceptance of the case. Requirements differ among arbitral institutions on information required to be provided, how long it will take the arbitral institution to issue the letter, and specific contents of the letter. In practice, parties should directly confirm with the arbitral institution regarding its specific requirements before making the application.

In general, an arbitral institution will issue a letter certifying formal acceptance of the case after it receives a notice of arbitration and the registration fee. The certification letter can be submitted to the Mainland court as supporting evidence together with the application for interim measures.

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[4] Qibo JIANG, Haijia ZHOU, Yanli SI, Kun LIU, *"Understanding and Application of the Arrangement of the Supreme People's Court Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region"* (the "Understanding and Application") People's Court Daily 2019-09-26 (003)

As far as we know, the certification letter and supporting materials need not be notarized and authenticated. However, it is necessary to obtain overseas notarization and authentication of authorization documents where a Mainland lawyer submits the application to the Mainland court on behalf of a party. In addition, the certification letter, if not in Chinese, should be accompanied by a translation.

**4. How will arbitral institutions support the parties when they make applications for interim measures?**

According to the Understanding and Application, as confirmed by the Supreme People's Court and the Government of Hong Kong Special Administrative Region, the following Hong Kong arbitral institutions may apply for interim measures with Mainland courts under the Arrangement: "the Hong Kong International Arbitration Centre ("**HKIAC**"), the China International Economic and Trade Arbitration Commission ("**CIETAC**") Hong Kong Arbitration Centre, International Court of Arbitration of the International Chamber of Commerce – Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Centre (HK), and eBRAM International Online Dispute Resolution Centre" [5].

According to our experience, all of the arbitral institutions proactively assist parties to apply for interim measures, including assisting in the issuance of letters certifying acceptance of the case, and maintaining confidentiality of the parties' application. For example, we have been deeply impressed by HKIAC for its responsiveness in cases where we have applied for interim measures with Mainland courts.

**5. Once the Mainland court has accepted the application for interim measures, is the subsequent procedure different from ordinary interim measures in domestic cases?**

After the Beijing courts accept an application for interim measures, generally the basic procedures for handling the interim measures are the same as those for Mainland courts in domestic litigations and arbitrations. These procedures include the provision of a guarantee by the applicant (generally it is necessary to provide a property security guarantee letter issued by a qualified insurance company) and provision of information about the assets to be preserved.

In practice, we have noted one slight difference that, according to paragraph 3 of Article 5 of the Arrangement, the court may require the relevant parties to submit "an explanation of the urgency of the circumstances so that if interim measure is not taken

[5] Qibo JIANG, et al., "*Understanding and Application*" People's Court Daily 2019-09-26 (003)

immediately, the legitimate rights and interests of the applicant may suffer irreparable damage or the enforcement of the arbitral award may become difficult, etc."[6] By comparison, there is no such requirement in the application for interim measures in domestic litigation and arbitral proceedings.

Considering that the court's practices and requirements may change as experience is accumulated with the implementation of the Arrangement, our analysis above is merely intended to serve as a reference.

## Conclusion

After one year of its operation, relevant data shows that the Arrangement has significantly facilitate the process of granting preservation orders by Mainland courts in support of arbitration in Hong Kong.[7] As precedents accumulate, more parties and practitioners will benefit from the mechanism provided by the Arrangement.

[6] Arrangement, Fashi [2019] NO.14. Available at: http://gongbao.court.gov.cn/Details/512d83a54880609e30b96321df3899.html (Accessed: 27 December 2020)
[7] See *Hong Kong-Mainland China Arrangement on Interim Measures: HKIAC Update*. Available at: https://www.hkiac.org/news/hk-prc-interim-measures-arrangement-hkiac-update (Accessed: 27 December 2020)

# Milestones in A Changing Era
# An Insight into Recent Developments of BAC

SUN Wei,

## Abstract

The economic turmoil, the COVID-19 pandemic and the market change have brought huge challenges and uncertainties to the international arbitration community. This article reviewed key efforts made by the Beijing Arbitration Commission/Beijing International Arbitration Center to respond to the changing environment, keep its competitiveness and further its internationalization, and provides an analytical insight into recent developments of its rules and practice.

### 1. A Changing Era for International Arbitration

Many years later, when people look back at the time that we are now experiencing, they may all agree that it is a challenging time.

For the international arbitration community, it is even more so. Looking back at the past decade, we will see that arbitration has experienced rapid growth worldwide. In the Greater China area, it was a boom. The boost of economy, free trade, and cross-border investment all contributed to a fantastic environment for the fast development of arbitration.

Now, however, it seems that everything has changed, a very sharp contrast to the picture merely several years ago when the globe was enjoying its uninterrupted economic growth since 2010. The ongoing China-US trade conflict has worsen the volatile world economic climate. Political crisis has unavoidably resulted in, and intertwined with, economic turmoil. Punitive tariff, tightened export control and broadened sanction list have become frequently appeared terms when we read business news. Since the statistics of 2020 is not available when this article is written, by most measures, 2019 was the worst year for the global economy since the global financial crisis, with global growth reaching a post-crisis low of 2.4 percent[1]. Even though the result of 2020 US presidential election is already clear, it is still hard for us to predict whether the original

[1] Carlos Arteta, Patrick Kirby, *The global economic growth outlook in five charts: Fragile, handle with care* (January 9 2020), available at https://blogs.worldbank.org/voices/global-economic-growth-outlook-five-charts-fragile-handle-care.

months-long tariff war will become years-long, nor can we estimate when the world economy will resume its normal operation.

The outbreak of COVID-19 earlier this year has made the situation even worse. Things from people's daily life to international trade have been bitterly affected. As shown by a report of the World Trade Organization, although world trade was slowing down before the COVID-19 outbreak, merchandise exports in nominal USD terms were down 21 per cent in the second quarter of 2020 compared to the previous year, while commercial services exports were down 30 per cent[2]. As commented by Torsten Slok, Chief International Economist of Deutsche Bank Securities, "*Now everything is not good everywhere.*"

For arbitration institutions, the whole picture is truly gloomy. How to maintain the caseload in a time of economic slowdown and even recession? How to keep their daily running as far as possible in an environment of pandemic? And how to ensure the fairness and efficiency of arbitral proceedings? In a word, is it still possible to enable arbitration to provide its certainty in such a changing era?

For Chinese arbitration institutions, one more challenge is the market change. For a long time, it has been a highly disputed issue whether foreign arbitration institutions are allowed to provide arbitration services in the mainland. Despite in a few cases the arbitration clauses providing arbitration by foreign arbitration institutions in China were held valid[3], the question remained unsolved since Art. 10 of the *PRC Arbitration Law* requires that an arbitration institution shall be registered with relevant governmental authority – a precondition for providing arbitration services. This was first changed with the setting up of the Shanghai Pilot Free Trade Zone (the "SHFTZ"). Shortly after that, in 2015, the PRC State Council required to "*support the settlement of internationally renowned commercial dispute resolution institutions in the SHFTZ, in a bid to enhance the internationalization of commercial dispute arbitration*"[4]. By now four foreign arbitration institutions opened their rep offices in the SHFTZ, including the ICC, the HKIAC, the SIAC and the KCAB. But such rep offices are for liaison purpose only, not allowed to provide arbitration services. Two years later, the State

[2] World Trade Organization, *Report shows marked decline in trade restrictions by WTO members amidst COVID-19 pandemic* (December 11 2020), available at https://www.wto.org/english/news_e/news20_e/trdev_11dec20_e.htm.

[3] See *Anhui Longlide Packaging & Printing Co, Ltd. v. BP Agnati S.R.L.*, (Ruling of PRC Supreme People's Court) (March 25 2013), available at https://hk.lexiscn.com/law/content.php?provider_id=1&isEnglish=N&origin_id=2456325&eng=0&keyword=6b6Z5Yip5b6X&t_kw=6b6Z5Yip5b6X&prid=e5e4149c-43ef-6715-7ef6-7a414992f311&crid=fac80a6f-34b0-4a52-ac0e-ef90398d4d7e.

[4] Art. 11, *Circular of State Council on Issuing the Plan for Further Promoting the Reform and Opening up of the China (Shanghai) Pilot Free Trade Zone*.

Council released the *Overall Plan for the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone*, allowing well-known foreign arbitration and dispute resolution institutions to, after being registered with the judicial administrative authority of the Shanghai municipal government and reported to the judicial administrative department under the State Council for record, establish a business organization in the said New Area to provide arbitration services with respect to civil and commercial disputes arising from such fields as international business, maritime affairs and investment[5]. This was followed up by responding rules of the Shanghai local government[6], symbolizing the true openness of the Chinese arbitration market.

A further step forward was taken this year in Beijing. In *Circular on Issuing the Overall Plans for the China Pilot Free Trade Zones* released by the PRC State Council on August 30 2020, it is clearly stated that well-known overseas arbitration and dispute settlement institutions are allowed to provide civil and commercial dispute arbitration services in Beijing Pilot Free Trade Zone in international commerce, investment and other fields, and support and safeguard the application for and execution of asset preservation, evidence preservation, behavior preservation and other interim measures by Chinese and foreign parties before and during arbitration proceedings; and support international commercial dispute prevention and settlement organizations to settle and operate in the zone. In other words, the opening-up process of the Chinese arbitration market has commenced, and Chinese arbitration institutions will have to compete with their foreign colleagues in an open market, directly.

**2. Why the BAC?**

As a dispute resolution practitioner, I have an interest in observing the Chinese arbitration industry for many years. In my mind, among all the swiftly growing Chinese leading arbitration institutions, the Beijing Arbitration Commission, also known as the Beijing International Arbitration Center (the "BAC"), is the one of the most representativeness. Starting from merely 7 cases with a total disputed amount of RMB 44 million (roughly USD 5.5 million) in 1995, the BAC's caseload swelled to 6,732 in 2019, with an overall disputed amount of RMB 94.804 billion (roughly USD 13.60 billion)[7]. It is not luck. It is thanks to the institution's continuous elaboration and hard work. Despite its rapid and even aggressive growth, I can see that the BAC management

[5] Art. 2(4), *Overall Plan for the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone*.
[6] See also *Administrative Measures for the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone* and the *Administrative Measures for Foreign Arbitration Institutions' Establishment of Business Organization in Lingang New Area of the China (Shanghai) Pilot Free Trade Zone*.
[7] Beijing Arbitration Commission, *2019 Annual Report*, available at https://www.bjac.org.cn/english/news/view?id=3718.

never fall into the trap of complacency, but always stay vigilant, facing the current and future challenges, and saving against a rainy day. It never fear a difficult environment, for it grew up from difficulties. It never hate competitions, either with its Chinese brothers or with foreign colleagues, as concluded by its management, "Competition is for better services to arbitration users".

I am not an arbitrator of the BAC, and this article is not meant to sell you on the BAC. In fact, it has already done an excellent job of promotion globally. The key to this article is trying to offer an insight into what the BAC has done to make its progresses and respond to this changing era in recent years, from which you will understand why I choose the BAC as a representative, and how far Chinese arbitration institutions have gone in their ways of development.

## 3. Strategic Deployments – Leading the Trends

It is generally agreed that Chinese arbitration institutions have surged to new highs again and again in recent years, both in caseload and in disputed amount. Nevertheless, this phenomenon is closely connected to, or even, is a by-product of, the economic prosperity. In a highly uncertain and unstable economic environment, such development may not be sustainable. To the BAC, it seems that its management has seriously thought of adversity in a time of prosperity, and has made earlier preparations. On the one hand, it forged a close tie with the national economic strategy. On the other hand, it updated the layout of its business. I think they may take years before the BAC can really harvest the fruits. However, as strategic deployments, they will be worthy of the wait.

### 3.1 Arbitration Integrated into Belt and Road Initiative

International trade has existed since merchants first navigated the perilous seas in fragile boats or travelled through mountains and deserts along the fabled Silk Road[8]. Silk Road has significant meanings to ancient China, and the rest of the world. I still remember the first time I listened to Kitaro's major work, which was exactly themed *Silk Road*. The melody evoked distant images of voyages by traveling merchants and bustling caravans in the old days.

The historical routes have long gone. In a new millennium, however, they are coming back. In 2013, the Chinese central government officially launched the One Belt and One Road Plan, also known as the Belt and Road Initiative, as a national economic strategy, and then

[8] Alan Redfern, *Interim Measures*, *The Leading Arbitrators' Guide to International Arbitration* (Edited by Lawrence W. Newman & Richard D. Hill), (Juris Publishing, Inc. & Staempfly Publishers Ltd., 2004), at page 242.

outlined its framework, key areas of cooperation and running mechanisms, aiming to further strengthen the connection and collaboration among Asian, European and African countries. The Belt and Road Initiative will extend from China to Europe and include more than 60% of the world's population living in 60-plus countries across Asia, Europe and Africa. This will cover 30% of the world's GDP, and 35% of world trade[9].

This grand blueprint has been followed by large-scale cross-border investment and trade. The overall investment is expected to be more than USD 500 billion. It brings new business opportunities. At the same time, it also brings a growing requirement for risk control and management as well as dispute resolution. In light of the huge divergence lying in the political systems, legal frameworks and judicial environments of countries and regions along the Belt and Road routes, as well as other practical issues such as cross-border recognition and enforcement, international litigation is usually incapable of meeting the requirement for resolving disputes arising from Belt and Road investment and trade. Hence the diversified dispute resolution mechanism represented by arbitration becomes a necessity for the Belt and Road Initiative.

Under this background, the BAC, with the extensive experience it has obtained from its internationalization and dispute resolution practice over the past 25 years, has actively sought to build dispute resolution service networks across the countries and regions along the Belt and Road routes. This proposal has won active responses and support from within the international arbitration community. Based on joint efforts, the China-Africa Joint Arbitration Centre (the "CAJAC") was jointly founded by Chinese arbitration institutions represented by the BAC， the Shanghai International Arbitration Center and the Shenzhen Court of international Arbitration, and their African partners, including the Arbitration Foundation of Southern Africa, the Nairobi Centre for International Arbitration (the "NCIA"), and the Organization for the Harmonization of Business Law in Africa, a landmark event in Sino-African cooperation in the realm of arbitration. On March 27 2017, the CAJAC – Beijing Center was established based on the Cooperation Agreement between the BAC and the NCIA. Subsequently, the standard CAJAC Arbitration Rules have been made and unveiled. Largely absorbed the "Chinese mode", the standard CAJAC Arbitration Rules adopt international practice while keep open to local features as supplements, stressing on party autonomy, due process and equal attention to be paid to requirements of parties from both common law and civil law jurisdictions.

Another effort is the Belt and Road Arbitration Program that was founded on May 19 2017, following the Belt and Road Arbitration Initiative Cooperation Agreement signed

[9] See https://beltandroad.zaobao.com/beltandroaden/concept.

by the BAC, the Kuala Lumpur Regional Centre for Arbitration (now the Asian International Arbitration Centre) and the Cairo Regional Centre for International Commercial Arbitration signed, the initiators of the Program.

As the Belt and Road Initiative covers more than 60 countries, its dispute resolution mechanism should be highly forward-looking[10]. The above arbitration networks the BAC endeavored to forge are aimed to integrate arbitration into the Belt and Road Initiative, strengthen the interaction and exchange between arbitration institutions in different countries and regions along the Belt and Road routes, promote the sharing of expertise, case management skills and facilities, for purpose of providing qualified and efficient dispute resolution services and legal security for investment and trade under the Belt and Road Initiative. It is an innovative attempt that worth looking into, and a leading design of huge potential.

### 3.2 Investment Arbitration with New Features

Investment arbitration is primarily the result of the spectacular growth of foreign investment in general during the past few decades[11]. Given the fact that investment arbitration diverts investors from the domestic judicial system of host states, and avoid local-protectionism and interference from host states thanks to the finality and enforceability of the awards, it has been widely accepted and used by investors, especially those from developed countries. As a result, most of the BITs and multilateral agreements provide for investment arbitration as the mechanism to resolve potential disputes between investors and host states. When looking at the Belt and Road Initiative, we will find that among the countries along the Belt and Road route, 55 are member states of the Washington Convention.

By far, the Investor-State Dispute Settlement (the "ISDS") system is the mostly applied regime of investment arbitration. After years' practice, it has been recognized that the ISDS is in need of reform. In the discussion of the UNCITRAL Working Group III, representatives of various states have expressed extensive concerns over the existing ISDS system, such as the uniformity, consistency, predictability and correctness of investment arbitration awards, transparency of arbitral proceedings, costs, time duration, diversity, independence and arbitrators' impartiality. It was under this background that the BAC realized the significance of the reform of investment arbitration, and expected to

[10] Guiguo Wang, *The Belt and Road Initiative in quest for a dispute resolution mechanism*, *Asia Pacific Law Review*, June 2017, Volume 25, Issue 1, Taylor & Francis, at page 12.
[11] Kaj Hober, *Arbitration Involving States*, *The Leading Arbitrators' Guide to International Arbitration* (Edited by Lawrence W. Newman & Richard D. Hill), (Juris Publishing, Inc. & Staempfly Publishers Ltd., 2004), at page 140.

contribute a Chinese approach to the concerns over the existing investment arbitration regime, and thereby enlarge the scope of its arbitration services.

In 2019, after widely seeking comments from experts and practitioners, the BAC unveiled its Rules for International Investment Arbitration, which became effective as of October 1 2019. Within the Chinese arbitration community, it is a pioneering effort to address those concerns about investment arbitration. Consisting of 58 provisions, the BAC Rules for Investment Arbitration are featured with the improvement of transparency in order to balance the transparency and confidentiality of investment arbitration, efficiency enhancement and cost reduction, higher requirements for arbitrators' qualification and performance, and the application of the rules in both institutional arbitration and ad hoc arbitration.

Among all the features, the most noteworthy highlight, in my opinion, is the adoption of an appeal mechanism, a design to help ensure the fairness and consistency of the awards.

According to the Rules, the parties may appeal based on their consent[12]. So the appeal procedure will not be applied without both parties' agreement. The parties are required to notify the BAC in writing of their consent to appeal prior to the deadline fixed by the tribunal. The written notice, however, does not mean the parties have commenced the appeal procedure, nor will they definitely do so in a later stage. They shall, within 60 days after the arbitral award is made, submit a letter of appeal to the BAC, and thereby formally initiate the appeal procedure. The aforesaid agreement to appeal shall be concluded and noticed to the BAC by the deadline fixed by the arbitral tribunal for the parties' comments on the draft award. This design is not only meant to avoid unreasonable delay of the arbitral proceeding, but also aimed at a cost-effective dispute resolution, because the appeal procedure will result in additional time and cost.
As to the grounds of appeal, the BAC Rules for Investment Arbitration provide three circumstances in which an appeal can be initiated[13]:

(1) that the arbitral award contains errors in the application or interpretation of the applicable law or rules of law;
(2) that the arbitral award contains manifest and material errors of fact; or
(3) that the BAC or the arbitral tribunal lacked jurisdiction, or the arbitral tribunal exceeded its power.

In most cases, the appeal may only be initiated on these three grounds. Nevertheless,

[12] Art. 46 and Appendix E, BAC Rules for International Investment Arbitration 2019.
[13] Rule 3 of appendix E, BAC Rules for International Investment Arbitration 2019.

Art. 46.4 leaves some space to party autonomy, where parties may select other grounds for appeal by agreement, but subject to the BAC's review, which means the BAC will determine whether such grounds agreed by the parties are acceptable for appeal. The purpose is to tackle the problem of incompatibility between the parties' agreed grounds and the mandatory law of the seat of arbitration, if any, so as to minimize the risk of annulment or non-enforcement of the award.

Similar as international commercial arbitration, an award of investment arbitration is also final and binding on the parties as of the date it is made[14]. The difference is that in the event of appeal, the appeal award shall substitute the arbitral award and shall be made in one of the following forms[15]:

(1) upholding the arbitral award;
(2) making material modification(s) to the award; or
(3) making a new award.

By unveiling the first set of Rules for Investment Arbitration that adopts an appeal procedure, the BAC is obviously trying to address the call for reform of the current investment arbitration system as represented by the ISDS, while update the whole structure of its arbitration services. In this specific field of dispute resolution that has long been dominated by the West, it is not easy, but definitely worth trying, and I do look forward to seeing the first international investment arbitration case filed with the BAC in the near future.

## 4. Tactical Approaches – Sharpening the Sword

Apart from the strategic deployments, a number of tactical approaches are also seen in the BAC's recent rules and practice, as the BAC management consistently seek new ways to fill the needs of its clients. These approaches provide immediate assistance and convenience to arbitration users and their counsels, by which the BAC well kept its competitiveness in international commercial arbitration.

### 4.1 New Weapon Available - EA Proceeding

As an important weapon in international arbitration, interim measures have long been discussed and practiced. In recent years, Emergency Arbitrator (the "EA") proceeding has been gaining momentum as most arbitration institutions incorporated EA provisions

[14] Art. 42, BAC Rules for International Investment Arbitration 2019.
[15] Rule 8 of appendix E, BAC Rules for International Investment Arbitration 2019.

when revising their arbitration rules[16]. Under the existing PRC law framework, however, interim measures in arbitration proceedings, although allowed and available, are somewhat limited. The arbitral tribunal is not authorized to determine on and render an order to attach assets or to take similar preservative measures. This is at the exclusive discretion of courts. Apart from that, the current laws on arbitration and civil procedure are silent on EA proceeding. As a result, the whole process for interim measures in practice is often delayed due to the heavy caseload of courts and the official communication between courts and arbitration institutions as the parties' application for interim measures shall be forwarded to courts by arbitration institutions.

In view of the above situation, the BAC inserted provisions on interim measures during the revision of its Arbitration Rules 2008, which are designed to satisfy the need of its clients in international arbitration practice. According to the BAC Arbitration Rules 2015, after a case is accepted by the BAC and before the arbitral tribunal is constituted, any party that wishes to apply for interim measures may submit a written application to the BAC for the appointment of an EA in accordance with the applicable law. The BAC shall make a determination on it. If the BAC approves the application, it shall appoint an EA from its panel within 2 days after the corresponding fee is paid, and shall notify the parties of such appointment[17]. The BAC Arbitration Rules 2019 remained such provisions. It is my understanding that the EA proceeding is a strong supplement to the previous versions of the BAC Arbitration Rules.

This innovation soon met its first test. At the end of 2017, the BAC accepted the first case in mainland China in which an EA proceeding was applied. The interim measure order was made by the EA within only 12 days from the date the case was formally filed, partially granting the interim relief sought by the claimant. After 4 more days, the order was recognized by the High Court of the Hong Kong SAR, which rendered an enforcement order. Based on this enforcement order, the case was finally settled amicably. The administration of this case has provided valuable practical experience of EA proceeding, and has attracted wide attention from within the Chinese arbitration community. This case is undoubtedly a precedent of the Chinese arbitration practice, and clearly shows the internationalization of Chinese arbitration institutions.

It can be seen from this case that the recognition and enforcement of EA orders are not restricted by law of the seat of arbitration, and parties may consider seeking enforcement

[16] Wei Sun, *First Emergency Arbitrator Proceeding in Mainland China: Reflections on How to conduct an EA Proceeding from Procedural and Substantive Perspectives* (September 1 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/09/01/first-ea-proceeding-mainland-china-reflections-conduct-ea-proceeding-procedural-substantive-perspectives/.
[17] Art. 63, BAC Arbitration Rules 2015.

of EA orders in other jurisdictions outside the mainland. Naturally, parties intending to initiate EA proceeding are suggested to pay close attention to the legal environment of the jurisdictions where the target assets of the counterparty are located before starting the EA proceeding.

### 4.2 Cost-effectiveness Improved – Reform of Arbitration Fee Structure

After several years implementation of its Arbitration Rules 2015, the BAC further revised the rules and unveiled its Arbitration Rules 2019 on July 19 2019. Among all the updates of this new and existing set of rules, the most highlight I would like to stress here is the bold breakthrough in the arbitration fee structure.

As a tradition of arbitration institutions in China and many other jurisdiction, importance is often attached to the disputed amount of the case, and both the administrative fee and arbitrators' fee are fixed with reference to the amounts in dispute. However, as a generally accepted fact, the fees payable depend essentially on the amount of work the arbitrators have devoted to the dispute[18]. Although the traditional practice has long been criticized, in China, it is difficult to be changed for historic and practical reasons, until the BAC Arbitration Rules 2019 came into effect on September 1, 2019.

The BAC Arbitration Rules 2019, and the annexed fee schedules divided arbitration fee into arbitrator's fee and administrative fee, an approach taken by many international arbitration institutions. The fee schedules consist of two parts:

(1) Annex I – Schedule of Arbitration Fees; and
(2) Annex II - Schedule of Fees for Appointing Emergency Arbitrators and Applying for Interim Measures.

In previous versions of the BAC Arbitration Rules, the division is made between the Case Acceptance Fee and the Case Handling Fee, which results from specific historical conditions. With the development of Chinese arbitration practice, there has been increasing criticism of these separate categories of arbitration fees. From the parties' perspective, it is unclear what these fees are paid for, while the correlation between the arbitrator's fee and administrative fee is unclear, and also deviates from international practice. In order to solve this problem, the BAC Arbitration Rules 2019 clearly categorize arbitration fees into arbitrator's fee and administrative fee in Annex I. Such classification will undoubtedly improve arbitrators' performance by allowing an appropriate level of remuneration for their

[18] Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, (Juris Publishing, Inc., 2003), at page 553.

professional contribution to a specific case. In the meantime, the BAC has further raised arbitrators' fee standard to align with current levels of economy and reflect reasonable respect for the value and expertise of arbitrators.

A more important point is that arbitrators may charge on an hourly basis by agreement of the parties. The hourly billing method is a common practice in international arbitration for calculating arbitrator's fee and can reflect the time and effort devoted by arbitrators to specific cases with greater accuracy. For cases with a large amount in dispute but with simple facts and legal issues, the adoption of hourly rates by agreement of the parties can effectively control the cost of dispute resolution. To provide more options to the parties, the BAC Arbitration Rules 2019 introduced hourly rates in the calculation of arbitrator's fee that is subject to the parties' agreement. At the same time, to reasonably control the costs of arbitration, the fee schedules impose a cap of no more than RMB5,000.00 (roughly USD765.00) in principle on the arbitrator's hourly rate. The adoption of hourly rates will substantially help to further the integration of Chinese domestic arbitration practice with international practice and provide the parties with more freedom in determining and controlling the costs.

This reform of arbitration fee structure has won extensive recognition as it well met the expectation of the arbitration community. To a larger extent, the arbitration fee structure embodies and reflects the identity and role of an arbitration institution. This reform actually means the BAC voluntarily gave up the complete control of the arbitration fee, and contributed part of its financial benefits, for better cost-effectiveness and transparency of arbitration. In light of the long history of the tradition in China, such effort is really hard to make, but the BAC did it. A strong signal of its innovation, courage and independence.

### 4.3 Tackling the Crisis - Wide Application of Technologies

With the ongoing COVID-19 pandemic, arbitration institutions have been facing unprecedented challenges. In an environment of social distancing and even quarantine, how to ensure the fairness and efficiency of arbitration while minimize the adverse impact such as undue delays? And how to provide effective guidance and assistance to parties and arbitrators, so as to deliver certainty and confidence?

Again, the BAC took prompt actions. Earlier this year, the BAC Working Guidelines on Online Hearings (For Trial Implementation) and online hearing system were launched, an timely and effective response to the pandemic by using digital and visual technologies. Under the Guidelines, the arbitral tribunal may decide to conduct an online hearing if both parties apply for it, or one party applies for it and the other raises

no objection, or the arbitral tribunal considers it necessary without objection from any of the parties. The application of technologies may be the best tool to keep the normal operation of arbitration. It not only avoids gathering of people, but also help to control costs, especially the travel expenses incurred by arbitrators, parties and their counsels and other participants in hearings if they come from different regions.

While providing the possibility of working remotely to arbitrators and parties, the Guidelines also set some limits on the online hearing practice, for purpose of ensuring the fairness and confidentiality of arbitration. This means that online hearing applications may not be allowed under several particular circumstances. For example, in some cases, the finding of key facts will be highly dependent on the physical authenticity of specific evidence, or, in some cases, the requirements for secrecy will be higher as state secrets or trade secrets are involved.

The application of digital and visual technologies have brought great convenience to arbitration practitioners. Nevertheless, since it is not possible to have face-to-face presentation of the case and debates, my suggestion is that parties and counsels do make sure they are well prepared before the online hearing, both their evidence and arguments of legal issues, and thereby help the arbitrators to better understand their case and issues in disputes and organize a more effective hearing.

What's also worthy of mention is that the abovementioned technologies are not only applied to hearings, but also to the BAC's various events. With growing reputation around the world, the BAC has been proactive within the global arbitration community. In recent years, it has organized a number of events and roadshows in major cities on different continents, such as London, Paris, Frankfurt, Hague, Vienna, Zurich, Toronto, New York, San Francisco, Singapore, Hong Kong, Kuala Lumpur – the list goes on and on. I used to attend such events from time to time to learn about the latest spotlights and know-hows of dispute resolution. At the beginning of this year, it seemed to me that such events will have to be ceased due to the pandemic. On the contrary, they were held as usual, but switched to a virtual way. A latest example is the 2020 Annual Summit on Commercial Dispute Resolution in China. Being the BAC's annual event since 2013, this is the first time it is held online. With more than a dozen of speakers and commentators and more than 1,900 audiences from 15 countries and regions, the online summit went smoothly and was proved to be a success.

**5. A Final Word**

Just when I was about to finish this article, the BAC released its draft Code of Ethics for Arbitrators in Investment Arbitration for comments. Another step forward. So we see, the

BAC, as a typical representative of Chinese arbitration institutions as well as emerging arbitration institutions in the Greater China area, never slow the pace on the road to its dreams.

Many years later, when arbitration practitioners review the history of arbitration development, they may see that arbitration institutions around the globe have varied experiences during the second and the third decade of the 21st century, when the world was full of unpredictability and abnormality. Some suffered. Some survived. Yet some not only got through but made new progresses, and the BAC is a distinguished example. It keeps moving ahead on the road to growth that is full of twists and turns. It keeps its consistency and innovation that are crucial for success in an unforeseeable world. It keeps its unwavering commitment to "professionalism, competence and transparency" (*Global Arbitration Review*) even in a time of breakdown.

Yes, it has turned breakdowns into breakthroughs, leaving its milestones in a changing era. Not just great, but legendary.

# Arbitration in Taiwan: Recent Developments

Jeffrey Lo*, Winnie Jo-Mei Ma**

## I. Introduction

Taiwan has a glorious experience in its economic development. Through several decades of effort, Taiwan has grown into a developed economy that neatly integrated into the global economy. From 1952 to 2009, Taiwan achieved a GDP growth for more than 200 times – the GDP was USD 1.711 billion in 1952 and became USD 377 billion in 2009.[1]

Today, Taiwan plays a crucial role in international economic activities. According to WTO's latest statistics, Taiwan ranked the 17th in terms of total value of commodity exported.[2] When focusing only on the global ICT supply chain, Taiwan has an even more significant contribution. Taiwanese firms supply a variety of products and services including cover foundry, mask ROM, IC packaging, IC testing, electrodeposited copper foil, optical discs.[3] Bloomberg Businessweek once praised the importance of Taiwan in a cover story "Why Taiwan Matters". It stated: "the global economy couldn't function without it".[4] Fifth years have passed since that evaluation, and Taiwan's position only becomes more crucial over time. Take Apple's product as an example, if one has an iPhone or other apple's product, there is a high probability that it is produced in Taiwan or by a Taiwanese firm.[5]

Behind Taiwan's outstanding economic growth, were the subtle but sturdy support provided by Chinese Arbitration Association, Taipei (the "**CAA**") with its efficient and

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1 *Council for Economic Planning and Development, Taiwan, "Economic Development of Taiwan"*, 5 (Council for Economic Planning and Development, 2010), *available at* https://ws.ndc.gov.tw/Download.ashx?u=LzAwMS9hZG1pbmlzdHJhdG9yLzEwL3JlbGZpbGUvNTYwNy83MzQvMDAxNDc5MC5wZGY%3D&n=RWNvbm9taWMgRGV2ZWxvcG1lbnQsIFIuTy5DLiAoVGFpd2FuKS5wZGY%3D&icon=..pdf.
2 International Trade Centre, https://www.intracen.org/itc/market-info-tools/statistics-export-country-product/
3 Council for Economic Planning and Development, above fn note 1, at 5-6.
4 *Bloomberg Businessweek*, "*Why Taiwan Matters"*, May 16, 2005, *available at* https://www.bloomberg.com/news/articles/2005-05-15/why-taiwan-matters
5 *See e.g*, *Nelson Yeh*, "*Taiwan manufacturing: More than just Apple"*, EAST SPRING INVESTMENTS, Nov. 5, 2018, https://www.eastspring.com/insights/taiwan-manufacturing-more-than-just-apple.

effective dispute resolution services. This article will explore the development of arbitration in Taiwan and the indispensable role played by the CAA in that respect. It will then address some crucial milestones in the CAA's work and its future plan.

## II. Arbitration in Taiwan and CAA

### A. *Arbitration Law*

As a response to the growing demand for efficient settlement of international trade, investment and other types of disputes, Taiwan enacted "Ordinance for Commercial Arbitration" in 1961. This legislation provided a basic procedural framework for arbitrations seated in Taiwan, and introduced modern arbitration into the jurisdiction. Several revisions have taken places. The most notable revision so far was in the 1998, when the ordinance received a total renovation and was transformed into "The Arbitration Law"（"**The Law**"） which governs arbitration seated in Taiwan today.[6]

The Law incorporates the essence of the New York Convention and UNICTRAL Model Law 1985. Parties' autonomy to agree on applicable procedures and rules, including constitution of the tribunal and challenges to members of arbitrators, was explicitly affirmed in the Law. Other important principles such as that the parties must have sufficient opportunity to present their case were incorporated. The grounds for refusing to recognize and enforce arbitral awards were limited to those under the Model Law and the New York Convention.[7]

Moreover, under the Law, courts are empowered to provide various assistance to arbitral proceedings, such as granting interim measures, appointing arbitrators, deciding on challenge to arbitrators. In practice, the court in Taiwan is generally supportive.[8] And the court rarely grants a request for setting aside or refusing to recognize and enforce arbitral awards.[9]

The Law, together with the court's supportive attitude, offers a stable and efficient framework for arbitration in Taiwan. As a result, Taiwanese parties are willing to

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[6] *See generally*, *Nigel N. T. Li & Angela Lin*, "*Taiwan"*, *in* "*Asia Arbitration Handbook"* (Moser and Choong eds., OUP, 2011), paras.6.09.
[7] *Id*., paras. 6.82-91.
[8] *Marianne Chao*, "*Taiwan Arbitration*, in "*Arbitration in Hong Kong: A Practical Guide*" (Ma et. al., eds, 4th ed., Sweet & Maxwell, 2014) , paras. 25.013-17.
[9] Li & Lin, above fn 6, paras. 6.204-206

choose arbitration as the method for dispute resolution, especially for cases involving complex legal, technical issues, foreign elements or large amount in dispute. The statistics of CAA demonstrate that the construction sector is still the most frequent user of arbitration, followed by international trade and financial sectors.[10]

However, some significant divergences from the model law or arbitration legislations of other major arbitration-friendly jurisdictions still exist in the current version of the Law and in practice. For example, Article 47 of the Law defines a "foreign arbitral award" as an award made outside the territory of Taiwan, or, an award made within Taiwan's territory but was made in accordance with foreign laws. The court has consistently interpreted the term "foreign laws" here to include "foreign arbitration laws", "rules of arbitration of foreign arbitral institutions and international organizations". Such interpretation, allegedly based on a contextual interpretation that informs Article 47 with Article 48, has caused problems in practice.[11] In Taipei District Court Civil Judgment No. 88 Zhong-Su-Zi 8, the losing party in the party in an arbitration conducted pursuant to ICC rules of arbitration, seated in Taipei Taiwan, attempted to set aside the arbitral award. The court held that because the arbitration proceeding at issue was conducted in accordance with rules of arbitration of a foreign arbitral institution, notwithstanding that the seat of arbitration was in Taiwan, the award was a foreign arbitral award under Article 47 of the Law. As a result, the court lacked authority to set aside the arbitral and thus the only applicable remedy for the plaintiff under the Law, was to request the court to refuse recognition of the award.[12] The court's interpretation of Article 47 leads to an undesirable, even unreasonable consequence that arbitral award in this situation could be immune from the set-aside proceeding entirely.

Another issue that stems from insufficient legislative awareness combining with the court's lack of understanding of arbitration is whether arbitral awards made under *ad hoc* arbitration are enforceable as their institutional counter parts. Court decisions such as Taiwan High Court Civil Ruling No. 98 Kang-Zi 2017 once opined that *ad hoc* arbitration did not enjoy the same legal status as institutional arbitration under the Law. An arbitral award made under an *ad hoc* arbitration was not entitled to the enforcement

[10] CAA's internal statistics.
[11] Article 48 provides, in relevant part: "To obtain recognition of a foreign arbitral award, an application shall be submitted to the court and accompanied by the following documents: ….3.The full text of the foreign arbitration law and regulation, the rules of the foreign arbitration institution or the rules of the international arbitration institution which applied to the foreign arbitral award."
[12] *See also* Taipei District Court 108 Zhong-Su-Zi No. 3 Civil Judgment for similar opinions.

mechanism for institutional arbitrations. This misunderstanding was partially clarified in the Supreme Court Civil Judgment No. 103 Tai-Kang-Zi 236 but some uncertainties remain.

Legislative efforts that rectify misunderstandings or undesirable results demonstrated above, therefore, are needed. The CAA thus once again has taken the lead to initiate the latest amendment to the Law. This Task force aims at modernizing the arbitration regime, and to make Taiwan a Model Law jurisdiction. Section IV of this article will address the details.

### B. *The CAA*[13]

When it comes to the development of Taiwanese arbitration, any discussion will be incomplete without the CAA. The CAA was established as the first private quasi-judicial entity in 1955. For the past 65 years, the CAA has been assisting Taiwanese economic development through provision of high-quality dispute resolution services. These services include arbitration, mediation, training and education, as well as other promotional activities.

For arbitration services, apart from case administration services for CAA arbitrations, logistic support is also available for *ad hoc* arbitrations or arbitrations administered by other arbitral institutions. As the most reputable arbitral institution in Taiwan, the bulk of Taiwanese arbitrations are administered by the CAA. Among these cases, approximately 10-20% are foreign-related.

Over the years, the CAA has gained ample experience and has developed a case management practice that ensures efficiency and quality of the arbitral proceedings. It is considered by parties from Taiwan and abroad as a trustworthy and competent arbitral institution. To better serve the parties demanding for international commercial arbitration, the CAA keeps refining its rules, case management techniques and facilities. The most significant two are the adoption of CAA Guidelines on Case Management Conference and the establishment of the CAA International Arbitration Centre (“**CAAI**”). The former represents the CAA’s effort to bridge the gap between domestic and international arbitration in Taiwan. The latter is part of the CAA-CAAI dual-track

[13] CAA English Website, http://en.arbitration.org.tw/

system of arbitration (see section III below).

While the parties to an arbitration are free to appoint co-arbitrators outside CAA's list of arbitrators, in most cases the arbitral tribunal is still formed by arbitrators on the list. Currently, there are more than 900 arbitrators on the CAA's list that have diverse backgrounds, including lawyers, academics, architects and other professionals.

Mediation services is another strength of the CAA. After the establishing of its mediation center in 2003, the CAA became the only private institution that provides a full spectrum of alternative dispute resolution in Taiwan. Before the establishment of the CAA Mediation Center, meditation was not considered to require professional skills and generally lacked identifiable methodology. The CAA Mediation Center changed that misconception/perception by introducing the idea and methodology of facilitative mediation into Taiwan. All mediators registered at CAA Mediation Center must receive two-staged training which enables the mediators to effectively conduct mediation following the facilitative approach. Such professionality and the facilitative approach distinguish the center from all other forms of mediation, such as town mediation and court mediation in Taiwan.

Beside services related directly to resolving certain disputes, CAA also provides training and education for ADR. As part of the cooperation between the CAA and the court, the CAA offers arbitration and mediation training to judges. The purpose of these training courses is to enhance the judicial system's understanding and awareness to the ADRs, so as to ensure the quality of judicial decision making relating to ADRs. Besides, under the Law, the CAA, among the arbitral institutions, is mandated to provide training for non-legal professionals who wish to become an arbitrator.

Through the provision of high-quality case management services, education and training to lawyers, arbitrators, judges and the general public, the CAA facilitates the development of arbitration in Taiwan.

## III. The Establishment of CAAI[14]

Responding to the growing demand for international dispute resolution services in

[14] Website of CAAI: http://www.caai-arbitration.org/; *May Tai, Helen Tang*, "*Rebecca Soquier, Taiwan's CAA adopts new international arbitration rule*", Herbert Smith Freehills Arbitration Notes, 17 August, 2017, https://hsfnotes.com/arbitration/2017/08/17/taiwans-caa-adopts-new-international-arbitration-rule/.

greater China as well as the Asia-Pacific region, the CAAI was established in Hong Kong as a not-for-profit company limited by guarantee since 2018. The CAAI specialises in international commercial arbitrations seated outside Taiwan, as well as bilingual arbitrations in Mandarin Chinese and English. For that purpose, the CAAI has its own set of arbitration rules reflecting the state-of-art standard and a diverse pool of experienced arbitrators.

Structurally, CAAI Secretariat is responsible for administering arbitration cases, while the CAAI Court of Arbitration oversees the compliance of CAAI rules and deciding on certain procedural issues. Moreover, endeavouring to ensure efficacy of arbitral awards, impartiality and integrity of the proceeding, CAAI adopts the CAAI Code of Ethics for Arbitrators and Parties in 2019 ("**CAAI Code of Ethics"**) as well as other guiding documents. The Code of Ethics not only envisages behavioral norms for the arbitrators, but also covers rules governing the parties and their representatives. The Code of Ethics grants the CAAI Court of Arbitration power and responsibility to monitor the arbitrator's conducts, while providing the arbitral tribunal necessary tools in regulating the parties' misbehaviors. Other guiding documents, such as CAAI Guidelines on Case Management Conference ("**CMC Guideline**"), are supplementary in nature but nevertheless offer good guidance to the parties and the tribunal on how to efficiently and effectively conduct the arbitration.

The CAAI's capability to administer arbitration cases was tested in the CAAI's first arbitration case in 2019, less than one year from the CAAI's establishment. This case was between a Taiwanese and a foreign party. The case involved an application for emergency arbitrator proceeding as well as complex governing law issues. CAAI Secretariat working closely with the Court of Arbitration to ensure the smooth proceeding. With the Secretariat's assistance, CAAI Court of Arbitration made the appointment of emergency arbitrator within 48 hours from the application. After two hearings and two rounds of submissions, the emergency arbitrator made the determination on the 16 day from the application (with parties' agreement to extend the deadline). This case demonstrated the efficacy and efficiency of CAAI Arbitration.

## IV. Amendment to Taiwan's Law

To further improve and internationalise Taiwan's arbitration law and practice, a

CAA task force has been deliberating and drafting amendments to Taiwan's Arbitration Law ("Draft Amendment") since March 2018. This task force consists of ten members with expertise and experience in diverse civil law and common law jurisdictions, including its co-convenors (Prof. Fuldien Li and Nigel N.T. Li), together with external reviewer (Prof. Chang-fa Lo).

CAA's Draft Amendment is essentially a new legislation with 70 articles which adopts the Model Law (UNCITRAL Model Law on International Arbitration 1985 with Amendments as Adopted in 2006), aligns with international best practices, as well as addresses other issues in the interpretation or application of the current Taiwan Arbitration Law. It is premised on a unitary or singular system, differentiating between arbitrations seated in and outside Taiwan only in specified circumstances.

The Draft Amendment adopts the Model Law's structure and provisions, with modifications tailored for Taiwan or intended to alleviate certain controversies arising from the Model Law.

- For example, Article 13 of the Model Law empowers the arbitral tribunal to decide on challenge to arbitrator unless the challenged arbitrator withdraws or the other party agrees to the challenge. However, the Draft Amendment (Article 20) distinguishes between institutional and non-institutional arbitrations, entrusting the administering arbitral institutions to decide on arbitrator challenges in institutional arbitrations while leaving the judiciary to decide for non-institutional arbitrations.

- Another example is Article 28(2) of the Model Law concerning the law applicable to the substance of dispute in the absence of the parties' choice of law, which authorises the arbitral tribunal to "apply the law determined by the conflict of laws rules which it considers appropriate". By contrast, the Draft Amendment (Article 47) enables the arbitral tribunal to apply the substantive law that it considers appropriate.

- Chapter 4 of the Draft Amendment adopts all the provisions concerning interim measures and preliminary orders in Chapter IVA of the Model Law, and expressly extends them to emergency arbitrators.

On the other hand, the Draft Amendment retains certain features of the current

Taiwan Arbitration Law because of their distinctiveness or effectiveness.

- The first example is the stringent time limits for award-making: six months from the arbitral tribunal's constitution, extendable by another three months (Article 21 of current law; Draft Amendment Article 48).
- The second example is the prescribed lists of arbitrator qualifications and disqualifications (Articles 6 to 8 of current law; Draft Amendment Articles 12 to 14).
- The third example is the conversion of mediated settlement agreement into arbitral award where the parties to an institutional arbitration agree to appoint a mediator who is also a qualified arbitrator (Article 45 of current law; Draft Amendment Articles 60 and 61).

Furthermore, the Draft Amendment seeks to enhance the autonomy of arbitral institutions in determining arbitration fees and costs, as well as in regulating ethics, expedited and emergency arbitration procedures, training and listing of arbitrators, etc. Other additional provisions serve specific interests such as arbitrability of disputes and confidentiality of arbitration.

Public consultation commenced in November 2020, while the presentation of the Draft Amendment to Taiwan's Legislative Yuan and Executive Yuan for deliberation and finalisation is scheduled for mid-2021. CAA's Draft Amendment will enable Taiwan to become a Model Law jurisdiction and thereby overcome persisting misconceptions arising from Taiwan's inability to accede to the New York Convention. It will contribute to making arbitration more accessible, adaptable and affordable, as well as more effective, efficient and enforceable, regardless of whether the arbitration is seated in or outside Taiwan.

## V. 2020 Taiwan Arbitration Week

In recent years, holding large scale arbitration promotion events like "arbitration week" has been a prevalent practice among various jurisdictions such as Hong Kong, Paris and New York. Learning from other jurisdictions successful experience, and taking the advantage of Taiwan's relatively well management of the pandemic, the CAA and Taiwan Bar Association ("**TBA**"), decided to launch the "Taiwan Arbitration Week" in 2020. As the largest promotion event for Taiwanese arbitration community so

far, the Arbitration Week initiative aimed at strengthening and enlarging the existing network of arbitration community. Considering the advantages of arbitration, including procedural flexibility and efficiency became more salient for international transaction under the pandemic, the event also purports to promote the awareness of arbitration to legal and business sectors.

Responding to the initiative, various other institutions, such as CIArb, Taiwan Construction Law Association and law firms, together with CAA and TBA held a series of knowledge events in three major cities of Taiwan. From lectures on drafting arbitration agreement, to workshops on dispute resolution involving wind-power industry and fintech arbitration, these events covered the needs of different types of audiences and received positive feedback. This event represents another important step for Taiwanese arbitration community to promote using of arbitration to solve commercial disputes, and to bring domestic arbitral practice in line with international standards.

## VI. Conclusion

Walking through six decades, Taiwan's legal regime has evolved into a modern, pro-arbitration one. Nowadays the major laws and regulations that governs Taiwanese arbitration largely reflect the essence of the Model Law, and the court has been and continues to be supportive to the arbitral proceedings, whether it is considered domestic or foreign related. Accompanying these legislative and judicial efforts is the vigorous arbitration community consists of lawyers, scholars, arbitrators and other professionals. It was an honor for the CAA to be part of the process. However, the time has come that Taiwan must once again move forward. The establishment of CAAI by CAA and the continuous working on the amendment of the Arbitration Law, proves that the Taiwan arbitration community will continually aim to make Taiwan a true model law jurisdiction, connecting the international and domestic arbitration community by bringing in more international elements and bringing out the best of Taiwan's arbitral practices.

# Could Competition Law Bar the Enforcement of Anti-Competitive Arbitral Awards?

Edward K H Ng

## Abstract

This article explores two possible pathways where arbitral awards may be refused enforcement, namely non-arbitrability and public policy. First, given that Hong Kong competition law contains a number of peculiarities that depart from the general international norm, there could be an argument that competition law issues may not be arbitrable. Second, courts are likely to find that Hong Kong competition law does relate to its local public policy. However, allegations of violation of competition law may not automatically mean that courts will intervene to refuse enforcement. There is strong argument that courts will only refuse enforcement where there are 'serious' violations.

## A. Introduction

Two parties, one of which is a Hong Kong company (with assets in Hong Kong), entered into an anti-competitive agreement. Subsequently the parties commenced arbitration in country A, with the laws of country A as the governing law. The parties raised competition law arguments during the arbitration. The competition law arguments failed. The arbitral tribunal issued an award which stated that the anti-competitive agreement shall be specifically enforced. The winning party now seeks to recognise and enforce the anti-competitive award in Hong Kong. How should Hong Kong courts deal with the award? Can enforcement of the award be refused?

Refusal of enforcement of an arbitral award is notoriously difficult. This is especially so in arbitration-friendly jurisdictions such as Hong Kong. However, the relatively recent introduction of the Hong Kong competition law regime may have opened up some new pathways to refusal of enforcement of an arbitral award. Hong Kong does not have case law on this particular point, but theoretically speaking, there are two pathways where arbitral awards may be refused enforcement. The first is that competition law issues may be non-arbitrable. The second reason is that Hong Kong competition law may be related to public

policy, and enforcement of an anti-competitive award may violate public policy. This article explores the soundness and the merits of both pathways.

## B. Grounds for Refusing Enforcement of Arbitral Award

As to the general law on refusal of enforcement of arbitral awards in Hong Kong, it has already been explored in various academic works, and my repetition of the same will not be of value. I shall simply briefly repeat them for the sake of completeness and ease of understanding for readers.

Enforcement of an arbitral award can be divided into three regimes in Hong Kong, with the applicable regime depending on the place of arbitration.[1] They are:-

1. Enforcement of an award in a country which is a party to the New York Convention[2] (which is contained in Part 10, Division 2 (ss87-91) of the Arbitration Ordinance (Cap 609) (**"AO"**));
2. Enforcement of an award where the place of arbitration is Mainland China (which is contained in Part 10, Division 3 (ss92-98) of the AO); and
3. All other cases, ie, where the place of arbitration is in Hong Kong, Taiwan, Macao or in one of the few foreign countries not party to the New York Convention (which is contained in the latter part of Part 10, Division 1 (ss85-86) of the AO).[3]

Under all three regimes, the reasons for refusal to enforce an arbitral award are more or less the same.[4] They reflect the wording of Article V of the New York Convention in that enforcement of an award in Hong Kong may not be refused unless one or more of the following prescribed reasons is established: (1) Invalidity of the arbitral agreement; (2) Incapacity of the parties; (3) No opportunity to present case; (4) Tribunal's lack of jurisdiction; (5) Compositional or procedural non-compliance; (6) Award not binding, set aside or suspended; (7) Non-arbitrability; and (8) Public policy.

[1] Graeme Johnston and Paul Harris, "*The Conflict of Laws in Hong Kong"* (Hong Kong, 2017), 3rd edn, [10.041].
[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.
[3] See, above fn 1.
[4] With the exception of enforcement of awards under the third regime, where s86(2)(c) of the AO, authorises the court to refuse enforcement *"for any other reason the court considers it just to do so."*

I. Arbitrability of Competition Law Issues

The first of the eight prescribed reasons that appears to be relevant to competition law is that of 'arbitrability'. Article V(2)(a) of the New York Convention states that recognition and enforcement of the arbitral award may be refused if *"[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country"*. This concept of 'arbitrability' under Article V(2)(a), is different from 'arbitrability' as decided by the arbitral tribunal under the principle of *kompetenz-kompetenz*. Using the example given by Gary Born as an illustration:-

> *"If parties from States A and B agree to arbitrate in State C (with the parties' arbitration agreement being governed by the law of State C) and an award is made in State C, which is then sought to be enforced in State D, State D may apply its own non arbitrability standards to deny recognition of the award."*

Hence, the mere fact that the arbitral tribunal ruled that the dispute under State C laws is arbitrable does not mean that the enforcing court cannot rule otherwise. This is simply the character of Article V(2)(a) as an exceptional device.[5]

Coming back to the issue of arbitrability under Article V(2)(a), in principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a court, and hence enforceable.[6] On the other hand, there is the argument that matters involving public rights and values, or interests of third parties, should not be arbitrable because of the effect that a private arbitration would have in the public sphere. Historically, competition law issues were held by national courts and arbitral tribunals alike to fall within the latter category and were non-arbitrable.[7] Their logic was, amongst others, that (1) competition law was prone to be complicated and sophisticated, which was therefore ill-adapted to an arbitral process; (2) decisions on anti-competitive regulation of businesses were too important to be lodged with arbitrators chosen from the business community, particularly those from a foreign community who have had no experience with or exposure to the local laws and values;[8] and (3) there was an inherent public interest element in the enforcement of competition laws, hence arbitrators should not be the persons enforcing the same or carrying out the courts' functions in this context.[9]

[5] Gary B Born, "*International Commercial Arbitration"* (Int'l, 2014) 2nd edn, vol III, 3701.
[6] Nigel Blackaby and others, *"Redfern & Hunter on International Arbitration"* (6th edn, OUP 2015) [2.125].
[7] Above fn 5, vol I, 975.
[8] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985); 105 S Ct 3346 (1985).
[9] *American Safety Equipment Corp v JP Maguire & Co* 391 F2d 821 (1968).

These sentiments lasted until the mid-1980s.[10] Nowadays, competition law is universally held to be capable of settlement by arbitration. In the famous case of *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*[11], the US Supreme Court (**"SCOTUS"**), by a majority of five to three, rejected all of the above arguments and held that international competition law issues are indeed arbitrable. By way of background, the facts of *Mitsubishi* are as follows. Mitsubishi commenced arbitration against Soler for breach of a sales agreement, while Soler counterclaimed Mitsubishi, claiming that Mitsubishi and a Chrysler International SA conspired to divide the markets in an attempt to restrict trade. SCOTUS held, amongst other things, that potential complexity should not suffice to ward off arbitration. The anticipated subject matter may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or the tribunal itself. Most importantly, the court also held that under Article V of the New York Convention,

> *"the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b), 21 U.S.T., at 2520; see Scherk, 417 U.S., at 519, n. 14, 94 S.Ct., at 2457, n. 14."*[12]

The ability for the court to take a 'second look' allows national courts to supervise and review the arbitral award at the enforcement stage to ensure that legitimate interests in the enforcement of competition laws have been addressed. This precisely allays the concern of public policy not being applied by arbitrators.

In a similar fashion, in the landmark case of *Eco Swiss China Time Ltd v Benetton International NV*[13], a dispute arose between the parties in relation to a licensing agreement. During the arbitration, neither parties raised any competition law issues. However, at the enforcement stage, Benetton for the first time, submitted that the award ought to be annulled on the basis that it was contrary to Article 81 of the EC Treaty[14]. The European Court of Justice (**"ECJ"**) was asked by the Supreme Court of the Netherlands to rule on whether a national

[10] Born, "*International Commercial Arbitration"*, vol I, 976.
[11] *Mitsubishi*.
[12] *Mitsubishi* [18].
[13] (Case C-126/97); [2000] 5 CMLR 816.
[14] Now art 101 of the Treaty on the Functioning of the European Union.

court, at the enforcement stage, should take into account competition law issues, subject to any judicial review.[15] The ECJ held that EU competition law does constitute EU public policy:-

> *"Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void."*[16]

Based on *Eco Swiss*, national courts within the EU are under a duty, at the stage of enforcing an award, to carry out (whether raised by the parties or at the court's own motion) a 'second look' at the award and provide an effective review of the award in question and to determine whether the award conforms with EU competition law principles.[17] The rationale behind the decision appears to be that the ECJ was legitimately concerned that the parties to the arbitration may collude and expressly decide not to raise any questions about the compatibility with competition law before the arbitration tribunal.[18] The ECJ held that,

> *'when one considers the interest of ensuring strict application of the provisions contained in Articles 85 et seq. of the Treaty, an interest that clearly extends beyond the interests of private parties to those of other undertakings, potential competitors and consumers. In other words, ... the need to supervise arbitration awards to ensure that they are compatible with Community law is particularly great in an area, such as competition, where there is a general interest in observance of the rules to ensure the smooth functioning of the Common Market.'*[19]

Redfern and Hunter however, noted that *Mitsubishi* and *Eco Swiss* did not directly answer the question of whether anti-trust issues are arbitrable.[20] The focus was more on the 'second look' doctrine, which allows courts to look into the merits and consider whether the award is in compliance with competition law policies, or parties who did not raise competition law issues during the arbitration, to have another opportunity to raise them again at the enforcement stage. The effect, nevertheless, is that it is now principally recognised throughout Europe that EU and domestic anti-trust claims are arbitrable in the same way US anti-trust claims are arbitrable.

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[15] Mark Brealey and Kyla George, *"Competition Litigation: UK Practice and Procedure"* (UK, 2019), 2nd edn, [21.11].
[16] *Eco Swiss* [36].
[17] *Eco Swiss* [32] and [49]; Born, "*International Commercial Arbitration"*, vol I, 978; Brealey, *"Competition Litigation: UK Practice and Procedure"* [21.34].
[18] *Eco Swiss* [24].
[19] ibid [35].
[20] Blackaby, *"Redfern & Hunter on International Arbitration"* [2.137].

Parallel to the US and EU, various jurisdictions within Europe[21], Australia[22], New Zealand[23] and Canada[24] similarly held that arbitrations can indeed deal with competition law issues. Gary Born even stated that *"there are virtually no reported contemporary decisions holding competition claims nonarbitrable."*[25]

II. Are Competition Law Issues Arbitrable in Hong Kong?

With this in mind, there is really little room for one to argue that competition law issues are not arbitrable in Hong Kong. Nevertheless, the issue of arbitrability and competition law has not yet been explored in the context of Hong Kong, and therefore warrants some discussion.

As a start, 'arbitrability' is not clearly defined under the AO. The only guidance that one has under the ordinance is whether it is *"capable of settlement by arbitration under the law of Hong Kong"*.[26] As the wording of the legislature make clear, 'arbitrability' means arbitrability under Hong Kong laws. It is irrelevant whether the issue is arbitrable under foreign law especially if the award has some connection with Hong Kong (such as a party originating from Hong Kong). Whilst there is no clear indication as to the scope of what is arbitrable in Hong Kong, there is some authority to suggest that Hong Kong has not overcome the pre-1980s mentality that competition law issues are non-arbitrable. *Halsbury's Hong Kong* explained that:-

> *"Disputes falling within the following categories may not, however, be referred to arbitration: criminal charges,[sic] disputes relating to any form of intellectual property, such as patents, trade marks,[sic] copyright and registered designs (except where enforcement of rights against particular persons is sought), competition and anti-trust, marriage, divorce,[sic] relations between parents and children, personal status, actions in rem against vessels [sic] and matters reserved for resolution by state agencies and tribunals (such as taxation,[sic] development control, immigration,[sic] nationality and social welfare entitlements)."*[27]

[21] *ET Plus SA v Welters* [2005] EWHC 2115; *Thalès Air Defence BV v GIE Euromissile & Ors* (2005) Rev Arb 750), translated in Denis Bensaude, *"Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law"* (2005) 3 J Int Arbitr 239, 242; (*Republic of Latvia v JSC Latvijas Gaze* (Case T 6730-03); *Marketing Displays International Inc v VR Van Raalte Reclame BV* (XXXI YB Com Arb 808-820), translated in *"Netherlands No. 29, Marketing Displays International Inc. v. VR Van Raalte Reclame B.Vc., Voorzieningenrechter, Rechtbank, The Hague, 27 May 2004 and Gerechtshof, The Hague, 24 March 2005"* in Albert Jan Van den Berg (ed), *"Yearbook Commercial Arbitration 2006 – XXXI"*, vol 31.
[22] *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 175 ALR 725.
[23] *A-G v Mobil Oil NZ Ltd* [1989] 2 NZLR 649.
[24] Born, "*International Commercial Arbitration"*, vol I, 979.
[25] ibid 980.
[26] This reflects the wording of the New York Convention.
[27] Halsbury's Laws of Hong Kong, vol 25, [25.003].

There is no supporting reference for the claim that "*competition and anti-trust"* claims are not arbitrable. However, the above list is endorsed by the learned authors of *Arbitration in Hong Kong: A Practical Guide*[28], in which Ma CJ, the previous Chief Justice of Hong Kong, was the editor-in-chief. Similarly, in a report compiled by the Committee on Hong Kong Arbitration Law in 2003, it was explained that common examples of non-arbitrable issues included anti-trust matters.[29] It is questionable whether the above authorities have paid tribute to the latest developments in this area of law.[30] Yet, despite support from some (with respect, arguably weak) secondary sources, there is a further argument in favour of competition law being non-arbitrable in Hong Kong.

In *Competition Commission v Nutanix Hong Kong Ltd & Ors*[31], the Hong Kong Competition Tribunal held, applying the Hong Kong Court of Final Appeal case of *Koon Wing Yee v Insider Dealing Tribunal*[32], that the criminal standard was applicable in the light of the criminal character of the proceedings which flowed from the presence of the power to impose penalty by a regulatory body.[33] This is because, first, the decision of *Koon Wing Yee* is binding to the Hong Kong Competition Tribunal. Second, Hong Kong courts also consider that violations of competition law draws strong stigma and obloquy since competition law constitutes a pervasive societal norm of acceptable behaviour.[34] Finally, it appears to be the legislative intent that the criminal standard of proof would apply in competition law proceedings in Hong Kong.[35] In *Competition Commission v W Hing Construction Co Ltd & Ors (No 2)*[36] the Hong Kong Competition Tribunal also held that, in relation to raising the efficiency defence under s1 of sch 1 of the Competition Ordinance (**"CO"**), the constitutionally protected presumption of innocence is engaged.[37] These principles are foreign to 'normal' civil proceedings. In contrast, the civil standard of proof on the balance of probabilities is uniformly applicable in other common law jurisdictions including Australia, Canada, New Zealand,

[28] (Hong Kong, 2017) 4th edn, chap 20, fn 147.
[29] Hong Kong Institute of Arbitrators, *"Report of Committee on Hong Kong Arbitration Law"* (LC Paper No. CB(2)2261/08-09(03) fn 20.
[30] The strongest indicator is that since 2017, the legislature has already confirmed that disputes relating to intellectual property is arbitrable. See part 11A of the AO.
[31] [2019] HKCT 2; [2019] 3 HKC 307.
[32] [2008] HKCFA 21; (2008) 11 HKCFAR 170.
[33] *Nutanix* [50]-[72].
[34] *Television Broadcasts Ltd v Communications Authority & Anor* [2016] HKCFI 135; [2016] 2 HKLRD 41, [76].
[35] Note however, that these legislative materials were held to be inadmissible in the determination of the standard of proof in *Nutanix*. See, *Nutanix* [65]-[69].
[36] [2019] HKCT 3; [2019] 3 HKLRD 46.
[37] ibid [188].

Singapore and the UK.[38] Hong Kong's competition law regime is no doubt the outlier. Given that Hong Kong courts and legislatures appear to view violations of competition law as so serious that a heightened standard of proof is needed, Hong Kong courts may be inclined to consider competition law issues as non-arbitrable.

Nevertheless, one must not detract from the fact that there is virtually no modern overseas case law in favour of competition law being non-arbitrable. There is no legitimate reason to doubt that Hong Kong courts will go on a tangent and depart from the international norm. As is held in *A Solicitor (24/07) v The Law Society of Hong Kong*[39],

> *"it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. … Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them."*

III. Competition Law as Part of Public Policy

The second of the eight prescribed reasons for refusing enforcement that appears to be relevant is the ground of public policy. Compared to 'arbitrability', the debate as to whether violations of competition law would equate to violations of local public policy is alive and well.

What is meant by 'public policy' merits an article for discussion in its own right, but generally, to trigger 'public policy' as a means to refuse enforcement of an arbitral award, the act in question must be contrary to the fundamental conceptions of morality and justice in the forum.[40] Courts ought to give a narrow interpretation of 'public policy' in order to further the object of the New York Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced.[41] Of course, not every violation of a mandatory provision of national law amounts to a violation of public policy as not all laws are an affront to concepts of morality and justice. Only provisions of law that are fundamental to the legal order or basic morality of a state are grounds for public policy violation.[42]

[38] *Nutanix* [70].
[39] [2008] HKCFA 15; (2008) 11 HKCFAR 117, [16].
[40] *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] HKCFA 40; (1999) 2 HKCFAR 111, 139F-G.
[41] ibid, 139D-E.
[42] *Desputeaux v Éditions Chouette (1987) Inc* 2003 SCC 17; [2003] 1 SCR 178, 181.

The question, therefore, becomes whether a violation of competition laws amounts to a violation of law that is fundamental to the legal order or basic morality of a state. Overseas authority clearly suggests that there is a strong link between a country's own competition law and its local public policy. For instance, the SCOTUS in *Mitsubishi* hinted the relevancy of 'public policy' by stating *"each signatory country [has] the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."*[43] Similarly, in *Eco Swiss*, the ECJ held that *"the provisions of Article 81 E.C. (ex Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention."*[44] This stance is the same in most of continental Europe.[45]

Curiously, in *Tensacciai SpA v Freyssinet Terra Armata Srl*[46], the Swiss Federal Supreme Court was faced with an agreement under which each company undertook to refrain from any separate agreements with other companies and from bidding individually in answer to their tenders. A dispute arose and the parties submitted the agreement to arbitration, during which Tensacciai submitted that the contract in dispute was contrary to Italian and EU competition laws.[47] A final award was given in Freyssinet's favour. Tensacciai sought to challenge the enforcement of the award. However, the Swiss court refused to entertain the appeal by ruling that *"the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, … would have to be found in any legal order."*[48]

However, a closer look at *Tensacciai* reveals that the Swiss court actually ruled that the competition law of a foreign jurisdiction does not form part of Swiss national/local public policy[49], rather than refusing the notion that competition law in general forms part of public policy in its entirety. Indeed, the court in *Tensacciai* held *that "[i]n reality, the differences between the various laws on competition are too acute – specially between Switzerland and*

[43] *Mitsubishi* [].
[44] *Eco Swiss* [39].
[45] Above fn 21.
[46] (ATP 132 III 389), translated in *"X. S.p.A. v. S.r.l., Swiss Supreme Court, 4P.278/2005. 8 March 2006"* (2006) 3 ASA Bulletin 4/2006, 521.
[47] Bearing in mind that Switzerland is not part of the EU, and so it is not necessarily bound by EU law.
[48] David Bailey and Laura Elizabeth John, *"Bellamy & Child: European Union Law of Competition"* (UK, 2018) 8th edn, [16.167]; *X SpA v Y Srl*, 558.
[49] *X SpA v Y Srl* 545.

*the European Union – to allow a finding that a transnational or international rule public policy would have to be found there".*[50] This would suggest that had EU competition law been more similar to that of the Swiss competition law, the court may well have arrived at a different conclusion.

What is clear, however, is that overseas authority clearly come to a consensus that (at least) local competition laws have a close connection with local public policy. Once again, there is no Hong Kong case law on this point, but there is no reason to believe that Hong Kong courts will detract from the generally accepted view of foreign courts. There is a strong case that Hong Kong's competition laws will have a bearing on Hong Kong's public policy.

IV. Balance Between the Underlying Principles in Competition Law and Arbitration

A more difficult issue that one needs to consider is when courts should intervene and refuse enforcement of the award. The difficulty arises from the fact that courts will need to balance between the:-

> *"fundamental opposition along the public-private dichotomy. Antitrust laws seek to protect public interests by preserving free competition in the markets. Public antitrust or competition agencies commonly enforce these laws by imposing fines, injunctions, or even criminal penalties pursuant to domestic antitrust laws. By contrast the international arbitration is a form of private, contractual, ordering, aimed at dispute resolution".*[51]

The fundamental conflict between competition law and arbitration has been a subject of heated debate amongst scholars.[52] National courts around the world are also split between two factions. On the one side of the spectrum, there is the 'minimum' approach. In short, the 'minimum' approach,

> *"means that not every conceivable violation of or noncompliance with a mandatory rule, and specifically with a rule of competition law, can be characterized as a breach of public policy under Article V(2)(b) of the New York Convention or under national provisions on annulment of awards. It is only the most serious violations of these rules that rise to the level of breaches of public policy."*[53]

[50] ibid, 557.
[51] Valentin Pepeljugoski and Ana Pepeljugoska, *"Arbitrability of Competition Law (Antitrust) Disputes"* (2018) 11 BSSR 7, 8.
[52] OECD, *"Hearings: Arbitration and Competition"* (DAF/COMP(2010)40).
[53] Gordon Blanke and Phillip Landolt, *"EU and US Antitrust Arbitration: A Handbook for Practitioners"* (US 2011) 763.

Under the 'minimum' approach, minimum intervention or review will be devoted by courts when enforcing the arbitral awards concerning competition law issues. The rationale for the 'minimum' approach is that if a full review of the award is carried out, this arguably defeats the purpose of going into arbitration in the first place and undermines the trust afforded to arbitrators and the institution of arbitration.[54]

Meanwhile, on the other side of the spectrum, there is the 'maximum' approach. The 'maximum' approach favours, *"a full-fledged review by the court of the award's findings of fact and of law to verify its flawless compliance with competition law even in the face of a mere allegation of its violation."*[55] The rationale for this approach is to avoid the risk that arbitration will be used to circumvent competition law. Courts can therefore consider in detail whether competition law has been applied 'correctly'.[56] I will not go into the details of the merits and preferability of either approach, as discussion of the same has been explored elsewhere.[57] However, suffice it to say that both approaches have a sound and logical basis. One's preference over the other could very well be considered a value-judgment, depending on one's views on the importance of the policy behind competition law and arbitration.

Generally, national courts within the EU adopts a 'minimal' approach. This is because, under the guidance in *Eco Swiss*, it was held that *"it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances."*[58] Following this, for instance, in *Thalès Air Defence*, the case concerned an agreement for a grant of exclusive rights to produce and distribute missiles. Thalès and Euromissile were unable to agree on the purchase price, and the parties filed a request for arbitration at the International Chamber of Commerce. With the award in favour of Euromissle, Thalès sought to have the award annulled on the basis that it violated competition law. The Paris Court of Appeal took a narrow approach and held that they would only set aside awards on EU competition law grounds if they show a *"flagrant, specific and concrete breach"* of French international public policy.[59] Since the issues have not been previously raised, this suggests that the issue was not

[54] OECD, *"Hearings: Arbitration and Competition"*, 13.
[55] Blanke, *"EU and US Antitrust Arbitration: A Handbook for Practitioners"*, 761.
[56] OECD, *"Hearings: Arbitration and Competition"*, 13.
[57] For instance, see OECD, *"Hearings: Arbitration and Competition"*, 38.
[58] *Eco Swiss* [35].
[59] Blackaby, *"Redfern & Hunter on International Arbitration"*, [11.121].

*"as plain as the nose on the face"*[60]. This 'minimal' approach is also followed by various jurisdictions in Europe.[61]

Similarly, In *A-G v Mobil Oil NZ Ltd*[62], the High Court of New Zealand declined to review the arbitral award in violation of New Zealand competition law on the basis that the parties must have fully considered the various restrictions, and there is no overriding consideration for the court to exercise its discretion.

In contrast, the Dutch[63] and Belgian[64] courts have taken a maximalist approach and were ready to undertake a substantive review of awards from a competition law perspective and have not refrained from subsequently annulling awards that were found to be in violation of EU competition law.[65]

Worst still, some countries have conflicting views within their own jurisdiction. In *Baxter International, Inc v Abbott Laboratories*[66], the US Court of Appeals Seventh Circuit gave extreme deference to the arbitral tribunal and held that once argued, an arbitration panel's determination of anti-competitive issues could not be re-argued again on the ground of mistake of law. *Baxter* was described as giving extreme amount of deference to an arbitral award that interprets federal statute, even when the award might be based on an incorrect interpretation of that statute and thus permitting illegal conduct on the part of the parties to an agreement.[67] On the other hand, in, *American Central Eastern Texas Gas Co v Union Pacific Resources Group, Inc*[68], the US Court of Appeals Fifth Circuit had no hesitation in scrutinising the reasoning of the arbitral tribunal.

Confusing as it may seem, these contradictory rulings serve to show that resolving the balance between the competition law principle of ensuring public interest is adequately

[60] *Thalès*.
[61] ibid; OECD, *"Hearings: Arbitration and Competition"*, 38.
[62] Above fn 23.
[63] *Marketing Displays*.
[64] *SNF SAS v Cytec Industrie BV* (2007) 127 GP No 112-114, 53.
[65] Blackaby, *"Redfern & Hunter on International Arbitration"*, [11.121].
[66] 315 F3d 829 (7th Cir 2003).
[67] Brenda M Williamson, *"Recent Developments: Baxter International, Inc. v Abbott Laboratories"* [2004] 19(3) Ohio St J Dis Res 1119.
[68] 93 Fed Appx 1, 2004 WL 136091 (5th Cir 2004).

protected, and the arbitration principle that awards should be final and readily enforceable is a difficult task.

## V. How Will Hong Kong Courts Approach these Issues?

Whilst academics seem to suggest that the 'minimal' approach appears to be more favourable and popular,[69] there is particular difficulty in predicting when Hong Kong courts will intervene when enforcing an anti-competitive arbitral award.

On one hand, Hong Kong is a very *"arbitration friendly"* jurisdiction.[70] Enforcement of an arbitral award is even described as *'subject to the narrowly confined exceptions, "almost as a matter of administrative procedure"'*.[71] In this sense, adopting the 'minimal' approach is no more than adopting the *status quo* of not interfering with the decision of an arbitral tribunal unless the award is a clear and blatant breach of the competition law.

Moreover, apart from the reasons in favour of the 'minimal approach' as explained above, the CO still contains a great number of exclusions[72] and exemptions[73] despite the heightened standard of proof in Hong Kong's competition law regime. Notably, under sch 1 of the CO, unless the acts in question involved 'serious anti-competitive conduct' the first conduct rule (which is akin to art 101 of the TFEU) does not apply to an agreement or concerted practice between undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed HK$200,000,000. The second conduct rule (which is akin to art 103 of the TFEU) does not apply to conduct engaged in by an undertaking if the turnover of which does not exceed HK$40,000,000 for the turnover period.

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[69] Jürgen Basedow, Stéphanie Francq and Laurence Idot, "*International Antitrust Litigation: Conflict of Laws and Coordination"* (UK 2012) 214, 218.
[70] *Wing Bo Building Construction Co Ltd v Discreet Ltd* [2016] HKCFI 485; [2016] 2 HKLRD 779, [55].
[71] *Shandong Hongri Acron Chemicaljoint Stock Co Ltd v Petrochina International (Hong Kong) Corporation Ltd* [2011] HKCA 168; [2011] 4 HKLRD 604, [12].
[72] These include: (1) Agreements enhancing overall economic efficiency; (2) Compliance with legal requirements; (3) Services of general economic interest; (4) Mergers; (5) Agreements of lesser significance; and (6) Conduct of lesser significance. See sch 1 of the CO.
[73] These include: (1) Exemption under regulations from the Competition Rules in respect of specified persons and persons engaged in specified activities (ss4-5 of the CO); (2) The Chief Executive in Council may, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules on public policy grounds (s31 of the CO); (3) The Chief Executive in Council may publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong (s32 of the CO); (4) Statutory body exemption (s2 of the CO); and (5) Block exemption order.

In other words, many undertakings may, upon fulfilment of certain requirements, be excluded or exempted from punishment under the CO. The Hong Kong Competition Commission even publishes a guideline for the public on to how to apply for the exclusions and exemptions.[74] These 'loopholes' exist by design. The creation of these loopholes, amongst other things, was viewed as a 'toothless tiger' even by Hong Kong legislators.[75] The 'minimum' approach is a mere reflection of this fact.

Another argument is that, in practice, and as a matter of policy, taking a 'maximum' approach would *"provide a formidable tool for dilatory and bad faith tactics by the losing party in the arbitration, whose motivation is merely self-interest and not the 'correct' application of the law."*[76] Judges may also suffer from an innate bias of finding faults in what has been done by others, which would increase the likelihood of annulment or non-enforcement of awards as a consequence of the courts second-guessing the arbitrators' appreciation of the facts and the law.[77]

Finally, the case of *Eco Swiss*, being a decision by the ECJ, is a strong and persuasive authority. This is especially so when the Hong Kong competition law regime is modelled after the EU legislation, and the legislature intended the courts to draw reference from EU case law.[78] *Eco Swiss* states that "*refusal to recognize an award should be possible only in exceptional circumstances"*. Hong Kong courts will likely follow suit and adopt the same approach.

On the other hand, the obvious counterargument is of course that case law around the world is not unanimous. It is open for the Hong Kong courts to follow the minority of case law where the 'maximum' approach is adopted.

Second, as has been explored above, Hong Kong courts deem violation of its local competition law as strong stigma and obloquy, which implies a strong linkage with public policy. This necessarily means that courts in Hong Kong may apply the 'maximum' approach

[74] Competition Commission, *"The Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders"*.
[75] Clara Ingen-Housz and Anna Mitchell, *"Antitrust Awakening"* (2016) 34 Int'l Fin L Rev 41.
[76] Legislative Council, "Official Record of Proceedings, Wednesday, 6 June 2012: The Council met at Eleven O'clock".
[77] ibid.
[78] Legislative Council, *"Report of the Bills Committee on Competition Bill"* (LC Paper No. CB(1)1919/11-12) [22].

to ensure that conduct which may intrude on the *"pervasive societal norm of acceptable behaviour"*[79] will not be perpetrated by private parties within Hong Kong.

There is another unique feature with regards to Hong Kong competition law regime – it adopts a judicial enforcement model to credible and impartial institutional framework which, as the Hong Kong Bills Committee hopes, allows for effective and efficient enforcement of the competition law.[80] Put simply, the legislative intent of the CO is to give deference to the courts as the overseer and enforcer of competition law in Hong Kong.

Moreover, the absence of a standalone right of action under the current CO also points to the indication that the legislature does not want private parties (even *via* the appointment of arbitrators) to manoeuvre issues revolving around competition law. Under the current CO, a party who suffers loss and damage as a result of another's anti-competitive conduct has no standalone right of action, unless that conduct has been 'determined' to be a contravention of Hong Kong competition law.[81] A conduct is taken to have been determined to be a contravention if it has been ruled so by the Hong Kong Competition Tribunal, the Hong Kong courts, or an admission (accepted by the Hong Kong Competition Commission) of a contravention.[82] The removal of a standalone right of action was in fact an intentional decision by the Hong Kong government. During public consultations prior to the enactment of the CO,

> *"[s]ome members and deputations including trade associations of SMEs are concerned that large companies could make use of the stand-alone right of private action to harass SMEs. They are worried that larger companies, which have more resources, could resort to or threaten litigation as a means to drive out or affect the business of smaller competitors…"*[83]

And so, the government's solution was to remove a right of standalone action entirely,

> *… to reduce the anxiety and concerns of SMEs, … At the initial stage, enforcement will be carried out by the Commission, supplemented by the follow-on right of action for determined contraventions… The Administration has proposed to introduce amendments to take out the relevant provisions (clauses 111 to 114) on the stand-alone right of private action."*

[79] *Television Broadcasts*.
[80] ibid [101].
[81] S111(1) of the CO.
[82] See also, *Taching Petroleum Co Ltd v Meyer Aluminium Ltd* [2020] HKCT 2, [210].
[83] Legislative Council, *"Report of the Bills Committee on Competition Bill"* [76].

Prof Luca G Radicati Di Brozolo once said that *"[d]eference to the arbitrators' decision is also justified by the fact that arbitration is recognised by states as a means of settlement of disputes on a par with recourse to national courts"*[84] The reverse is true in Hong Kong. The lack of a recourse to national courts, and indeed the implementation of a judicial enforcement model, could mean that there is no intention by the legislature to defer the same to arbitrators, and courts will likely follow this legislative intent.

As such, there are sound arguments to speculate that courts in Hong Kong may depart from the 'minimal' approach and take the view that it should not stand by and assist in the enforcement of violations of competition law. Balancing the above, in my humble view, the 'minimal' approach is more likely to be adopted by the Hong Kong courts. This is because jurisdictions that adopt the 'maximum' approach appear to be in the minority. Given that the CO is modelled after EU law, EU case law would by definition by more persuasive than, for instance, Dutch and Belgian authorities. Moreover, it is doubtful whether the Hong Kong legislature had in mind the inherent conflict between competition law and arbitration at the time when the CO was enacted. Specifically, the removal of a standalone right of action was only to reduce the anxiety and concerns of small and medium enterprises. As such, perhaps drawing a link between the removal of a standalone right of action and enforceability of an arbitral award may be a bit of a stretch. Of course, at the end of the day, how and the extent to which Hong Kong courts will resolve the conflict between the arbitration and competition law still remains to be seen.

## C. Conclusions

The issue of enforcement of arbitral awards in Hong Kong and Hong Kong competition law has not yet been academically explored. There is also no Hong Kong case law on this point. However, through a comparative analysis of the approach taken overseas, we can draw the following conclusions. First, given that Hong Kong competition law contains a number of peculiarities that depart from the general international norm,[85] there could be some argument that competition law issues may not be arbitrable. Second, courts are likely to find that Hong Kong competition law does relate to its local public policy. However, allegations of a violation

[84] Luca G Radicati Di Brozolo, *"Arbitration and Competition Law: The Position of the Courts and of Arbitrators"* (2011) 27(1) Arb Int'l 1, 5.
[85] For a list of peculiarities, see Kelvin Hiu Fai Kwok, *"The New Hong Kong Competition Law: Anomalies and Challenges"* (2014) 37 World Competition 541.

of competition law at the enforcement stage may not automatically mean that courts will intervene to refuse enforcement. There is strong argument that courts will only intervene and refuse enforcement where there are 'serious' violations of competition law. On the other hand, given Hong Kong's peculiar characteristics of competition law, it is not without argument that Hong Kong courts may commence a full-fledged review of the award to ensure strict compliance.

There will no doubt be significant and exciting developments to Hong Kong competition law and the law of arbitration in the years to come. Hopefully Hong Kong courts will provide an answer to the above issues soon.

# Waiver of Right of Recourse Against Arbitral Award: a Global Perspective

Justice Datuk Dr. Hamid Sultan Bin Abu Backer[1] and Arun Kasi[2]

## Abstract[3]

This article considers the concept of waiver in arbitration and the relationship between Article V of the New York Convention and articles 34 and 36 of the UNCITRAL Model Law 1985. Further, it asserts that (i) the Convention does not permit a foreign arbitral award to be set aside for error of fact and/or law but the award can be set aside if the arbitral process was defective on one of the grounds set out in Article V of the Convention; (ii) Article V is a Convention obligation for all Contracting States to ensure compliance through their State courts to preserve the integrity of the arbitration process at the enforcement stage; (iii) any attempt by a waiver clause in an arbitration agreement or a waiver provision incorporated into the parties' agreement through institutional rules to avoid the challenge under Article V will be in breach of the Convention and in consequence the enforcement court would be obliged not to recognise the waiver; (iv) the Model Law attempts to provide a procedural mechanism to ensure an award made at the seat of the arbitration, in the case of international commercial arbitration,[4] is not in breach of any of the grounds in Article V in order that it will be enforceable in the state of the seat or in another state; (v) where the enforcement is in the State of the seat, Article 34 repeats the provision of Article V of the Convention to ensure the Convention obligation of the State is met; and (vi) when a foreign award is sought to be enforced in a Model Law state other than the State of the seat, Article 36 of the Model Law repeats Article V of the Convention to ensure that the Convention obligation of the state is met.

In essence, this article asserts that any attempt by a party, or parties, to arbitration proceedings to tinker with Article V of the Convention by agreement or through institutional rules may not be welcome by the enforcement court. It may also be against public policy for

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[1] Judge of Court of Appeal, Malaysia; author of *International Arbitration with Commentary to Malaysian Arbitration Act 2005,* Kuala Lumpur, Janab Law Publications, 2016.

[2] Advocate and Solicitor of High Court of Malaya; author of *Arbitration: Stay of Court Proceedings and Anti-Suit Injunctions*, Kuala Lumpur, CLJ Publication, 2014; *The Law of Carriage of Goods by Sea*, Singapore, Springer, 2021.

[3] Consent is given to all to publish this paper in arbitration and/or law journals, etc. in the 'pursuit and dissemination' of knowledge. Acknowledged are the contributions made or to be made by Tom Moisley, solicitor, England, Dr. Jur. Thomas R. Klötzel, lawyer, Stuttgart, Germany, Bachir Hadj Hamou, advocate, Paris, France, Jainil Bhandari, advocate and solicitor, Singapore, Voon Kiat Lai, advocate and solicitor, Hong Kong, Khaled Hamid Chowdhury, advocate and solicitor, Bangladesh and Robert W. Wachter, lawyer, Seoul, South Korea for reading this paper in draft and for the dissemination of this paper to all relevant stakeholders globally and also to obtain reviews from the relevant jurists. Special thanks to S.V. Parvin Rathinam and V. Saratha Devi, advocates and solicitors, Chennai, India for their input in writing this article and for dissemination of this paper to relevant stakeholders.

[4] When an international arbitration award is enforced through the seat court, the award is referred to as 'domestic international arbitration' award. The new phrase 'domestic international arbitration' appears to originate from the decision of Belinda Ang Saw Ean J, judge of the High Court of Singapore, in *Astro Nusantara International BV v. PT Ayunda Prima Mitra & Others* [2012] SGHC 212 (*Astro I*). On appeal, it received endorsement by the by the Court of Appeal Singapore, reported as *PT First Media TBK v Astro Nusantara Internationalo BV & Ors* [2014] 1 SLR 372 (*Astro II*).

the court to recognise such a waiver clause in an agreement or in the institutional rules under which the parties have agreed to conduct the arbitration proceedings when the waiver provision blatantly impinges on Article V of the Convention.

**Introduction to Concept of Waiver**

'Waiver' is a generic term. In the legal context, the consequences of waiver relating to contract may differ from country to country. In essence, the law relating to the concept of waiver may not be uniform in all countries. The concept of waiver, its application and acceptability may be complex when it relates to a statute or constitution.

'Waiver' often relates to the voluntary relinquishment or surrender of some known right or privilege. There are authorities to suggest that there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts which would have enabled him to make an effective election as to the waiver[5].

**Introduction to New York Convention and UNCITRAL Model Law**

The New York Convention, 1958 ("Convention") is the foundation of modern international commercial arbitration. The Convention, *inter alia*, requires the States that have subscribed to it[6] to enact laws in their respective jurisdictions to recognise an arbitral award made in a foreign State[7] as binding and to enforce it[8], subject to conditions laid down in the Convention[9].

Art. III of the Convention provides as follows:

> Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. …

However, the Convention did not gain much popularity until the introduction of the UNCITRAL Model Law, 1985[10] ("Model Law"), because the Convention did not provide for the mechanism or procedure by which an award enforceable under the Convention could be obtained. This gap was filled by the Model Law[11], which provided a template for a fully-fledged arbitration statute, for Contracting States to adopt with desired modification, to facilitate an effective arbitral process that would result in an award enforceable under the Convention theme.

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[5] See P. Ramanathan Aiyer, *Law Lexicon*, 2nd edn, p. 1970.
[6] At present, there are about 167 countries which have subscribed to the Convention. They are called "Contracting States".
[7] The Convention allows Contracting States to limit the application of the Convention to other contracting States on grounds of reciprocity (Article I(2) of the Convention).
[8] Article III of the Convention.
[9] Article IV of the Convention.
[10] Amended in 2006.
[11] At present, about 85 states in a total of 118 jurisdictions have substantially adopted the Model Law and enacted it as their local law with desired modification. These countries are called Model Law countries.

It must be observed that the terms of the Convention constitute a sovereign obligation of the Contracting States. The integrity of the system of arbitration provided by the Convention lies in Art. V, which guarantees the due process of arbitration. Art. V of the Convention provides as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —
>
> (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) 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, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that —
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Without the guarantee of due process contained in Art. V, Convention arbitration would not appeal to the commercial world. The Convention arbitration theme must be understood. It

gives a free hand to the parties in the appointment of arbitrators and in the procedure at arbitration. There is no restriction as to who can be the arbitrator and as to the procedure to be adopted. There is no necessity for the parties to have their disputes arbitrated under any institutional rule or through any institution and parties may opt for *ad hoc* arbitration. Under the Convention theme, even a tribal leader can be appointed by the parties to arbitrate a dispute between them and make a Convention award enforceable worldwide in the Contracting States. Having given such freedom and flexibility, the control mechanism (or the check and balance device) is implanted into the system only through Art. V, which upholds the integrity of the system of Convention arbitration.

The Convention did not expressly make provision for setting aside of an award at the seat court. However, such setting aside was within the envisagement of the Convention. Art. V(1)(e) refers to such setting aside as well as Art. VI. The Art. VI reads as follows:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

The Model Law, in its Art. 34, made provision for the setting aside of an award at the seat court. The grounds for setting aside provided in the Art. 34 are materially the same as the grounds for refusing recognition and enforcement in Art. V of the Convention. Whilst Art. 34 of the Model Law makes provision for the setting aside of an award, Art. 36 materially mirrors Art. V of the Convention, i.e. provision for refusing to recognise and enforce an award.

In effect, the check and balance mechanism in Art. V of the Convention is reflected in articles 34 and 36 of the Model Law. At the outset, it must be noted that both the articles 34 and 36 of the Model Law clothe the court with a discretion[12] to set aside or refuse enforcement of an arbitral award, when materially one or more of the Art. V grounds are established, as opposed to placing a duty on the court to set aside or refuse enforcement, as the case may be.

It is important to understand the relationship between the articles 34 and 36 of the Model Law, and how they reflect Art. V of the Convention. First, Art. 34 of the Model Law is an expression of the setting-aside envisaged in Art. V(1)(e)[13] of the Convention.

Second, Art. 34 is an amplification of Art. V of the Convention and thus also of Art. 36 of the Model Law. When an award is unenforceable within the terms of the Convention, it may be prudent to have it set aside at the seat. Without such setting aside, an award may be taken around the world, particularly in the case of an award debtor with assets in many jurisdictions, to jurisdiction after jurisdiction, until full satisfaction of the award sum.

[12] Like art. V of the Convention.
[13] And article VI of the Convention.

**The Trend: Waiver of the Rights of Recourse against Award**

A trend has been evidenced whereby the rules of some arbitral institutions pave the way for the rights of recourse to be waived. The recourses against an arbitral award or its enforcement are those found in articles 34 and 36 of the Model Law, rooted in Art. V of the Convention. An application to set aside under Art. 34 will always be made to the seat court[14]. A request or plea to refuse recognition and enforcement under the art. 36 will be made at any court where enforcement is sought[15].

The starting point of the institutional waiver clause was the UNCITRAL Arbitration Rules (as revised in 2010) ["UNCITRAL Arbitration Rules"], which also serve as model rules that have been subsumed, with desired modifications, into the arbitration rules of many institutions worldwide[16]. The said Rules provide, in their Annex entitled: "Model Arbitration Clause for Contracts", that parties, if they wish to exclude recourse against an arbitral award, may agree to a waiver of 'their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law'. The provision reads as follows:

> **Possible waiver statement**
> *Note: If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.*
>
> *Waiver*
> The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

A close reading of the said Annex to the UNCITRAL Arbitration Rules will reveal that the model waiver clause therein was intended to be adopted by the parties into their agreement, if they desired, and not for adoption by the arbitral institutions into their rules as a default clause. However, various arbitration institutions took it a step further by including in their arbitration rules a clause waiving the parties' rights of recourse.

[14] For example, in the UK, an application will be made by invoking the jurisdiction of the court under ss. 67 and/or 68 of the Arbitration Act 1996. In Singapore, it will be under ss. 3 and/or 24 of the International Arbitration Act. In Malaysia, the jurisdiction will be invoked under s. 37 of the Arbitration Act 2005. In Hong Kong, it will be by s. 81 of the Arbitration Ordinance which *per se* incorporates art. 34 of the Model Law.

[15] In the UK, such a request will be made under s. 103 of the Arbitration Act 1996. In Singapore, under ss. 3 and/or 31 of the International Arbitration Act. In Malaysia, it is under s. 39 of the Arbitration Act 2005. In Hong Kong, the same will be made by virtue of s. 83 of the Arbitration Ordinance which per se incorporates art. 36 of the Model Law and ss. 86, 89, 95 and 98D of the Ordinance as applicable.

[16] Including KLRCA in Malaysia.

The ICC Arbitration Rules, at Art. 35(6), provide that, by agreeing to arbitrate under the ICC Arbitration Rules, parties 'shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made'. LCIA[17] Arbitration Rules[18], in its article 26.8, provides that, by agreeing to arbitrate under these rules, '[t]he parties also waive irrevocably their rights to any form of appeal, review or recourse to any state court … insofar as such waiver shall not be prohibited under any applicable law'.

The Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules)[19], at Art. 32.11, provides for waiver in almost identical terms as that in LCIA Arbitration Rules. AIAC[20] Arbitration Rules 2018 is not an exception to the trend. It provides for waiver in its rule 12(10)[21] in almost identical terms to that of LCIA Arbitration Rules and SIAC Rules.

Art. 34.2 of 2013 HKIAC[22] Administered Arbitration Rules provides for the waiver of recourse in a slightly different style, namely '[t]he parties … shall be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of any award, in so far as such waiver can validly be made'. It must be observed that in all the institutional rules providing for the waiver a caveat has been placed to say that parties may so waive their rights only insofar as such waiver can validly be made.

The reason why arbitral institutions include such waiver clause may be to earn themselves a competitive edge in commercialising their institution[23]. However, inclusion of waiver clauses in institutional arbitration rules raises two crucial issues. The first is the question of public policy affecting waiver of the rights of recourse against arbitral award and its enforcement. The second is the question of degree of notice required to incorporate such waiver clauses into the parties' agreement by reference.

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[17] London Court of International Arbitration.
[18] Effective 1st October 2014.
[19] 6th Edition.
[20] Asian International Arbitration Centre (Malaysia).
[21] The same provision was found in rule 11(7) in the previous version of the KLRCA Arbitration Rules (Reprint 2014) and rule 12(11) of the AIAC Arbitration Rules 2017.
[22] Hong Kong International Arbitration Centre.
[23] In ECtHR, *Tabbane v Switzerland* (application no. 41069/12), 1st March 2016, the European Court of Human Rights ("ECtHR") held that a law allowing waiver of recourse against an arbitral award was not contrary to Art. 6(1) of the European Convention on Human Rights ("ECHR"), which guaranteed the right of access to court and right to a fair hearing. In this case, the parties entered into a share related agreement which contained an arbitration clause. The arbitration clause stipulated that the right of recourse to court against the award was waived. Upon a dispute between the parties, arbitration was conducted with seat in Switzerland. Following the finding of the arbitral panel, the losing party applied to the Supreme Court of Switzerland to set aside the award. Art. 192 of the Swiss Private International Law Act ("PILA") expressly allows recourse against an arbitral award to be waived by agreement of parties when the parties thereto are non-Swiss. In view of the waiver agreement and Art. 192 of PILA, the Supreme Court refused to entertain the application to set aside. The losing party took Switzerland to ECtHR on the question of whether its right of access to court, guaranteed in Art. 6(1) of ECHR, was thereby compromised. The ECtHR held that the law allowing parties to agree on such waiver did not offend Art. 6(1) of ECHR. The ECtHR also noted that the aim of Art. 192 of PILA was to facilitate Switzerland's policy to appear as an attractive venue for arbitration and to reduce the caseload of its Supreme Court. Such statutes allowing waiver are also found in a few other jurisdictions including France, Belgian and Sweden. It appears that the ECtHR did not consider Art. V of the New York Convention which was in the nature of fundamental guarantee applicable to all arbitrations, the awards whereof are intended to be enforced under the New York Convention theme. It also appears that the ECtHR did not consider the common sovereign obligation undertaken by Contracting States by subscribing to the New York Convention. In any case, the authorities on this issue from jurisdictions where there is a statutory provision allowing the waiver agreements will not be applicable to jurisdictions where there is no such statutory provision.

The general jurisprudence relating to waiver of legal rights and the general jurisprudence relating to incorporation of terms by reference will first be dealt with below. That will be followed by a discussion of the application of those general principles to the waiver clauses in question.

## Waiver of Legal Rights: General Jurisprudence

A promise, made orally or by conduct, to waive a right may operate as an estoppel. It is important to distinguish the principle of estoppel from that of waiver. Estoppel is not a cause of action but it relates to a rule of evidence[24].

Waivers may arise in relation to constitutional, statutory or contractual rights. Courts may be more ready to recognise a waiver when it has no nexus to a statute and stands purely as contractual in nature only[25], i.e. the waiver relates only to a right conferred by terms of the contract. However, courts are extremely reluctant to allow a waiver when it relates to a constitutional and fundamental right[26]. The Courts have also said that a right arising from requirements and conditions imposed by a statute for the benefit of a party can only be waived by the party if no public interest is involved in such waiver[27]. Even when a waiver relates only to a contractual right, the question of waiver may become complex in the presence of a 'non-waiver clause', which is common in financial facility documents[28].

A waiver clause in a standard form agreement may be harsh to a party who did not indeed intend to waive his rights. Generally, to avoid inadvertent waiver of any rights in the course of a contract, it is not uncommon to find a 'non-waiver clauses' in agreements.

## Incorporation of Terms by Reference: General Jurisprudence

The law relating to incorporation by reference of terms found in one document into a parties' agreement may vary from jurisdiction to jurisdiction. Generally, the more onerous a term is, the better the notice of it required to incorporate it by reference. This has been a measure of safeguard the courts have taken to protect contracting parties from being bound by terms which they do not know or cannot be expected to know.

There are English authorities that support the proposition that onerous clauses sought to be incorporated by reference require a higher or specific notice of the clause, called 'Red Hand Clause'. In *Thornton v Shoe Lane Parking*[29], the English Court of Appeal held that the more onerous the clause, the better notice of it needed to be given.

[24] See *Municipal Corporation of Greater Bombay v Dr. Hakimwadi Tenants Association & Ors*, AIR 1988, SC 233.
[25] See *Miranda v Arizona* 384 U.S. 436.
[26] See *Basheshr Nath v Commissioner* AIR 1959 SC 149.
[27] See *Krishna Bahdur v M/s Purna Theatre & Ors* AIR 2004 SC 4282.
[28] See *Tele2 International Card Company SA and Others v Post Office Limited* [2009] EWCA Civ 9.
[29] [1971] 2 WLR 585.

In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[30], the respondent hired 47 photos from the appellant at a rate of 50 pence[31] per photo per day. The delivery note *inter alia* included a term that if the photos were held for more than 14 days, a holding charge of £5.00[32] per photo per day would be charged, which was 10 times the original rate. The respondent held the photos for 14 days beyond the initial 14 days. The appellant billed the respondent a sum of £3,290.00[33] for the additional period. The English Court of Appeal said, as a guideline, that in deciding whether a clause was incorporated into the contract between the parties, regard should be had to the nature of the transaction, the character of the parties, the sufficiency and proportionality of the notice, and whether it would be fair to hold the parties to the condition in question. Having taken these factors into consideration, the court held that the onerous term in that case was not incorporated into the contract. The court also said that 'particularly onerous or unusual' terms require special notice and that when a term is particularly onerous the person seeking to rely on the term must take greater measures to bring it to the attention of the other party.

**Waiver of Rights of Recourse against Award: Public Policy considerations**

Effectiveness of an agreement to waive the right of recourse against an arbitral award or its enforcement depends on public policy considerations affecting such waivers, which are discussed below.

*(i) Convention perspective*

An agreement between parties to waive all of their rights of recourse to court against an arbitral award is contrary to the terms of Art. V of the Convention, which constitutes a sovereign obligation of Contracting States. Any attempt to remove the jurisdiction of the court to check the due process of arbitration as provided by Art. V of the Convention will hit the very foundation of the system of Convention arbitration, the integrity of which is upheld only by the provision in Art. V, i.e. the check and balance mechanism.

A distinction must be made between the other rights entrenched in the Model Law, such as a right of appeal against a preliminary ruling as to jurisdiction made by an arbitral tribunal under art. 16 of the Model Law, and the right arising from the guarantee of due process embedded in Art. V of the Convention. A waiver of such other rights may not strike public policy as would a waiver of Art. V of the Convention do. For example, if the right of appeal against a preliminary ruling as to jurisdiction is waived in the interests of speeding arbitral proceedings, it may not compromise the integrity of the system of Convention arbitration as any award made will still be subject to scrutiny as to due process guaranteed by the Art. V of the Convention.

[30] [1989] QB 433.
[31] Plus VAT at 15%.
[32] Plus VAT at 15%.
[33] Plus VAT at 15%.

Unlike other rights entrenched in the Model Law, like the right of appeal under art. 16 of the Model Law referred to above, the requirements in Art. V of the Convention are fundamental in character, which cannot by their very nature be excluded or waived. For instance, the ground provided for in Art. V(1)(a) *inter alia* is that the parties did not have capacity to enter into the contract, eg. one of the parties was a minor. If a minor enters into an agreement, without capacity, and such agreement includes an arbitration clause coupled with the waiver clause incorporated by reference to rules of some arbitral institution, will the courts deny the ability of the minor to challenge the award?

Art. V(1)(b) *inter alia* provides a ground for challenge when a party was not given proper notice of the arbitral proceedings. If a claimant obtains an award without notice to the respondent, which will be in fundamental breach of natural justice, will the courts deprive the respondent of his ability to apply to set aside or refuse recognition and enforcement of the award?

The ground provided in Art. V(1)(d) *inter alia* is that the composition of the arbitral tribunal was not in accordance with agreement of parties. For example, if an agreement provides for arbitration by a panel of three arbitrators, one to be appointed by each party and the third one to be appointed by two arbitrators, and one of the parties appoints a sole arbitrator and procures an award, will the courts refuse to set aside or be unwilling to refuse recognition and enforcement?

The ground in Art. V(2)(a) is that the subject matter of the difference between parties is not capable of settlement by arbitration. Some good examples of such differences were given in the Singapore Court of Appeal case of *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in compulsory liquidation)*[34]. They were disputes over citizenship, legitimacy of marriage, grant of statutory licences, validity of registration of trade-marks and patents, copyright, winding-up of companies, bankruptcy and administration of estates. Again, will the party be restrained from challenging an award made on such matters?

Art. V(2)(b) provides the ground for challenge when the award is contrary to public policy. Will a court close its mind to public policy because the parties agreed to waive their right of recourse against an award? It cannot be denied that no court can be asked to recognise and enforce an award that is against public policy.

It has to be reiterated that the requirements in Art. V of the Convention, by their very nature, cannot be waived. Any attempt to disable the check and balance mechanism in Art. V, if allowed, would result only in a miscarriage of justice.

*(ii) Ousting of court's jurisdiction*

[34] [2011] SGCA 21, [2011] 3 SLR 414.

A waiver clause in the context of recourse against an arbitral award or its enforcement is in the nature of an agreement to oust the jurisdiction of the court which has been conferred by statute. An agreement to arbitrate is a private matter between the parties affecting them only. However, an agreement to oust the jurisdiction of the court is one related to administration of justice and is a matter between the parties and the court. Parties submit to arbitration by agreement, but they submit to the court by exercise of court's jurisdiction under the statue. An enactment subsuming art. 34 of the Model Law has nothing to do with any agreement of the parties. Hence, it may not be a matter for agreement or choice of parties. The court, in exercising its jurisdiction and discretion under a specific statute, may not be bound or limited by an agreement of the parties.

Lord Denning in *The Fehmarn*[35] said "the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them". In a similar line, the Court of Appeal in *Tan Kok Cheng & Sons Realty v Lim Ah Pat*[36] held "there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants".

The above cited authorities support the general proposition that jurisdiction of the court cannot be ousted by agreement of parties. If the courts are barred from exercising their jurisdiction and discretion, administration of justice will be compromised. Such a usurpation of the court's function and role will not find favour when considered in light of public policy[37].

In the context of arbitration, an old English case, *Czarnikow v Roth Schmidt & Co*[38], would support the proposition that the jurisdiction of the court cannot be ousted by the parties' agreement. In this case, an arbitration clause stipulated that the arbitrator might not make a reference to the High Court on any point of law, which otherwise the arbitrator would have had authority to make. The court held the restriction to be contrary to public policy.

*(iii) Inequality of bargaining power*

When dealing with policy issues in relation to waiver clauses, it must also be taken into account that many standard form contracts contain arbitration clauses with reference to some institutional rule, such as an insurance contract. The institutional rule may include the waiver clause.

In such cases, there will be no equality in bargaining power. In the above example, the insured may not have any commercial choice but to accept the whole of the standard form including the arbitration clause, which in turn imports by reference the unexpected institutional

[35] [1958] 1 AER 333.
[36] [1995] 3 MLJ 273.
[37] In the Malaysian context, any agreement which "(b) it is of such a nature that, if permitted, it would defeat any law" is unlawful and void under s. 24(b) of the Contracts Act 1950 and any agreement which "the court regards it as immoral, or opposed to public policy" is unlawful and void under s. 24(e) of the Act.
[38] [1922] 2 KB 478.

waiver clause. This may be a factor to be taken into account when considering public policy issues affecting waiver clauses incorporated by reference into standard form contracts[39].

**Waiver of Rights of Recourse against Award: Incorporation by Reference**

Apart from public policy considerations affecting the waiver clauses discussed above, another question that arises in relation to institutional waiver clauses purported to be incorporated only by general reference to the institutional arbitration rules is whether such a clause can be incorporated merely by general reference to the institutional arbitration rules.

The general principle, as stated above, is that the more onerous a term is the higher the notice required. The basic function of institutional arbitration rules is to provide the *procedure* for arbitration conducted under the rules and to make provisions relating to the fees of the arbitrators and of the institution. The right of recourse is not a matter of procedure. In fact, recourse against an award or its enforcement is not a matter which is part of *arbitral proceedings*, as they come into play only after completion of arbitration.

Thus, it will be beyond the scope of, and anomalous for, a procedural rule to state that parties waive their rights of recourse to the courts, post award, which will not ordinarily be expected by any party or possibly even its legal representative.

In fact, arbitration clauses are also said to be 'midnight clauses', because it is usually one of the last items to be written into the agreement after all the commercial and substantive matters have been dealt with, and not much thought may have been given to the drafting of the clause. It has also not been uncommon to find poorly drafted arbitration clauses being held 'pathological'[40] and not having the intended effect. Given this condition, a court may have to be more cautious when dealing with a waiver clause incorporated only by a reference made in an arbitration clause and to ensure sufficient notice if such a clause is to be incorporated into the parties' agreement.

Taking into account the onerous nature of the waiver clause regarding recourse to a court against an arbitral award or its enforcement and the fact that such a waiver clause is anomalous in procedural rules, a court may require that the parties or their legal representatives are actually aware of the clause before it may be incorporated into the parties' agreement by reference.

[39] Swiss Supreme Court in BGE 133 III 235 (*Cañas v ATP Tour*), 22 March 2007, ASA Bull. 3/2007 dealt with a standard form sports contract incorporating an arbitration clause with the waiver provision, where athletes had little bargaining power against the sports institution. The court held the waiver clause to invalid.

[40] See *Mangistaumunaigaz Oil Production Association v. United World Trading Inc.* [1995] 1 Lloyd's Rep. 617; *Shagang South-Asia (Hong Kong) Trading Co. Ltd. v. Daewoo Logistics* [2015] EWHC 194 (Comm); *Kruppa v Benedetti & Anor.* [2014] EWHC 1887; *Swiss Supreme Court in X Holding AG and Ors v Y Investments NV*, 25 Oct 2010; and *Seeley Int Pty Ltd v Electra Air Conditioning BV* [2008] FCAFC 169.

## Conclusion

The Model Law waiver clause appearing in the UNCITRAL Arbitration Rules as a clause that may be optionally agreed on by the parties and the inclusion of the waiver clause in various arbitral institutional rules give rise to complex legal issues. Arbitral institutions, by inclusion of such a waiver clause, purport to compromise the right of parties to have access to courts for redress against an award which is made in breach of the Convention terms. They purport to shut down a party's right to the fundamental defence and guarantee entrenched in Art. V of the Convention.

It is important to appreciate that the intention of the Model Law was to pave the way for the arbitral tribunals to deliver an award that would not breach the Convention terms, and was therefore enforceable in the Contracting States, and for the courts to play a supervisory role over the arbitral process and the consequent award. It could not have been the intention of a legislature adopting the Model Law to allow a party to be deprived of the benefits of obligations that the State has subscribed to under the Convention.

Hence, institutional arbitration rules which purport to deprive parties of their ability to rely on Art. V of the Convention to set aside the award or request refusal of recognition and enforcement may be a challenging issue for the courts of Contracting States to deal with. The subject of institutional waiver clause may become a fertile area of litigation in jurisdictions which have subscribed to the Convention and have subsumed the Model Law.

# In Thailand, does the Court have the Power to Set Aside a Foreign Arbitral Award?

*Pasit Assawawattanaporn*[1]

*Leela Gedkhuntod*[2]

## Abstract

Thailand is a member of the Convention on Recognition and Enforcement of Foreign Arbitral Award (1958), commonly known as the New York Convention. The current Arbitration Act of Thailand was enacted in 2002 in order to comply with the New York Convention to some degree. From the start with the enactment of the new law, Thai courts appeared to have struggled to balance the role of the court in the enforcement of foreign awards, favouring the setting aside of foreign awards over enforcement. However, in several recent Supreme Court decisions Thai courts now appear to be more in line with international practice, when considering whether to set aside or enforce foreign awards.

One of the reasons for the success of arbitration as alternative dispute resolution (ADR) method is the Convention on Recognition and Enforcement of Foreign Arbitral Award (1958), commonly known as the New York Convention, signed by 168 states[3].

The Convention requires courts of contracting states to give effect to private agreements to arbitrate, recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, the New York Convention applies to arbitrations that are not considered as domestic in the state where recognition and enforcement are sought. However, the New York Convention provides grounds on which the recognition and enforcement can be refused.

The grounds to refuse the recognition and enforcement are stated in Art. V of the New York Convention[4]Art. V may be approached in two parts. Paragraph 1 of the said article deals with the grounds that may be relied upon to resist the recognition and enforcement of the award.

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[3] Contracting States of New York Convention, Retrieved from http://www.newyorkconvention.org/list+of+contracting+states.

[4] United Nations Conference of International Commercial Arbitration, "Convention of the recognition and enforcement of foreign arbitral awards", Retrieved from 21_english.pdf (newyorkconvention.org)

These grounds are namely: the incapacity of a party and the invalidity of the arbitration agreement; issues related to the notification of the arbitrator's appointment or proceeding; impossibility for a party to present his case; the decision contained in the award exceed the limits set by the arbitration agreement; issues concerning the composition of the arbitral tribunal or the arbitral proceeding and lastly the setting aside of the award. Paragraph 2 of the said article deals with the arbitrability of the dispute and public policy.

Thailand became a member of the New York Convention in 1959[5]. However, for more than 25 years, no arbitration law was enacted in the country. It was only in 1987, that the Arbitration Act B.E. 2530[6] ('the Arbitration Act') was enacted. It was on the passing of the Arbitration Act that Thailand enforced the first arbitration award. The Arbitration Act, however, lacks provisions for the annulment of the award. This problem was resolved in 2002 when the new Arbitration Act B.E. 2545[7] ('the new Act') was passed, when the UNCITRAL Model Law (1985) came into force. In particular, the provision regarding the annulment of the award is in Section 40 paragraph 1:

*"The annulment of the arbitral award may be made by a request to the court that has jurisdiction to annul the award as provided in this section […]"*

Likewise, a new provision dealing with refusing the recognition and enforcement of the award was introduced by Section 43, paragraph 6.

*"The court has the power to refuse recognition and enforcement of an arbitral award, even if the seat of arbitration is in another country if the party against whom it is invoked furnishes proof that: […]*

*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, that award was made […] "*

The provisions in Section 40 of the new Act paraphrase the ones in Art. V, paragraph 1(e) of the New York Convention. However, in interpreting that part of the provision - *"[…] by a competent authority of the country in which, or under the law of which, that award was made."*, Thai courts have qualified the interpretation by referring to the *"Court with jurisdiction […]"*.This leads to interpretation problems.

[5] Contracting States of New York Convention, Retrieved from http://www.newyorkconvention.org/list+of+contracting+states.
[6] Royal Gazette no.114 Section 156 p.1, retrieved from www.ratchakitcha.soc.go.th/DATA/PDF/2530/A/156/1.PDF
[7] Royal Gazette no.119 Section 39 A p.1, retrieved from www.ratchakitcha.soc.go.th/DATA/PDF/00054010.PDF
(For the English translation of this Act, please see : Office of the council of state, "Arbitration act, B.E.2545 (2002)", retrieved from http://web.krisdika.go.th/data//document/ext825/825530_0001.pdf)

In the Arbitration Act 2002, the court's jurisdiction is defined in Section 9[8], and the same wording is also used in Section 40, so the interpretation of the latter is made in the light of the definition of Section 9. Such interpretation allows Thai courts to set aside awards made in other countries, this uncertainty in the interpretation is reflected in the different views of the Intellectual Property Court and the Supreme Court.

The Intellectual Property Court takes the view that courts have the power to set aside foreign awards in accordance with Section 9 of the Arbitration Act 2002.This is clearly the case in of Kor Khor 151-152/2550. This case concerns a sales agreement in which one party refused to open a letter of credit causing the opposing party damages. In accordance with the arbitration agreement found in the contract, the opposing party referred the dispute to arbitration. In the case, the arbitral tribunal decided in favour of the claimant, issuing an award for damages. The respondent challenged the award in the Intellectual Property Court seeking the setting aside of the award. The Court found that there was no contract between the parties, consequently, the arbitration agreement included in the contract did not exist. Accordingly, the Court set aside the award under Section 40 paragraph 1(b) and Section 43 paragraph 2 of the Arbitration Act 2002. The decision was appealed to the Supreme Court. The Supreme Court had to decide if the Intellectual Property Court had the power to set aside a foreign award. In the decision n. 5511-5512/2552, despite Section 40 of the Arbitration Act 2002 stating that the setting aside of an arbitral award had to be dealt with at the seat of arbitration, the Supreme Court, nevertheless, found that Thai courts have the power to refuse the recognition and enforcement of the award and further, has the power to set aside the award.

In n. Kor Khor 119/2557, the losing party in the, arbitration, which had the seat of arbitration in the UK, requested the Intellectual Property Court to set aside the award. The Intellectual Property Court granted the request, basing its decision on Section 25 of the Arbitration Act 2002.
The Supreme Court, has however, taken the view that under the Arbitration Act 2002, courts do not have the power to set aside foreign arbitral awards. This can be seen in the decision n. Kor Khor 80-81/2553 concerning an award rendered in Singapore. That Singapore award ruled that the claimant had to pay damages to the respondent in accordance with the terms of the sales agreement. The claimant, being dissatisfied, requested the Intellectual Property Court to set aside the award. The Intellectual Property Court rejected the request. The claimant appealed to the Supreme Court. The Supreme Court agreed with the judges of the Intellectual Property Court and rejected the appeal. In another case, the decision n. 13535-13536/2556, the Supreme Court explained that powers in Sections 40, 43 and 44 of the Arbitration Act 2002 have the same origin but are separated in different sections to comply with Art. V, paragraph 1(e) of the

[8] Section 9 of Arbitration act, B.E. 2545 (2002)

"Section 9. The Central Intellectual Property and International Trade Court or the Regional Intellectual Property and International Trade Court or the Court in whose jurisdiction the arbitral proceedings are conducted or the Court in whose jurisdiction any of contractual parties is domiciled or the Court having jurisdiction to try and adjudicate disputes submitted to arbitration shall be the competent Court under this Act."

New York Convention. Accordingly, only the court at the place of the seat of arbitration has the power to set aside the award.

In the Supreme Court decision n. 8539/2560, based on the provisions of the New York Convention and the Arbitration Act 2002, the judges decided that Thai courts only have the power to annul domestic awards or international awards, whose seat is in Thailand. On this interpretation, in the case referred to above, the Intellectual Property Court has no power to set aside the award made in the UK concerning the International Cotton Association.
Based on what was discussed above, the position regarding the power of Thai courts to set aside foreign awards appears to be unclear, with conflicting positions being taken by the Supreme Court and the Intellectual Property Court. It is hoped that in the future the views of the Supreme Court and the Intellectual Property Court on the interpretation of the Arbitration Act 2002 can be reconciled and be more consistent.

To sum up, Art. V, paragraph 1(e) of the New York Convention, seems clear in providing that an award can only be set aside by courts at the seat of arbitration. That being the case, if a foreign award is set aside by Thai courts, even in cases where Thailand is not the seat of the arbitration, such a decision appears to be contrary to the provisions of the New York Convention. Internationally, it is unlikely that other jurisdictions would take the same position as the Thai courts, simply because the position taken by Thai courts on the setting aside of foreign arbitral awards appear to be contrary to the substance and spirit of the relevant provision in the New York Convention.

# The Rise of South Korea as an "Arbitration Eager" Jurisdiction: Rethinking the Current Role and a Promising Future

Rinat Gareev

## Abstract

*This paper introduces the concept of an "arbitration eager" jurisdiction and sets out principal criteria that could be used to describe the term. The author analyses and discusses the recent development of international commercial arbitration industry in South Korea as a prime example of a jurisdiction that matches the description of the concept.*

## Introduction

The spectacular growth of many economies, ambitious industrial reformation and vast technological progress in the Asian Pacific region was termed as an "asian miracle".[1] The extraordinary record of economic growth has led to the fact that Asia is today the world's fastest growing economic region,[2] and is still undergoing rapid growth and industrialization.

In less than a half a century, the Republic of Korea (further in the article - Korea) has evolved from a war-torn region to a top-notch, high-tech economy, which is today renowned worldwide as a global innovation leader in tech industry. Korean economic success story has been referred to as the "miracle on the Han river"[3]. Technological innovation has played a pivotal role in Korea's long-term economic growth success, and such advanced developments can now be further exploited in other areas, such as in dispute resolution.

Such rapid economic growth would not be possible without global cooperation, exchange of knowledge, utilization of technology, foreign investments inflow and exploration of new export markets. As many of the Asian countries began to dominate large portions of the global economy, they had not been an exception to the internationalization. Export became not only an engine of further economic growth, but greatly contributed to the wider opening of borders and prompted the countries to explore new ways of international collaboration. To take a well-known example, China's ambitious Belt and Road Initiative (一带一路) was launched with an aim to foster trade cooperation by building a massive network of trade, investments,

[1] *Nelson Richard* and *Pack Howard*., "*The Asian Miracle and Modern Growth Theory*" [1999] The Economic Journal, 109 (457). P. 516.
[2] International Monetary Fund., "*World Economic Outlook: Growth Slowdown, Precarious Recovery*", 2019. P. 15, 47.
[3] *Karadas Songül* and *Cetin Rajmi*., "*The Miracle on the Han River: South Korean Economic Development*" [2018] Istanbul Journal of Economics-Istanbul Iktisat Dergisi, 68(1). P. 93-95.

transportation and energy infrastructure projects, that connects Asia, Europe, the Middle East and Africa.[4] In 2020, 15 Asian countries, including Korea, signed the Regional Comprehensive Economic Partnership (RCEP) agreement, the world's largest free trade agreement.[5] The arrangement signals the countries' shared commitment to open and connect supply chains, multilateral trade integration and openness towards foreign investments.

Globalization has also contributed directly to the rapid and broad growth of international arbitration.[6] A proliferation of cross-border trade inevitably leads to the increased number of disputes and the need for a neutral, efficient mode of dispute resolution. In the cross-border trade's context, dispute settlement is an essential pillar of ensuring security, integrity and reliability.[7] For various reasons, including, inter alia, speed, confidentiality, ease of enforcement,[8] international arbitration became the medium for good: foreign investors and corporations prefer to resort to international arbitration, and Asian parties are not exception.[9]

As a result of the financial crisis that jolted the Korean peninsula in the late 90s, many Korean corporations were involved in a high number of complex cross-border disputes that, as a result, led to the sophistication of international arbitration industry in the country. Today, however, a new chapter for the international arbitration in Korea began to unfold: it gains a firm foothold of acceptance and credibility worldwide as a safe, efficient and user-friendly seat of arbitration.

To hasten the growth of transboundary cooperation and business, the Korean government supports wider implementation and utilization of various ADR techniques, including international arbitration, to resolve cross-border disputes. Government support is manifested through the state's legislative activities and is evidenced by the judicial response. Economic growth in Korea led to the demand in dispute resolution services that can deal with some of the most tangled cross-border disputes. This article explores the recent developments in the Korean arbitration *fora* by providing an introductory overview of the Korean *lex arbitri* and the Korean Commercial Arbitration Board (KCAB)'s International Arbitration Rules and certain other noteworthy capacity building projects.

## I. Unveiling the Concept of "Arbitration Eager" Jurisdictions

The selection of an appropriate seat of arbitration is arguably one of the most crucial considerations for the parties to an arbitral agreement.[10] By choosing the seat, parties determine the mandatory law of the procedure which the arbitration adopts, and pursuant to

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[4] *Mitrovic Dragana*., "*The Belt and Road: China's Ambitious Initiative*" [2016] China International Studies, 59. P. 76.

[5] *Cimino-Isaacs Cathleen* and *Sutherland Michael*., "*Regional Comprehensive Economic Partnership: Status and Recent Developments*" (Congressional Research Service, 2020) Available at: https://crsreports.congress.gov/product/pdf/IN/IN11200.

[6] *Leahy Edward* and *Bianchi Carlos*., "*The Changing Face of International Arbitration*" [2000] Journal of International Arbitration, 17(4). P. 19.

[7] *Snyder Earl*., "*Foreign Investment Protection: The Arbitration Aspect*" [1964] South Carolina Law Review, 16(3). P. 388-398.

[8] *Born Gary*., "*International arbitration: Law and practice (Second edition.)*" (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016). P. 7.

[9] *Taylor Veronica* and *Pryles Michael*., "*The Cultures of Dispute Resolution in Asia*" (Dispute Resolution in Asia (3rd ed), Kluwer Law International, Rijn, The Netherlands, 2006). P. 16.

[10] *Ordway Eric*., "*The Importance of the Seat of Arbitration*" [2003] Advocate (State Bar of Texas), 25. P. 16.

which national courts will exercise its supervisory jurisdiction over the arbitration.[11] The seat will also determine the degree to which an arbitral award may be challenged, as it is common that the local courts in the designated seat hear appeals in relation to arbitral awards.[12] Further, the extent to which judicial review is available to parties will also depend on the principles of the law of the seat.

As such, the law of the seat impacts international arbitration on a number of fronts. The judiciary retains a level of control over arbitration to ensure that the private system of justice meets at least minimum standards of fairness – so that ADR is not a system that is fraudulent, corrupt, or lacking in essential due process.[13] On many occasions, the parties and tribunals seek assistance from state courts in the seat of arbitration: regarding the composition of the arbitral tribunal, applications to stay concurrent proceedings, interlocutory injunctions, taking of evidence and enforcement of the arbitral award, to name a few. Whilst these procedural assistance does not *per se* determine the merits of the dispute, it nonetheless has a significant impact on the arbitration proceedings and affects parties' experience.

In 2015, the Chartered Institute of Arbitrators (CIArb) developed the London Centenary Principles,[14] which sought to encapsulate the key elements of a "safe seat" for international arbitrations. The principles identify key characteristics that an arbitral seat should have in order to ensure that an international arbitration can be conducted effectively and efficiently.

The Queen Mary University of London (QMUL) International Arbitration Survey also considered the factors that influenced respondents when choosing a seat of arbitration. The results of the survey indicated that reputation and recognition were primary factors driving the choice of seat. In addition, preferences for certain seats were mainly based on an assessment of the seat's formal legal infrastructure, the neutrality and impartiality of the legal system, the national arbitration law and its track record for enforcing arbitration agreements and awards.[15]

Yet another project was undertaken by the Delos Dispute Resolution (Delos). Considering the best practices, the most recent developments and "accepted wisdom" in international arbitration,[16] the so-called Delos Principles on fair and efficient international arbitration were introduced. According to the Delos, a "safe seat" of arbitration is the one where the legal framework and practice of the courts support recourse to arbitration as a fair, just and cost-effective binding dispute resolution mechanism. Conversely, a place of arbitration that does not qualify as a "safe seat" by the Delos standards is the one that materially increases the

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[11] *Ostrove M.*, et al., "*Choice of venue in international arbitration*" (Oxford University Press, 2014).

[12] *Birgonul Talat*, *Dikmen Irem* and *Bektas Sinasi*. "*Comparison of an Emerging Seat of Arbitration and Leading Arbitration Seats and Recommendations for Reform*" [2018] Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 10(1). P. 2.

[13] *Moses, Margaret*., "*The Principles and Practice of International Commercial Arbitration*" (Cambridge: Cambridge University Press, 2008). P. 84.

[14] CIArb London Centenary Principles 2015. Available at: https://www.ciarb.org/media/1263/london-centenary-principles.pdf.

[15] "2018 International Arbitration Survey: The Evolution of International Arbitration" (Queen Mary University of London in partnership with White & Case). Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

[16] *Virjee Hafez*., "*Activating Arbitration: Four Principles to Achieve Fair and Efficient International Arbitration*" [Delos Dispute Resolution, 2017]. Available at: http://delosdr.org/wp-content/uploads/2018/01/Hafez-R-Virjee-Activating-Arbitration-Delos-2017.pdf.

cost of arbitrating disputes in that place, whether such cost is borne by the parties directly (e.g. jurisdictions that require awards to be signed at the place of arbitration and/or deposited with competent authorities).

Despite the safe seat term, arbitration community frequently tags certain jurisdictions as "arbitration friendly" to describe certain appealing features. Taking into account the most recent developments in the international arbitration landscape, emergence of new arbitral forums bent on securing a piece of the market, and the pro-active role of local governments in promoting ADR, the time has come to unveil the concept of an "arbitration eager jurisdiction".

Arbitration is by no means a modern innovation, there are a number of well-established arbitration hubs like Paris and London. As more countries are increasingly enmeshed in the cross-border transactions, new seats are concomitantly emerging as new locations for international arbitration. In the Asian region, by way of example, arbitration has been developing "at full gallop".[17] Several countries adopted modernized arbitration laws, invested substantially in capacity building programs to raise awareness of ADR among practitioners and judiciary, cultivated the sense of trust in international arbitration among businesses, supported financially and administratively launch of the state-of-the-art hearing facilities.

A pro-arbitration legislation is a distinct trend in many countries. Nevertheless, domestic laws on arbitration vary greatly from one country to another. The key distinguishing factor of an "arbitration eager" jurisdiction is its innovative, pro-active approach to arbitration. These jurisdictions joined the arbitration race more recently, but they compete intelligently. They must have already undergone legislative reforms, demonstrated a good track record of judicial support of international arbitrations, evolved into neutral and transparent seats. Arbitration eager jurisdictions actively seek to modernize the arbitration process by introducing new concepts, supporting diversity and implementing pioneering measures to boost arbitration.

In Asia, several countries have already demonstrated arbitration eager attitude. When the issue of choice is in question, the new entrants understand that they need to play wisely to compete with veteran competitors. In Singapore, for example, the government introduced tax exemption for non-resident arbitrators till the year of 2022.[18] In Hong Kong, the Arbitration Ordinance (Cap. 609) was amended to allow third party funding in international arbitration. Being neighbors with such powerful competitors, Korea faces heavy competition. In Korea, the government introduced the Arbitration Industry Promotion Act,[19] which laid down cardinal principles for promoting the arbitration industry in the country.

Korea was barely visible on the international arbitration map just fifteen years ago,[20] however, today it has firmly marked itself as a major player. The government was the

[17] *D'Agostino Justin*., "*Arbitration in Asia at Full Gallop*" [2014] Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2014/02/10/arbitration-in-asia-at-full-gallop.

[18] Inland Revenue Authority of Singapore, Government Agency Website. Available at: https://www.iras.gov.sg/irashome/Individuals/Foreigners/Your-Situation/Non-resident-professional/Non-Resident-Arbitrators.

[19] Arbitration Industry Promotion Act (Act No. 14471, 27 December 2016). Available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42311&lang=ENG.

[20] *Yoon Byung-Chol* and *Richardson Joel*., "*The Legal System for International Arbitration in Korea*" [2014] Korean Arbitration Review 4. P.18.

staunchest supporter of rebranding and revitalization of the international arbitration industry in Korea.

Subsequent paragraphs will consider a combination of factors that make Korea a vibrant and successful player in the highly competitive world of international arbitration.

## II. General Overview of the Korean Arbitration Laws

The recent years witnessed unprecedented transformations and rapid changes in the arbitration landscape of Korea. By bringing creativity and innovation in the business sector, the Korean government has been successful in developing and commercializing innovative new products and services and also very virtuosic in utilizing its innovative capacities in implementing and advancing dispute resolution services. To this date, KCAB, the only authorized national arbitral institution in Korea, has gained a strong foothold among the international arbitration community in Asia and continues its transformation into a leading arbitral institution.

Korea has a relatively long arbitration tradition. ADR as means of resolving disputes has deep roots in the Korean legal tradition dating back to the Yi Dinasty (1392 – 1910).[21] It has been a common practice for traders to call upon a respected colleague to express a view on disputes between them.[22] Also, Korea has traditionally encouraged the use of arbitration to resolve disputes between domestic parties, particularly for construction disputes. With international trade growing at a brisk pace, arbitration has come to the fore and became a preferable method of dispute resolution among Korean companies involved in cross-border business. Today, Korean companies are among the most fervent users of international arbitration.[23]

The establishment of a permanent arbitration system in Korea begins with promulgation and enforcement of the Korean Arbitration Act in 1966.[24] The Act [25] was first enacted as a stand-alone statute governing both domestic and international arbitrations.[26] In the same year, a separate commercial arbitration committee had been established as a section of the Korean Chamber of Commerce and Industry,[27] which in 1970 transformed into a separate legal entity, the KCAB.

Keeping pace with contemporary developments in international arbitration and acting towards achieving the objective of meeting demands of the business community, Korean legislators introduced comprehensive amendments to the arbitration legislation. In 1999, the

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[21] *Liew Song Kun*., "*Commercial Arbitration in Korea with Special Reference to the UNCITRAL Rules*" [1977] Korean Journal of Comparative Law 5. P. 69.

[22] *Collier John* and *Lowe Vaughan*., "*The Settlement of Disputes in International Law: Institutions and Procedures*" (Oxford University Press, 1999). P. 45.

[23] *MacArthur David*., "*What's «Next» For Arbitration in Korea*" [2019] Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2019/04/19/whats-next-for-arbitration-in-korea/.

[24] *Kim Hong-Kyu*., "*Reality and Problem Areas of Korea's Arbitration System*" [1996] Journal of Arbitration Studies 6. P. 23.

[25] Above fn 19.

[26] *Shin Hi-Taek.*, "*Republic of Korea: Model Law in Asia: the case for Korea*" in "*The UNCITRAL Model Law and Asian Arbitration Laws*" (Cambridge University Press, 2018). P. 116.

[27] *Yoon Byung-Chol, Kim Grant* and *Lee Chul-Won*., "*Arbitration in Korea*" [2013] International Commercial Arbitration in Asia 263.

National Assembly approved extensive amendments to the Korean Arbitration Act which incorporated the UNCITRAL Model Law on International Commercial Arbitration 1985 to a great extent.[28] As Korean legislators highlighted, the purpose of these amendments was to promote international trade and international commercial arbitration by adopting international standards, minimizing domestic court interference, and facilitating enforcement of arbitral awards.[29]

Adhering to the UNCITRAL Model Law as early as in 1999, Korea became the first nation in North-East Asia that fully harmonized its *lex arbitri* with the generally accepted international standards. In 2016, Korea further enacted several important amendments to its Arbitration Act to reflect the new features of the 2006 UNCITRAL Model Law.

In 1973, Korea acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and ratified ICSID Convention in 1967. It also has a well-developed judicial system that is fully conversant with arbitration and have demonstrated its pro-arbitration stance.

The Korean government today continues to endorse the promotion of ADR. Notably, with an objective to invigorate arbitration, the Korean government introduced the Arbitration Industry Promotion Act (Promotion Act),[30] which laid down cardinal principles for promoting the arbitration industry in Korea. The Promotion Act not only reiterates the government's common support of ADR, but it also demonstrates its pro-activeness in creating incentives and encouraging the growth and development of arbitration in the region. The Korean government also actively invests in the infrastructure: it supported the launch of the Seoul International Dispute Resolution Center (Seoul IDRC) in 2013,[31] which was later consolidated with KCAB in 2018, the same year the KCAB INTERNATIONAL was established as an independent international division of the KCAB,[32] to meet the growing demand for cross-border dispute resolution services. For international cases, KCAB introduced separate International Rules in 2011 which made it more attractive to foreign users.[33] Today, the KCAB INTERNATIONAL actively contributes to capacity building in Asia and beyond.

The growing popularity of arbitration in Korea was accompanied by corresponding developments of its *lex arbitri*. In 2016, Korea revised its domestic laws on arbitration to reflect the best practices and it now fully integrates leading international standards. Korean legislators adopted the 2006 UNCITRAL Model Law, praised for its simplicity, flexibility and pragmatism.[34] The principal legislation was amended to reflect the most recent changes to the UNCITRAL Model Law, including provisions regarding the definition of arbitration,

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[28] Above fn 26. P. 117.
[29] Ibid P. 117.
[30] Online resource: "*Arbitration Industry Promotion Act*". Available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42311&lang=ENG.
[31] *Kim Joongi*., "*International Arbitration in East Asia: From Emulation to Innovation*" [2014] Arbitration Brief 4(1). P. 1, 8.
[32] Online resource: "*The Official Launch of KCAB INTERNATIONAL*". Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do.
[33] *Rhie John* and *Byun Shinhong*., "*Development in International Arbitration and Mediation at the KCAB*" [2012] Korean Arbitration Review 1. P. 29.
[34] *Dunna Timothy*., "*Keeping with the times, revisiting the UNCITRAL model law on international commercial arbitration*" [2020] Journal of International Dispute Settlement 11(3).

expanding the scope and application of interim measures, taking evidence in arbitration, and, perhaps most importantly, simplifying the requirements for recognition and enforcement of awards. The changes strengthen the effectiveness of the arbitration process and further help to make it more user-friendly.

In the last several years, Korea has sent a clear message to the arbitration community that its legislature and judiciary endorse a pro-arbitration policy. Korean courts will set aside an award only in limited and defined circumstances pursuant to the Korean Arbitration Act, which is based on the UNCITRAL Model Law.

Together with modern pro-arbitration legislation, arbitration-friendly judiciary, and in-depth expertise in ADR, Korea is today an appealing place for international arbitration. Indeed, Korea earned a reputation of an arbitration eager jurisdiction as it energetically competes with traditional forums and strives for more innovative, cost-efficient and user-friendly experiences. Specific legal changes that made Korea considerably more attractive as a forum for international arbitration are discussed below.

### a) The Devil is in the Detail: noteworthy provisions of the Korean *lex arbitri*

An up-to-date legislation is necessary to attract a greater number of arbitration cases.[35] Although pro-arbitration legislation is a distinct trend in many countries, domestic laws on arbitration, nevertheless, vary greatly from one jurisdiction to another, and certain specific details are what mark the *lex arbitri* out of the mass.

Under the amended Article 3(1) of the Korean Arbitration Act, the definition of arbitration has been expanded. The scope of arbitrable disputes has been widened by encompassing disputes based on both property rights and non-property rights. The amendment eliminated confusion between private and public law matters, as was the case in the previous version of the provision.[36] In Korea, there is no exhaustive list of non-arbitrable matters, however, Article 1 of the Korean Arbitration Act refers to the "disputes in private law".[37]

In this regard, the issue of arbitrability of IP-related disputes garners special attention. The issue is particularly relevant given the fact that Korea is one of the leading holders of IP rights and is home to many leading tech companies. The 2019 KCAB Annual Report reveals that Information Technology ranked 2nd in the list of all arbitration cases, grouped by industry. Out of all cases filed before KCAB, 16% was the Information Technology related disputes, whilst IP-related cases amounted to 3.4%, accordingly. Traditionally, the general view in Korea has been that issues such as the validity of IP rights were non-arbitrable,[38] whilst the recent change in the wording of the arbitration act has made IP-related disputes arbitrable, *in*

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[35] *Werbicki Raymond*., "*Arbitral Interim Measures: Fact or Fiction?*" in "*AAA Handbook on International Arbitration & ADR*" (JurisNet, 2010).

[36] *Shin Chang-Sop*., "*Korea's New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea*" [2006] Journal of Arbitration Studies 16(3). P. 9.

[37] Article 1: «The purpose of this Act is to ensure the appropriate, fair and prompt settlement of disputes in private law by arbitration»; Under Article 3: Arbitration «means a procedure to settle a dispute over property rights or disputes based on non-property rights that the parties can resolve through a reconciliation, not by a judgment of a court, but by an award of an arbitrator».

[38] *Rhie John* and *Noh Harold*., "*Resolving IP Disputes through International Arbitration*" [2016] Korean Arbitration Review 7. P. 15.

*principium*. As such, it is now the prevailing view in Korea that the validity of registered IP rights is an arbitrable issue as long as it has the binding effect between the parties.[39]

Drawing attention to the provisions on arbitration agreements, Article 8(3) of the Korean Arbitration Act provides that an arbitration agreement in writing is deemed to exist when "*the inclusion of an arbitration agreement in the documents exchanged between the parties is asserted by one party and not denied by the other party*". The definition is wider than that under the New York Convention, which is seen by practitioners as a better fit with the current business practices.[40] In today's ever-busy "빨리빨리" ("Ppali-Ppali" that means "hurry-hurry" in the Korean language) environment,[41] multi-million-dollar contracts might be entered orally on the plane or in a zoom conference, therefore, the more liberal approach is generally seen as the more appropriate. This approach demonstrates Korea's credentials as a sound choice of location for resolving business disputes in today's business climate.

Under Korean case law, an arbitration agreement only needs to contain parties' clear intention for arbitration and does not require other provisions such as an arbitral institution, governing law or the place of arbitration.[42] Seoul High Court upheld a skeletal arbitration agreement drafted in abbreviations,[43] and an arbitration agreement that technically referred to a non-existing arbitration institution was found to be valid by the Seoul District Court.[44]

The question that also gathers prominence in international arbitration is the validity of an arbitration clause incorporated by reference. The phenomenon is not unheard of in Korea, as the recent case law became more homogeneous. Generally, the courts uphold arbitration agreements not only where an arbitral clause is stipulated in a contract but also where a contract refers to another document that contains an arbitral clause and the parties deem it part of the contract.[45] A more recent case involved the incorporation of an arbitration agreement through a standard voyage charter party.[46] With regard to the group of companies doctrine (from what doctrine and case law the author has been able to access), suggests that Korean courts only recognize "piercing the corporate veil", and in very limited circumstances, such as when a corporate entity is used by a company or individual in bad faith to circumvent the law or avoid liability in a grossly unfair or unjust manner.[47]

Another noteworthy decision presents the issue of termination of an arbitration agreement. In 2018, the Seoul High Court rejected a party's attempt to terminate an arbitration

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[39] *Baek Yun Jae* and *Ahn Jeonghye Sophie*., "*Challenging and Enforcing Arbitration Awards: South Korea*" [2020] Global Arbitration Review. Available at: https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/south-korea.

[40] *Shin Chang-Sop*., "*Korea's New Arbitration Act and Its Implications for International Commercial Arbitrations in Korea*" [2006] Journal of Arbitration Studies 16(3). P. 12.

[41] *Mechitov Alexander*, *Moshkovich Helen* and *Springer Levi*., "*Economic Success Story South Korean Way*" [2019] Journal of International Finance and Economics 19(3).

[42] Hanjin Heavy Industries & Construction Co. v Hanshin Steel Construction Co., 2005 Da 74344, 31 May 2007 (The Supreme Court of Korea).

[43] Shagang Shipping Co., Ltd. v IDS Co., Ltd., 2005 Na 102982, 10 November 2006 (Seoul High Court).

[44] Guangzhou Shipping v Eagle Shipping, 91 Gahap 45511, 1 May 1992 (Seoul District Court).

[45] Keumjung Co. v Gyeong-Deok Seo (II), 99 Da 13577, 10 April 2001 (The Supreme Court of Korea).

[46] P Trading v D Corp, 2008 Gahap 7003, 24 September 2008 (Busan District Court).

[47] Above fn 30. P. 122.

agreement against a counterparty that had become insolvent based on the impossibility of performance theory.[48]

Furthermore, according to the Korean Supreme Court's position, an arbitration agreement applies not only to contractual claims arising out of the underlying contract but also to any dispute that is directly or closely related to the validity, effect and performance of the underlying contract.[49]

Lastly, while the Korean Arbitration Act is based on the UNCITRAL Model Law, it nevertheless differs from it in several respects. The Korean Arbitration Act also applies to arbitrations between Korean domestic parties. As such, a foreign company, whose Korean subsidiary enters into a contract with another Korean company, need not take any special measures to ensure that there is at least one "foreign" party to the contract, because the procedures for enforcing domestic arbitral awards are similar to those for enforcing a foreign award under the New York Convention.[50]

### b) Provisions Regarding Interim Measures

There are other several noteworthy features of the domestic legislation on arbitration, which make Korea an appealing seat of arbitration. For instance, the power to grant interim measures in international arbitration was historically solely reserved for domestic courts. The question whether the party that's being attached or enjoined under such measures will comply with the tribunal's order was of the utmost concern. The domestic courts' approach towards interim measures rendered by arbitral tribunals varies greatly across jurisdictions. In Switzerland, for instance, the Swiss Federal Tribunal has characterized it as "dangerous" to treat interim measures as an award,[51] whilst in several other jurisdictions interim measures by tribunals are not enforceable as being not final.

Recognizing that protection of parties' rights at the early stage is essential, the Korean Arbitration Act explicitly acknowledged that arbitral tribunals may order interim measures for the first time in 2010.[52] Under the amended Article 18(1) of the Korean Arbitration Act, an arbitral tribunal can, at the request of a party, order any interim measures that it considers necessary, and those interim measures are now enforceable *per se*. With an aim to provide a clearer guidance, the amended provision illustrates various types of interim measures that can be rendered by the arbitral tribunal when so requested. This change sends a positive signal that the Korean arbitration industry assures efficiency and neutrality.[53]

The amended Arbitration Act adopts all of the interim measures available under the Chapter IV A. of the 2006 Model Law, with a minor exception for *ex parte* preliminary orders. Article 18-3 of the Korean Arbitration Act states that arbitral tribunals may modify, suspend

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[48] A v B., 2018 Na 24, 27 April 2018 (Seoul High Court).
[49] Decision No. 2004 Da 67264, 13 May 2005 (The Supreme Court of Korea).
[50] *Kim Grant*., "*Korea's Bali Bali Growth in International Arbitration*" [2015] Pepperdine Dispute Resolution Law Journal 15(3). P. 619.
[51] X. v Y. BV. Judgment of April 13, 2010, DFT 136 III 200.
[52] *Lee Junsang* and *Um Young Shin*., "*The New Arbitration Act of Korea: Focus on the New Interim Measure Regime and Courts' Assistance in Evidence Taking*" [2016] Korean Arbitration Review 7. P.16.
[53] *Suk Kwanghyun*., "*Proposals for the Revision of the Korean Arbitration Act with a Focus on International Commercial Arbitration*" [2012] Seoul Law Journal 53(5) P. 538.

or terminate interim measures. However, it adds a requirement that the tribunal must examine the parties before they do so. Another minor departure from the verbatim wording of the 2006 Model Law is that Article 18-8 of the Arbitration Act allows refusal of recognition or enforcement of an interim measure only if the measure has been terminated or suspended by the tribunal, thus, excluding refusal by the courts at the seat of arbitration or under the laws of which that interim measure was granted. The amended provision provides significant convenience to the parties and clarifies that an interim measure issued by an arbitral tribunal shall be recognized as binding and can be enforced upon application to the competent court.

As such, under the current Korean arbitration regime, arbitral tribunals are explicitly vested with a wide range of discretion to render interim measures in various types and forms. The relevant provisions of the Arbitration Act ensure the ease and further maximized convenience to the parties by providing that an interim measure issued by an arbitral tribunal shall be recognized as binding and can be enforced upon application to the competent court.[54]

In the same vein, Article 32 of the KCAB International Arbitration Rules also explicitly sets forth that the arbitral tribunal, at the request of a party, may order conservatory and interim measures it deems appropriate. The parties may also, by mutual consent, agree on the types and forms of interim measures the tribunal can issue. It is, however, important to note that interim measures may not be directed to third parties and are ineffective to them *in principium*.

This provides a powerful protection of right to property and secures the effectiveness of the final judgment.[55] Without such mechanisms, the adverse party may remove or alter crucial evidence or deplete the assets base.

### c) Who Can Be an Arbitrator and What Could be Awarded?

The amended Korean Arbitration Act deals with yet another issue that has been also the object of intense discussions among the arbitration practitioners. In certain jurisdictions, a question sometimes arises in international commercial arbitrations as to the qualifications of the arbitrators or counsels. As per the Article 12(1) of the Korean Arbitration Act, an arbitrator can be appointed regardless of his or her nationality, unless the parties agree otherwise. Notably, the Korean Arbitration Act does not require an arbitrator or a counsel to be licensed to practice law in Korea or in any other jurisdiction. One exception is, however, active Korean judges, who are prohibited from engaging in any profit-making activities. In the Incheon Airport case, the Seoul High Court confirmed that if a person not licensed as an attorney acted as a counsel in an arbitration it would not affect the award.[56]

Considering the fact that parties often select arbitrators for their unique expertise in a specific field, which enables them, by training and experience, to determine a specific dispute better than a domestic court would do, the amended provision provides further flexibility and fosters a better users' experience.

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[54] Korean Arbitration Act, Article 18-7 (Recognition and Enforcement of Interim Measures), Section 1.

[55] *Marchac Gregoire*., "*Interim Measures in International Commercial Arbitration under the ICC, AAA, LCA and UNCITRAL Rules*" [1999] Am. Rev. Int'l Arb. 10. P. 136.

[56] Incheon International Airport Corporation v Halla Engineering and Construction, 2002 Na 6878, 2 July 2002 (Seoul High Court).

Yet another noteworthy amendment of the Korean *lex arbitri* concerns the types of remedies that are available to the parties to arbitration. The parties can freely agree on the remedies to be sought from the arbitral tribunal, and might even seek remedies that are not available in the domestic courts.[57] In general, domestic courts in Korea do not intervene in an arbitral tribunal's ordering of remedies, damages or profits.[58] It must, however, be noted that punitive damages included in a foreign arbitral award may not be enforced as it be found to violate Korean public policy.[59]

By way of conclusion, the amended Korean Arbitration Act brings Korea closer to meeting international standards in relation to the arbitration procedures. With the objective of modernizing the Korean legal framework on arbitration, the revised Arbitration Act enshrines important legal instruments and principles, further strengthens party autonomy and ensures limited curial interventions, that in turn enhances the attractiveness of Korea as a place of arbitration. Some amendments might seem trivial, but these are small yet concrete steps in order to complete the long journey. The amended Korean Arbitration Act establishes a sound legal framework for the fair and efficient settlement of commercial disputes by means of arbitration, and it is hoped to serve as a powerful tool to lead the future direction of the international arbitration in Korea, bringing more opportunities for international arbitration to flourish.

## III. The Role and Input of Judiciary in Upholding the Korea's Status as an Arbitration Eager Jurisdiction

The domestic courts in Korea have also made a crucial contribution by delivering decisive judgments in aid of international arbitration, further upholding the status of Korea as an arbitration eager jurisdiction.

Arbitration, despite being praised for its autonomous nature, arbitration, in certain instances depends on assistance from state courts and public authorities as it lacks certain procedural powers traditionally vested in state courts. Evidence taking is one of the most explicit examples when the state court's assistance in arbitration proceedings might be required. State courts can also complement the arbitral tribunal's competence in protecting interim rights.[60]

The Korean court system has earned an international reputation as one of the most efficient and cost-effective judiciaries in the world,[61] and consistently maintains the pro-arbitration stance.[62] When asked to appoint a chair-arbitrator in an international *ad hoc*

[57] *Baek Yun Jae, Lee Hyung Keun, Ahn Jeonghye Sophie* and *Park Hyunah*., "*Arbitration procedures and practice in South Korea: overview*" [2020] Thomson Reuters, Practical Law. Available at: https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[58] *Kim Joongi*., "*International Arbitration in Korea*" (Oxford University Press, 2017). P. 304.

[59] *Mok Young-Joon*., "*Sangsa Jungjebeop [Commercial Arbitration]*" (Pakyoungsa, 2011) P. 326.

[60] *Lee Junsang* and *Um Young Shin*., "*The New Arbitration Act of Korea: Focus on the New Interim Measure Regime and Courts' Assistance in Evidence Taking*" [2016] Korean Arbitration Review 7. P. 20.

[61] World Bank. 2017. Doing Business 2017: Equal Opportunity for All. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0948-4.

[62] *Shin Hi-Taek*., "*Changing Scene in International Arbitration and Notable Developments in Korea*" [2018] Korean Arbitration Review 9. P. 6.

arbitration case with a seat in Seoul, the Seoul Central District Court appointed a foreign arbitrator of neutral nationality after requesting a list of recommendations from the KCAB.[63]

It is well settled that domestic courts in Korea will refuse to hear an action regarding a dispute falling under an arbitration agreement unless such agreement is found to be «nonexistent, null and void, inoperative or incapable of being performed», as per provisions of the New York Convention.[64] In principle, as highlighted by the Seoul High Court, domestic courts in Korea cannot supplement nor alter final arbitral awards.[65] Despite some past controversies at the local courts level, the Korean Supreme Court noted in particular that courts should not second-guess arbitrators in international cases.[66]

Domestic courts elucidate the minimum requirements with which the parties must comply in order to uphold the parties' decision to opt to arbitration. Insofar as the arbitration agreement acknowledges the parties' intent to submit the relevant dispute to arbitration, Korean courts have continuously enforced arbitration agreements despite various forms of drafting defects, such as the inclusion of ambiguous or equivocal elements. For instance, the Seoul High Court upheld a skeletal arbitration agreement drafted in abbreviations.[67]

In Korea, domestic courts take a pro-active stance to ensure the smooth running of the arbitral proceedings. Under the amended provisions of the Korean Arbitration Act, domestic courts can help to resolve many pressing challenges relating the procedural issues, for instance, in taking evidence. It has been reported that interim measures may be obtained from Korean courts easier than in other jurisdictions.[68] No cases when Korean courts intervened to frustrate arbitral proceedings have been reported.[69]

Switching the gears to the issue of enforceability of arbitral awards, which is touted as arbitration's "most valuable characteristic".[70] One of the key amendments to the Korean Arbitration Act was introduction of a simplified process for recognition and enforcement of foreign arbitral awards, which now is carried out by issuing an order (rather than a judgment, which requires an oral hearing), stimulating more expeditious and streamlined enforcement process. Importantly, the Korean Arbitration Act provides that awards can only be set aside by a judgment, thus, drawing crucial distinction to reflect the general view that a court cannot easily set aside an award and it must carefully review the reasons before doing so.

In the same vein, under the Korean Arbitration Act, arbitral awards cannot be appealed before the courts. The Korean Arbitration Act defines an arbitration as "*a procedure to resolve a dispute by an award of arbitrators under an agreement between parties, not by judgment of*

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[63] Decision No. 2016Bihap30170, 19 July 2017 (Seoul Central District Court).
[64] Above fn 58. P. 337.
[65] Decision No. 2013Na13506, 17 January 2014 (Seoul High Court).
[66] *Chang Seung Wha*., "*Article V of the New York Convention and Korea*" [2008] Journal of International Arbitration 25(6). P. 865.
[67] Shagang Shipping Co., Ltd. v IDS Co., Ltd., 2005 Na 102982, 10 November 2006 (Seoul High Court).
[68] *Hopkins Bryan*., "*A Comparison of Recent Changes in the Arbitral Laws and Regulations of Hong Kong, Singapore and Korea*" [2013] Korean Legislation Research Institute Repository 3(1). P. 302.
[69] Above fn 66. P. 306.
[70] "2018 International Arbitration Survey: The Evolution of International Arbitration" (Queen Mary University of London in partnership with White & Case). Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

*a court*", which is to exclude the national court's jurisdiction over a dispute (Article 3(1), Korean Arbitration Act). There is a lower court decision invalidating an arbitration agreement that provided for a right to appeal an arbitral award to a court of competent jurisdiction.[71]

Through the years, domestic courts in Korea have taken an arbitration-friendly stance regarding enforcement of the foreign arbitral awards. In general, domestic courts in Korea refuse enforcement of final arbitral awards only in rare cases where one or more of the grounds under the Arbitration Act (Article 38) or the New York Convention (Article V) exist.[72] The Korean Supreme Court, by far, has never refused enforcement on the public policy grounds,[73] and has held that the public policy exception must be construed narrowly.[74] In 2019, an appellate court ordered the enforcement of an ICC award in favor of a foreign investment company fund against a subsidiary of Korea Deposit Insurance Corporation.[75]

## IV. Korea's Premier Arbitration Institution: a promising start and steps forward

As an arbitration eager jurisdiction, Korea went an extra mile to promote arbitration industry. In 2018, KCAB INTERNATIONAL, a separate division of KCAB was formed to meet the growing demand for efficient resolution of cross-border disputes and to promote Seoul as a seat of international arbitration.

The KCAB is the only statutory recognized arbitral institution in Korea. With a wealth of experience in providing ADR services in Korea, KCAB has firmly established itself as a leading regional ADR provider in Northeast Asia. It has handled over 7,000 arbitration cases and 15,000 mediation cases, including court-annexed mediations. In 2019, a total of 443 arbitration cases were filed with KCAB, including 70 international cases.[76] That represents a substantial increase from the 393 cases filed in 2018, and the 385 cases filed in 2017. Compared to the previous year, 2019 saw a growth of 12,7%. The number of new arbitration cases filed with the KCAB continues to increase steadily.

In 2019, the total sum in dispute of the administered cases amounted to over USD 875 million. Notably, there was a remarkable increase of 200% in the number of high value cases. The highest ever dispute amount for a single arbitration case in the institution's history is USD 1.39 billion.[77] Administrative fees at KCAB, according to the GAR Guideline,[78] are lower than in other leading arbitral institutions.

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[71] Decision No. 2002 Na 68982, 24 October 2002 (Seoul High Court).

[72] *Yoon Byenchol* and *Menard Richard*., "*Role of Korean Courts in International Arbitration*" [2012] Korean Arbitration Review 1. P. 15.

[73] *Shin Hi-Taek*., "*Changing Scene in International Arbitration and Notable Developments in Korea*" [2018] Korean Arbitration Review 9. P. 6.

[74] Decision No. 2006 Da 20290, 28 May 2009 (The Supreme Court of Korea).

[75] *Lim Sue Hyun*., "*Innovation in Progress – developments in Korea after the launch of KCAB International*" [2021] The Asia Pacific Arbitration Review. P. 19.

[76] KCAB Annual Report 2019. Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=174&CURRENT_MENU_CODE=MENU0017&TOP_MENU_CODE=MENU0014.

[77] Above fn 38. P. 11.

[78] Guide to Regional Arbitration (Global Arbitration Review, 2020) vol. 6. Available at: https://globalarbitrationreview.com/survey/the-guide-regional-arbitration/2020.

With regard to the parties, United States ranked the first in the number of users of KCAB. It is noteworthy that Vietnam overtook China and became the second largest user of KCAB services in 2019.

The KCAB reports that, based on the cases it has administered, the most commonly arbitrated disputes are construction and real estate-related, followed by disputes involving trade, technology and telecommunications, and maritime issues, accordingly.

In 2013, Seoul IDRC opened its doors in Gangbuk and later moved in 2018 to Gangnam, the heart of the business district of Seoul. Equipped with the state-of-the art technology, the hearing facility offers an elevated level of services. The project was carried out by the Korean Bar Association and the KCAB, with support and funding from the Seoul Metropolitan Government and the Korean Ministry of Justice.[79] This is further indication of Korean government's determination to establish the country as a primary arbitral hub in the world.

The KCAB International Arbitration Rules were adopted in 2011 and subsequently updated in 2016. The truly unique feature of the KCAB International Arbitration Rules is their coherence, clarity, and the particular attention to detail. In cross-border commerce, arbitration is seen as providing a way for companies from different parts of the world to level the procedural playing field.[80] With this in mind, KCAB paid great attention to adopting procedural provisions with more precise and explicit rules.

As a reaction to the increased number of international arbitration proceedings involving multiple parties, the 2016 KCAB International Arbitration Rules outline a detailed provision for conducting multi-party arbitrations. In contrast to court proceedings, generally the consent of all parties is required before additional parties or related disputes can be joined to existing arbitration proceedings.[81] In multi-contract and multi-party transactions' context, joinder issue has proven itself to be a highly controversial and complicated issue.[82]

Article 21 of the KCAB International Arbitration Rules sets out a detailed procedure in which third parties can be joined in pending arbitration proceedings. The requirements for joinder are: when the joining party is a party to the same arbitration agreement with the parties, its written consent is required for joinder; the provision also permits joinder of one who is not a party to the arbitration agreement provided that the joining party and all the parties have consented to joinder in writing. Article 21(3) grants discretion to the tribunal by providing that it may refuse joinder if it is not appropriate in the circumstances of the case, for instance, when it will cause a delay of the proceedings. Joinder may be permitted only after the constitution of the arbitral tribunal.

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[79] *Cha Dami* and Song Zachary., "International arbitration in South Korea: overview of KCAB International's Statistic for 2019" [2020] Lexology. Available at: https://www.lexology.com/library/detail.aspx?g=c8b15846-4d65-47ac-82c8-6581d922161c.

[80] *Park William*., "*Arbitration's Protean Nature: The Value of Rules and The Risks of Discretion*" [2003] Arbitration International 19(3). P. 2.

[81] *Strong SI.*, "*Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?*" [1998] Vand. J. Transnat'l L. 31. P. 922.

[82] *Redfern Alan* and *Hunter Martin.*, "*Law and Practice of International Commercial Arbitration*" (Sweet & Maxwell, 1991). P. 184.

One of the conventional benefits of international arbitration is its speed.[83] There is, however, a growing concern that arbitration saves neither money nor time, and it is becoming quite similar to litigation.[84] To streamline the arbitration process, the 2016 KCAB International Arbitration Rules enshrine the default expedited procedure for certain disputes. The main features of the procedure are that disputes are resolved by a sole arbitrator, with only one hearing, within shorter time limits for rendering an award in a summary form.

The KCAB's diverse panel of renowned arbitrators, highly experienced in various fields, provides additional assurance to the parties that their dispute will be resolved in an efficient and most-proper manner.

### a. Navigating Challenges: KCAB's creative leadership and response to the contemporary needs of users

KCAB adapts promptly and responses proactively to the contemporary challenges, facilitating a move to a more user-friendly arbitration. As the technology advanced significantly over the last decade, videoconferencing has become a viable alternative to traditional in-person witness examinations. Accordingly, the KCAB developed the Seoul Protocol on Video Conferencing in International Arbitration (Seoul Protocol).[85]

Korea's cutting-edge I.T. infrastructure is another major attribute. The country is ranked as number one for the world's fastest internet connectivity and access. In Korea, the mobile internet speed is 3.4 times faster than the world average of 35.96 Mbps.[86] With this level of I.T. infrastructure, the KCAB is in unique position to utilize various technological solutions to improve its users' general experiences. Seoul IDRC offers an innovative, sophisticated virtual hearing service, that facilitates a fast, stable and seamless connection for conducting hearings remotely.[87]

Due to the continued worldwide spread of COVID-19, many hearings are conducted virtually. KCAB remained fully operational and offered its users the possibility to conduct hearings virtually or semi-virtually. With the use of high-definition video quality cameras, it is possible to ensure that facial expressions and body gestures are clearly visible. As opposed to an in-person hearing, video conferencing provides a closer-up view of witnesses and allows for video replays (if recording permitted) for analyzing body language. Through the installation of rotating cameras, parties and tribunals may monitor the witnesses to remove any outside influence.

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[83] "2018 International Arbitration Survey: The Evolution of International Arbitration" (Queen Mary University of London in partnership with White & Case). Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

[84] *Overcash Allen*., "*Fast Tracking Construction Arbitrations*" [2011] Colorado Lawyer 40(8). P. 69.

[85] *Hong Jiyoon* and *Hwang Jong Ho*, "*Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing*" [2020] Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

[86] Online resource: Korea has world's fastest mobile internet for 2nd straight month. Available at: https://www.korea.net/NewsFocus/Sci-Tech/view?articleId=191128.

[87] Online resource: "*About Seoul IDRC V-Hearings*". Available at: http://www.sidrc.org/idrc/en/page/hearing.do.

Article 24(2) of the 2016 KCAB International Arbitration Rules expressly permit hearings and meetings to be conducted at any physical location that the tribunal deems appropriate. Commentary to the 2016 KCAB International Arbitration Rules explain that this provision exists to enhance the efficiency and convenience of arbitrations, and videoconferencing would naturally be allowed by this reasoning.[88]

Korea and local lawyers are pioneers in the movement towards virtual hearings. The Seoul Protocol was drafted to enable users to identify potential issues with videoconferencing and to address them effectively by making necessary preparations in advance. The Seoul Protocol offers a standard set of rules that counsels and arbitrators may use for guidance on how to address some of the logistical challenges presented by remote hearings. While not directly applicable to all circumstances involving video hearings, and principally targeted at international arbitration practitioners, the Seoul Protocol offers helpful default standards that may be more widely applicable to streamline video-conference proceedings.[89]

These technologically advanced solutions coupled with logistical best practices, address a majority of concerns on the credibility of virtual hearings. Korea is in the forefront in ensuring efficiency, cost-effectiveness of international arbitration.

In the same vein, considering Korea's leads in high-speed internet and advanced information and communication technology infrastructure, there is a great potential for development of ODR processes. As a global hub of I.T., the Korean government has been investing heavily into innovative technologies such as artificial intelligence which could also greatly benefit arbitration industry in the very near future.

### b. The Best of Both Worlds – hybrid forms of arbitration

In the realm of ADR, mediation and arbitration remain the most popular methods for resolving disputes. As is often said, hybrid forms of arbitration and mediation (Med-Arb, Arb-Med, Arb-Med-Arb) meld the two processes and provide the parties with the best of both worlds by guaranteeing more efficient resolution of their dispute through one process or another.[90] With the introduction of the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), the attractiveness of hybrid forms of international arbitration has increased. However, hybrid forms of arbitration and mediation in the wrong hands presents a minefield of problems.[91] KCAB has a broad experience in dealing with domestic court-annexed mediations and has already administered more than 15,000 mediations.[92] Also, KCAB has been running a special training program for mediators since 2012.

KCAB INTERNATIONAL is planning to enhance its rules to allow more flexibility in the use of mediation. As reported, KCAB is in the process of making mediation rules

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[88] *Kim Inho*, Korean Council for International Arbitration., "2016 KCAB International Arbitration Rules Commentary" (KCAB INTERNATIONAL, 2018).
[89] Above fn 82.
[90] *Weisman Martin* and *Stark Sheldon*., "*Is Med/Arb the Process for You*" [2016] Michigan Bar Journal 94(6). P. 26.
[91] *Lang Georgialee*., "*Family Law MED/ARB: The Best of Both Worlds*" [2013] Advocate (Vancouver Bar Association) 71(6). P. 841.
[92] Above fn 76.

specifically tailored to international disputes.[93] The initiative is expected to boost the use of ADR in the region, considering the Asian culture of disliking litigation and appreciating value of relationships.

### c. Capacity Building Initiatives: promoting diversity in arbitration

The phrase "pale, male, and stale" is frequently used to describe the lack of diversity in arbitration.[94] KCAB INTERNATIONAL led the creation of KCAB Next which aims to promote arbitration among younger and diverse community of professionals and students. The idea behind the initiative is to encourage and support professional development of its members through various educational and social events. The primary aim is to facilitate the sharing of know-how and build skills through collaboration among practitioners, academia, and students. The unique feature of the KCAB Next is that it does not set any age limits and welcomes any interested persons to participate in the project. KCAB Next was established to foster diversity, professional development and to inspire next generation of lawyers to become ADR experts.

The KCAB INTERNATIONAL's case management team also deserves to be mentioned separately. Being led by the Chairman, Professor Hi-Taek Shin, and the Secretary-General, Ms. Sue Hyun Lim, both highly esteemed figures in the Korean arbitration community and beyond, the international team of case managers, admitted to practice in Korea, New York, Washington D.C., and New Zealand, brings a myriad of benefits to the users. Thanks to each member's cultural background, language abilities and extensive experience in international arbitration, KCAB International delivers the best user experience.

## V. The Future is Now: Korea's distinct geo-political and socio-economic position as a key determinant of development

Recent changes to the Korean *lex arbitri*, KCAB International Arbitration Rules and KCAB's pro-active stance ushers in a new era for Seoul as a new hub for international arbitration. Korea's unique geo-political location merits particular attention: it is strategically located in close proximity to China, Japan and Russia. Setting aside all the differences, one of the most visible set of characteristics of these countries' is their legal systems, that are based on the principles adopted from the civil law tradition. One can certainly argue that Seoul can attract users from China, Japan and other East Asian countries who seek civil-law-centric model of arbitration that replicates the proceedings followed by their domestic courts. Whilst Asia is home to a number of world-class arbitral institutions that have recently made great progress, they are, for the most part, located in common law jurisdictions. Korea's civil law background does not make it a lesser attractive seat for users from common law jurisdictions. To date, KCAB has managed a lot of arbitration cases filed by various countries and continents, with the largest percentage being 49.3% in Asia, followed by 16.4% in North America and 15.1% in Europe. In 2019, the United States ranked the first in the number of users of KCAB INTERNATIONAL. Arbitrators appointed by KCAB INTERNATIONAL, as per 2019 Report,

[93] *Shin Hi-Taek*., Keynote Speech titled "*Proposal for facilitating use of international mediation*" delivered at V Asia Pacific Mediation Conference (11 December 2020), Conference Paper. P. 6.
[94] *K.V.S.K Nathan*., "Mealey's International Report" [2000] Mealey's International Arbitration Report 15. P. 24.

constituted arbitrators from Germany, Australia, the United Kingdom, whilst arbitrators from the United States of America were the top choice.

Despite already strong interest by users from common law jurisdictions, stable and predictable Korean *lex arbitri* and judicial support of arbitration are increasing the country's prospect of becoming a prominent seat in Asia, providing also an alternative civil law jurisdiction seat to parties and counsels who may be more familiar with civil law procedures.[95]

To illustrate the potential for growth in that direction, Russian companies, by way of example, faced with the western sanctions, had been forced to seek alternative forums for conducting arbitrations. In practical terms, much controversy arose on whether western arbitrators' services amounted to "technical assistance" prohibited by the sanctions laws, the asset-freezing, limitations on international bank transfers created further practical obstacles to conducting arbitration proceedings in traditionally favored European countries.[96] As a result, businesses had to turn towards Asian ADR providers.[97] HKIAC, for instance, was among the first to be granted permission to operate as a permanent arbitration institution in Russia.[98]

In terms of actual numbers, the bilateral trade between Korea and Russia has shown an upward trend with the goal to reach $30 billion by 2020.[99] The recent period saw a significant increase in the flow of Korean investment into Post-Soviet countries with major Korean companies (such as Samsung and Hyundai) trying to increase their market share in the region. President Moon Jae-in announced New Northern Policy (NNP), to improve ties with northern neighbors, whilst Russia was named a "key partner".[100]

Russia, for its part, started to pay more focused attention to the country's Far Eastern territories. Russia's plans for the development of its Pacific regions require closer cooperation with the neighboring states and generally correlate with Korea's desire to expand ties with Eurasian countries. With enhanced trade connections, steep increased number of commercial activities, there will inevitably be a heightened demand for independent dispute resolution providers.[101] As such, Korea has a great potential for promoting itself as a new, promising arbitral seat for users from the civil law centered countries.

### a. Opportunities in Niche Sectors: Entertainment, Information Technology and beyond

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[95] *Chung Liz* (*Kyo-Hwa*)., "*International Arbitration in South Korea: A new Push Forward*" [2018] Proceedings of the ASIL Annual Meeting 112 P. 98-100.

[96] *Gareev Rinat*., "*Russian Response to Western Sanctions: Exclusive Jurisdiction of State Commercial Courts*" [2020] CIS Arbitration Forum. Available at http://www.cisarbitration.com/2020/06/25/russian-response-to-western-sanctions-exclusive-jurisdiction-of-state-commercial-courts/.

[97] *Cheng Teresa* and *Joe Liu*., "*Russia Turns East: The Use of Hong Kong Arbitration for Russian Disputes*" [2017] Kutafin University Law Review 4(2). P. 458.

[98] Online resource: "*HKIAC permitted to administer disputes in Russia*". Available at: https://www.hkiac.org/news/hkiac-permitted-administer-disputes-russia.

[99] *Suk-yee Jung*., "South Korea and Russia to Work on Service and Investment FTA" [2019] Business Korea. Available at: http://www.businesskorea.co.kr/news/articleView.html?idxno=36377.

[100] Online resource: "*2020 New Year's Address by President Moon Jae-in*". The Republic of Korea. Available at: https://english1.president.go.kr/BriefingSpeeches/Speeches/741.

[101] *Lew Julian* and et al., "*Comparative International Arbitration*" (Kluwer Law International, 2003). P.1.

Arbitration industry in Korea has a great potential for growth in certain niche sectors. Entertainment, Information Technology (I.T.) and cryptocurrency are some of the fields that could bring more international arbitration business in Korea.

The construction sector is a major industry in Korea, with a contribution of about 67.4 trillion won to GDP in 2018.[102] Despite the negative effects of COVID-19, the construction industry is nevertheless expected to recover among the first. In Korea, arbitration of construction disputes is not novel. The KCAB Annual Report for 2019 reveals that 25% of all filed cases were related to construction industry, although majorly of which are domestic arbitrations. As such KCAB accumulated extensive experience over the years and can provide a full range of dispute resolution services to the construction industry for fast and efficient resolution of international projects.

As a well-recognized leader in information and communication technology, Korea is uniquely positioned to offer arbitration services for the companies within these sectors. In the 2020 Bloomberg Index Innovation Index, Korea secured the second place as a nation with high concentration of patent activity, high-tech density, innovative and technologically advanced manufacturing.[103] Korea is home to global leading electronics and I.T. companies, such as Samsung and LG, that might prefer to resolve their IP related cases in arbitration. Korean government is also heavily investing in artificial intelligence and released the 2020 Digital New Deal, which emphasizes its efforts to turn Korea into an AI powerhouse.[104]

Also, another possible avenue for expanding arbitration industry is entertainment and media sectors. Today, the world witness phenomenal growth of K-Pop, Korean movies and online games, to name a few. The Korean government considers the entertainment industry as a major driver for the future national economy.[105]

Although Korea has already made extensive progress in promoting arbitration in these sectors among local companies, it is now gaining a momentum by establishing itself as a hub for international arbitration. The aforementioned sectors are only a few industries that might fuel the use of international arbitration in Korea. Blockchain-related technologies, cryptocurrency and certain other emerging technologies could bring more arbitration business in Korea.

## Concluding remarks

[102] *Statista*. "Gross domestic product (GDP) from the construction sector in South Korea from 2009 to 2018". Available at: https://www.statista.com/statistics/756955/south-korea-gdp-from-the-construction-sector/.

[103] *Jamrisko Michelle* and *Lu Wei., "Germany Breaks Korea's Six-Year Streak as Most Innovative Nation"* [2020] Bloomberg. Available at: https://www.bloomberg.com/news/articles/2020-01-18/germany-breaks-korea-s-six-year-streak-as-most-innovative-nation.

[104] *Stangarone Troy*., "*South Korea's Digital New Deal*" [2020] The Diplomat. Available at: https://thediplomat.com/2020/06/south-koreas-digital-new-deal/.

[105] U.S. Department of Commerce. "*South Korea – Country Commercial Guide, 2020*". Available at: https://www.trade.gov/knowledge-product/korea-entertainment-and-media.

In roughly half a century, Korea emerged from a country lacking reliable electricity to becoming the center of the global economy. Rapid expansion of cross-border commercial relationships has fueled the use of international arbitration as a preferred method of dispute resolution.

The globalization has created exciting opportunities for the development of commercial arbitration in the Asia-Pacific region, and Korea took colossal steps towards supporting development of international arbitration. In the midst of intensifying competition in the market for international arbitration services, Korea demonstrated innovative and pro-active approach. Korea not only evolves into neutral and transparent seat, but also its judiciary consistently maintains the pro-arbitration stance. The government is the staunchest supporter of rebranding and revitalization of international arbitration industry in Korea.

KCAB INTERNATIONAL has also taken extraordinary strides towards making a reputable name for itself in the international arbitration scene. It has lifted the Korean arbitration industry to international prominence and continues to gain a stronger foothold as a viable and credible ADR provider.

As an arbitration eager jurisdiction, it is expected that Korea will continue to implement innovative features to advance cross-border dispute resolution services. With more innovative and flexible solutions, Korea will stand head and shoulders above other illustrious arbitral hubs.

# Thoughts on the impact of international sanctions on international arbitration proceedings involving sanctioned practitioners

Steve Ngo*

## Introduction

In August 2020, the United States Treasury imposed sanctions on ten top officials from Hong Kong SAR and Mainland China, including the Chief Executive of Hong Kong SAR, Carrie Lam, which involved having all property in the US seized and financial assets frozen.[1] In recent times, we are increasingly hearing more about 'sanctions' although chiefly we are generally familiar with diplomatic sanctions which are enacted as declarations against *personae non gratae* or persons declared not welcome to enter the territory of a state.[2] Sanctions are not new; they could be a penalty that is imposed by a state when a person ignores or does not obey a rule or a law. They could be imposed as censures and retaliations, which can be equated to 'shield' and 'sword' so to speak. Due to recent geopolitical issues involving China and some western countries, on 26 March 2021, the Ministry of Foreign Affairs of the People's Republic of China ('MFA') announced sanctions ('263 Sanction') on 'Relevant UK Individuals and Entities,'[3] which included Essex Court Chambers ('ECC'), a large set of English barristers' chambers in London.

At the outset, it is imperative to state for the record that the purpose of this short commentary is not to study the international law aspects dealing with sanctions but the potential impact of the 263 Sanction on international commercial arbitration. Likewise, this commentary will not deal with the circumstances leading to the 263 Sanction, about which readers can familiarise and appraise themselves. This commentary focuses on the effect and impact of the 263 Sanction on members of ECC who may have been involved as arbitrator or counsel in ongoing international arbitration cases or may be involved in such capacities in future international cases. More broadly, the analysis in this commentary would apply to other future sanctions by other states on other arbitral professionals.

### 'Doing business'

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[1] BBC News, 'Hong Kong: US Imposes Sanctions on Chief Executive Carrie Lam' (London, 8 August 2020) <https://www.bbc.com/news/world-us-canada-53699084> accessed 3 April 2021.

[2] Peter Cane and Joanne Conaghan (Eds), *The New Oxford Companion to Law* (OUP, 2008) 1045.

[3] 'Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities', <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1864366.shtml> accessed 2 April 2021.

Quoting the official announcement of the MFA of the 263 Sanction dated 26 March 2021:

> 'As of today, the individuals concerned and their immediate family members are prohibited from entering the mainland, Hong Kong and Macao of China, their property in China will be frozen, and Chinese citizens and institutions will be **prohibited from doing business with them**.'
>
> *(Emphasis added)*

According to the MFA announcement, the 263 Sanction was imposed on several UK individuals and entities including ECC due to what was described as acts that '*maliciously spread lies and disinformation*'[4]. Afterwards, ECC published a statement on its website stating that they understood the sanction to be in connection to a legal opinion written by four of its members on instructions by certain organisation(s).[5] It was reported that ECC subsequently removed the legal opinion from its website following the sanction announcement where it has *"more than 90 barristers and Singapore Members practising full-time as members*".[6] Meanwhile, *The Global Times* quoted prominent Chinese academics who warned that '*[t]he removal of the reference from Essex Court Chambers' website is far from enough'*.[7]

The plain reading of the 263 Sanction suggests that, unless the Chinese government rescinds the sanction, it applies to any person who was a member of ECC on 26 March 2021.

The 263 Sanction imposes an unequivocal prohibition of Chinese citizens and institutions from doing business with the sanctioned persons and entities. One might ask, what constitutes 'doing business' in this context? According to the Oxford Dictionary, 'business,' *inter alia*, refers to a 'person's regular occupation profession, or trade', 'an activity that someone is engaged in', 'Commercial activity' or 'Trade considered in terms of its volume or profitability.'[8]

Arguably, therefore, the term 'doing business' is broad and seeks to encompass many activities regardless of whether there is a derivation of profits/payments or not between Chinese citizens and institutions on the one hand and persons who are/were members of ECC on 26 March 2021. The term "doing business" would clearly capture any business activity or professional relationship that is not done on a charitable/gratia basis or any relationship that is not undertaken as a friendship. It would capture the formal rendering of activities arising from a profession, vocation, trade and craft. In the context of arbitration, it would likely involve the following aspects of 'business' conducted between persons who are/were members of ECC on the date of the 263 Sanction where they are:

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[4] *Ibid*.
[5] See, '*Essex Court Chambers statement on sanctions imposed by Chinese government'* https://essexcourt.com/essex-court-chambers-statement-on-sanctions-imposed-by-chinese-government/.
[6] Primrose Riordan and Jane Croft, 'UK chambers removes Xinjiang genocide opinion reference after China sanctions' *Financial Times* (London, 28 March 2021) <https://www.ft.com/content/dc74a008-3cc5-44b8-966f-085773ba0674> accessed on 5 April 2021.
[7] Xu Keyue and Li Sikun, 'A UK chambers' removal of a legal opinion defaming Xinjiang shows China's counter-sanctions are an effective deterrent against rumors: experts' *The Global Times* (Beijing, 29 March 2021) <https://www.globaltimes.cn/page/202103/1219780.shtml> accessed on 5 April 2021.
[8] <https://www.lexico.com/definition/business>.

(i) Acting as an arbitrator
(ii) Acting as a counsel/party representative in arbitration proceedings
(iii) Acting as a legal expert in arbitration proceedings

We will in turn attempt to examine each of the above aspects and the potential impact of the 263 Sanction on ongoing/pending/future arbitration proceedings as well as the enforcement of a related award against a Chinese person or institution.

Firstly, a sanctioned person acting as an arbitrator: at the outset, the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') contains only provisions dealing with removal of arbitrators due to impartiality and independence,[9] or failure or impossibility[10] to act. In terms of defining the relationship between an arbitrator and the parties, its appointment is said to be *intuitu personae* ('because of the person') meaning to say, an arbitrator is 'appointed' because of the person due to the doctrine of party autonomy in arbitration. This is diametrically opposed to national court litigation as litigant parties before court proceedings are not able to choose judges *per se* and their dealings throughout the proceedings involve the judicial system but not with the individual judges.

Under English law and in arbitrations seated in England, an arbitrator engaged by the parties does not imply an employer-employee relationship, as held by the UK Supreme Court in the case of *Jivraj v Hashwani*[11] where it was established that an arbitrator is not an employee of the parties or disputants. However, in the course of arbitration proceedings in any seat of arbitration, the parties are expected to engage with the arbitral tribunal in a rather significant magnitude, such as making submissions, receiving orders/directions and its compliance, oral arguments, and be bound by the final and binding arbitral awards made by the tribunal. Moreover, in institutional administered arbitrations, the parties appoint the arbitrators through the applicable procedural framework of 'nomination' then 'confirmation' by the institution.

Nevertheless, the manner of the appointment of the arbitrator does not matter in this context, whether by the parties or institutions, since eventually, the parties are expected to be 'engaging in an activity' relating to arbitral profession or vocation, with the arbitral tribunal. Arbitrators expect to be paid for performing their services as an arbitrator. In these present circumstances, it is clear that Chinese citizens and institutions as well as any person (who was a member of ECC on 26 March 2021) would all be equally in breach of the 263 Sanction as soon as any payment is to be made to a person who was a member of ECC on 26 March 2021. The opposing party to a Chinese citizen or institution is likely to invoke its right to party autonomy in appointing any person who was a member of ECC on 26 March 2021 as party-nominated arbitrator. There is no need to deal with arbitral proceedings seated in China (including Hong Kong and Macau) since a person who was a member of ECC on 26 March 2021 would not be

[9] UNCITRAL Model Law, article 12(1) & (2).
[10] *Ibid*, article 14.
[11] Jivraj v Hashwani [2011] UKSC 40.

even allowed to enter the country nor sit as arbitrator nor act as counsel in any Chinese seated arbitrations.

**Potential challenge of a person who was a member of ECC on 26 March 2021 from acting as party-nominated arbitrator in seats of arbitration outside China**

It is more important to focus on the situation of what course of action arbitral institutions would be likely to take in arbitrations seated outside China. It is very likely that arbitral institutions would not be likely to confirm such a person to be an arbitrator where there is a certainty that any arbitral award that may need to be enforced in China, Hong Kong or Macau will be refused recognition and enforcement for being in direct breach of the 263 Sanction. Article V (2)(b) of the New York Convention entitles the courts of a Contracting State to refuse recognition and enforcement of an award when they find that such recognition or enforcement would be contrary to its public policy. Any award rendered by any tribunal which may compose of an arbitrator who was a member of ECC on 26 March 2021 would very likely be deemed to be in breach of both the laws of China as well as China's public policy. The 263 Sanction is a regulation or rule implemented by China and one can expect the State to uphold and implement its own decree. In the event that the arbitral institution does confirm a party nominated arbitrator who was a member of ECC on 26 March 2021, one can expect there to be challenges made against such an arbitrator under different grounds in both UNCITRAL Model Law jurisdictions as well as non-UNCITRAL Model Law jurisdiction.

For UNCITRAL Model Law jurisdictions, one can anticipate challenges to be brought in cases where the governing law is Chinese law or where there is a clear possibility that the award would need to be enforced in China. The anticipated challenge may be the premise that it would be a breach Article 34(2)(iv) ('**the composition of the arbitral tribunal** or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with **a provision of this Law from which the parties cannot derogate**, or, failing such agreement, **was not in accordance with this Law.'**) Since it would be illegal under the 263 Sanction for any Chinese citizen and institution to conduct business with any arbitrator who was a member of ECC on 26 March 2021, one can also anticipate that Chinese citizens and institutions can legitimately boycott the arbitration proceedings and then challenge any award at the seat of the jurisdiction. Such Chinese citizens and institutions may therefore also be expected to bring another challenge premised on a breach of Article 36(1)(a)(i) ('*a party to the arbitration agreement referred to in article 7 was under some incapacity*') if the challenged arbitrator was not removed from sitting as arbitrator in the arbitration.

It is thought likely that arbitral institutions with branches in China including the ICC, HKIAC and SIAC would have to comply with the 263 Sanction and not allow a person who was a member of ECC on 26 March 2021 to be confirmed as arbitrator or remain as arbitrator in any of their institutional administered cases in China or outside China. This is because they would also hold official permission from the Chinese government to be able to administer arbitrations or conduct marketing activities for their respective institutions in China. Those institutions who

are registered in China would themselves be likely to be considered to be deemed as a Chinese institution. If so, these institutions would themselves run the risk of having their operations in China shut down for being in breach of the 263 Sanction. One can therefore expect that arbitral institutions located outside China would also have to be careful not to allow any person who was a member of ECC on 26 March 2021 to be appointed as arbitrator or to continue as arbitrator in cases involving Chinese citizens and institutions.

The fact that ECC was highlighted as a target under the 263 Sanction may in itself give rise to an additional challenge made against a potential arbitrator who was a member of ECC on 26 March 2021. One can foresee a challenge made against an arbitrator who was a member of ECC on 26 March 2021, that he might harbour subconscious bias against a Chinese party because he felt aggrieved that he would no longer be allowed to act as arbitrator or counsel or expert witness for any Chinese citizen or institution as a result of the 263 Sanction. Arguably, it would be hard for such an arbitrator to make a statement to say that he feels nothing at all about the 263 Sanction. It would be a detrimental if he were to say that he felt aggrieved by the 263 Sanction or if he took the extreme situation to say that he considered the 263 Sanction as a 'badge of honour'.[12] This is an unfortunate situation for such an arbitrator to be placed in but it would be very difficult for such an arbitrator to be able to make a declaration to say that he or she does not have any feelings whatsoever on the implementation of the 263 Sanction.

**Potential challenge of a person who was a member of ECC on 26 March 2021 from acting as party-appointed counsel or expert in seats of arbitration outside China**

In the case of a party-appointed counsel or expert, it is evident that there is a commercial activity *inter se*, concerning counsel or expert offering services of one's vocation, trade or profession. There is a 'business' dealing in this instance and insofar as arbitration proceedings are concerned, the Model Law is silent on the party appointed representative as well as their removal leaving it entirely at the discretion of the appointing parties. The situation is much clearer for cases where Chinese citizens or institutions have appointed any person who was a member of ECC on 26 March 2021 as party-appointed counsel or expert legal witness. They are not entitled to appoint any such person to be party-appointed counsel or expert witness since this would immediately be in breach of the 263 Sanction since the wording of the 263 Sanction clearly forbids Chinese citizens and institutions from doing business or paying fees to any person who was a member of ECC on the 26 March 2021.

The situation is less clear where it is the Chinese citizens or institution that is challenging a person, who was a member of ECC on 26 March 2021, from continuing to be a party-appointed counsel or expert legal witness in the arbitration proceeding. The opposing party against a Chinese citizen or institution is likely to invoke its right to party autonomy in appointing any person who was a member of ECC on 26 March 2021 as party-appointed counsel or expert

[12] Christian Shepherd, Primrose Riordan and Jasmines Cameron-Chileshe, 'Beijing targets British MPs for 'gross interference' *The Financial Times* (London, 27 March 2021) <https://www.ft.com/content/9dfb1a4b-1e83-4428-b708-c9562397a8d5> accessed 5 April 2021.

legal witness. It would be harder to refuse recognition and enforcement of any award rendered where the opposing counsel to the Chinese party may compose of a counsel or expert witness who was a member of ECC on 26 March 2021 on the grounds that the award is in breach of the laws of China. However, there is a possibility that it may be challenged during any enforcement in China on the ground that enforcement of the award is in breach of China's public policy. Any such challenge alone is less likely to succeed but it is always possible. The chances of success in resisting enforcement under Article V (2)(b) of the New York Convention may be higher if the award also includes costs which include the costs of a counsel or expert witness who was a member of ECC on 26 March 2021. While Chinese citizens and institutions can make a clear legitimate case that they are prevented from doing business or paying counsel fees to any person who was a member of ECC on the 26 March 2021, they would have a harder case in refusing to pay for party costs that includes the fees of opposing counsel or expert who was a member of ECC on the 26 March 2021. It can be envisaged that the arguments would centre on an objection to make indirect payment via the opposing party. The Chinese courts may refuse to recognise and enforce the costs award as being contrary to the public policy of China to breach the 263 Sanction. In addition, there is always also a possibility that the entire award itself may not be enforced if arguments on severability of the main award from the costs award are not entertained by the enforcing Chinese courts. In such situations, it may be safer for the opposing party not to claim the costs of a counsel or expert witness who was a member of ECC on 26 March 2021 but to claim all other costs.

**The possible impact of current arbitral proceedings involving sanctioned person or entity**

It is not known if there are other examples of an outright sanction of 'doing business' with an identified professional entity as in the case of the 263 Sanction. However, typically, other sanctions are a 'blanket' ban by the sanctioning State on specified natural and juridical persons. In this instance, the sanction applies to a named entity. A plain reading suggests that both the juridical persons and, natural persons i.e. the arbitrator member, barrister, clerk, employee, associate or agent of the entities would all be subjected to the sanction from 26 March 2021 onwards, of which Chinese citizens and institutions are prohibited from doing business with them. For brevity's sake and the purpose of this article, 'sanctioned party' refers to a named sanctioned persons and implied sanction person by virtue of association with the sanctioned entities.

What are the possible impacts affecting a sanctioned party in ongoing arbitral proceedings, in the case of an arbitrator or a counsel? In the case of an arbitrator, it would appear that absent any provisions within the procedural law or arbitration rules, a person who is a sanctioned party may try his or her luck in insisting on staying appointed as arbitrator, counsel or expert witness assuming if the parties do not object to it. This is extremely unlikely to happen as Chinese citizens and institutions would be too concerned of being hit hard by the 263 Sanction if they continued in the proceedings without mounting strong objections. However, even if it is theoretically possible that there is no objection, any award made against any Chinese person might attract a late challenge on grounds of being contrary to China law and/or public policy

under the New York Convention[13] when recognition and enforcement are sought in the sanctioning State.

However, what if a party that is a Chinese citizen or institution involved in an ongoing arbitral proceeding requested for substitution of an arbitrator who was a member of ECC on 26 March 2021, on that grounds? Depending on the applicable arbitration rules and *lex arbitri*, earlier mentioned, the Model Law is itself silent on the issue of challenge or removal of the arbitrator on grounds of sanction. However, when a challenge is mounted by a party and is unsuccessful, an application can still be made in the courts where the juridical seat of the arbitration situates. Depending on the jurisdiction, however, the local courts may find that an application for removal of arbitrators on grounds of sanctions to be novel. Nevertheless, the unsuccessful party who may be unsuccessful in its challenge to remove a sanctioned person is also entitled to boycott the arbitration proceedings and to resist the recognition and enforcement of any award made against the party. As the 263 Sanction is a fundamental law, any such challenge is not contingent upon whether the 263 Sanction had been revoked earlier on in the proceedings. However, a point for further discussions would be as follows - if an award was rendered by an arbitrator who was still sanctioned, can it still be enforced subsequently even after the sanction was lifted? To date, no further details have been provided on the breath and scope of the sanction.

In so far as the sanctioned party acting as counsel or expert in any arbitral proceedings appointed by Chinese parties or institutions, in the course of the effective period of the sanction, they are considered to be doing business *inter se*. This situation is relatively straightforward, as any parties or clients do commonly discharge their counsels or experts notwithstanding this sanction; substituting counsels in arbitral proceedings are almost always permissible under various arbitral institution rules and present no known impediments.

## Conclusion – Circumventing or loosening the hold of the 263 Sanction?

This 263 Sanction in its current form is thought to be unprecedented and raised some crucial questions. Would a natural person who has since left the sanctioned entity after 26 March 2021 be free to do business with Chinese individuals and institutions, effectively circumventing the 263 Sanction? While leaving a sanctioned entity or simply renaming the sanctioned entity is extremely easy to undertake, one would expect that it is not possible to circumvent the 263 Sanction since the whole point of sanctions, and indeed the spirit of all sanctions not only this present one under discussion, is to capture a group of individuals or entities and not to allow them to easily escape. If the prudent approach to be taken is not to underestimate the gravity of the sanction, then it would appear to be the case that persons who were members of ECC as of 26 March 2021 have all been sanctioned and remain sanctioned until or unless the Chinese government rescinds the 263 Sanction.

[13] Article V(2)(b) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The famous quote, '*Un pour tous, tous pour un*' by Alexandre Dumas[14] which translates to 'one for all, all for one' comes to mind. The State has appeared to have taken the position that the members of ECC (members as of 26 March 2021) have collective responsibility for the hosting and promotion of the offending Opinion shared on ECC website.[15] As of this writing, none of the members of ECC (members as of 26 March 2021) has made any public statement to disagree with the posting of the offending Opinion on the ECC website despite the imposition of the 263 Sanction. Might the State take the position that until a current or previous member of ECC (as of the 26 March 2021) makes a statement against the posting of the opinion, they are considered to continue supporting the offending Opinion posted on the ECC website?

As a matter of introspection, considering the gravity of State sanctions, it also begs the question of whether a person 'infected' by the Sanction by virtue of association with a sanctioned entity would be cured by way of simply moving to another unsanctioned entity. This is thought to be quite unlikely since, if it were so easy to circumvent a sanction, there would be no place for sanctions and sanctions can be easily circumvented. Facing the reality, it is highly unlikely that any government in the world would allow their country's sanctions to be that easily side-stepped so as to cause the sanctions to be held a mockery. Meanwhile, would it also mean that the four individuals of ECC who authored the Opinion could simply move to another chambers since they have themselves not been sanctioned in their personal names but only as members of ECC on the 26 March 2021? These also gives rise to another important question affecting the long-term picture: what does this mean for new members who may decide to join ECC in the future, vis-à-vis China-related work? Also, would there be any implications to other chambers in relation to China-related work if they take on persons who were ECC members as of 26 March 2021? It is hard to answer these hypothetical questions as it might be argued that future persons who were not responsible for the past acts of ECC, in this case, allowing the advertising of the opinion to take place on the common website of ECC, should not be sanctioned.

It remains to be seen whether further clarification would be forthcoming from China's MFA but until such time the 263 Sanction establishes an extremely serious impact on international arbitration all over the world where cases involve Chinese citizens or institutions on the one hand and persons who were members of ECC as of 26 March 2021 on the other hand. In conclusion, it would be imperative to monitor this situation closely as to its impact on possible future sanctions on other legal or non-legal professionals by China's MFA, but also other similar sanctions by other sovereign states in time to come, given that international arbitration has become the common method of dispute resolution in the world.

[14] From the novel *The Three Musketeers* published in 1844.
[15] See footnotes 4 and 5.