Asia Pacific Regional Arbitration Group

In this issue

APRAG E-JOURNAL
SECOND EDITORIAL 2023

Asia Pacific Regional Arbitration Group

Preface

It brings me great pleasure to introduce the 2nd issuance of the Asia Pacific Regional Arbitration Group (APRAG) E-journal. As President of APRAG, I am honored to present this edition, which not only marks a significant milestone for our organization but also reflects the continued evolution of international arbitration in the Asia Pacific region.

In celebrating the 19th anniversary of APRAG, we pause to reflect on the journey that has led us to this point. Over the years, APRAG has emerged as a dynamic platform for knowledge exchange, collaboration, and progress within the realm of international arbitration. Our commitment to fostering a culture of fairness, transparency, and excellence has played an integral role in shaping the legal landscape across the Asia Pacific.

In recent years, the Asia Pacific Region's dynamic economic landscape has become a hub for business and investment, further amplifying the need for efficient and reliable dispute resolution mechanisms. With respect to this, the articles featured in this edition shed light on the growth of international arbitration in our diverse jurisdictions and insights that have emerged from this transformative period.

I am deeply grateful to the APRAG E-journal Editorial Board for their dedicated efforts in curating thought-provoking content that enriches our understanding of the ever-evolving arbitration landscape. Their commitment to scholarly excellence and their role in advancing the discourse surrounding international arbitration have been pivotal in shaping the direction of this E-journal.

As we turn the pages of this 2nd issuance, let us remain inspired by the progress we have collectively achieved. The Asia Pacific region stands on the cusp of new opportunities. APRAG, with its rich history and diverse membership, is poised to play a pivotal role in shaping the future of dispute resolution in our region. I invite you to immerse yourself in the insights, analyses, and perspectives presented within these pages. May this E-journal serve as a testament to our unwavering commitment to excellence, collaboration, and the pursuit of justice in international arbitration.

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(APRAG)

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Asia Pacific Regional Arbitration Group

Editorial Team

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Philippine law and jurisprudence consistently encourage the use of alternative dispute resolution methods, including international arbitration, to achieve speedy and impartial justice. Yet, what is considered arbitrable in the Philippines is not clear-cut. Arbitrability, a key concept of international arbitration law, determines what types of disputes can and cannot be settled by arbitration. Public policy considerations greatly affect arbitrability. This article seeks to tackle the question of arbitrability and public policy in the Philippines and proposes that courts should look at (1) the underlying statute governing the dispute and (2) whether third-party rights will be affected to determine whether a dispute is arbitrable.

I. INTRODUCTION

The Philippines has long recognized arbitration as an alternative method of resolving disputes. Republic Act No. 876 has governed domestic arbitration since 1953. The Philippines has been a State Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention, since 1965. In 2004, with the signing of Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004, the Philippines adopted the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). Despite the

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Arthur P. Autea, "Philippine Arbitration Reform: Fresh Breathing Space from Congested Litigation", in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (Anselmo Reyes and Weixia Gu eds., 2018), p 163-164; Jan Vincent S. Soliven and Camille Ross G. Parpan, "Arbitration in the Philippines", Global Arbitration Review, <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2020/1193381/philippines>

An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedures for Arbitration in Civil Controversies.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter "NY Convention"].

An Act to Institutionalize the Use of An Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes.

Alternative Dispute Resolution Act, §19.

presence of the necessary legal instruments, observers note that arbitration, both domestic and international, remains to be a "small slice of the pie" of the legal practice in the country.

Recently however, there has been a surge of international arbitration in the Philippines. There are now arbitrations seated in the Philippines and several international commercial arbitration cases involving Philippine parties or disputes that have originated in the Philippines.

The Philippine Supreme Court has facilitated capacity building to equip the judiciary with expertise to deal with international commercial arbitration-related cases. Philippine law and how it has been interpreted by the judiciary takes a pro-arbitration policy and encourages parties to resolve their disputes via arbitration.

These developments are unable to fill the gaps in Philippine law that lead to the underutilization of arbitration in the country. One such gap is the question of what subject matter or what types of disputes are arbitrable – those which can be settled by arbitration – and those which are non-arbitrable – those which cannot be settled by arbitration. Arbitrability, especially in relation to public policy, has yet to be determined by Philippine legislation and jurisprudence. While there are certain disputes outlined in the Alternative Dispute Resolution Act of 2004 that cannot be arbitrated, there is still no clear guidance on what role public policy plays in what is and what is not arbitrable. For instance, the Philippines has yet to deal with the question of arbitrability in relation to insolvency, intellectual property, competition law, and even bribery and corruption. Discussing what arbitrability is and what disputes cannot be arbitrated as it is deemed contrary to public policy to do so is an important concept as it has "the potential to affect the validity of an arbitration agreement, strip an arbitrator of jurisdiction to determine a matter in spite of party agreement or derail enforcement of an award".

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Above fn 1, Autea, p 173.

Jeneline N. Nicolas, “Philippines”, Global Arbitration Review, <https://globalarbitrationreview.com/chapter/1141962/philippines>

Above fn 1, Autea, pp 170-171.

Above fn 1, Autea, p 170.

Above fn 1, Autea, pp 172-173.

Above fn 1, Autea, p 172; Above fn 7; Loretta Malintoppi and Charis Tan, “Investment Protection in Southeast Asia: A Country-By-Country Guide on Arbitration Laws and Bilateral Investment Treaties” (BRILL, 2016), Chapter 8.

Joseph Mante, “Arbitrability and Public Policy: An African Perspective” [2016] Arbitration International, Volume 33, Issue 2, June 2017, pp 275-276.

In the following sections, this article will explain the concept of arbitrability (Part II). Part III outlines the arbitration framework in the Philippines. Part IV reviews how the Philippines has defined the concept of public policy in terms of its applicability to contract law and to the extent that it has been applied to international arbitration. Examining countries within the region as a point of comparison, Part V looks at the experiences of Singapore, China, and Thailand. Finally, Part VI provides what the Philippines can learn from these countries. This article is focused on the concept of public policy in terms of how it defines what is capable of being settled through international commercial arbitration.

II. ARBITRABILITY

Arbitrability is a key concept of arbitration law. It deals with resolving what disputes can be settled by arbitration and which must be settled by courts. What kind of disputes can or cannot be arbitrated depends on the laws of a specific country. Countries have excluded some disputes from the domain of arbitration because of its "public importance or a perceived need for judicial protections". States are given free rein to decide which disputes may be resolved by arbitration by taking into account its political, social, and economic policies. Reserving some disputes for resolution by national courts is also seen as an acknowledgment by states that arbitration is "a private proceeding with public consequences". Generally, disputes involving criminal law, bankruptcy or insolvency, and intellectual property are fields of law that are considered non-arbitrable by several countries.

Accordingly, public policy plays a significant role in determining what disputes are arbitrable. By definition, public policy has generally been understood to mean the "most basic notions of morality and

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Karim Abou Youssef, "The Death of Inarbitrability", in Arbitrability: International and Comparative Perspectives (Loukas A. Mistelis and Stavros Brekoulakis eds., 2009), p 48.

Nigel Blackaby KC, Constantine Partasides KC and Alan Redfern, "Redfern and Hunter on International Arbitration" (6th ed. 2015), pp 80, 110; Sundaresh Menon, Rethinking Arbitrability in the Context of Corporate Disputes, paper presented in the Mauritius International Arbitration Conference 2010.

Gary B. Born, "International Arbitration: Law and Practice" (2nd ed. 2016), p 87; Above fn 14, Blackaby, et al., p 12.

Above fn 15, 87.

Above fn 14, Blackaby, et al., pp 81, 111.

Id. at 110.

Above fn 14 Blackaby, et al., p 112; Above fn 15, p 87.

Pierre Mayer and Audley Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" Arbitration International, Volume 19, Issue 2, 1 June 2003, pp 249, 252; Stavros Brekoulakis, "On Arbitrability: Persisting Misconceptions and New Areas of Concern", in Arbitrability: International and Comparative Perspectives (Kluwer Law International, 2009), pp 19, 21-22; Above fn 14, Menon.

justice". Yet, the concept of public policy has often been seen as an "unruly horse". This has a lot to do with the fact that defining public policy is a difficult task. The International Law Association Committee on International Commercial Arbitration concluded that "no precise definition [of public policy] is possible". What is considered the "basic notions of morality and justice" differs from state to state.

Public policy however remains crucial in drawing the line between arbitrable and non-arbitrable cases. It has been said that "[a]rbitrability creates a zone for arbitration and that zone is controlled by sovereign States through public policy". It is the state, through considerations of public policy, that exempts some types of disputes even though the very parties to the dispute may have agreed that they would rather arbitrate the matter. Consequently, one type of dispute can be considered arbitrable in one state and non-arbitrable in another. This makes the concept of arbitrability and public policy an important one. A determination of which subject matter is considered arbitrable affects arbitration agreements, what can be decided by an arbitral tribunal and whether an arbitral award can be recognized and enforced.

The New York Convention and the UNCITRAL Model Law reinforces the concept that what is arbitrable is different for every state. The New York Convention provides that recognition and enforcement of an arbitral award may be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country". The UNCITRAL Model Law states that an arbitral award may be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State". Article 36(1)(b)(i) of the Model Law also provides that a court may refuse to recognize or enforce an award if the subject-matter of the dispute cannot be settled by arbitration under the laws of that state.

Parsons & Whittemore Overseas Co., Inc. v. Societi Generate de I'Industrie du Papier RAKTA and Bank of America 50 2d 969 (2nd Cir., 1974).

Richardson v Mellish (1824) 2 Bing 229 at 252; Farshad Ghodoosi, "International Dispute Resolution and the Public Policy Exception" (Routledge, 2017), p 6.

Loukas A. Mistelis, "Arbitrability: International and Comparative Perspectives", in Arbitrability: International and Comparative Perspectives (Kluwer Law International, 2009), p 2.

Above fn 20, Mayer and Sheppard.

Murat Sümer, "Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship" [2008] 1 Ankara Bar Review 55, p 60.

Above fn 12, 278; Above fn 14, Menon.

NY Convention, Article V(2)(a).

UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), Article 34(2)(b)(i).

Several countries now consider most commercial disputes arbitrable as public policy has been narrowly defined in their jurisdictions. For instance, in the United States, there is a presumption in favour of arbitrability. U.S. courts have expanded the concept of arbitrability "to areas of economic activity heavily impregnated with public interest". There is even a stronger presumption in favour of arbitrability with respect to disputes that involve international commerce. In France, courts have "dissociate[d] arbitrablity from public policy [and] gradually associated it with a more international and less restrictive notion". In America and most of Europe, issues regarding arbitrability focus on patents, trademarks, insolvency, antitrust and competition laws, fraud and bribery, and corruption.

In other parts of the world, the concept of arbitrability and public policy remains to be controversial. In several African countries, public policy still plays a crucial role in determining what is arbitrable. Issues on the arbitrability of matters "concerning constitutional interpretation and enforcement, public or national interests, crime, and environmental issues" are still to be determined in relation to public policy. Matters that are non-arbitrable in several African countries remain to be broader in scope, especially if a commercial dispute touches upon issues regarding constitutional interpretation, tort, public interest, the legality of an underlying agreement between parties, or when a state or public entity is a party to a dispute. Several African countries see public policy as a "vital safeguard [ ] against perceived 'biased arbitral tribunals' who may have as their main objective the satisfaction of commercial interests", making the question of what is arbitrable reliant on national legal, institutional, and economic interests.

In the Philippines, the question of what is arbitrable is increasingly becoming relevant. There has been an uptick of international arbitration cases involving Philippine parties, disputes that have originated in the Philippines, and arbitrations seated in the Philippines. Government entities have now also become

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Above fn 14, Blackaby, et al., p 124.
Above fn 20, Brekoulakis, p 21.
Joseph T. McLaughlin, Arbitrability: Current Trends in the United States, 59 ALB. L. REV. 905, 906 (1996).
Above fn 13, p 56.
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
Above fn 13, p 59.
Id. at 292.
Mante, supra note 12, at 289.
Id.
BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical Co., 31 October 2002 delivered by Mahmud Mohammed, Justice of the Court of Appeal, Court of Appeal, Kaduna Division, Nigeria (unreported).
Above fn 12, p 294.
Id.
Above fn 1, Autea, pp 170-171.

more involved in international transactions that require disputes to be settled by arbitration. Questions now arise in the Philippines as to whether disputes that involve the construction of an expressway or those that arise out of a water concession agreement can be resolved through arbitration. Whether matters that touch upon public or national interests can be arbitrated are yet to be resolved by Philippine courts.

III. FRAMEWORK FOR ARBITRATION LAW IN THE PHILIPPINES

Arbitration in the Philippines is generally seen as an "inexpensive, speedy and amicable" process. The Philippine Supreme Court has called arbitration as the "wave of the future" and has consistently said that it adopts a pro-arbitration stance.

Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004 ("ADR Act of 2004") outlines the rules that govern mediation and arbitration in the Philippines. Relevantly, Chapter 4 of the ADR Act of 2004 covers international commercial arbitration. Section 19 states that international commercial arbitration is governed by the UNCITRAL Model Law (1985). Section 42 of the law provides that recognition and enforcement of foreign arbitral awards shall be governed by the New York Convention.

Section 2 of the ADR Act of 2004 provides that it is the

declared ... policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. …

Id.; Executive Order No. 78, "Mandating the Inclusion of Provision on the Use of Alternative Dispute Resolution Mechanisms in All Contracts Involving Public-Private Partnership Projects, Build-Operate-Transfer Projects, Joint Venture Agreements Between Government and Private Entities and Those Entered into by Local Government Units", Section 1 (2012).

LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc., G.R. No. 141833, 26 March 2003, citations omitted.

Id.

It refers to Republic Act No. 876 for domestic arbitration and Executive Order No. 1008 for the arbitration of construction disputes.

Alternative Dispute Resolution Act, §19.

Emphasis supplied.

Under Chapter 4 on international commercial arbitration, Section 25 specifically mandates that "the court shall have due regard to the policy of the law in favor of arbitration".

The ADR Act of 2004 explicitly provides that it does not apply to: (a) labor disputes covered by the Labor Code of the Philippines, (b) the civil status of persons, (c) the validity of a marriage, (d) any ground for legal separation, (e) the jurisdiction of courts, (f) future legitime, (g) criminal liability, and (h) those which by law cannot be compromised. These are the only areas thus far that have been identified as not being capable of being settled by arbitration. Whether disputes relating to insolvency, environmental law, intellectual property, competition law, fraud and bribery, or corruption can be arbitrated or cannot be arbitrated because it infringes on Philippine public policy is an open question.

The Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004 ("IRR") replicates the Alternative Dispute Resolution Act of 2004 by stating that "in interpreting this Chapter, the court shall have due regard to the policy of the law in favor of arbitration and the policy of the Philippines to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangement to resolve their dispute". Article 4.36 of the Implementing Rules and Regulations covers the grounds for refusing recognition and enforcement of New York Convention and non-Convention awards. For New York Convention awards, Article 4.36 essentially reproduces Article V of the New York Convention. Specifically, it provides that Regional Trial Courts in the Philippines may refuse recognition and enforcement if the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines or if the recognition or enforcement of the award would be contrary to the public policy of the Philippines.

The Philippine Supreme Court also issued the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules) to complement the arbitration and mediation rules in the country. It applies to and governs the following: (a) relief on the issue of existence, validity, or enforceability of the arbitration agreement, (b) referral to alternative dispute resolution, (c) interim measures of protection, (d) appointment of arbitrator, (e) challenge to appointment of arbitrator, (f) termination of mandate of arbitrator, (g) assistance in taking evidence, (h) confirmation, correction or vacation of award in domestic

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Emphasis supplied.

Department of Justice, Rules and Regulations Implementing the Alternative Dispute Resolution Act of 2004, Republic Act No. 92585, Article 4.2(c) (2009).

Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08-SC, 1 September 2009.

arbitration, (i) recognition and enforcement or setting aside of an award in international commercial arbitration, (j) recognition and enforcement of a foreign arbitral award, (k) confidentiality/protective orders, and (l) deposit and enforcement of mediated settlement agreements. In Rule 2.1, the Supreme Court acknowledges and echoes the state policy enshrined in the ADR Act of 2004 and its accompanying IRR, by providing that

[i]t is the policy of the State to actively promote the use of various modes of ADR and to respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the courts. To this end, the objectives of the Special ADR Rules are to encourage and promote the use of ADR, particularly arbitration and mediation, as an important means to achieve speedy and efficient resolution of disputes, impartial justice, curb a litigious culture and to de-clog court dockets.

The Special ADR Rules states that courts may refuse to enforce or set aside awards if the subject-matter of the dispute is not capable of settlement under Philippine law. The Special ADR Rules provides that courts can only set aside an award in an international arbitration based on the grounds found in Article 34 of the UNCITRAL Model Law. If the court is asked to set aside an award based on any ground other than those found in the Special ADR Rules, it can only do so if the ground for setting aside or non-recognition is that there is a violation of public policy.

The Special ADR Rules also adopts the policy of judicial restraint when it comes to arbitration. Rule 19.10 specifically provides that "[t]he court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal".

Another relevant law is Executive Order No. 78, s. 2012, which mandates that all government contracts involving public-private partnership projects, those that involve the Build-Operate and Transfer Law, and joint venture agreements between government and private entities issued by the National

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Above fn 50, Rule 1.1.

Emphasis supplied.

Above fn 50, Rules 12.4(b), 13.4(b).

Above fn 50, Rule 19.10.

Emphasis supplied.

Mandating the Inclusion of Provisions on the Use of Alternative Dispute Resolution Mechanisms in All Contracts Involving Public-Private Partnership Projects, Build-Operate and Transfer Projects, Joint Venture Agreements Between the Government and Private Entities and Those Entered Into by Local Government Units.

Economic and Development Authority shall include provisions on the use of ADR mechanisms at the option and upon agreement of the parties to the said contracts. The Executive Order reiterates that "the State shall encourage and actively promote the use of ADR mechanisms through conciliation and negotiation, mediation and arbitration, in the order of application, as an efficient tool and an alternative procedure in achieving speedy and impartial justice and de-clogging court dockets". More importantly, Section 1(3) of the Executive Order provides that

[w]hen parties to the abovementioned contracts agree to submit the case for ADR, the use of either domestic or international ADR mechanisms shall be highly encouraged, giving the parties complete freedom to choose which venue and forum shall govern their dispute, as well as the rules or procedures to be followed in resolving the same.

By including provisions on ADR mechanisms, including arbitration, in government contracts, the Philippine government hopes that it can aid in generating private investments "by making the resolution of disputes arising out of a contract less expensive, tedious, complex and time-consuming, especially for large-scale intensive infrastructure and development contracts".

IV. PUBLIC POLICY IN THE PHILIPPINES

Despite the long history of the regulatory framework for international arbitration in the Philippines, it has been described to still be in its infancy. There are only a handful of cases decided by the Supreme Court that directly deal with international arbitration. It was only fairly recently that the Court defined what the public policy defence is in the Philippines in terms of challenging an arbitral award. Thus, there is a need to determine how the Philippines defines public policy in terms of which type of disputes are within and outside the purview of the public policy defence in international arbitration.

Above fn 42, Executive Order No. 78, s. 2012, §1(1).

As defined under Section 2, Chapter 2, Title I, Book III of the Administrative Code of 1987, Executive Orders are acts of the President providing for rules of a general or permanent character in implementation or execution of constitutional statutory powers. While an Executive Order can easily be revoked by the issuance of a later Order, Executive Order No. 78, s. 2012 remains to be good law.

Emphasis supplied.

Above fn 42, Executive Order No. 78, s. 2012.

Above fn 1, Soliven and Parpan.

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It is a fundamental rule of Philippine civil law that contracts are binding on the contracting parties and that a contract should be respected as it is the law between parties. Parties are free to "establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy".
It is in this context that the Supreme Court has defined public policy as

that principle under which freedom of contract or private dealing is restricted for the good of the community. Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold a transaction when its object, operation, or tendency is calculated to be prejudicial to the public welfare, to sound morality or to civic honesty.

Applying this concept to agreements that allow for arbitration to settle disputes, the Supreme Court held that contractually agreeing to arbitrate a dispute before one has arisen is not contrary to public policy. In Korea Technologies Co., Ltd. v. Hon. Lerma and Pacific General Steel Manufacturing Corporation, Korea Technologies Co. and Pacific General Steel Manufacturing Corporation ("PGSMC") entered into an agreement that stated that disputes arising out of their contract will be settled through arbitration in Seoul, Korea in accordance with the rules of the Korean Commercial Arbitration Board ("KCAB"). PGSMC sought to have the arbitration clause invalidated by alleging that it was against public policy as it ousts Philippine domestic courts of jurisdiction to deal with their dispute. The lower courts agreed with PGSMC and ruled that the clause was contrary to public policy as the clause ousted courts from jurisdiction over the case and left the determination of legal rights to an arbitral tribunal. The Supreme Court reversed this ruling and ultimately found that an agreement voluntarily entered into to settle disputes via arbitration is valid. The Supreme Court ruled that agreeing to arbitrate is itself a contract. The arbitration clause entered into by the parties was mutually and voluntarily agreed upon and there was no indication that they had dealt with each other on unequal footing. Thus, the Court said that a clause that states that "the arbitration must be done in Seoul, Korea in accordance with the Commercial Arbitration Rules of the KCAB, and that the arbitral award is final and binding, is not contrary to public policy".

Halagueña v. Philippine Airlines, Incorporated, G.R. No. 172013, 2 October 2009.
An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 1306 (1950).
Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, G.R. No. 183789, 24 August 2011, citations omitted.
G.R. No. 143581, 7 January 2008.
Citing Gonzales v. Climax Mining Ltd., G.R. No. 161957, 28 February 2005, and Del Monte Corporation-USA v. Court of Appeals, G.R. No. 136154, 7 February 2001.

In 2018, the Supreme Court, in Mabuhay Holdings Corporation v. Sembcorp Logistics Limited, discussed the parameters of the public policy defence when challenging an arbitral award. Mabuhay Holdings Corporation ("Mabuhay") and Infrastructure Development & Holdings, Inc. ("IDHI") are both duly registered corporations under the laws of the Philippines. These two corporations entered into a Shareholders' Agreement with Sembcorp Logistics Limited ("Sembcorp"), a company incorporated under the laws of Singapore. All three corporations invested in a common carriage by inter-island fast ferry venture in the Philippines. Mabuhay and IDHI jointly guaranteed Sembcorp a minimum accounting return of US$ 929,875.50. The contract between the parties included an arbitration clause, which stated that disputes arising out of or relating to their contract, except intra-corporate disputes, shall be finally settled by arbitration in Singapore in accordance with the rules of the International Chamber of Commerce ("ICC"). Mabuhay and IDHI subsequently failed to pay Sembcorp. Mabuhay admitted its liability but argued that its obligation was only for half the claim. Sembcorp then instituted arbitration proceedings against Mabuhay in accordance with the arbitration clause in the parties' contract. An arbitral award was rendered, ordering Mabuhay to pay half of the minimum accounting return that it guaranteed with IDHI, to pay interest, and reimburse half of the costs of the arbitration. Sembcorp sought to have the arbitral award recognized and enforced in the Philippines and filed the necessary petition before a Regional Trial Court ("RTC"). The RTC refused enforcement, finding that the underlying dispute was an intra-corporate dispute, not within the ambit of the arbitral tribunal's jurisdiction. The RTC's decision was reversed by the Court of Appeals, which found that the RTC had no authority to disturb the arbitral tribunal's determination of facts and/or interpretation of the law. Mabuhay then appealed to the Supreme Court.

The Supreme Court held that Mabuhay failed to establish any of the grounds for refusing enforcement and recognition. The Supreme Court found that the tribunal was constituted in accordance with the arbitration agreement and the ICC Rules. The tribunal had jurisdiction as the dispute did not involve an intra-corporate controversy. The Supreme Court ruled that enforcing the award would not be contrary to public policy. The Court expressly acknowledged that prior to Mabuhay Holdings, it "ha[d] yet to define public policy and what is deemed contrary to public policy in an arbitration case". To arrive at a conclusion, the Court looked at how other countries resolved the same and found that "[m]ost arbitral jurisdictions adopt a narrow and restrictive approach in defining public policy pursuant to the pro-enforcement policy of the New York Convention". The Court cited Hong Kong, where an award obtained through fraud could not be enforced as fraud is contrary to Hong Kong's fundamental notions of morality

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G.R. No. 212734, 5 December 2018.

and justice. The Court also referred to Singapore, where the public policy ground is "entertained by courts" if recognition and enforcement of an award would be "injurious to the public good or… wholly offensive to the ordinary reasonable and fully informed member of the public".

The Supreme Court also surveyed its previous rulings on the definition of public policy and found that

x x x At any rate, courts should not rashly extend the rule which holds that a contract is void as against public policy. The term "public policy" is vague and uncertain in meaning, floating and changeable in connotation. It may be said, however, that, in general, a contract which is neither prohibited by law nor condemned by judicial decision, nor contrary to public morals, contravenes no public policy. In the absence of express legislation or constitutional prohibition, a court, in order to declare a contract void as against public policy, must find that the contract as to the consideration or thing to be done, has a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property.

An older case, Ferrazzini v. Gsell, defined public policy for purposes of determining whether that part of the contract under consideration is against public policy:

By "public policy," as defined by the courts in the United States and England, is intended that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the "policy of the law," or "public policy in relation to the administration of the law." Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. In determining whether

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Citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2009] 12 H.K.C.F.A.R. 84, 100 (C.F.A.) and Hebei Import & Export Corporation v. Polytek Engineering Company Limited [1999] 1 HKLRD 665.

Citing PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] I SLR(R) 597, Deutsche Schachtbau-und Tiejbohrgesellschaft m.b.H. v. Shell International Petroleum Co. Ltd., Court of Appeal, England and Wales, 24 March 1987, [1990] 1 A.C. 295.

a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved.

Taking all these together, the Supreme Court concluded that

… pursuant to the State's policy in favor of arbitration and enforcement of arbitral awards, the Court adopts the majority and narrow approach in determining whether enforcement of an award is contrary to Our public policy. Mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society.

In Mabuhay Holdings, the Supreme Court also appealed to lower courts to apply the ADR Act of 2004 and the Special ADR Rules judiciously. The Court, once again, recognized that arbitration "is undeniably one of the viable solutions to the longstanding problem of clogged court dockets". It also acknowledged that, since international arbitration is the preferred mode of dispute resolution for foreign countries, it would attract foreign investors to do business in the Philippines and boost the economy.

As Philippine parties continue to enter into contracts with international investors, it is expected that there will be an increase in arbitration cases. To further shape the legal framework for arbitration, there are experiences in other jurisdictions that the Philippines can learn from.

V. JURISPRUDENCE FROM SINGAPORE, CHINA, THAILAND

Singapore, China, and Thailand are jurisdictions that have all dealt with the issue of arbitrability and public policy.

Emphasis in the original and citations omitted.

It is significant to look at how Singapore has dealt with this question given that Singapore is one of the most commonly used international commercial arbitration seats. It has a reputation for being an arbitration-friendly jurisdictions that have comprehensive laws governing international arbitration. In Mabuhay Holdings Corporation v. Sembcorp Logistics Limited, the Supreme Court expressly referenced Singapore's approach as a pro-enforcement jurisdiction.

China is also an interesting case study as the practice of arbitration in China is continuously being modernized, especially by its Supreme People's Court. More importantly, the Philippine government's pivot to China has led to new foreign investments. Several transactions between government agencies and Chinese companies have also been concluded. A number of these contracts likely include dispute resolution clauses that requires parties to resolve any dispute through arbitration.

Like the Philippines, Thailand is also one of the emerging economies in Southeast Asia. It hopes to be an arbitration hub in the region and is continuously seeking to modernize arbitration in its jurisdiction. Thailand's judiciary has also resolved questions of arbitrability and public policy that involve government entities. Since the Philippine government and its instrumentalities has entered into and continuously enters into agreements with arbitration clauses, it would be significant to look at Thailand's laws and jurisprudence.

A. SINGAPORE

Singapore is perceived to be a very pro-arbitration jurisdiction. It has become a popular seat for arbitration due to the fact that it has comprehensive arbitration legislation, English being widely spoken,

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SIDRA, Singapore Management University Yong Pung How School of Law, "SIDRA International Dispute Resolution Survey: 2022 Final Report", <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1>, p 16.

Id.

G.R. No. 212734, 5 December 2018.

JC Punongbayan, "Why the Influx of Chinese in the Philippines?", Rappler, <https://www.rappler.com/thought-leaders/233238-reasons-influx-chinese-philippines>

Pia Ranada, "List: Deals Signed During Xi Jinping's Trip to Philippines", Rappler, <https://www.rappler.com/nation/217156-deals-signed-during-xi-jinping-visit-philippines>; Pia Ranada, "19 deals with Chinese businesses signed during Duterte's China trip", Rappler, <https://www.rappler.com/nation/229091-deals-signed-with-chinese-businesses-duterte-china-visit-april-2019>

Tony Andriotis and Noppramart Thammateeradaycho, "Thailand as Regional Arbitration Hub", Global Arbitration Review, <https://globalarbitrationreview.com/article/1211243/thailand-as-a-regional-arbitration-hub>

Id.; Vanina Sucharitkul, "Thawing the Restrictions on International Arbitration in Thailand", Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2019/12/17/thawing-the-restrictions-on-international-arbitration-in-thailand/>

wide availability of facilities for arbitration, and a respected judiciary. It is an UNCITRAL Model Law country and a party to the New York Convention. Thus, Singapore's public policy towards arbitration is in favor of implementing and facilitating arbitration, such that "there is a clearly public interest in promoting the arbitral process and enforcement of awards in Singapore. Any obstacle to this clear objective is a matter of public policy". Its courts also adopt a "minimal curial intervention" approach when it comes to arbitration and highly regards party autonomy. Despite being a pro-arbitration country, this does not mean that Singapore "[rubber-stamps] all disputes to arbitration". Its Court of Appeal has repeatedly ruled that some disputes cannot be resolved by arbitration when it runs counter to public policy concerns.

The International Arbitration Act ("IAA") governs international arbitration in Singapore. On public policy and arbitrability, Section 11 (1) provides that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so". Unlike the Philippines, Singapore law does not have a list of what is or what is not arbitrable. Case law has been instructive in determining what is arbitrable. Sundaresh Menon, currently Chief Justice of the Supreme Court of Singapore, observed wile still Singapore's Attorney General, that disputes should be considered arbitrable unless "(1) the matter at hand raises issues that affect third parties not party to the dispute; (2) the arbitrator is neither empowered nor well placed to give the remedies sought; or (3) the matter concerns a public interest or the interest of a person not party to the arbitration".

While "there is no exhaustive list of non-arbitrable matters [in Singapore], [ ] it is generally accepted that which may have public interest elements such as citizenship, validity of registration of patents, or winding-up of companies are not arbitrable".

Chan Leng Sun KC, "Making Arbitration Work in Singapore", in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (Anselmo Reyes and Weixia Gu eds., 2018), p 143.

Locknie Hsu, Public Policy Considerations in International Arbitration: Costs and Other Issues - A View from Singapore, 26 Journal of International Arbitration 101, 112 (2009).

Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd, [2007] S.G.C.A. 28.

Above fn 78, p 151.

Larsen Oil and Gas Pte Ltd v. Petropod Ltd (in official liquidation of the Cayman Islands and in compulsory liquidation in Singapore), [2011] SGCA 21; Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals, [2015] SGCA 57.

Id.; "Ch. 04 International and Domestic Arbitration in Singapore", Singapore Law Watch, <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-04-international-and-domestic-arbitration-in-singapore>

Above fn 78, p 151.

Above fn 14, Menon.

Above fn 83, Ch. 04 International and Domestic Arbitration in Singapore.

Asia Pacific Regional Arbitration Group

In Larsen Oil and Gas Pte Ltd v. Petropod Ltd (in official liquidation of the Cayman Islands and in compulsory liquidation in Singapore), the Court of Appeal refused to honour an arbitration agreement regarding a dispute surrounding Petropod's avoidance claims against Larsen as there existed a "public interest in the regulation of company insolvency".

To determine whether the insolvency claim could be settled by arbitration, the Court of Appeal surveyed the approach of English, American, and Australian courts. It concluded that

There are, all in all, strong reasons for supporting a generous approach towards the construction of the scope of arbitration clauses, given that such an approach has received widespread acceptance among the leading commercial jurisdictions, and is strongly supported by the academic community. Such an approach is also consistent with this court's philosophy of facilitating arbitration. Accordingly, we agree that the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise.

On non-arbitrability, the Court of Appeal said that

The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

After an examination of the insolvency and bankruptcy regulations of Singapore, the Court concluded that insolvency claims cannot be arbitrated because (1) statutory remedies meant to protect creditors from a company's pre-insolvency management could not be restricted, (2) there is a need to avoid

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[2011] SGCA 21.
Above fn 78, p 151.

different findings by different adjudicators, (3) creditors and other entities who are not parties to the arbitration agreement cannot be compelled to arbitrate disputes and would be deprived of their fundamental access to courts, and (4) an insolvent company's creditor cannot be allowed to contract out through arbitration the proof of debt process required under Singapore law. The Court said that "a collective enforcement procedure is clearly in the wider public interest". Arbitration agreements that include insolvency disputes should not be allowed "where the agreement affects the substantive rights of other creditors. Otherwise it will undermine the policy aims of the insolvency regime".

In Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals, the Court ruled that there exists a presumption of arbitrability if the parties had entered into an arbitration agreement and that such "presumption may be rebutted by showing that Parliament had intended to preclude a particular type of dispute from arbitration or that it would be contrary to public policy to resolve that type of dispute in private arbitration". In this case, Silica Investors alleged that Tomolugen Holdings conducted its affairs in an oppressive and unfair manner against it as the minority shareholder. To determine whether a shareholder oppression dispute was arbitrable, the Court of Appeal looked at the Companies Act. The Court found that the Companies Act protected the commercial expectations of parties in an agreement and "does not engage [ ] public policy considerations".

Taking all these together, it appears that Singapore courts would "examine the statutes governing the claims to determine whether it is 'contrary to public policy' to arbitrate such a claim. The main point which the Singapore courts seemed to consider when determining whether a claim was arbitrable was whether there would be a restriction of statutory third-party rights".

B. CHINA

In China, arbitration is also considered as the "preferred means of settling business disputes". China's Arbitration Law provides the framework of its arbitration practice. China is a State party to the New York Convention but it has not adopted the UNCITRAL Model Law. Its Supreme People's Court

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[2015] SGCA 57.

Above fn 78, p 152.

Weixia Gu, "China's Arbitration Modernisation Under Judicial Efforts and Marketisation Waves", in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (Anselmo Reyes and Weixia Gu eds., 2018), p 17.

Id. at 24.

(SPC), the "highest judiciary and a de-facto rule making institution", is the main driver in promoting and refining arbitration. China's judiciary has also been described as generally pro-arbitration.

Article 2 of China's Arbitration Law provides that "disputes over contracts and disputes over property rights and interests, as between citizens, legal persons and other organizations that are equal parties" can be arbitrated. Article 3 states that (1) marital, adoption, guardianship, support and succession disputes; and (2) administrative disputes that shall be handled by administrative organs as prescribed by law may not be arbitrated. When it comes to the public policy defence in recognition and enforcement of foreign arbitral awards, the SPC has ruled that "the infringement of public interest shall be interpreted as a violation of the basic principle, infringement of the national sovereignty, jeopardizing public security, violation of public policy and other circumstances which will infringe the basic public interest".

In 2019, the SPC ruled that anti-monopoly disputes cannot be arbitrated as they involve public law. In Shell (China) Limited v. Hohot Huli Material Co., Ltd., Hohot Huili questioned a horizontal monopoly of distribution agreement supposedly organized by Shell. The agreement between Shell and Hohot Huili provided that all disputes were to be settled by arbitration. In reaching its decision, the SPC looked at China's Anti-Monopoly Law which states that anti-monopoly disputes are to be resolved by law enforcement of government or by civil litigation. No reference is made to arbitration and it is not expressly included in the law as a means to resolve anti-monopoly disputes. The SPC also found that given that this dispute is not one related to contracts or property rights, as enumerated in Article 2 of the Arbitration Law. It is thus implied that a court can take cognizance of the case if one party files a claim with the court. The SPC further held that the dispute involved was one that is of "public interest governed by the Anti-Monopoly Law and should not be regulated by the contractual rights and obligations as stated in the distribution agreement" of the parties.

Id. at 18.
Id. at 26.
TCL Air-conditioner (Zhongshan) Limited v Castel Electronics Pty Ltd, Min Si Ta Zi No. 46. [2013].
([2019] Zhi Min Xia Zhong No. 47)
Glenn Haley, et al., "Arbitrability of Antitrust Disputes in PRC and Hong Kong", Brighton, Cave, Leighton, Paisner, <https://www.bclplaw.com/en-US/thought-leadership/arbitrability-of-antitrust-disputes-in-prc-and-hong-kong.html>
Id.
Id.

More importantly, the decision of the SPC implies that "unless explicitly provided otherwise, claims concerning 'public interest' are non-arbitrable under Article 2 of the Arbitration Law".

C. THAILAND

While Thailand is considered an arbitration-friendly jurisdiction, foreign companies have had difficulty in enforcing arbitration awards, with Thai courts raising the issue of public policy in refusing to enforce awards. Public policy in Thailand has not been clearly defined as well.

Section 40 of Thailand's Arbitration Act B.E. 2545 (2002) provides that a court shall set aside an arbitral award if it "finds that: (a) the award deals with a dispute which is non-arbitrable matter under the law; or (b) the recognition or enforcement of the award would be contrary to the public policy of Thailand". The Arbitration Act has also adopted Article V of the New York Convention on recognition and enforcement. Disputes that can be arbitrated in Thailand refer to "civil matters [ ] not contrary to public policy". Matters relating to the status of persons and validity of marriages are removed from the reach of arbitration.

In The Expressway and Rapid Transit Authority of Thailand ("ETA") v. BBCD Joint Venture ("BBCD"), the Supreme Court refused to enforce an award against the State-run ETA on the ground that the underlying agreement between the two parties was contrary to public order and good morals. ETA had entered into a construction contract with BBCD to build an expressway. ETA was obliged to assist BBCD to obtain approvals from the Department of Highways within a particular date. ETA failed to obtain the necessary approvals. This entitled BBCD to seek reimbursement from ETA for additional expenses caused by the delay. BBCD and ETA then extended the completion date of the project. Towards the

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Kai-chieh Chan, "China's Top Court Says No to Arbitrability of Private Antitrust Actions", Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2020/01/23/chinas-top-court-says-no-to-arbitrability-of-private-antitrust-actions/>

Veena Anusornsena, Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia, (November 2012) (unpublished S.J.D. dissertation, Golden Gate University School of Law) <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses>, p 175.

Nathee Silacharoen, David Beckstead, Sakolrat Srangsomwong, Norrapat Werajong, "Public policy and its implications on the enforcement of arbitral awards in Thailand", International Bar Association, <https://www.ibanet.org/public-policy-implications-enforcement-arbitral-awards-Thailand>

Arbitration Act B.E. 2545 (2002), Section 43.

Above fn 101, p 179.

Id.

Supreme Court Case No. 7277/2549 (2006) (Deeka 7277/2549).

Vanina Sucharitkul, Thai Administrative Court Overturns Arbitration Award Against the Government, Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2014/10/09/thai-administrative-court-overturns-an-arbitration-award-against-the-government/>

completion of the expressway, BBCD sought to be reimbursed 8 million baht for the delay in the project caused by ETA. ETA confirmed that BBCD had the right to be indemnified but only for 6 million baht. The parties subsequently sought to have their dispute resolved via arbitration. An arbitral award was rendered in favor of BBCD. The Supreme Court refused to enforce the award because the underlying contract between the parties was considered to be an administrative contract and that the transaction was marred with bribery and numerous conflicts of interest. Thai law defines an administrative contract as one that "includes an agreement in which at least one of the parties is an administrative agency or a person acting on behalf of the State, and which exhibits the characteristics of a concession contract, public service contract, or a contract for the provision of public utilities or for the exploitation of natural resources". The Court said that, at the time the contract was made, the governor of the ETA sought to purchase shares of BBCD for his personal gain.

Another landmark case in Thailand is the ITV Case against the Office of the Prime Minister. ITV had a concession contract granted by the Office of the Prime Minister to broadcast television programs. The contract had an arbitration clause. An amendment to the contract also provided that the Office of the Prime Minister would not allow other concessionaires with similar businesses to ITV to advertise on their stations and, should ITV sustain financial damages because of advertisements by others, ITV could seek compensation from the Office of the Prime Minister. ITV later won an arbitration case against the Office of the Prime Minister based on the advertisement provision. The arbitral tribunal "also reduced the concession-fee payments from those specified in the contract [and adjusted] the news-to-entertainment ratio of programming". The Supreme Administrative Court refused to enforce the award and nullified the same based on public policy grounds. The Court held that the amended provision on advertising could not bind the Office of the Prime Minister as the provision was not added in compliance with government regulations and infringed upon public order. In addition, the Court found that since broadcasting was a public resource, the arbitral tribunal had no authority to reduce the concession fee or change the news-to-entertainment ration of programming. The Court said that the authority to do so belonged to the government and not to an arbitral tribunal.

Id.; Construction Firm Giant Loses Legal Battle, Bangkok Post, <https://www.bangkokpost.com/thailand/general/1277411/construction-firm-giant-loses-legal-battle>; "The Baker & McKenzie International Arbitration Yearbook 2008" (2009), p 69.

The Act on Establishment of Administrative Courts and Administrative Court Procedure (1999); Above fn 108, The Baker & McKenzie International Arbitration Yearbook 2008, p 69.

Supreme Administrative Court Case No. 349/2549.

Above fn 101, p 185.

Above fn 107.

Above fn 101, p 186.

It appears from these cases that Thai courts consider that it is against public policy for arbitral tribunals to tackle fraud, bribery, and the illegality of underlying contracts which contain arbitration agreements.

Thailand has been criticized for its "occasionally broad and unexpected interpretation of public policy [ ] that has led to some surprising and unpredictable results". In 2019, Thailand implemented changes to its arbitration legislation to make it a more arbitration-friendly jurisdiction and more appealing to investors. Its courts have tried to rein in its overly broad interpretation of public policy and have become more willing to uphold arbitration and enforce arbitral awards.

VI. ARBITRABILITY AND PUBLIC POLICY: A PHILIPPINE APPROACH

As illustrated above, arbitrability and public policy are inextricably linked. As Blackaby, et. al, puts it, "[w]hether or not a particular type of dispute is 'arbitrable' under a given law is, in essence, a matter of public policy for that law to determine". Given the rise of international commercial arbitration cases in the Philippines and the increasing involvement of the state and government entities in transactions that include international arbitration clauses, it is imperative to determine what disputes that touch upon public policy issues can be or cannot be resolved through arbitration in the Philippines. Doing so will create more stability in the international commercial arbitration regime of the Philippines, making arbitration more effective and efficient. At the same time, arbitrability offers a chance for the Philippines to "maintain control over important issues affecting [its] existence and welfare through recourse to [its judiciary]". Arbitrability and public policy can then be taken together in a way that safeguards national interest.

If the Philippines wants to uphold its proclaimed state policy in favor of arbitration and hopes to be an arbitration hub, it must resist the temptation to define arbitrability and public policy in a way that would

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Above fn 107.

Maximilian Clasmeir, The Kingdom of Thailand And International Arbitration – Ending the Journey On a Winding Tollway?, Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2015/12/15/the-kingdom-of-thailand-and-international-arbitration-ending-the-journey-on-a-winding-tollway/>; Above fn 77, Sucharitkul.

Id.

Above fn 14, Blackaby, et. Al., p 112.

Above fn 12, p 293.

Id.

impede party autonomy by excluding several types of disputes from the ambit of arbitration. As such, any effort to amend the ADR Act of 2004 and future rulings of the Philippine Supreme Court should not automatically and summarily determine that any claim that has a public interest element to it is automatically non-arbitrable. Thailand's approach of prohibiting arbitral tribunals from determining the legitimacy of commercial contracts and arbitration agreements is overly broad and is inconsistent with how the Philippine Supreme Court has characterized arbitration in Mabuhay Holdings. The Philippines should move towards letting tribunals determine the legitimacy of commercial contracts, including those agreements entered into by the government and its instrumentalities.

The Philippines can look to the Singaporean model. In determining whether a dispute cannot be arbitrated as it will be contrary to public policy, Philippine courts should examine the underlying statutes governing the dispute and whether statutory third-party rights will be restricted. In Larsen Oil, the Singapore Court of Appeal acknowledged that

the mere fact that Petroprod's claims against Larsen were avoidance claims did not preclude them from falling within the scope of the Arbitration Clause. The scope of any arbitration clause is based on the parties' expressed intention, and it is conceivable that the parties to a contract may agree that all disputes between them, including disputes arising out of avoidance actions in the event of insolvency, should fall within the scope of the arbitration clause. This would be a matter of documentary construction.

Subsequently, the Court of Appeal then examined the statutes and the corresponding legislative history relevant to the dispute and studied whether third-party rights would be affected.

Singapore also serves as a good model in looking at the issues of fraud and illegality surrounding an underlying commercial contract. In AJT v. AJU, the Court of Appeal ruled that arbitral tribunals are well-equipped to weigh the factual circumstances to determine whether an underlying contract has been marred with fraud or illegality. The Court of Appeal found that the tribunal looked at all the pieces of

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Emphasis supplied.
[2011] 4 SLR 739.

evidence before reaching its conclusion. There was no finding that the illegality of an underlying contract was not arbitrable. As such, the Court said that the public policy of Singapore was not at all engaged.

Philippine courts, should they face questions on arbitrability, must move towards the two-step determination in order to find out if a particular subject matter can be settled by arbitration. They should look at the underlying statute governing the dispute and whether third-party rights will be affected. If after conducting this examination, it would appear that the underlying statute removes the dispute from the ambit of arbitration or if the dispute affects third parties or concerns the interest of a person not party to the arbitration, Philippine courts should find that such dispute cannot be arbitrated as it goes against public policy and "tends to clearly undermine the security of individual rights, whether of personal liability or of private property".

Questions of fraud or illegality of the underlying contract should not automatically be considered non-arbitrable for public policy reasons. As illustrated in AJT v. AJU, tribunals can be well-equipped to determine fraud or illegality.

VII. CONCLUSION

More and more international commercial arbitration cases involving Philippine parties are being commenced. Arbitration undeniably helps in decongesting court dockets. It is a "viable option to settle disputes… and a better alternative for business and industry". As such, Philippine courts should continuously uphold and respect party autonomy. They should avoid summarily viewing arbitration as incapable of addressing disputes that may have public policy implications. Accordingly, Philippine courts should adopt the two-step approach, where it would look at the statutes governing the claims and determine if third-party rights are involved and restricted. Approaching arbitrability and public policy in this manner is practical. It would help ensure that public policy is not a catch-all ground that facilitates dilatory tactics and groundless oppositions to the arbitral process. It would support the practice of arbitration in the Philippines and help it thrive.

Darius Chan, Singapore Court of Appeal Re-Affirms Commitment to Minimal Intervention of Arbitral Awards at the Intersection of Illegality and Public Policy, Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2011/09/12/singapore-court-of-appeal-re-affirms-commitment-to-minimal-intervention-of-arbitral-awards-at-the-intersection-of-illegality-and-public-policy/>

Above fn 14, Menon.

Id.

Leoncio Gabriel v. Monte de Piedad y Caja de Aharros and the Court of Appeals, G.R. No. L-47806, 14 April 1941.

Above fn 1, Autea, pp 181, 184.

Francisco Pabilla, Jr., "Chief Justice Sees Arbitration as Viable Alternative To Litigation", The Philippine ADR Review, <https://www.pdrci.org/web/wp-content/uploads/2019/12/2019-11-Philippine-ADR-Review.pdf>

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Asia Pacific Regional Arbitration Group

RECOGNITION AND ENFORCEMENT OF HONG KONG ARBITRAL AWARDS IN MAINLAND CHINA: THE STATE OF PLAY

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This article centres on recognition and enforcement of Hong Kong arbitral awards in Mainland China. Part I looks back on the history of the legal framework for reciprocal recognition and enforcement of arbitral awards between the two jurisdictions. It then illustrates the main content of the current legal regime and introduces recent updates to the mechanism. Part II focuses on analysis of judicial practices of Mainland courts in recognition and enforcement of Hong Kong arbitral awards. Overall speaking, the current enforcement mechanism is an effective one, and is predictably to be further enhanced by the new amendments.

I. Legal Framework

A. Pre-1997: the New York Convention

The Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") came into force in China as of 22 April 1987. Since then, it has been the framework for reciprocal recognition and enforcement of arbitral awards between Hong Kong and China. Upon resumption of sovereignty over Hong Kong on 1 July 1997, China extended the territorial application of the New York Convention to Hong Kong. As a result, the New York Convention no longer applied as between the two jurisdictions, which created a period of legal void for reciprocal enforcement of arbitral awards between Mainland China and Hong Kong.

B. Post-2000: The Arrangement for Mutual Enforcement

On 21 June 1999, Mainland China and Hong Kong entered into the Arrangement Concerning Mutual Enforcement of Arbitral Awards (the "Arrangement for Mutual Enforcement" or the "Arrangement"). It later took effect on 1 February 2000. The Arrangement on Mutual Enforcement is detailed in the Arbitration Ordinance of Hong Kong, while it is implemented in Mainland China in the form of judicial interpretation. Main content of the Arrangement is illustrated below.

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1. Time limit for application

According to Article 5 of the Arrangement, the time limit for applying to courts of Mainland China for enforcement of arbitral awards made in Hong Kong shall be in accordance with the provisions of the laws on time limits of Mainland China.

In this regard, Article 239 of the Civil Procedure Law of the PRC provides that, "[t]he period for applying for enforcement shall be two years. The suspension or interruption of the time limitation for applying for enforcement shall be governed by legal provisions regarding the suspension or interruption of the time limitations for instituting an action." In the case of Ding Yi v. Shen Dong , Shenzhen Intermediate People's court held that application to Hong Kong court for enforcement constitutes an event for interrupting the time limit.

Article 483 of the Interpretation of SPC on the Application of the Civil Procedure Law of the PRC further clarifies that if the applicant files an application for mandatory enforcement beyond the time limit, the people's court shall still accept the application. However, if the party subject to enforcement raises an objection as to the expiration of time limit, the people's court shall render a ruling of non-enforcement if it concludes that the objection is valid. In the case of Xiongfeng Group (Shenzhen) Co., Ltd. v. Xiongfeng Group Co., Ltd. , the award creditor applied to Shenzhen Intermediate People's Court for enforcement of a Hong Kong ad hoc arbitral award 4 years after the issuance of the award, the court held that since the party subject to enforcement did not raise an objection on the time limit, the court accepted the application.

2. Competent courts

According to Article 2 of the Arrangement, the competent court to accept application for enforcement of Hong Kong arbitral award in Mainland China is the intermediate people's court of the place where the respondent resides or where the respondent's property is located.

However, it should be noted that China implements a centralized-jurisdiction system for foreign-related cases, which include cases of recognition and enforcement of Hong Kong arbitral awards. Thus, in addition to the requirement under Article 2 of the Arrangement, the

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(2019) Yue Zhi Fu No.73 [(2019) 粤执复73号].

(2018) Yue 03 Min Chu No.2267 [(2018) 粤03民初2267号].

courts that would be competent to hear this type of cases should come from those that have centralized jurisdiction over foreign-related cases.

In this regard, Article 1 of the Provisions on Certain Questions Concerning the Jurisdiction of Foreign-related Civil and Commercial Litigation Cases (effective as of 1 March 2002) provides, "[t]he jurisdiction of the first instance foreign-related civil and commercial law cases shall be vested with the following courts: (1) courts established within the Economic and Technological Development Zones that are approved by the State Council; (2) intermediate courts located in the capital cities of provinces, autonomous regions and directly administered municipalities; (3) intermediate courts established within Special Economic Zones and cities under separate planning; (4) other intermediate courts designated by the Supreme People's Courts; and (5) higher people's courts. The regional extent of jurisdiction for the above intermediate people's courts shall be determined by the higher people's court in the relevant locality."

3. Grounds for refusing enforcement

Article 7 of the Arrangement sets out two categories of grounds upon which enforcement could be refused by courts of Mainland China or Hong Kong, which largely mirror those in the New York Convention. The first category of grounds can be relied by the court only if the party against whom application is made adduces evidence to prove the existence of any of the grounds. These include:

a. a party to the arbitration agreement was, under the law applicable to him, under some incapacity,

b. the arbitration agreement was not valid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the place in which the arbitral award was made;

c. the party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case;

d. the award deals with a difference not contemplated or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of

the submission to arbitration;

e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with agreement of the parties, or, failing such agreement, with the law of the place where the arbitration took place;

f. The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place.

The second category contains two grounds which the court may apply ex officio or upon proof of the party against whom application is made, including:

a. under the law of the place of enforcement, the dispute is incapable of being settled by arbitration;

b. the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland.

It should be noted that Article 7 of the Arrangement uses the term "the court may refuse to enforce the award" (emphasis added) for both categories of grounds, which indicates that the courts of Mainland and Hong Kong have discretion to allow enforcement even if any of the grounds for refusal of enforcement is made out.

4. Recourse against rulings of the court

According to Article 1 of the Provisions of the SPC on Several Issues relating to the Hearing of Cases Involving Judicial Review of Arbitration (the "Provisions on Judicial Review of Arbitration"), cases of application for recognition and enforcement of arbitral award made in Hong Kong fall into the scope of cases involving judicial review of arbitration. Regarding recourse against rulings of the court in this type of cases, Article 20 of the Provisions on Judicial Review of Arbitration provides, "[t]he ruling made by the people's court for a case involving judicial review of arbitration shall come into effect once it is served, except for such circumstances as in-admission, dismissal of application or objections to jurisdiction. If the

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See e.g. Chan Lui-yu v Ho Chi-lan, HCMP 3203/2013,

party concerned applies for a reconsideration, lodges an appeal, or applies for a re-trial, the people's court shall not accept the application, unless otherwise provided by law and judicial interpretations." (emphasis added) Accordingly, parties do not have right of appeal against the court's ruling on whether to recognize and enforce the arbitral award made in Hong Kong.

5. Prior reporting

Established in 1995, the Prior Reporting System is an internal court process and one of the most praiseworthy approaches taken by the SPC to create an arbitration-friendly environment and to ensure consistency in the judicial review of arbitration-related cases. The system was initially designed to apply only in the context of foreign or foreign-related arbitral awards and arbitration agreements. After an amendment promulgated in 2018, it now covers all arbitration-related cases, whether foreign, foreign-related or domestic.

Under this system, if an intermediate people's court intends to refuse enforcement of an award made in Hong Kong, it should report and request approval from the high people's court in its jurisdiction. If the latter concurs, then the case will be ultimately reported to the SPC for final approval.

C. 2020: The Supplemental Arrangement

Seeking to refine the current enforcement regime and remove certain restrictions in the Arrangement, on 27 November 2020, the Department of Justice of Hong Kong Government and the Supreme People's Court (SPC) of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "Supplemental Arrangement"). The Supplemental Arrangement clarifies and modifies the existing arrangement in four aspects:

1. Express reference to the "recognition" procedure

According to Article 3 of the New York Convention, each Contracting State shall "recognize" arbitral awards as binding and "enforce" them in accordance with its domestic rules of procedure and the Convention. Therefore, recognition and enforcement are separate concepts under the New York Convention. The Civil Procedure Law of the PRC and relevant judicial

interpretations of the SPC also use the term "recognition and enforcement" in respect of foreign arbitral awards and arbitral awards made in Macau and Taiwan.

By contrast, the Arrangement only use the term "enforcement" with no mention of the procedure of recognition of arbitral awards made in Hong Kong or Mainland China. However, in the Provisions of Causes of Actions in Civil Cases issued by the SPC (initially promulgated in 2008 and amended in 2011), the relevant cause of action is "application for recognition and enforcement of an arbitral award made in the HKSAR" (emphasis added). Such lack of clarity in the law leads to inconsistent judicial practices as to whether Hong Kong arbitral awards are subject to recognition procedure before they are enforced in Mainland China.

A notable example is the divergent approaches taken by Shenzhen Intermediate People's Court and Wuhan Intermediate People's Court on the enforcement of an HKIAC arbitral award rendered on 20 October 2014. The award creditor first applied to Shenzhen Intermediate People's Court for mandatory enforcement of the award, which was dismissed by the court on grounds that the applicant must apply for recognition of the award prior to applying for enforcement . Afterwards, the award creditor applied to Wuhan Intermediate People's Court for recognition of the award. However, the court clarified to the applicant that in accordance with the Arrangement, recognition is not a prerequisite to enforcement . As such, the applicant withdrew the application for recognition and directly applied to Wuhan Intermediate People's Court for enforcement of the HKIAC arbitral award.

The above inconsistent interpretation by people's court is arguably unsupported since Article 1 of the Supplemental Arrangement clarifies that, "[t]he procedures for enforcing arbitral awards

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Article 283 of the Civil Procedure Law of the PRC provides, "Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, […]"

See Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards (in effect as of 1 January 2008) and Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region (in effect as of 1 July 2015).

See Intel Capital (Cayman) Corp., Intel Capital Corp., Deutsche Telekom AG, v. Airway Telecom International Holding Co., Ltd., et al., (2017) Yue 03 Zhi Yi No.97 [(2017)粤03执异97号].

See Intel Capital (Cayman) Corp., Intel Capital Corp., Deutsche Telekom AG v. Huang Shuying, (2019) E 01 Zhi No.2 [(2019) 鄂01执2号].

of the Mainland or the HKSAR as specified in the Arrangement shall be interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR."

2. Removing the concept of “recognised Mainland arbitral authorities”

The Preface of the Arrangement provides that, “[…] the courts of the HKSAR have agreed to enforce arbitration awards made by mainland Chinese arbitration organisations (the list of which shall be provided by the Office of Legal Affairs of the State Council through the Office of Hong Kong and Macao Affairs of the State Council) in accordance with the Arbitration Law of the People's Republic of China […]” (emphasis added) Accordingly, with respect to awards of Mainland China, the Arrangement only applies to those rendered by Mainland arbitration institutions within the prescribed list.

Article 2 of the Supplemental Agreement removes the concept of “recognised Mainland arbitral authorities” (the italic part in the Preface), meaning that all arbitral awards made in Mainland China will be covered by the Arrangement. This reflects Mainland China’s move to align with international practice with respect to the standard for determinination of the origin of arbitral awards, namely, by focusing on the seat of arbitration rather than the nationality of the arbitration institution rendering the award.

Removal of this restriction also paved the way for further development of ad hoc arbitration and the operation of foreign arbitration institutions in Mainland China.

Currently the Arbitration Law of the PRC only allows for institutional arbitration and ad hoc arbitration only legally edged its way into China with the issuance of Supreme People's Court Opinion on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones (the “FTZ Opinion”) on 30 December 2016. To illustrate, Article 16 of PRC Arbitration Law requires that a valid arbitration clause must specify the designated arbitration commission to administer the arbitration.The FTZ Opinion relaxed this requirement for free trade zones by providing, at Paragraph 3, Article 9, that an arbitration agreement “between two companies registered within the pilot free trade zones, which provides for arbitration in a specified location in mainland China pursuant to specified arbitration rules and by specified arbitrators” may be held valid.

Article 10(3) of the Arbitration Law of the PRC requires arbitration commissions to be registered with the relevant department of justice. However, Chinese laws and regulations do not expressly deal with the registration of foreign arbitration institutions. This then gives arise to uncertainty on whether foreign arbitration institutions can administer cases in Mainland China. On 6 August 2019, the State Council of the PRC (the “State Council”) published the Framework Plan for the New Lingang Area of the China (Shanghai) Pilot Free Trade Zone, permitting reputable foreign arbitration and dispute resolution institutions to register with the Shanghai Municipal Bureau of Justice and the judicial administrative authority of the State Council, and set up operations in the New Lingang Area of the Shanghai Pilot Free Trade Zone. The Chinese arbitration market was further opened to foreign institutions by a reply issued by the State Council on 7 September 2020, which allows “well-known foreign arbitration and dispute resolution institutions to set up, after registering with the administrative department of justice of the Beijing Municipality and filing with the Ministry of Commerce, operational entities in designated areas of Beijing, to provide arbitration services for civil and commercial disputes in international business and investment sectors”.

3. Allowing simultaneous enforcement applications in Hong Kong and Mainland China

Currently Article 2(3) of the Arrangement prohibits award creditor from lodging separate applications for enforcement with courts of Hong Kong and Mainland China at the same time, except that when enforcement of the award in one place is insufficient to satisfy the liabilities, application may then be made with the court of the other place for enforcement of the outstanding liabilities. This has forced award creditors to make a choice at the outset on whether to pursue enforcement in Mainland China or Hong Kong.

If enforcement at the place firstly chosen turns out to be unsuccessful, the risks facing the award creditor are two-fold: (a) subsequent application to the court of the other place might be time-barred. This happened in the case of CL v. SCG [2019] HKCFI 398 where application for leave to enforce a Hong Kong arbitral award was held to be time-barred by the Hong Kong Court of First Instance after an initial unsuccessful attempt by the award creditor to enforce the award

in the Mainland. (ii) by the time application is made to the court of the other place, the award debtor has already transferred or disposed of its assets in order to evade enforcement.

Article 3 of the Supplemental Arrangement has effectively mitigated the above risks by allowing parallel applications for enforcement with courts of Hong Kong and Mainland China. However, this is subject to the condition that the total amount to be recovered from enforcing the arbitral award in the courts of the two places shall not exceed the amount set out in the arbitral award. This Article also requires the courts of the two places to provide information on its status of the enforcement of the arbitral award at the request of the court of the other place.

4. Availability of interim relief

Under Chinese law, the power to grant interim relief in support of arbitration rests exclusively with the people's courts. However, under the Civil Procedure Law of the PRC, court-ordered interim relief in aid of arbitration is restricted to domestic arbitration. In practice, cases are rare where the people's court would award interim relief at the application of a party to arbitration proceedings seated outside of Mainland China.

This treatment used to extend to arbitrations seated in Hong Kong. On 1 October 2019, with the coming into force of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administration Region (the "Arrangement on Interim Measures"). Article 1 of the Arrangement on Interim Measures defines "interim measures" in Mainland China as including "property preservation, evidence preservation, and conduct preservation."

However, Article 3 of the Arrangement on Interim measures places a significant restriction that such application is available to parties to arbitration proceedings seated in Hong Kong prior to the issuance of arbitral awards. This left a legal void as to the possibility for a party to seek interim relief after the awarded has been rendered.

The Supplemental Arrangement filled that void by providing in Article 4 that, "[t]he relevant court may, before or after accepting the application for enforcement of an arbitral award, impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement." Thus, court-order interim measures in Mainland China are available to parties to Hong Kong arbitration throughout the entire lifespan of an arbitration, namely, prior to the commencement of arbitration, during the arbitral proceedings and at the enforcement stage of the award.

II. Case Analysis

A. An Overview

Since the promulgation of the Arrangement in 2000, the courts of Mainland China have recognized and enforced approximately 40 arbitral awards from Hong Kong. To date there are only 3 reported cases where recognition and enforcement were refused, 2 of which concern public interests and the other one was where the award dealt with a difference not falling within the terms of the submission to arbitration. In general, the grounds most frequently revoked for resisting recognition and enforcement are that enforcement of the arbitral award would be contrary to the public interests, the respondent was not given proper notice, and that the arbitration agreement is not valid.

B. Standard of Review

1. Public interests

There is no statutory definition of "public interests" in Chinese laws, regulations or judicial interpretations of the SPC. In a Letter of Reply to a lower court , the SPC articulated that "violation of public policy under the New York Convention should be construed as contradiction with the fundamental principles of law, infringement on the sovereignty, damage to public safety, violation of good social customs and other situations that suffice to imperil the public interests of China." Accordingly, as far as judicial review of arbitration in China, the meaning of public policy and public interests are the same.

In cases concernin the applicationof the New York Convention, there is only one case where the court held that recognition and enforcement of the award would contravene the public interests of China. In that case, the court held that the award contradicts with a prior judgement

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[2006] Min Si Ta Zi No.36 ([2006]民四他字第36号).

made by the people's court which undermines the judicial sovereignty of China.

Similarly, in the 2 cases abovementioned where recognition and enforcement of Hong Kong arbitral awards were refused by the people's courts due to public interests concerns , the underlying arbitration agreements were found to be invalid by the people's courts before the application was lodged, so the courts concluded that enforcement of the awards would contradict with effective decisions of the people's courts, which constitutes violation of the public interests of Mainland.

A Senior Judge of the SPC confirmed that "Chinese court interpret public policy in a very narrow way […]. It is triggered only if the award is manifestly contrary to the principle of the law, fundamental interests of the society, safety of the country, sovereignty, or good social customs".

In a landmark case of recognition and enforcement of foreign arbitral award , the SPC opined that violation of mandatory provisions of Chinese law does not equate with violation of public policy of China. The opinion of the SPC was reiterated in subsequent court rulings on public policy defence in similar situations.

In the case of Farenco Shipping Pte. Ltd. v. Eastern Ocean Transportation Co., Ltd. , the respondent alleged that enforcement of the Hong Kong arbitral award would go against the requirement of the Arbitration Law of the PRC that arbitration agreement should be expressed in writing. Guangzhou Maritime Court reaffirmed that violation of Chinese law shall generally not be deemed as contravention of public interests of Mainland, unless it reaches the threshold

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Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd. [2008] Min Si Ta Zi No. 11 ([2008] 民四他字第11号), English summary of the case in the New York Convention Guide: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=836

Automotive Gate FZCO Corp. et al. v. Hebei Zhongxing Automobile Co., Ltd., (2015) E Yichang Zhong Min Ren Zi No.00002 [(2015)鄂宜昌中民认字第00002号], Wicor Holding AG v. Thaizhou Haopu Investment Co.,Ltd., (2015) Tai Zhong Shang Zhong Shen Zi No.00004 [(2015) 泰中商仲审字第00004号]

See Report on the Public Policy Exception in the New York Convention, China, p.2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=5E68BFA3-533B-40CB-A4A3-181636B88802. .

ED & F Man (Hong Kong) Co., Ltd. v. China National Sugar & Wines Group Corp., [2003] Min Si Ta Zi No. 3 ([2003] 民四他字第3号), English summary of the case in the New York Convention Guide: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=638

(2019) Yue 72 Ren Gang No.1 [(2019) 粤72认港1号].

of fundamental principles of law. In another occasion the public interests defence failed where potential damage to state-owned assets was alleged .

2. Proper notice

In a Letter of Reply to Beijing High People's Court regarding a case of recognition and enforcement of foreign arbitral award , the SPC opined that notice in the arbitration procedure should be deemed properly given by the applicable arbitration rules. The SPC opined that it would not be determined by the treaty on bilateral judicial assistance or Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In judicial practices relating to the Arrangement, the people's courts have followed the above standard established by the SPC. In the case of Bensley Design Group International Consulting Co., Ltd. v. Chengdu Chenchuan Industrial Co., Ltd. , Chengdu Intermediate People's Court pointed out at the outset that the basis for deciding whether notice had been properly given was the arbitration rules. As the arbitration documents were served in accordance with the provisions of the underlying contract and were confirmed as received by the respondent, they have been deemed as served in conformity with the arbitration rules. The court also rejected the respondent's allegation that the arbitration documents should have been served pursuant to the Administrative Measures on China Entrusting Notary Public (Hong Kong). In another case of recognition and enforcement of Hong Kong arbitral award, notice served via electronic mail was also found by the court to be properly given due to conformity with the HKIAC Administered Arbitration Rules .

By contrast, in a 2015 case , the Hong Kong Court of First Instance refused enforcement of a Mainland arbitral award on the basis of improper notice, despite that the notice was deemed as served in accordance with the arbitration rules of Guangzhou Arbitration Commission. In that

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David Dein & Bramley v. Guo' an Football Club, (2020) Jing 04 Ren Gang No.5 [（2020）京04认港5号].

[2016] Min Si Ta Zi No.36 ([2006]民四他字第36号).

(2019) Chuan 01 Ren Gang No.1 [(2019) 川01认港1号].

Israel China Europe International Investment Group Co., Ltd. v.Wuxi New District Wangzhuang Technology Development Co., Ltd. & Wuxi Franke Gmkp Energy Control Co., Ltd.,(2015) Xi Shang Wai Zhong Shen Zi No. 2[(2015)锡商外仲审字第2号].

Chan Lui-yu v. Ho Chi-lan, HCMP 3203/2013.

case, Guangzhou Arbitration Commission sent the notice of hearing to the Respondent's address but was subsequently returned to the arbitration commission marked with the words "No acknowledgement of Receipt and Return". Because the arbitration commission had previously served the notice of arbitration to the same address, which was confirmed receipt by the respondent, the second notice of hearing was deemed properly served pursuant to the then arbitration rules of Guangzhou Arbitration Commission. The arbitration hearing was conducted in the absence of the respondent. The Hong Kong court held that, the notice of hearing was not a valid hearing notice for the purposes of section 95(2) of the Arbitration Ordinance because it was undisputed that the notice had not been received by the Respondent and had been returned to the Guangzhou Arbitration Commission.

3. Validity of arbitration agreement

Another defence frequently put up by parties resisting enforcement is that the underlying arbitration agreement is invalid. According to Article 7 of Arrangement, the applicable law for determining the validity of the arbitration agreement should be the law that applies to the arbitration agreement itself, or failing express indication thereon, the law of the place where the arbitral award was made.

In deciding the law applicable to the arbitration agreement, the people's courts have prevailingly adopted the "separability" rule, namely, the arbitration clause is independent from the underlying contract. For example, in the case of David Dein & Bramley v. Guo' an Football Club , Beijing Fourth Intermediate People's Court held that, the parties in the present case agreed only on English law as the governing law of the agreement, without stating explicitly the law to be applied to the arbitration agreement. As both the location of the arbitration institution and the seat of arbitration were in Hong Kong SAR, the Arbitration Ordinance of Hong Kong should apply in examining the validity of the arbitration agreement.

Objection to the validity of arbitration agreement in the enforcement stage often triggers discussion on waiver of right to object, a principle widely acknowledged in domestic arbitration

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(2020) Jing 04 Ren Gang No.5 [(2020) 京04认港5号].

laws and the arbitration rules of international arbitration institutions .

Article 4 of the UNCITRAL Model Law on International Commercial Arbitration defines this principle as: “[a] party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

The Arbitration Law of the PRC and relevant judicial interpretation have also provided for waiver of right to object in respect of objection to the validity of arbitration agreement. Specifically, Article of the Arbitration Law of PRC provides that, “[..] A party's challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing.” Article 27 of the Judicial Interpretation on the Arbitration Law of the PRC further elaborates that, “Where a party concerned did not object to the validity of the arbitration agreement during arbitration procedures, and requests revocation or resist enforcement of the arbitral award on the ground of invalidity of the arbitration agreement, such request or defence shall not be supported by the people's court.”

The Chinese law and regulations do not make it clear whether the above provisions also apply to cases of recognition and enforcement of Hong Kong arbitral awards. However, in the case of Brambile Co., Ltd v. Zhangjiagang Huafeng Heavy Equipment Manufacturing Co., Ltd , the court rejected the respondent’s defence of invalidity of the arbitration agreement for reason that the respondent did not raise objection in this regard during the arbitration proceedings.

See Arbitration Act 1996, Section 73: “Loss of right to object： (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection […]”;

See also, LCIA Arbitration Rules (Effective 1 October 2020), Article 32.1: “A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection as to such non- compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes.”

SCC Arbitration Rules 2017, Article 36: “Waiver: A party who, during the arbitration, fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure."

(2014) Su Zhong Shang Wai Chu Zi No. 00031 [(2014)苏中商外初字第00031号].

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Although the court did not refer to the above provisions of the Arbitration Law of the PRC and the judicial interpretation in its reasoning, the decision is a de facto application of waiver of right to object.

Concluding Remarks

The enforceability of an arbitral award is a key consideration for commercial parties when choosing to resolve their disputes through arbitration. The Arrangement has provided a simple and effective mechanism for the reciprocal recognition and enforcement of arbitral awards between Mainland China and Hong Kong in the last 20 years, thereby playing a pivotal role in making arbitration a preferable means of dispute resolution for business transactions involving the two jurisdictions. Implementation of the Arrangement in Mainland China also speaks to the pro-arbitration stance taken by Chinese courts in judicial review of arbitration. The Supplemental Arrangement will assist in curing some of the deficiencies of the current arrangement that have been come to light over the years and provide parties with more legal certainty and protection, and will predictably further enhance Hong Kong's status as a hub for international dispute resolution.

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This article focuses on the status of recognition and enforcement of Hong Kong arbitral awards in the Mainland through analysis of the legal regime and judicial practices.

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Efforts and Significance of Badan Arbitrase Nasional Indonesia (BANI) Arbitration Centre for The Development of Arbitration in Indonesia

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The role of BANI in the development of the world of arbitration in Indonesia needs to be observed quantitatively and qualitatively. As a forum for resolving disputes through arbitration, BANI has been established for 45 years. It was set up 22 years before Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution was passed. During this time period, a reflective and evaluative question needs to be raised to assess the significance of BANI's existence. This significance is observed by looking at the efforts that BANI has made to socialize arbitration both practically and cognitively. The result can be seen from the development of the number of cases handled by BANI and the quality of disputes resolved by BANI's arbitrators. In essence, BANI has shown significant development with also continuing to evaluate in various aspects. This paper elaborates in more detail the materials that BANI has consistently disseminated to the general public so that it has an impact on its significant development.

A. BACKGROUND

Arbitration is a business dispute resolution method that has been known in Indonesia. During the Dutch East Indies period as stated in the Reglement op de Rechtsvordering (RV), arbitration was known as "referee". Nonetheless, neither the substance nor the procedure was detailed at the time. About 42 years after the declaration of independence, the Indonesian Chamber of Commerce and Industry (Kadin) saw the urgency of establishing a body focused on arbitration. Through the Decree of the Chamber of Commerce Number 152 of 1977, an arbitral institution was established called the Indonesian National Arbitration Board (BANI). At the time, some of the procedures still referred to RVs and others referred to formal regulations made by BANI itself.

The new arbitration gained its more detailed format nationally through Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (hereinafter referred to as the "Law on Arbitration and ADR"). The main factor was the monetary crisis and the large number of business disputes, both international and national level, in Indonesia. The law recognizes the existence of arbitration body as a body chosen by the disputing parties to resolve their business disputes. The absolute competence based on the arbitration agreement and the finality of the award produced by arbitration body are two important elements that strengthen the existence of arbitration bodies, one of which is BANI.

Both before and after the promulgation of the law on Arbitration and the ADR, there are still several issues related to arbitration. The main issue relevant to the development of arbitration is the limited knowledge of the Indonesian people regarding arbitration. Such knowledge includes: (1) its differences from the court; (2) the paradigm of its dispute resolution mechanism; and (3) the procedure. At its core, there are still many parties who confuse the arbitration with conventional dispute resolution in court.

The reflective and evaluative question to be answered in this paper is how significant the existence of BANI is in answering these problems. If there are facts that show that BANI has been

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Reglement op de Rechtsvordering (RV), Art. 642.

Kamar Dagang dan Industri Indonesia (The Chamber of Commerce of Indonesia), The Decree of the Chamber of Commerce Number 152 of 1977.

UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa (Lembaran Negara RI Tahun 1999 No. 138, Tambahan Lembaran Negara RI No. 3872) ("Law on Arbitration and Alternative Dispute Resolution (ADR)").

Ibid, art 60

significantly able to answer these problems, it means that the existence of BANI is of significant value. On the other hand, if the fact is found that BANI is unable to answer them, it means that an evaluation is needed for its existence to be significant.

The first aspect that needs to be answered is whether BANI has sought to provide correct understandings of arbitration to the public. This aspect is answered not only practically but cognitively in the form of socialization. Some of the matters socialized include the distinctions between BANI and the court, the principles in arbitration that are often not understood and/or implemented by the disputing parties, and also the "ought" paradigm in arbitration.

The next aspect that needs to be looked at is the number of business people choosing BANI as their business dispute resolution forum. The answer to the first aspect should be linear with an increase in the number of business people that choose arbitration as a dispute resolution mechanism. Although the answer is quantitative, there is a quality aspect in it. The selection process, in general, requires two things: (1) there are several options besides BANI; and (2) the option chosen is seen as better than the other options. In a normative way, parties' choosing arbitration as a dispute resolution forum – not through a court – means having a rationalization that an arbitration forum is better than another dispute resolution forum. Calculating the rationalizations varies, from the aspects of the quality of dispute resolution to the application of confidentiality principles as well as time and cost efficiency.

Then, the data that needs to be looked at further is whether the quantity tends to increase, decrease, or be unstable. If no one has used or the graph tends to decline, it means that a search is needed to find out the root causes, such as the substance quality of dispute resolution, effectiveness, and efficiency. The upward trend means that there are strong indications that BANI has succeeded in convincing business people who choose that arbitration is a better method to use in dispute resolution than the conventional court.

B. DISCUSSION

B.1. Quantity of Business Dispute Resolution Cases Settled in BANI

The development of BANI occurs gradually. In the year BANI was founded, no party has chosen BANI to resolve its disputes. During the first 5 years, from 1977 to 1982, only in 1979, there were several cases that were requested to BANI to be resolved. It was not until 1983 onwards, every year, that there were cases resolved through BANI although the trend tended to be unstable and declining. This meager quantity is mainly due to, at first, not many had knowledge regarding arbitration and why arbitration was better to choose.

Only in the years approaching the reforms, there began to be a fairly significant increase. As a result of the monetary crisis, there were many business disputes. On the other hand, business people began to consider using other alternatives to the courts to resolve their disputes. At that time also in 1999, arbitration finally got its format nationally through the law on Arbitration and ADR. From 1998 to 2000, more than 25 disputes were submitted to BANI each year . The format of the finality of the arbitral award, the confidentiality aspect, and the professionalism of the arbitral institution began to interest many business people as a dispute resolution forum.

In the next 5 years from 2001 to the end of 2005, the trend again showed a decline to below 20 disputes. In 2006, users of arbitration services experienced another increase despite a decline until 2008. Only after 2009, BANI received cases to be resolved in at least 40 cases. The initial significant spike occurred from 19 cases in 2008 then to 44 cases in 2009, or an increase of more than 200%. The second spike came from 59 cases in 2013 and then to 88 cases in 2014. After that, in 2015, the number of cases resolved broke the 137 case mark. After 2016 which had 136 cases, there was a downward trend back

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30 cases in 1998, 37 cases in 1997, and 29 cases in 1998.

until 2020, namely 79 cases. However, even in a pandemic, BANI is still trusted by many parties to resolve their business disputes.

In total for 45 years, BANI has resolved 1513 business disputes. In fact, the conclusion that can be said during the 45 years of its establishment is that there has been significant development since BANI was founded. From the 20 years initially, the dispute handled no more than 20 cases, then in the last 10 years to a minimum of about 60 cases per year. This may indicate a major point, namely the emergence of awareness that arbitration is a better dispute resolution forum. Not only that, in parallel, there are efforts that have been made consistently by all elements in BANI to bring about this awareness, both through practical and cognitive levels so that it has an impact on the development of the use of significant arbitration.

B.2. Efforts to Provide Correct Understandings in Arbitration

1. Distinguishing the Arbitral Body from the Arbitral Proceedings and the Court

In the beginning, even today, there are still many parties who misunderstand arbitration as a body and as a process, mixing up its meaning and function. The mixing is either done accidentally because of a mistake in thinking or deliberately to create a wrong assumption for one's own interests. In many annulment applications, BANI was implicated as a Co-Respondent or even a Respondent. As if, BANI, as a body, is involved or contributes directly to an arbitral award decided by the Arbitral Tribunal.

In fact, BANI's position is limited to institutional and administrative management. The arbitral tribunal has the widest autonomy over the resolution of disputes. Even today, BANI's board should not hold a case at all even though they are arbitrators.

Errors in distinguishing between arbitral bodies and proceedings can stem from several factors. The first thing is that there is a blurring of relevant norms in providing explanations, particularly in the law on Arbitration and ADR. Under Article 1 number 8, an arbitral institution is the body chosen by the parties to a dispute to resolve a dispute. The lay understanding of this clause is that the arbitral body is the entity that resolves the dispute; in fact, the subject of resolving the disputes is person who is registered as an arbitrator in the arbitration body.

For example in BANI, it has been affirmed in Article 1 of the BANI Arbitration Rules and Procedures of 2022 that BANI is not a dispute resolution institution but is an independent institution that only administers the dispute resolution process through arbitration and the arbitral tribunal. One such form of administration is the provision of a list of arbitrators that the parties to the dispute can choose to resolve their disputes; In addition, BANI also provides a format for arbitration procedures. In certain contexts, the parties may propose, to the Chairman of the BANI, arbitrators who are not registered but whose expertise is indispensable for resolving disputes.

In fact, against the Arbitral Tribunal which has been chosen by the parties to resolve the dispute, the Chairman of BANI and his staff shall not intervene or know the material of the dispute. The relationship between the body and the arbitrator is not a relationship of a contractual subordinative nature. Although the arrangement for the payment of arbitrator fees is made by the body, it is only part of the Agency's Rules and Procedures and has no implications for the existence of a hierarchy between the two.

BANI Arbitration Centre, SK.No. 21.001/I/SK-BANI/AWR (The Decree of The Chairman of BANI Arbitration Centre).

The Law on Arbitration and Alternative Dispute Resolution, art. 1 number 8.

BANI Arbitration Rules and Procedures of 2022, art. 1.

Ibid, art. 10.

Ibid, art. 18.

Ibid, art 10(2).

Apart from the limitations of explanation in the law, there is no Supreme Court Rule (Peraturan Mahkamah Agung or Surat Edaran Mahkamah Agung) which gives an understanding of the distinction in the mechanism for annulment of arbitral awards in courts. Thus, the pleading party has no direction as to whether the arbitral institution can be withdrawn as a party to the respondent or even the respondent. With the concern that his application would be rejected due to lack of parties, the party applying for annulment retained the arbitral body as either co-Respondent or even Respondent, which in this case was merely a matter of administrating.

This distinction is necessary because there is a principle of confidentiality that must be maintained. All information relating to disputes is only circulated within the arbitration courtroom. Unlike the prevailing procedure in the District Court, which is open to the public (Article 13 of Law No. 48 of 2009 on Judicial Power), dispute resolution through arbitration is carried out in a closed manner to the public (Article 27 Law on Arbitration and ADR). This is done in order to maintain business relations and reputational interests of the parties to the dispute. In addition, this element of confidentiality will also make the parties more open in disclosing the subject matter of the dispute and the evidence and understanding of the parties' business transactions so that the Arbitral Tribunal has more data to resolve the dispute properly.

Not only for the benefit of the parties to the dispute, this principle is also related to the credibility of BANI or other arbitral bodies in resolving business disputes. An arbitration body is not essentially a state institution, but rather an independent institution whose operational sustainability depends on whether the businessmen in dispute trust the resolution of their disputes through the arbitration body. Basically, a dispute can affect the reputation of the businessmen in dispute.

In addition, there are still many parties who equate or even do not know at all the difference between the arbitral body and all its procedures with the district courts. One concrete form is ignoring the arbitration clauses as the basis of the absolute competence of arbitration to resolve disputes. Using the principle that courts should not reject cases (Article 10 of Law No. 48 of 2009 on Judicial Power), absolute competence under arbitration clauses is not heeded as a basis for rejecting requests for dispute resolution in court, as in some cases we do not state here (due to maintaining confidentiality). In fact, there are also parties who write, on their contracts, dispute resolution forums through arbitration alternatively with the district court. The impression that arises is that although the dispute resolution forum written in the parties' agreement is arbitration, dispute resolution by arbitration is the same as dispute resolution in the district court.

Although Article 10 of the Judicial Power Law states that courts are prohibited from rejecting cases, the courts also need to look at the absolute competence in Article 2 of the Arbitration Law. Even in Article 3 of the Arbitration Law, it is stated that the district court is not authorized or must reject an application for dispute resolution in which there is an arbitration clause. This statement does not intend to generalize all parties, but shows that arbitration is still an impressive alternative to the courts.

Not only that, in arbitration proceedings, it was found that there were parties who brought adversarial nuances into the arbitration courtroom whose orientation, in fact, was non-adversarial. The form is by accusing each other without giving understanding to the tribunals. In other words, the orientation is not to resolve disputes, but to obtain claims that are as large as possible or won by the tribunal.

UU No.. 48 Tahun 2009 tentang Kekuasaan Kehakiman (Lembaran Negara RI Tahun 2009 No. 157, Tambahan Lembaran Negara RI No. 5076) (“The Law on Judicial Power”), art. 13.

The Law on Arbitration and ADR, art. 27.

The Law on Judicial Power, art. 10.

The Law on Arbitration and ADR, art. 2.

Ibid., art. 3.

In addition, there are also researchers or authors who state that the district court may intervene before, during, and even after arbitration proceedings. This statement is supported by reference to several articles in the Arbitration Law and the UNCITRAL Model Law. This view is not entirely correct. Because, where the parties have agreed in good faith to resolve their dispute by arbitration, the district court does not need to intervene at all.

In the process of selecting arbitrators, the parties to the dispute have the autonomy to choose which registered arbitrator is entrusted. Then during the hearing process in the proceedings, the parties generally want all the material content of the dispute to be solely within the arbitration courtroom without the other party knowing whoever it is. In fact, since the beginning of the entire arbitration has fully entrusted the Arbitral Tribunal and each other has good faith, the execution of the arbitral award can be carried out on the basis of moral responsibility and without having to register it in the district court; such registration is only required in the context of any party not voluntarily executing the arbitral award.

In addition, there is an aspect of the proceedings that cannot be equated between the procedure of abiding through the arbitral body and the procedure of proceeding through the district court. By orientation, arbitration is an attempt to resolve disputes with a dispute resolution mechanism behind closed doors. This has implications for the nuances of familial proceedings which prioritize giving understanding to the Arbitral Tribunal to better understand the sitting of the case comprehensively. There should be an effort to ensure that the dispute needs to be resolved so that the parties can still establish a business relationship in the present and future.

One more element that needs to be properly put is to distinguish arbitrators from judges in courts. Prof. Bismar Siregar, who has been a chief justice and also an arbitrator, said in his book entitled "Bertasakkur Atas Hadiah Allah", that there are several characteristics of differences between arbitrators and judges, namely as follows.

1. Arbitrators are nobler than formal judges. This relates to the lack of official oversight in tiers at arbitral institutions, such as BANI. Unlike the case with court judges, there is scrutiny until it culminates in the Supreme Court. This glory is judged because the supervision of arbitrators within the BANI is inherent in oneself as well as supervision by the Supreme Supervisor, the Divine Rabbi.
2. In addition, in the context of a trial judge, there is an oath of office before taking office even though in reality it is not in line between the oath and the practice. On the contrary, the member of the arbitrator does not take the oath of office because the arbitrators are obliged to understand and animate, what they do is not just any obligation but one work of resolving a case is equal to the duty of the Judge to swear Justice Based on the Almighty Lordship. It is therefore understood an arbitrator, ethically, does not need to apply, but waits to be applied for by the arbitral institution based on the guarantee so far as to have a good report of his conduct beyond doubt.
3. In addition, unlike in the Courts that rely more on the formal truth to secular law and not to Pancasila, the verdict is only between two: lose or win. For such a Judge it does not matter what the relationship between the parties becomes after the trial. On the contrary, through dispute resolution in BANI it is more about reconciliation efforts. And to be able to do so, (an arbitrator) requires art, patience, wisdom and the ability to touch the conscience of the disputing parties to understand the meaning of brotherhood in this mortal life.

See Tri Ariprabowo, "Annulment of Arbitral Awards by Courts in Constitutional Court Judgments No. 15/PUU-XII/ 2014" Constitutional Journal Vol. 14 No. 4 (2017), p. 717.

See in a contrario way in Art. 61 of the Law on Arbitration and ADR.

Apart from talking about the distinction above, some parties still do not know and/or implement the basic principles in arbitration. The three principles we mean are: trust, confidentiality, good faith. As of now, the understanding and the important values of these three principles continue to be socialized and also practiced consistently by all elements of BANI.

2.1. Trust

There are two important elements of trust: (1) willingness; and (2) expectations. A person is willing to ask another person to do something due to rationalizations and careful considerations that provide a sense of "I will let you do this job because I trust you will be able to do this". In parallel, this willingness implies the existence of an expectation or an end that is resulted from the activities carried out by the trusted person. With this construction, relationships based on trust are relationships of fulfilling rights and responsibilities to each other or a give-and-take activity.

In respect of willingness, rationalizations and considerations are based on: (1) the existence of abilities/skills that can be entrusted to solve a problem or more; and (2) the existence of integrity or morality in a narrow sense in solving that problem. These two influence one another. A person will find it difficult to trust the other person having ability but lacks honesty and often commits fraud. Likewise, that person will also find it difficult to trust the other person that is honest but not able to solve the problem.

Meanwhile, with respect to expectation, it is the goal to which the will is directed. The form of expectation in arbitration is, normatively, the disputes being resolved on the basis of truth and justice. From the perspective of the disputing parties, this expectation, as well as willingness, does not only arise due to a factor commonly referred to as "relational trust" (trust based on the quality of the arbitrator). However, another aspect, which can also generate trust, is the concept of "procedural justice" (trust based on formal proceedings in arbitration). A study reveals the importance of fair settlement procedures to public trust in resolving disputes in court. In essence, the community will still be satisfied with the results, even if they lose, if the court procedures they go through are carried out fairly and objectively.

In arbitration, the disputing parties have the freedom to choose which arbitrator to sit in the tribunal (personal level) pursuant to art. 9(3) and the explanatory part of Law 30/1999. Based on the article, the disputing parties have the freedom to choose the arbitrators based on integrity, honesty, expertise, professionalism, and neutrality. In this context, the trust concept that becomes the basis is relational trust. Arbitrators who are considered problematic in terms of ability and/or integrity will certainly not be chosen. In fact, an arbitrator chosen by the applicant party also needs to seek approval from the respondent party. In the other words, the arbitrators chosen are the choice of both parties.

Peter O. Mülbert and Alexander Sajnovits, "The Element of Trust in Financial Markets Law," German Law Journal 18 (March 2019): 4-5.

Kyle J. Thomas, "Rationalizing Delinquency: Understanding the Person-situation Interaction through Item Response Theory," Journal of Research in Crime and Delinquency 56 (2019): 5-17.

Tom R. Tyler, Psychology and the Design of Legal Institutions (Nijmegen: Wolf Legal Publishers, 2007), 22.

P. Colin Bolger and Glenn D. Walters, "The relationship between police procedural justice, police legitimacy, and people's willingness to cooperate with law enforcement: A meta-analysis," Journal of Criminal Justice (2019): 95.

Diego M. Papayannis, "Independence, impartiality and neutrality in legal adjudication," Revus 28 (2016): 5-23.

Article 11 of Peraturan dan Prosedur Arbitrase Nasional Indonesia Tahun 2022.

Besides, this trust is also concretized from the perspective of the arbitration institution. The body absolutely tends to make sure that it is trustworthy for disputing parties. These are some mechanisms to do that.

1. A strict process to become arbitrators of the arbitral institution. This strictness relatively exists in various law enforcement institutions, such as judges of the general court. The distinguishing factor is that the arbitration institution has an interest, like a company, to be chosen by the public in resolving disputes. One of the legit reasons is that its source of funding does come from disputing parties wanting to resolve their disputes through arbitration.
2. The mechanism to give sanctions to arbitrators who do not maintain the principle of trust. As background, one of the factors that influence trust in dispute resolution institutions is how there is a possibility of bribery happening in between the process. To overcome this issue, the parties will choose the most credible institution to resolve disputes objectively, not institutions without integrity. To date, there have been no cases of corruption or bribery involving BANI's arbitrators resulting in the parties trusting BANI as their dispute resolution.
3. The right of denial (hak ingkar) is based on Arts. 22-26 of Law 30/1999 and Art.12 of the BANI Indonesia Arbitration Rules and Procedures of 2022. One example is that after the parties determine arbitrators that will resolve their dispute, they are prohibited from meeting personally with the parties. If this is found, one of the parties can file a right of denial which will be assessed by the body to replace those arbitrators breaking that rule.

2.2. Confidentiality

We found that there are four elements of confidentiality: (1) information; (2) that information affects the interests of the parties; (3) it contains interpersonal aspects in the form of trust in keeping the information confidential; and (4) confidentiality is not always confidential as long as there is a context in which the interests of others will be disturbed if it is not disclosed. These elements of confidentiality were gathered from the explanation in the General Data Protection Regulation (GDPR) in which more than 120 countries are already exposed to international privacy laws for data protection to ensure the data security for their citizens.

The disclosure of data or information that is confidential should follow the global privacy principles: notice is to advise the parties to protect their personal information; choice and consent to provide parties with choices and consent to the use, storage, management, and collection of personal information; access and participation—to ensure that the information from the parties is accessed by within the right security protocol; integrity and security—to ensure the information is secured from unauthorized access, and enforcement—to ensure the platform using the information is under regulation.

In the context of confidentiality in arbitration, Reuben explains that confidentiality in arbitration is natural and the parties should already safeguard the sensitive information throughout the process. This confidentiality of the information is limited in terms of its scope and generally recognized according to Article 25(a) UNCITRAL Rules, Article 21(3) ICC, and Article 19(4) of the LCIA. Only information that affects the interests or reputation of disputing parties can enter the universe of

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Ibid., Art. 10.

Article 10 of Code of Ethics and Code of Conduct for Arbitrators of the Indonesian National Arbitration Board.

Thales, "Beyond GDPR: Data Protection Around The World," accessed 28 June 2022, https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/magazine/beyond-gdpr-data-protection-around-world.

Richard C. Reuben. "Confidentiality in Arbitration: Beyond the Myth," Kansas Law Review Vol. 54 (2005-2006): 1280.

information that is being discussed. The consideration of whether or not a piece of information is confidential is determined by different parties in different jurisdictions.

In England, there is only an implicit duty of confidentiality by requiring parties to cover all documents disclosed or generated in the arbitration process, including documents that contain trade secrets or market commercial sensitive information. While in Australia, the High Court of Australia determines confidentiality only in respect of documents under the order of the tribunal. But in other jurisdictions, there is no clear regulation to determine whether a piece of information is confidential or not and it relies upon the agreement between the parties to keep the documentation of arbitration confidential.

Confidentiality contains an interpersonal aspect. For example, the disputing parties trust the other party – in this case, arbitral tribunals – to maintain the confidentiality of the information. The principle of confidentiality is regulated under Article 30 of LCIA Arbitration Rules in which confidentiality should be carried out in a well-defined manner. This international regulation is adopted under Indonesian law through Article 1 section (7) of Law on Arbitration and ADR in which there is a selection before choosing an arbitrator as an implication of the confidentiality principle. According to Emmanuel Gaillard and John Savage, one of the four arbitrators' obligations, to maintain that confidence, is that they must maintain the confidentiality of all matters relating to the arbitration cases they are settling.

Last but not least, confidentiality is also contextual and can be open but very limited. In general, confidential information should be disclosed whenever the interests of other parties are compromised when the information is not disclosed. However, notifying such information must be based on careful rationalizations. First, the information will not be circulated to irrelevant parties. Second, the notification is done for a specific purpose, such as solving the cases.

Confidentiality in arbitration is contained in Article 27 of the law. Pursuant to this article, all arbitration hearings by an arbitrator or an arbitral tribunal, are closed and not open to the public. These closed trials are different from the trial procedure in the district court that is open to the public. This article reflects the UNCITRAL Model Law in Article 34.5 which recognizes the principle of confidentiality by requiring the consent of both disputing parties to make the arbitration be made public.

In contrast to the provision in Law Number 48/2009 on Judicial Power in which it is stated that court decisions are only valid and have legal force if they are pronounced in a trial open to the public; there is no such provision in the law on Arbitration and ADR. This contradiction is further explained in the explanation part of Article 27 of the law which states that although a closed trial contradicts the usual process of civil law procedure, it is justified to emphasize confidentiality in the arbitration process as a dispute resolution.

Furthermore, in the Explanation Part of the law, confidentiality is one of the advantages of arbitration over other institutions. This assumes that there is a general understanding in arbitration procedures that confidentiality is a procedural elemnt that must be maintained in the entire implementation of dispute resolution through arbitration.

Simon Crookenden QC, "Who Should Decide Arbitration Confidentiality Issues?" Arbitration International 25 (December 2019): 605.

Article 30 of LCIA Rules.

Article 1 section (7) of Law No. 30 of 1999.

Emmanuel Gailard and John Savage, Fouchard, Gailard, Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999), 609-613.

Pursuant to Article 27 of Law No. 30 of 1999, all of the process in dispute inspection by the arbitrators is done closely.

Article 13 section (1) of Law No. 48 of 2009. Also look at Art. 52 section (1) that the courts have to make their decisions accessible to the public.

Explanation of Article 27 of Law No. 30 of 1999.

The normative basis for confidentiality is also found in the internal regulations for the arbitrators – in this case, the regulations issued by BANI. Pursuant to Article 14 paragraph (2) (Confidentiality Section) of the BANI Indonesia Arbitration Rules and Procedures of 2022:

All trials are closed to the public, and all matters relating to the appointment of arbitrators, including documents, reports/records of trials, witness testimonies, and decisions, must be kept confidential between the parties, the arbitrators, and BANI, except by laws and regulations it (that confidentiality) is not required or agreed upon by all disputing parties.

The article emphasized that there is a general understanding of confidentiality as an advantage of the arbitration process. This is also in line with Article 6 of the BANI Code of Ethics and Guidelines for Arbitrators' Conduct, in which it is stated in several paragraphs that: (1) the arbitrators are obliged to maintain confidentiality on all matters relating to the case, the course of the arbitration process, the results of the deliberation of the arbitral tribunals, and/or the awards, before and after the awards are read to the disputing parties; (2) the arbitrators are prohibited from discussing the cases they are settling outside the court proceedings; (3) the arbitrators are prohibited from using confidential information obtained during the arbitration process for their personal interests or the interests of others.

The importance of confidentiality can be observed in practice. First, it is to maintain the reputation of the concerned parties. Besides, from the side of arbitral tribunals, the confidentiality guarantee helps them settle the disputes.

Normally, parties are apt to settle their disputes in a format not open to the public. Rosan Perkasa Roeslani, the former Chairman of the Indonesian Chamber of Commerce and Industry (Kadin), provides testimony that such a format protects companies' reputations. As written by Margarot Jacoby in Huffpost, not only does a lawsuit cost a company a lot of money, regardless it has been dismissed by the court, but it also makes customers hesitant to do business with that company. The reason is that the news spread cannot be filtered by the company; thus, customers play safe to stay out of trouble. reputation becomes one of the main business assets responsible for sustained financial outcomes.

2.3. Good Faith

In essence, in the context of arbitration, good faith is an intention to resolve a dispute based on these three grounds: (1) truth; (2) benefit; and (3) justice. Several implications arise directly from these grounds. First, the purpose/intent of submitting a case to an arbitration institution is to settle disputes, not merely to gain claims as much as possible. Second, this purpose implies the way the arbitration process is done; the disputing parties should not cherry-pick facts and arguments that are in their favor. To Priyatna, arbitration is a dispute settlement that bases its resolution on evidence provided by the parties, but with honesty and good faith.

The importance of good faith in arbitration is also emphasized in the 'Guidelines on Standards of Practice in International Arbitration' published by ICCA which provides a survey of professional standards, ethical rules, and civility guidelines under a variety of jurisdictions. The guidelines explained arbitral process will work effectively and fulfill its purpose according to participants' acts of good faith,

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Badan Arbitrase Nasional Indonesia, The Role of BANI in the Development of Arbitration (Jakarta: BANI, 2020), 68.

Peter W. Roberts and Grahame R Dowling, "Corporate Reputation and Sustained Superior Financial Performance," Strategic Management Journal 23 (September 2002): 1077.

Peter W. Roberts and Grahame R Dowling, "Corporate Reputation and Sustained Superior Financial Performance," Strategic Management Journal 23 (September 2002): 1077.

H. Priyatna Abdurrasyid, Penyelesaian Sengketa Komersial Nasional dan Internasional) di luar Pengadilan, Article, September 1996, 1.

treating each other with respect, courtesy, and civility, as well as adhering to the standards of integrity, honesty, and candor.

Based on Black's Law Dictionary, good faith is a mental state that consists of four elements. The first element is honesty in intent. This means that the demonstrated intention is sincere to resolve the disputes. The second element is loyalty to duties or obligations. The third element is compliance with the commercial standards in transactions. Fourth, a person with good faith does not cheat on the system or seek personal gains, but does have the intention for the sake of collective goods.

The next question is: why is good faith necessary in arbitration? The UNCITRAL Model Law on International Commercial Arbitration explains the uniform rules of a arbitration process that aims to ensure the predictability and the certainty of the process. One of the principles is good faith according to Article 2A (1) of the Model Law. It is explained that the interpretation of this Model Law needs to promote uniformity and observe the existence of good faith as the international origin and general principles. This proves that the principle of good faith has global importance in the practice of arbitration, as well as in its practice in Indonesia.

In Indonesia, the term "iktikad baik" (good faith) is also normatively mentioned 3 (three) times in the law on Arbitration and ADR. According to these several provisions, good faith must be the basis of both making an arbitration clause and in the arbitration process.

1. The basis or foundation of dispute resolution outside the court through the alternative dispute resolutions – one of which is arbitration – is good faith. (Article 6 paragraph (1)). In this context, good faith is discussed at the stage that arbitration is being selected as a method of dispute resolution or the creation of an arbitration clause.
2. The arbitration clause is immediately binding on the parties to be implemented in good faith (Article 6 paragraph (7)). In this context, good faith is discussed in the stages of the arbitration process carried out by the disputing parties.
3. The arbitral tribunal that carries out all actions taken during the trial process to carry out its functions, based on good faith, cannot be subject to any legal responsibility (Article 21). In this context, good faith is discussed at the stage of the arbitration process carried out by arbitral tribunals.

Beside its normative importance, good faith, based on our observation, has a practical significance. The application of good faith by both parties makes the dispute resolution process the nuance of honesty, not adversarial. From the side of arbitral tribunals, this nuance will make it easier for the tribunals to grant fair awards. The disputing parties not having good faith will complicate the process by hiding or manipulating facts.

2.4. Arbitration in Indonesia after the Pandemic

Even in a pandemic situation, many business disputes still go to BANI to be solved. There are disputes over agreements that were made before the pandemic emerged or after. The implementation of health protocols and social distancing policies forces the businessmen involved and BANI to accommodate teleconferencing technology. At the same time, all parties are beginning to feel that the existence of this technology results in a much more efficient arbitration process in time and cost

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Audrey Sheppard, "The Lawyer's Duty to Arbitrate in Good Faith and with Civility," Arbitration International 37 (2021): 544.

Anita Dewi, Asas Itikad Baik dalam Penyelesaian Sengketa Kontrak Melalui Arbitrase (Bandung: Alumni, 2013), 95.

Ibid.

Ibid.

Ibid.

Article 2A of UNICTRAL Model Law on International Commercial Arbitration.

regardless of the shortcomings produced. However, there are things related to teleconferencing technology that need to be considered for the application of the principle of confidentiality to it.

The first thing to note is: can the available video conferencing platforms really guarantee no unauthorized parties can access the conference? Today, these platforms are not only what they used to be Skype, but also Zoom, Google Meet, Lifesize, Microsoft Teams, Cisco Webex, Join.me, CyberLink U, Zoho, Any Meeting, and others. All of them not only offer ease and completeness of use, but also confidentiality by using the end-to-end encryption feature.

What is the understanding of end-to-end encryption? In simple terms, the data / messages sent by the sender will be encrypted or made in the form of codes until they reach the receiver so that no one will be able to access in the middle of the delivery. As long as, no one has the decryption key, the transmitted message will not be readable. Thus, in fact, in simple terms, according to Kurt Guntheroth, if the key is successfully retrieved or even in the hands of an unknown institution for decryption, the communication can still be read in the middle before it reaches the recipient.

In addition, attention to end-to-end encryption existed for a long time before the internet was what it is today. There is a report made by Michael A. Padlipsky, D.W. Snow, and P.A. Krager entitled "Limitations of End-to-End Encryption in Secure Computer Networks". This report was made, in 1978, for the Deputy for Technical Operation of Electronic Systems Division of Air Force Systems Command of the United States Air Force. In essence, in this report, it is stated that it is not enough to rely on end-to-end encryption technology as a way to guarantee security. The main reasons are: [p]otential senders of classified information have several channels (addresses, lengths, and timing of transmissions) available through which to communicate with potential receivers. Although it is at best extremely difficult to eliminate the potential senders or to block the channels, it does seem that the potential software receivers of the information can be prevented from further communicating the information to human agents. The security kernel-based communications subnetwork processor to do this, however, could even be permitted to receive unencrypted transmissions from the Host.

Not only in the matter of the proceedings through the arbitration, but also the submission of thousands of files to the Tribunal. In online events, the parties can of course collect these files online through encrypted messages. However, not all online messaging services also have an encrypted system that can guarantee that there will be no conceding. Unlike the case of collecting files in person or offline, no one will be able to interrupt in the middle to read them.

The second issue to note is how to ensure that during the examination of witnesses or the trial process, there are no irrelevant parties in it. In simple terms, the solution that can be given is to use a 360° camera. Nonetheless, usually, the parties will go directly to the person's place or call him at his representative's office to state his testimony. Ultimately, the complexity of ensuring this confidentiality also arises in online hearings.

Despite these issues, the use of online trial mechanisms is a necessity. Apart from the wide variety of issues that surrounds it, the expediency in terms of efficiency 'forces' both the parties and the Arbitral Body as well as the arbitral tribunal to use it. Moreover, for example, the parties to the dispute are cross-border or even just cross-county, and also the arbitrators are not always in one place. Distance and time

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Kurth Guntheroth is an expert in software development (software engineer) for almost 40 years. Kurt has worked with C++ for more than 20 years, as well as with Dale Green and Shaun R. Mitchell created a book called "The C++ Workshop" and several other publications. This answer is given in a question asked through Quora with the question: can end-to-end encryption be hacked?.

Michael A. Padlipsky (1939-2011) was a graduate of the Massachusetts Institute of Technology who was one of the early members of the team that developed the Arpanet networking protocols which is the foundation of today's internet. One of his books that groundbreaking be The Elements of Networking Style.

constraints are no longer an issue in such contexts as the presence of online hearings. Currently, BANI has formulated in detail the procedure through online hearing in the BANI Arbitration Rules and Procedures 2022 to ensure the preservation of the principle of confidentiality. Virtual hearings and hybrid proceeding can be used so long as both the disputing parties and the tribunal agree to do so.

3. Straightening out the Arbitrated Paradigm: Win-Win or Win-Lose?

In this paper, the paradigm in question is a win-win, win-lose, or even a lose-lose mechanism. Based on the interviews we conducted, several arbitrators and academics stated that the paradigm of arbitrage is a win-win mechanism; in fact, some state that paradigms should be lose-lose. On the other hand, the other advocates as well as academics state that arbitration should be a win-lose mechanism as a differentiator from other dispute resolution methods such as negotiation, conciliation, or mediation. We ourselves once revised by peer-reviewed in a national law journal that arbitration should be a win-lose mechanism.

The paradigm is a basic foothold in the minds of each party, be it the arbitrator or the parties to the dispute, in arbitrating. For arbitrators, this footing will determine how the arbitration procedure begins until the final award is made. For example, when a win-win mechanism is implemented, there is a tendency during the proceedings that the sole arbitrator/arbitrator tribunal should not make either party feel in a losing state. At the end, each party must feel that the award rendered puts the parties in a victorious state. Thus, any process of proving facts, the application of norms, the application of business concepts, should be directed to such orientation.

On the other hand, this paradigm also raises the question: is it possible that in a dispute, both parties to the dispute equally win? Based on a statement from one of the arbitration lawyers we interviewed, the application of a win-win mechanism in the world of arbitration in Indonesia will only make businessmen rethink using arbitration services in Indonesia. Basically, for the parties to the dispute and the attorneys, the use of arbitration is to determine whose arguments are more appropriate to apply in a final and binding manner, not to reconcile the two by means of applying a win-win mechanism. This is because the parties to the dispute can also continue the civil relationship between the two by resolving the dispute in a win-lose manner.

Nonetheless, the statement about the win-lose paradigm also raises some issues. The main problem that arises is that this paradigm gives birth to an implication that is not in line in the context of dispute resolution in Indonesia, namely reconciling. The principle is amicable resolution preserves relation. In the nuances of that paradigm, as is often the case in court proceedings, there is a tendency to assume that it is the right party. Although in the general context of arbitral business dispute resolution that we often find, not always one party is 100% correct while the other party is 100% wrong. Assuming each of the parties to the dispute is in good faith, the adversarial nuances should not be implemented.

One of the concrete implementations of the amicus resolution is the deliberative approach which is the soul of the Indonesian nation, for example Hybrid Arbitration. This mechanism combines arbitration with other ADR mechanisms, for example with mediation or Arb-Med-Arb. The mediation process in arbitration is different from the mediation conducted in courts in Indonesia as stipulated in Supreme Court Regulation Number 1 of 2016. If in court mediation is conducted by force so that it is often carried out only by mere formality, in arbitration proceedings mediation is conducted voluntarily after the arbitrator has opened up the parties' thinking that mediation is a viable mechanism to be pursued in order to obtain a mutually acceptable settlement. In addition, arbitrators have an obligation to seek deliberation between the parties in any proceedings, so that mediation proceedings in arbitration may be held at any time if the arbitral award has not been read out. This explains why the success rate of mediation in arbitration proceedings is much higher compared to in court.

C. Conclusion

The role of BANI in the development of arbitration in Indonesia is significant. At the age of 45, BANI has sought to socialize the correct understanding of arbitration both through public seminars and when it becomes an institution for organizing business dispute resolution through arbitration. Not only consistently making substantive distinctions from the courts in general, all elements of BANI continue to strive to socialize 3 basic principles in arbitration, namely trust, confidentiality, and good faith. As an implication, especially in the last 10 years, more and more businessmen trust BANI to be a dispute resolution forum that arises because it is in line with the needs of their desired dispute resolution characteristics. In our opinion, this can happen because the main factor is the awareness of business people that dispute resolution through arbitration at BANI is better than conventional dispute resolution methods through the courts. Nevertheless, BANI continues to evaluate in various aspects to continue to be the organizer of dispute resolution through competitive arbitration in the Asia Pacific environment.

C. Conclusion

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Asia Pacific Regional Arbitration Group

Recent Trends in Institutional Arbitration and Mediation

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A. Overview of Commercial Arbitration

1. Legal Framework

a. Commercial Arbitration

Cambodia is one of the 172 State Parties to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). It acceded to the New York Convention on 5 January 1960 and the instrument entered into force in Cambodia on 4 April 1960 in accordance with its Article XII. Cambodia has not made any declaration under Article I (3) of the New York Convention.

The Law on the Adoption and Implementation of the UN Convention on the Recognition of Foreign Arbitral Awards, promulgated on 23 July 2001 (the "Law on Adoption and Implementation"), defines the adoption and implementation of the New York Convention. This law also defines the procedure and jurisdiction of the Cambodian court when there is a question of the recognition and enforcement of a foreign arbitral award pursuant to the New York Convention.

The Law on the Adoption and Implementation is not a general legislative instrument governing commercial arbitration in Cambodia. It instead integrates the New York Convention into the Cambodian legal order to enable relevant domestic institutions to implement the provisions of the New York Convention. For instance, Article 4 of the Law on the Adoption and Implementation provides that "the Cambodian Court must decide in compliance with the New York Convention in adjudicating on the recognition and enforcement of foreign arbitral awards". The Law on Adoption and Implementation defines the jurisdiction to the Phnom Penh Appeal Court and the Cambodian Supreme Court (collectively, the "Cambodian Court") when adjudicating over matters concerning the recognition and enforcement of foreign arbitral awards. It also defines a "foreign arbitral award" as an "award of an arbitration made in a country other than the Kingdom of Cambodia or under the procedures law of a country other than the Kingdom of Cambodia" (Art. 2 (1)).

Article 15 of the Law on Adoption and Implementation reproduces, mutatis mutandis, the terms of Article V of the New York Convention as grounds for refusal of recognition or enforcement of a foreign arbitral award. The same article of the Law on Adoption and Implementation adds a principle to guide the Cambodian Court in interpreting the concept of "public policy". It provides that by "determining the standard of public policy applicable to the refusal of foreign arbitral award, the court shall consider based on the standard of public policy applied by the court of other signatory countries of the New York Convention".

The Law on Commercial Arbitration was promulgated on 5 May 2006 (the "LCA") and its implementing regulations (Sub-Decree No. 124 on the Organization and Functioning of the National Arbitration Center as amended by Sub-Decree No. 182) constitute the main statutory legal framework governing commercial arbitration in Cambodia. The LCA was modelled after the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

Article 1 of the LCA sets its purpose as being "to facilitate the impartial and prompt resolution of commercial disputes arising in Cambodia in accordance with the wishes of the parties, to safeguard the legal rights and interests of the parties, and to promote the sound development of the economy". Contrary to the Law on Adoption and Implementation, the LCA constitutes a comprehensive regime for commercial arbitration in Cambodia. The LCA governs the form of an arbitration agreement, the role of the courts in supporting arbitral proceeding, the composition and jurisdiction of arbitral tribunals, the conduct of arbitral proceedings, the making of awards, and the termination of arbitral proceedings.

The provisions of the LCA that may conflict with the Law on Adoption and Implementation are those of Chapter VIII of the LCA on the recourse, recognition, and enforcement of arbitral awards. The LCA does not explicitly repeal any provisions of any law, but only provides in Article 47 that "any provisions in commercial arbitration sector that are contrary to [the LCA] shall be abrogated". The Chapter VIII of the LCA is based on Article V of the New York Convention and in line with the Chapter VII and VIII of the Model Law. Therefore, the provisions of Chapter VIII of the LCA may serve as legal grounds for actions for setting aside, recognising or enforcing any arbitral award. The LCA also provides that the "jurisdiction over recourse, recognition, and enforcement of arbitral award shall rest with the Appellate Court of the Kingdom of Cambodia" and that the Supreme Court of Cambodia shall be the final jurisdiction to try appeals against the decision of the Appellate Court.

The scope of the LCA, being related to disputes of a commercial nature, defines the word "commercial" in the same terms as recommended by the Model Law, which provides that:

"the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of good or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; and carriage of goods or passenger by air, sea, rail or road".

Moreover, one of the highlights of the LCA is the establishment of a specialized dispute resolution center, the National Commercial Arbitration Center (the "NCAC"). The LCA does not make it mandatory to resolve any dispute of a commercial nature through institutional arbitration. Article 2 of the LCA defines "arbitration" as "any arbitration whether or not administered by a permanent arbitral institution", thus also including ad hoc arbitration.

b. The Establishment of the NCAC

The NCAC is a non-profit organisation established by Chapter V of the LCA, under which the NCAC is described as "an independent [center] … established under the auspices of the Ministry of Commerce". Article 10 of the LCA enumerates the NCAC's objectives as follows: (1) to promote the settlement of commercial disputes by means of arbitration in Cambodia; (2) to create the necessary infrastructure and rules for the administration of arbitration cases in Cambodia, where parties agree to refer their disputes to the NCAC; (3) to ensure that high quality standards of arbitration are maintained in Cambodia, including setting standards for the qualification of arbitrators.

The LCA provides that the organization and functioning of the NCAC shall be governed by a Sub-Decree (Sub-Decree No. 124 on the Organization and Functioning of the NCAC, issued on 12 August 2009 ("Sub-Decree No. 124"), as amended by the Sub-Decree No. 182 on the amendment of Article 52 of the Sub-Decree No. 124 on the Organization and Functioning of the NCAC, issued on 31st December 2010). Article 2 of Sub-Decree No. 124 provides that the NCAC has the role of providing "extra-judicial commercial dispute resolution services", and "carrying out others functions as determined by the NAC's General Assembly". Article 4 of Sub-Decree No. 124 vests the NCAC's General Assembly with the power to consider and approve "internal regulations and rules concerning the dispute resolution process". For the implementation of those provisions, the NCAC has subsequently developed its own set of rules as a basis for arbitral proceedings.

For background on arbitration trends in Cambodia, reference can be made to the latest statistics released by the NCAC at its General Assembly on 18 March 2023. As per its Annual Report, a total of 32 cases were submitted to the NCAC between 2015 and the first quarter of 2023 with total sum of around USD 91 million in dispute. Of the 32 cases, 68% are domestic and 32% are international cases. 2018 and 2020 had the highest number of case registrations, 25% and 28% of the total 32 cases respectively. There are 70 arbitrators registered with the NCAC as of 31 December 2022), among which 61 are Cambodian and 9 are foreign nationals.

Even though most cases administered by the NCAC are domestic, around 47% of administered cases were conducted in English and 53% in Khmer. Regardless of being administered in Khmer or English, all administered cases were governed by Cambodian Law and conducted in Cambodia as the seat of arbitration. On the 32 cases administered by NCAC, 53% (17 cases) concluded with an award, of which one was a consent award. While 16% of the total case (5 cases) remain active, there are also cases in which the NCAC was found to have lacked jurisdiction or which were withdrawn by the parties .

2. Institutional Framework

The NCAC's first arbitration rules (the "2014 Rules") were adopted by its General Assembly on 11 July 2014 and came into force on 11 July 2014. The 2014 Rules were revised on 28 March 2021. The amended rules (the "2021 Rules") took effect from 28 June 2021. The NCAC promulgated s Code of Conduct for Arbitrators Registered with or Conducting Arbitrations under the Arbitration Rules of the NCAC on 6 April 2015. The Code was amended by the NCAC's General Assembly on 28 March 2021. The revised Code (the "Code of Conduct") took effect from 28 June 2021. Internal Rules were adopted by the NCAC's General Assembly on 11 July 2014, coming into force on the same date. The Internal Rules were revised with effect from 28 March 2021.
In this section, we will focus on provisions and rules that may be construed as facilitating the settlement of disputes through the parties' agreement.

a. The 2021 Rules

Article 35.3. (Exploring amicable resolution) of the 2021 Rules provides:
"Before or at the preliminary meeting, the Tribunal shall confer with the parties for the purpose of exploring whether the possibility of an amicable resolution of the dispute exists, and shall assist the parties in any manner it deems appropriate."

Article 45 of the 2021 Rules states:
"If, before the final award is made, the parties agree on a settlement of the dispute, the Tribunal shall either issue an order for the termination of the arbitration proceedings or, if and to the extent requested by both parties and accepted by the Tribunal, record the settlement in the form of an award by consent. The Tribunal is not obliged to give reasons

NCAC, Management Report 2022-2023.

in such an award. Any such settlement shall include a settlement regarding the payment of the costs of the arbitration."

Those rules are in line with the Articles 38 and 39 of the LCA. Article 38 of the LCA stipulates:
"Upon request by both parties, prior to commencement of formal arbitration proceedings, the arbitral tribunal may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement of the parties' dispute:
(1) if the parties determines that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate.
(2) If the parties settle the dispute prior to commencement of the formal arbitral proceedings, or in the course thereof, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, may record the settlement in the form of an arbitral award on agreed terms.
(3) An award on agreed terms shall be made in accordance with the provisions of Article 39 of this Law, and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case."
If the parties reach a settlement agreement as per the provisions and rules, then the award (the "consent award") recording such settlement shall comply with the form and content requirements stipulated in Article 39 of the LCA and Article 49 of the 2021 Rules.
As mentioned in the LCA, a consent award is an arbitral award and thus cannot be deemed a mere settlement agreement. However, under Article 39 (2) of the LCA, it is not required that the arbitral tribunal state the reasons on which it is based. Article 45 of the 2021 Rules instead provides that the "[t]he Tribunal is not obliged to give reasons in such an award". Furthermore, whereas in the normal case Article 50.1 (a) of the 2021 Rules the arbitral tribunal must submit its draft award to the NCAC General Secretariat for scrutiny, Article 50.1 (b) of the 2021 Rules stipulates that scrutiny of a consent award is not needed. Article 45 of the 2021 Rules, however, requires that "[a]ny such settlement shall include a settlement regarding the payment of the costs of the arbitration". Indeed, it is likely that the parties when reaching a settlement on the subject matter of a dispute may also reach an agreement over the payment of the costs of the arbitration. There may be instances where that is not the case. If so, Article 39 (3) of the LCA may be considered. That provides:
"The award shall allocate among the parties the costs of the arbitration, including the arbitrator(s) fee(s) and incidental expenses, in the manner agreed by the parties, or in the absence of such agreement, as the arbitrators deem appropriate. If the parties have so agreed, or the arbitrators deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees."
Article 56.3 of the 2021 Rules on the apportionment of costs of the arbitration may also serve as a basis for the arbitral tribunal to determine who should bear the costs of the arbitration and in what amount. Thereafter, in accordance with Article 56.4 of the 2021 Rules, "[t]he parties shall be jointly and severally liable for payment of the total costs of the arbitration to NCAC".

b. The Code of Conduct

We have identified several provisions that empower the arbitral tribunal to assist the parties in reaching an amicable settlement of their dispute. However, in acting as facilitators, the members of the arbitral tribunal may compromise their ability to determine (and be seen to determine) the parties' dispute impartially if the parties do not reach a settlement.
Article 6.5 of the Code of Conduct cautions:
"An arbitrator may assist the parties in reaching a settlement of the dispute in accordance with the NCAC Arbitration Rules. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties shall remain bound by their waiver."

B. Development of Commercial Mediation Services

1. Legal framework for the Development of Commercial Mediation Services

The question whether the NCAC is entitled to offer services other than arbitration to resolve disputes has been raised among legal practitioners and ADR professionals in Cambodia. Laws are always subject to interpretation and, in order to analyse the effect of the LCA and its implementing regulations on the foregoing question, we will discuss three potential approaches below. These are the restrictive interpretation, the liberal interpretation, and the intermediate interpretation.

a. Mediation services as a stand-alone mechanism

A restrictive interpretation of the LCA would be that it LCA only concerns the settlement of commercial disputes through arbitration. It should be recalled that the NCAC was established by the provisions of the LCA, which provides that the role and functions of the NCAC is to enable the settlement of commercial disputes through arbitration in Cambodia. Considering only these provisions, a strict interpretation would result in excluding any possibility for the NCAC to develop other services for dispute resolution, for example mediation.

As mentioned earlier, the ultimate purpose of the relevant legislation is to establish a framework for parties to resolve their commercial disputes in a way that is beneficial to the development of the Cambodian economy. The LCA deals with commercial arbitration, whether ad hoc or institutional. It establishes the NCAC and its provisions govern the roles and functions of the NCAC. The LCA may not explicitly deal with resolving commercial dispute through mediation. But at the same time it does not prohibit any institution from offering services that contribute to accomplish such purpose, as long as there is compliance with the Article 1, paragraph 2, which stipulates that:

"[the LCA] shall not affect any other law of the Kingdom of Cambodia by virtue of which certain dispute may be submitted to arbitration or other dispute resolution procedures, or by virtue of which certain disputes may not be submitted to arbitration".

There are examples of jurisdictions in which the national arbitration centers or other institutions offer mediation services pursuant to a statute regulating mediation or an act authorizing such institutions to offer mediation services. For instance, the Thailand Act of Arbitration Center 2007 provides that "the [Thailand Arbitration Center] shall have the following objectives: (1) to promote and develop procedures on conciliation and arbitration...". However, the governance of the Thailand Arbitration Center ("THAC") and the NCAC are different. In Malaysia mediation is governed by the Mediation Act 2012. But the statute does not create any specific institution but only establishes a general framework for the conduct of mediation.

In Cambodia, Article 2 of Sub-Decree No. 124 implementing the LCA merely states that the NCAC's role is (among others) to provide "extra-judicial commercial dispute resolution services". There is no restriction on developing other alternative dispute resolution services to resolve commercial dispute. Sub-Decree No. 124 also describes the NCAC's role as "carrying out other functions as determined by the NCAC's General Assembly". Article 4 of Sub-Decree No. 124 then vests the NCAC's General Assembly with the power to consider and approve "internal regulations and rules concerning the dispute resolution process". This may be construed as a basis for expanding the NCAC's roles and functions into the provision of mediation services.

b. Mediation Services as a Necessary Infrastructure for the Administration of Arbitration Cases

Even if one remains skeptical about the application of a strict interpretation of the provisions of the LCA, a moderate interpretation of the provisions of the LCA would seem to reconcile the two approaches. Based on Article 1 of the LCA, mediation services could be developed by the NCAC. Mediation services may also be considered as a part of the "necessary infrastructure and rules for the administration of arbitration cases in the Kingdom of Cambodia" (LCA, Art. 10 (2)). Furthermore, Article 2 mentioned above, as well as the Article 4 of Sub-Decree No. 124 providing that the General Assembly may consider and approve rules concerning dispute resolution process and amend any provision related to the functioning of the NCAC, may be construed as grounds for developing mediation services in support of arbitral proceedings. Under such interpretation, the mediation services could still be developed as a support mechanism to arbitration, not only as a stand-alone mechanism.
Nevertheless, we submit that the restrictive and moderate interpretations are both unnecessarily narrow. It is unclear why a more liberal intepretation would run contrary to the fuflfillment by the NCAC of its functions. Therefore, we will analyse in this paper how commercial mediation services be develop at the institutional level.

2. Institutional Commercial Mediation Framework

On 16 February 2023, the NCAC initiated a public consultation on draft Rules and a Code of Conduct for mediation services. For this purpose, it conducted a public consultation workshop on 22 February 2023 among ADR professionals, members of the public, and representatives of business associations. On 18 March 2023 the NCAC's Executive Board submitted draft Rules on Mediation and a draft Code of Conduct for Mediators to its General Assembly. The General Assembly approved the Rules on Mediation (the "Mediation Rules") and the Code of Conduct for Mediators on that day.

a. The Mediation Rules

The Mediation Rules provide the institutional framework for conducting mediation under NCAC administration.

Key definitions are in Article 1 of the Mediation Rules. The definition of “mediator” and “mediation” is in line with Article 2 (3) of the UN Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention”). Article 1 of the Mediation Rules states:

“’Mediator’ means a third person(s) who assists the parties in reaching amicable settlement to their dispute, whether in whole or in part, through Mediation. The Mediator does not have authority to impose a solution to the dispute on the parties”, and by defining the mediation as “a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of the Mediator”.

“Mediation Clause” means “a contractual provision requiring parties to resort to mediation to resolve their disputes. The Mediation Clause may take the form of an electronic record”.

The Mediation Rules are “designed for the mediation of commercial disputes, whether local or international”. “Commercial disputes” are defined by the Mediation Rules in similar terms as in the LCA and the 2021 Rules . It will be seen that the Mediation Rules do not explicitly exclude other types of disputes since, although “designed for the mediation of commercial disputes,” the parties “may at any time agree to exclude or vary any provision of the Rules” (Mediation Rules, Art. 2.3). Nonetheless, the Mediation Rules must be read in the context of the hierarchy of legal norms and “the need to comply with the national legal framework” . Thus, a settlement agreement will need to be drafted with any applicable relevant legislation in mind. Similarly, a dispute of a commercial nature may also be prevented from being resolved through mediation administered under the Mediation Rules if any mandatory law provides otherwise. To emphasize such constraint, Article 2.4 of the Mediation Rules provides that “mandatory legal and regulatory provisions governing mediation supersede any provision in these Rules that may contradict therewith”.

The Mediation Rules stipulate that “the NCAC is the only body authorized to administer mediation proceedings under the Rules” (Art. 2.5). In the same manner, the Mediation Rules provide that “the Rules shall apply to all mediations administered by NCAC” (Art. 2.2). Nevertheless, since mediation is a voluntary process, the Mediation Rules state that “the Parties may at any time agree to exclude or vary any provision of the Rules, through the conclusion of Terms of Reference, with the written agreement of the

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Mediation Rules, Art. 2, “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of good or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; and carriage of goods or passenger by air, sea, rail or road.”.

Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17 (A/77/17), Annex III, par 6.

General Secretariat and the Mediator, provided that any such exclusion or variation does not contradict with the spirit of the Rules and/or contradict with any mandatory applicable legal provision" (Art 2.3). The flexible nature of the mediation process is also reflected in Article 2.6 of the Mediation Rules to the effect that "[i]n all matters not expressly provided for in the Rules, Mediator and the Parties shall act in the spirit of the Rules".

The Mediation Rules regulate the mediation process, including the commencement of a mediation, the appointment or replacement of a mediator, the duties of the mediator, the conduct of mediation, and the termination of mediation.

The Mediation Rules also state that the conduct of mediation does not preclude the parties from initiating parallel proceedings. Thus, Article 17 acknowledges that:

"mediation may take place under the Rules at any time regardless of whether arbitral, judicial, or other dispute resolution proceedings have been already initiated. Initiation of such proceedings is not of itself to be regarded as waiver of any agreement triggering the use of Mediation or as a termination of the Mediation".

The parties may resort to mediation "at any time" regardless of any other proceedings already initiated, including adjudicative proceedings, such as arbitration. Such provision is in line with the Article 10 (1) of the UNCITRAL Mediation Rules and partially reproduces Article 10 (2) of the UNCITRAL Mediation Rules (2021). Thus, Article 17 of the Mediation Rules read in conjunction with the Articles 38 and 39 of the LCA and Articles 35.3 and 45 of the NCAC Arbitration Rules opens the door to the parties agreeing on resolving their commercial dispute through Arbitration-Mediation-Arbitration (Arb-Med-Arb).

b. The Code of Conduct

The Code of Conduct applies to "all persons appointed by the General Secretariat to act as Mediators in Mediation administered by NCAC, including those not registered in NCAC's list of mediators" (Article I).

The Code of Conduct does not specifically deal with Arb-Med-Arb procedure, but it addresses aspects of the implementation of such procedure. Those aspects are impartiality, independence, and the prevention of conflicts of interest, as well as the conditions for termination of the mediation by the mediator.

Impartiality is defined by Article III of the Code of Conduct as "freedom from favoritism, bias or prejudice for or against any party either by word or by action. Impartiality is a commitment to serve all mediation Participants as opposed to a single party, and to avoid any conduct that gives any appearance of partiality or prejudice". Being impartial, the mediator has a duty "to provide a procedurally fair process in which each party is given an adequate opportunity to participate".

The independence of the mediator and the prevention of conflict of interest are handled together in Article IV of the Code of Conduct, where it is provided that "mediators must conduct reasonable inquiries to check the presence of any existing or perceived conflict of interest that might raise doubts in the parties' perception". Subsequently, a non-exhaustive list of behaviours is provided concerning circumstances that may raise a reasonable doubt as to the mediator's independence. Examples are a direct or indirect financial interest in any party or the outcome of the mediation or the receipt of confidential information about the parties or their dispute from sources outside the mediation (excluding confidential information that any party may disclose to the mediator during the mediation proceedings).

Further, Article VII of the Code of Conduct stipulates that the mediator shall terminate the mediation upon of the occurrence of some events, including "(d) if it is unlikely for the parties to reach settlement". Thereafter, upon any event triggering the termination of the mediation process, the mediator "may assist the parties in assessing further process options for dealing with their dispute".

2. Prospects of Institutional Commercial Mediation Services in Cambodia

A. Cambodia and the UNCITRAL Framework on Commercial Mediation

1. The Singapore Convention

Unlike some other ASEAN states (Singapore, Malaysia, Brunei, Philippines, Laos, Myanmar), Cambodia (much as Thailand, Viet Nam, and Indonesia) is not a signatory to the Singapore Convention. However, among ASEAN states, only Singapore has ratified the Singapore Convention on Mediation .
Article 1 of the Singapore Convention on Mediation provides that the instrument applies:
"to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: (a) At least two parties to the settlement agreement have their places of business in different States; or, (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a

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United Nations Convention on International Settlement Agreements Resulting from Mediation, United Nations Commission on International Trade Law, <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 16 April 2023.

substantial part of the obligations under the settlement agreement is performed; or, (ii) The State with which the subject matter of the settlement agreement is most closely connected".

The Singapore Convention excludes from its scope of application settlement agreements involving consumers or relating to family, inheritance, or employment law, as well as judicial settlement agreements, or settlement agreements that have been recorded and are enforceable as an arbitral award. But the travaux préparatoires, reflecting the principle of the more-favourable-right provision, mention that:

"States would have the flexibility to enact domestic legislation, which would include in its scope such settlement agreements and that such an inclusion would not be a breach of their international obligations under the instrument".

The Mediation Rules may be used to mediate international commercial disputes. Upon the termination of the mediation after the reaching of a settlement agreement, the question for the parties will be how to enforce such settlement in the absence of voluntary compliance. In the words of Gary Born, the "Singapore Convention streamlines enforcement of such settlement agreements in different jurisdictions, in a manner broadly similar to the New York Convention's treatment of arbitration agreements and awards" . Indeed, Article 3 (1) of the Singapore Convention provides that "each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention". In the same manner that the New York Convention has been enforced upon the Law on Adoption and Implementation and the LCA, ratification of the Singapore Convention could help the authorities to develop procedures to streamline enforcement of mediated settlement agreements in Cambodia.

A question that could arise is whether a settlement agreement resulting from a mediation administered by the NCAC would be enforceable under the Singapore Convention if acceded to by Cambodia. For that, it may be necessary to assess the international nature of the settlement agreement in accordance with Article 1 of the Singapore Convention.

2. UNCITRAL Model Law on Mediation

As indicated earlier, there is no specific Cambodian legislative instrument governing mediation or the enforcement of mediated settlement agreements. To develop a comprehensive regime on mediation, Cambodia may consider adopting the UNCITRAL Model Law on Mediation.

United Nations Commission on International Trade Law, Fifty-first session (A/CN.9/929), par. 19.

Gary Born, International Commercial Arbitration, Kluwer Law International, 3rd edn, 2020, p. 303.

The Code of Civil Procedure of the Kingdom of Cambodia provides for the possibility to conclude a judicial action by way of a judicial settlement protocol. See Articles 217-222. A title of execution for compulsory execution

B. Med-Arb Approaches

As a med-arb mechanism, the arbitration and mediation institutional framework of NCAC may be enhanced by considering best practices ASEAN. A med-arb mechanism can be defined as "a multi-tier dispute resolution method combining mediation and arbitration".

1. Settlement Agreement and Consent Award

Med-arb proceedings may comprise two or more stages whereby the parties "attempt to reach a settlement through mediation" and ultimately "If parties reach a settlement, the proceedings will come to an end and the parties' settlement agreement will be embodied in an arbitral award".
The THAC has adopted such an approach by developing the Rules of the Thailand Arbitration Center on Arbitration from a Mediation Settlement Agreement through Mediation of the Dispute (2014) (the "THAC Rules"). The THAC Rules state:
"[A]t present, disputing parties have preferred the use of mediation for dispute resolution between them. Nevertheless, there are concerns that once the mediation resolves the dispute through a settlement agreement and one of the parties fails to comply with the agreed terms, there is a new dispute that arises pursuant to the settlement agreement. In order to support mediation through enforcement as an arbitral award, the Thailand Arbitration Center has therefore issued these Rules."
Issues that may arise from the med-arb mechanism are well identified, it may "result in questions about the impartiality of the arbitrator if an unsuccessful mediator is subsequently appointed to serve as arbitrator," or "there is a high risk of conflict of interest in med-arb proceedings where the same individual is to act as mediator and arbitrator". Such concerns may not invalidate the validity of multi-tier agreements, but instead raise the necessity to establish safeguards on how med-arb is conducted.

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may be also obtained, the Article 350 of the Code of Civil Procedure of the Kingdom of Cambodia provides that "2. A title of execution refers to the following: (…) (f) a notarized document prepared by a notary concerning a claim for a fixed amount of money. This shall only apply to a notarized document that contains a statement that the debtor shall be immediately subject to compulsory execution".

Anselmo Reyes, Practice of International Commercial Arbitration: A Handbook for Hong Kong Arbitrators, Routledge, 2021, p. 31.

ibid 31–32.

Born (fn 6), p.307.

Reyes (fn 8), p. 32.

Born (fn 6), p.307.

Safeguards may be provided by institutional rules. For instance, the THAC Rules provide in Article 5:
"In the event that all the disputing parties agree to have an arbitral award according to the mediation settlement agreement by the arbitrator, the arbitration shall proceed with the Registrar preparing for both parties the request for arbitration and appoint the sole arbitrator, who shall not have been the mediator, to constitute the Arbitral Tribunal."
Such rule potentially resolves any objection that may be raised by a party as to a conflict of interest. Likewise, Article 34 of the THAC Rules stipulate:
"[T]he Mediator is prohibited from performing as an arbitrator, a representative, or an advisor in the proceedings of arbitration or court deliberating the dispute previously mediated by him."
Under such Rules, the arbitral tribunal does not have jurisdiction to start a new proceeding, but as provided by Article 8 of the THAC Rules:
"[W]here the Arbitral Tribunal considers and finds the mediation settlement agreement as not contrary to the law, the Arbitral Tribunal shall make the arbitral award according to that mediation settlement agreement without necessarily having to state the reasons on which it is based."
Those rules are similar to the International Chamber of Commerce (ICC) Arbitration Rules (2021) which provide in Article 33 that a settlement "shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so". Even though, the ICC Arbitration Rules do not mention compliance with any law, they provide discretion to the arbitral tribunal to refuse to make a consent award ordering the performance of an unlawful act.
The Asian International Arbitration Center (AIAC) also offers the possibility of a med-arb approach. The AIAC Mediation Rules (2018) recommends use of the following model clause:
"The Parties further agree that any settlement reached in the course of mediation commenced under the AIAC Mediation Rules shall be referred to the arbitral tribunal appointed by the AIAC and may be made in a form of an award made by the consent of the Parties."

Nigel Blackaby and others, Redfern and Hunter on International Arbitration (7th ed, Oxford University Press 2022) para 9.40.

It is to be noted that this approach is similar to the SIAC-SIMC Arb-Med-Arb Model Clause: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ('SIAC') in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this

Article 8 (3) of the AIAC Mediation Rules is similar to Article 12 of the UNCITRAL Mediation Rules (2021) which state: "Unless the Parties have otherwise agreed in writing, the mediator and/or co-mediator shall not act as an arbitrator in any arbitral proceedings between the Parties".

2. A Multi-tiered Clause Approach

The UNCITRAL Mediation Rules suggest a model mediation clause the first limb of which specifies that "[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules". But, given that the parties may not succeed in resolving their dispute through mediation, the model clause has a second limb as follows: "If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules, the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules". This approach differs from those described above as the aim of the second limb is not to enable the parties to record a settlement agreement in a consent award for enforcement purpose. The second limb is instead an "escalation clause" or "step clause". It is essentially an arbitration agreement and provides for a different mode of dispute resolution if mediation within the specified period fails.

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clause. … The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ('SIMC'), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms".

Born (n 6), p.305.

ibid 306. See also the Notes on UNCITRAL Mediation Rules (2021), par. 19-22.