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EDITORIAL

This 25th anniversary issue of *Asian Dispute Review* begins with an article by Natasha Singh on the limits of witness preparation in international arbitration, which is one of the two winning articles in the HK45 2023 Essay Competition. It is followed by a contribution from Ngan Tran, Rohan Bishayee and Nishant Choudhary, who analyse the benefits and pitfalls of agreeing to arbitration when compared with local court litigation in Myanmar and Vietnam. Dr Doğan Gültutan then examines the concept of awards of moral damages under international investment law. An Shouzhi & Li Jilong then write on the latest developments in sports arbitration and its place in dispute resolution in Mainland China.

Our In-House Counsel Focus article, written by Edward Lu, Dimitri Phillips and Jingyi Hu, compares arbitration and litigation in Mainland China by reference to factors that influence party choice of one system or the other. The Jurisdiction Focus article, by Ahmed Durrani, Umang Singh and Masham Sheraz, then provides a useful and timely update on the annulment and enforcement of arbitral awards in Qatar.

Joel Evans provides this issue's book review, of *The Goff Arbitration Lectures 1990-2022*, co-edited by Neil Kaplan KC and Robert Morgan JP.

This issue concludes with the News section written by Robert Morgan.

General Editors

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Nothing but the Truth: Limits on Witness Preparation in International Arbitration

Natasha Singh

This article discusses approaches to the vexed question of witness preparation (or 'coaching') adopted in differing jurisdictions and legal traditions, pursuant to a variety of arbitration rules and leading arbitral codes of evidence, procedure and ethics. It also discusses comparative legal, ethical and practical perspectives on combatting abuse of witness preparation. These tend to militate against any realistic prospect of reaching global consensus on truly practicable and universally applicable and enforceable transnational standards. The article is an edited version of the winning entry in the Asia Emerging Economies category of the 2023 HK45 Essay Competition.

"Memory is malleable. History is mutable. All I can do is try to make sure my story isn't lost."
(Jeffrey Cranor (b 1975), American writer)

Introduction

Trying to formulate limits as to the extent of witness preparation poses a dual dilemma within any legal system. On the one hand, short of prohibiting interviews, instituting *any* restriction seems impractical: a court or tribunal can hardly know if an attorney has cleverly coached a witness in the privacy of the office. On the other hand, in the total absence of guidelines, a forum confronted with a suspiciously

rehearsed witness will do as it deems fit - dismiss the evidence, strike the testimony, or (in the case of a court) even convict the witness of perjury.

For categories of witness preparation with illustrative examples and a checklist setting out relevant considerations, see figures 1 and 2 at, respectively, pages 51 and 53 below.

For example, in *EnergySolutions EU Ltd v Nuclear Decommissioning Authority*,[1] an English court reprimanded witnesses for not only following a "pre-ordained script"[2] but also for having been unable to respond coherently when cross-examined, seriously stalling the process of determining whether EnergySolutions had manipulated the parties' contract. This case concerned a claim worth £7 billion. Present-day international arbitration (particularly treaty arbitration in ISDS cases) is increasingly revolving around much larger amounts, significantly raising the stakes. Moreover, as arbitral awards, such as those in *Landis v USADA*[3] and *LETCO v Liberia*[4] demonstrate, displeased tribunals will often punish procedural bad faith with costs sanctions.[5] It is clear, then, that developing limits to witness preparation in international arbitration is of immense legal, ethical and practical importance.

> "… [A]s arbitral awards, such as those in *Landis v USADA* and *LETCO v Liberia* demonstrate, displeased tribunals will often punish procedural bad faith with costs sanctions."

Background

Although restrictions on witness preparation have gained traction in recent years, they are not a radically novel concept. In fact, despite the perceived gulf between civil and common law jurisdictions, each of these legal traditions had historically imposed general moral obligations on lawyers.[6] These obligations were eventually codified into modern day 'professional ethics', the vast majority of which prohibit witness coaching. Some jurisdictions (notably, civil law) ensure this by prohibiting pre-trial contact with witnesses altogether, while others (notably, common law) place restrictions on how far lawyers may prepare witnesses. As Cartoni asserts, where the permissibility of witness preparation is concerned, the major difference now lies between American and non-American legal systems.[7]

> "It is clear … that developing limits to witness preparation in international arbitration is of immense legal, ethical and practical importance."

However, domestic legal practices are not directly relevant to international arbitration. Although the law of the seat of the arbitration may come into play if an award is challenged before a domestic court, arbitral hearings are usually organised at the pre-award stage, in accordance with applicable institutional rules. Unfortunately, those looking to these rules for guidance on witness preparation are likely to be disappointed, as the rules of most major arbitral institutions (such as the HKIAC, ICC, ICDR and SCC, as well as CIETAC, SHIAC and VIAC) do not address the issue.[8] Article 4(3) of the optional IBA Rules on the Taking of Evidence in International Arbitration state only that it is *not improper* for any representatives of a party to interview witnesses,[9] an approach that is mirrored in the rules of several other arbitral institutions, such as art 20.6 of the LCIA Rules,[10] art 27.3 of the Swiss Rules[11] and rule 25.5 of the SIAC Rules.[12] The IBA Guidelines on Party Representation in International Arbitration go one step further, allowing lawyers to meet witnesses and "discuss and prepare" their upcoming testimony.[13] None of this is definitive, however, and although a limited set of "ethical expectations" may have emerged in international arbitration,[14] there continue to

be, as an ICC Commission on Arbitration and ADR report of 2021 on witnesses of fact has stated, "no applicable general standards" for witness preparation.[15]

> "… [T]he vast majority of … [ethical codes] prohibit witness coaching. Some jurisdictions (notably, civil law) ensure this by prohibiting pre-trial contact with witnesses altogether, while others (notably, common law) place restrictions on how far lawyers may prepare the witnesses. … There continue to be [per an ICC Commission on Arbitration and ADR report of 2021] … "no applicable general standards" for witness preparation."

Comparative perspectives

Before discussing the limits on witness preparation that should be instituted, it may be useful to characterise regional approaches and place them on a spectrum of permitted contact with witnesses, drawing not only from English, American and Continental European jurisprudence (discussion of which has traditionally dominated the witness preparation discourse) but also from newer Asian and Middle Eastern perspectives.

Undoubtedly, the broadest latitude for counsel involvement is permissible under the American legal system. Pursuant to Section 116(1) of the *Third Restatement on the Law Governing Lawyers*, a lawyer can interview and even cross-examine witnesses for both the discovery process and the actual trial.[16]

In the US, extensive witness guidance is in fact regarded as an obligation owed to the client,[17] a feature that brings to mind an instance in which prominent American attorney Daniel Inouye refused to apologise for his constant objections to his client's cross-examination during the Iran-Contra hearings before the US Senate in 1987, responding, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job."[18]

This 'client-first' culture can be jarring for those from other legal traditions, particularly those in which lawyers are considered officers of the court[19] or at least possess an "overriding duty" to act with candour and never to deceive or participate in deception of the court.[20] This is the approach in many common law countries in spirit, if not in the letter. In England & Wales, apart from disciplinary guidelines,[21] there is case law expressly prohibiting witness coaching. The seminal 2005 criminal trial case of *R v Momodou*[22] decreed that any coaching beyond simply familiarising the witness with court procedure was unlawful. Later that year, *Ultraframe (UK) Ltd v Fielding*[23] affirmed the applicability of the *Momodou* principles to all cases, not just criminal trials. *Momodou* quickly became a hugely influential precedent in common law jurisprudence, being cited as the leading authority in a number of important judgments in different jurisdictions.

> "Unfortunately, those looking to … [institutional arbitration] rules for guidance on witness preparation are likely to be disappointed, as the rules of most major arbitral institutions … do not address the issue."

For example, in *Day v Perisher Blue Pty Ltd*[24] (also decided in 2005), the New South Wales Court of Appeal in Australia

criticised many of the practices impugned therein as violating the *Momodou* principles, including attorneys suggesting responses to potential questions and meeting witnesses in groups to discuss their testimonies. *À propos* the latter, the Court correctly pointed out that the participating witnesses would almost certainly succumb to peer pressure and change their answers to 'improve' them and make them consistent with each other.[25] Similarly, judges in many Asian jurisdictions have used *Momodou* as a starting point to develop limits on witness preparation thoughtfully. For example, in *De La Sala v Compañia De Navegación Palomar SA*,[26] the High Court of Singapore cited *Momodou* to emphasise that a lawyer was prohibited from influencing a witness in *any* manner, either directly or through another person, in order to modify potential testimony. The Court of Appeal[27] agreed with this view, noting how the witness had been given a "transcript and script," and, if he made a mistake during the rehearsal, the question was repeated until he answered it correctly. Likewise, the Hong Kong Court of Appeal, in *HKSAR v Tse Tat Fung*,[28] prohibited attorneys from using indirect methods, such as "repetitive drilling, … oblique comments, non-verbal cues, and the general shape of questioning", to influence a witness.

Though this may seem restrictive by comparison with the American legal system, it is still a great deal more liberal than the traditional civil law approach to witness preparation, under which lawyers do not meet with witnesses at all during the pre-hearing period. The putative basis of this practice is that civil law proceedings are inquisitorial, not adversarial:[29] someone who is simply assisting the court in its fact-finding exercise hardly needs preparation. Thus, in countries like Germany,[30] France[31] and Switzerland,[32] as well as certain Middle Eastern jurisdictions,[33] lawyers scrupulously avoid contact with witnesses. It is worth noting, however, that these jurisdictions are starting to carve out exceptions for international arbitration, such as under rules of the Swiss and French bars adopted in 2005 and 2008, respectively.[34] These rules were, evidently, relaxed to avoid disadvantaging civil lawyers, even as their legal training seeks to influence their conduct: as Hanotiau points out, some civil lawyers remain "…unwilling to interview their witnesses and refuse, therefore, to submit witness statements."[35]

> "[The] US 'client-first' culture can be jarring for those from other legal traditions, particularly those in which lawyers are considered officers of the court or at least possess an "overriding duty" to act with candour and never to deceive or participate in deception of the court. [Under] the traditional civil law approach to witness preparation, … lawyers do not meet with witnesses at all during the pre-hearing period."

Figure 1: Gradient summary of domestic legal approaches to witness preparation

1	2	3	4	5	6	7	8
False testimony	Altering evidence	Factual rehearsal	Factual cross-examination	Detailed discussion	Mock cross-examination	Explanation of legal process	Interviewing
Coaching					**Familiarisation**		**Interviewing**

Why should limits be imposed?

There are three grounds on which limits may be instituted on witness preparation in international arbitration: legal, ethical and practical. Though these factors are interrelated (for example, as to how the legal system punishes breaches of professional ethics), this rough taxonomy allows us to examine the sometimes overlapping considerations that inform our thinking about witness preparation.

(1) Legal

Although, as Born points out, witness preparation is technically a matter of arbitral procedure, it is difficult to overlook the fact that the arguing lawyer still retains his or her membership of a domestic bar and that flagrant ethical violations, if any, will almost certainly attract disciplinary action in the home jurisdiction.[36] Moreover, procedural irregularities also give rise to the possibility of future litigation against the award in municipal courts - an outcome that seriously detracts from the finality of the arbitral process.

> "An English attorney may find it improper to 'coach' a witness beforehand, but an American lawyer will almost certainly do so, possibly violating the equality of arms principle enshrined both in art 18 of the UNCITRAL Model Law and in art 17 of the UNCITRAL Arbitration Rules."

(2) Ethical

As many scholars have pointed out, the multi-jurisdictional nature of international arbitration gives rise to the possibility that each counsel will play by his or her own rules, creating an uneven playing field.[37] An English attorney may find it improper to 'coach' a witness beforehand, but an American lawyer will almost certainly do so, possibly violating the equality of arms principle enshrined both in art 18 of the UNCITRAL Model Law and in art 17 of the UNCITRAL Arbitration Rules.[38]

> "…[A]ny international approach to witness preparation in arbitration must allow lawyers and disputants from different jurisdictions to 'meet in the middle', *viz.*, the solution must be legally, morally and practically acceptable to the international arbitration lawyer."

(3) Practical

Most importantly, a witness is present because he or she has a valuable account of his or her own to present. Bühler and Dorgan caution witnesses against simply repeating a party's pleadings,[39] a scenario that arose in *Landis v USADA*, wherein the arbitral panel criticised the expert witnesses for "… acting for the most part as advocates for the Appellant's cause … and not as scientists objectively assisting the Panel in the search for the truth."[40] Even if the witness is not arguing in favour of a particular party, being 'over-prepared' is, as Hanotiau states, a speedy way to "… lose credibility in the eyes of the tribunal."[41]

What limits should be imposed?

The foregoing discussion on domestic practices is not to suggest they are or should be implemented in international arbitration. Rather, the author proposes that any international approach to witness preparation in arbitration must allow lawyers and disputants from different jurisdictions to 'meet in the middle', *viz.*, the solution must be legally, morally and practically acceptable to the international arbitration lawyer.

Illegally manufacturing, altering, or otherwise distorting the *substance* of testimony is obviously out of the question, ruling out one end of the extreme. Since the lawyers must almost always meet the witness during the pre-hearing period to prepare a witness statement,[42] the other extreme (ie, the domestic civil law approach) is also arguably excluded. The question then becomes: during the interview with the witness, what should the lawyer do and not do?

On the lawyer's side of the equation, there is an abundance of practical guidance advising counsel not to over-prepare their witnesses. In 2003, Roney proposed a six-point guide for witness preparation,[43] emphasising the importance of having the witness self-prepare in advance and limiting discussions with counsel in order to subvert the possibility of the witness being 'led' by the lawyer.[44] These warnings were amply reiterated by Harbst in his treatise on the subject.[45] For counsel, witness preparation can feasibly extend up to any point at which it remains beneficial to the party's case.

There are other, non-practical, considerations, however: namely, the law of the seat (and other applicable laws), as well as 'weak' legal considerations, such as the home jurisdiction of the counsel and the tribunal. As discussed above, counsel from non-American jurisdictions may be at a relative disadvantage; further, a tribunal's own legal training may influence its attitude toward any procedural irregularities discovered during the hearing. Thus, although there is a great deal of flexibility regarding witness preparation in international arbitration, there have to be limits to ensure that disputants and tribunals are on the same page and that they participate together in a hearing that is procedurally fair and sound.

Figure 2: Sample matrix of a 'Checklist' approach to witness preparation

Phase	Permitted Zones	Considerations	
Witness-Counsel conference	Between 3 & 8 (see Figure 1)	Characteristics of the witness	• Is the witness a fact witness or expert witness? • How familiar is the witness with legal procedure? • How important is the testimony of the witness to a Party's case?
		Legal background of Counsel	• Will Counsel breach any disciplinary rules of his/her home jurisdiction in the course of witness preparation?
Pre-hearing conference	Per the discretion of the Tribunal	**Weak** ↓ **Strong**	• Legal background of the Parties • Legal background of the Tribunal • Legal backgrounds of both Counsel • Institutional rules • Law of the Seat
Hearing	Per the applicable procedural rules		

> “… [A]lthough there is a great deal of flexibility regarding witness preparation in international arbitration, there have to be limits to ensure that disputants and tribunals are on the same page and that they participate together in a hearing that is procedurally fair and sound.”

How should limits be imposed?

Lastly, the nature and success of any limits on witness preparation also depend on the method of their enforcement. There is a view that international arbitration must be regulated by a binding international legal instrument, be it a set of rules, a code of ethics, a convention or a treaty. As far back as 2002, Rogers had dubbed international arbitration as an “ethical no-man’s land.”[46] Eight years later, Doak Bishop and Stevens revived the debate to argue in favour of an obligatory supranational code of conduct, even putting forward (at a major international arbitration conference) a draft Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals,[47] rules 24 and 25 of which sought to institute universal standards for witness preparation.[48] Would this really have resolved the existing problems?

At the outset, there is a strong theoretical criticism: arbitration is a creature of consent, and augmenting an “overriding layer of ethical regulation” would hurt this consent-based model.[49] Given the vast difference between varying legal cultures, some question whether it is even possible to formulate truly transnational ethical standards. More practically, though there are a number of ‘soft law’ instruments already in place - apart from the Bishop and Stevens draft code,[50] there is also Cyrus Benson’s Checklist of Ethical Standards for Counsel in International Arbitration,[51] as well as codes drafted by the International Law Association[52] and the Council of Bars & Law Societies of Europe,[53] which, of themselves, obviously lack the capacity to be enforced. Perhaps Mosk says it best: any supranational code is doomed to be “unwieldy and ineffectual”[54] and ultimately (per Wachter) “more trouble than it is worth.”[55]

> “… [A]rbitration is a creature of consent, and augmenting an “overriding layer of ethical regulation” would hurt this consent-based model. … [A] tribunal-led approach may [therefore] be the best fit for imposing limits on witness preparation. There is broad consensus that tribunals are well advised to hold pre-hearing conferences to level the playing field …”

Conversely, a tribunal-led approach may be the best fit for imposing limits on witness preparation. There is broad consensus that tribunals are well advised to hold pre-hearing conferences to level the playing field; as Wachter states, doing this at “early stage of the proceeding can help ensure that [everyone has] the same understanding and expectations.”[56] Moreover, this also allows them to take into account the law of the seat, even if it is not completely abided by. Municipal courts are also starting to keep step with such an approach, revealing a progressive and strongly pro-arbitration attitude. For example, the English Commercial Court, in *BPY v MVX* (2023),[57] disregarded *Browne v Dunn*[58] in rejecting a challenge to an award under s 68 of the English Arbitration Act 1996 (the 1996 Act) simply because the tribunal had *expressly* excluded the application of the *Browne* principle before the hearing.[59]

Conclusion

It is amply clear that there is no way either to evolve or enforce universal limits to witness preparation in international arbitration. It would be senseless to utilise the flexibility offered by the arbitral process to *constrain* the parties; rather, tribunals can use this procedural room to set some ethical standards the parties must play by, rather than waiting for procedural problems to be discovered and penalised after the fact. This resistance to harmonisation has been reaffirmed by scholars and practitioners alike.[60]

At the same time, tribunals should not take the onus of setting ethical standards lightly. As Williams and Kirk observe, though detractors of instituting ethical standards in international arbitration are quick to point to its nature as a 'creature of consent,' sustaining this consent relies on preserving parties' confidence that arbitration can deliver a fair and just result.[61] Tribunals must therefore strive to ensure that witness preparation, where utilised, does not extinguish the genuineness of the witness's recollection. After all, memory is malleable. History is mutable. All we can do is make sure the witness's story isn't lost.[62]

> "… [T]ribunals should not take the onus of setting ethical standards lightly. … [S]ustaining … consent relies on preserving parties' confidence that arbitration can deliver a fair and just result. Tribunals must therefore strive to ensure that witness preparation, if any, does not extinguish the genuineness of the witness's recollection."

1 *EnergySolutions EU v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC). See also *Republic of Djibouti v Abdourahman Boreh* [2016] EWHC 405 (Comm); *Harlequin Property (SVG) Ltd v Wilkins Kennedy (a firm)* [2016] EWHC 3188 (TCC); Dominic Hopkins, *The Case of the Unconvincing Witness*, Cambridge Network (9 January 2017), available at https://www.cambridgenetwork.co.uk/node/511147.

2 *Supra* (note 1) at [82], per Fraser J.

3 *Floyd Landis v United States Anti-Doping Agency*, Court of Arbitration for Sport, 2007/A/1394, Arbitral Award (30 June 2008), in which the respondent was awarded costs worth more than US$100,000. See also Ian Austen, *Court Rules against Landis, Then Criticizes His Defense*, New York Times (1 July 2008), in which the author remarked that costs were awarded as an "apparent rebuke" to Landis.

4 *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No ARB/83/2, Award (31 March 1986), in which the respondent was ordered to pay full costs on the ground of procedural bad faith.

5 Other examples include *Telenor Mobile Communications A/S v Republic of Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006), paras 104-107; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Arbitral Award (8 May 2008), para 729; *Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10, Decision on Annulment (8 January 2007), para 88. See also David A R Williams & Anna Kirk, 'Fair and Equitable Treatment of Witnesses in International Arbitration - Some Emerging Principles', in David D Caron *et al* (Eds), *Practising Virtue: Inside International Arbitration* (2015, Oxford University Press), pp 373-374.

6 Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU Law Review 1389-1402, 1385 (2004).

7 Bernardo Cartoni, *Ethics and International Arbitration: Coaching a Witness Under Different Perspectives* (2023) 15(1) Australasian Policing 28-33.

8 *Ibid*, p 30.

9 "It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them." – IBA Rules on the Taking of Evidence in International Arbitration 2020, available at https://www.ibanet.org/resources.

10 "Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its authorised representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing." - Article 20.6, LCIA Arbitration Rules 2020, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

11 "Any person may be a witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses or potential witnesses." - Article 27.3, Swiss Rules of International Arbitration 2021, available at: https://www.swissarbitration.org/centre/arbitration/arbitration-rules/.

12 "It shall be permissible for any party or its representatives to interview any witness or potential witness (that may be presented by that party) prior to his appearance to give oral evidence at any hearing." - Rule 25.5, Singapore International Arbitration Centre Rules (6th Edn, 2016), available at https://siac.org.sg/siac-rules-2016. *Editorial note*: The 2016 Rules are, at the time of writing, under review.

13 "A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony." - Guideline 25, IBA Guidelines on Party Representation in International Arbitration 2013, available at https://www.ibanet.org/resources.

14 Williams & Kirk, *op cit* (note 5 above), p 358.

15 "… [T]o date, in the international arbitration context, there is limited guidance on the steps which may be taken by party counsel to 'prepare' a witness, and there are no applicable general standards." - ICC Arbitration and ADR Commission, *Report on the Accuracy of Fact Witness Memory in International Arbitration* (2021), para 5.3.5, available at https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-the-accuracy-of-fact-witness-memory-in-international-arbitration/.

16 "A lawyer may interview a witness for the purpose of preparing the witness to testify." - Section 116(1), *The Restatement (3d) of the Law Governing Lawyers*, American Law Institute (2000). Comment (b) on Section 116(1) states: "A lawyer may invite the witness to provide truthful testimony favourable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: … reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet."

17 Cartoni, *op cit* (note 7 above) at p 29. See also John W Allen, *Emerging from the Horse Shed, and Still Passing the Smell Test - Ethics of Witness Preparation and Testimony*, Omnilearn, available at http://omnilearn.net/ethics/pdfs/witness_coaching.pdf.

18 *Iran-Contra Hearings: Note of Braggadocio Resounds at Hearing* (New York Times, 10 July 1987), available at https://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html.

19 Examples include the following:

(1) India: "An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, … " - Preamble, Chapter II, Bar Council of India Rules.

(2) England & Wales: Solicitors are considered officers of the Court - *Rondel v Worsley* [1969] 1 AC 191, 282 (House of Lords).

(3) New South Wales, Australia: (i) "The paramount duty of barristers is to the administration of justice …" - New South Wales Bar Association, Barristers Rules (https://nswbar.asn.au/bar-standards/barristers-rules); (ii) "These Rules are made in the belief that (a) barristers owe their paramount duty to the administration of justice',. … [and] (d) barristers owe duties to the courts …" - Legal Profession Uniform Conduct (Barristers) Rules 2015 (amended as at 4 March 2022).

20 (1) "A practising barrister has an overriding duty to the Court to act with candour and independence in the interests of justice." - Chapter 10.29, Code of Conduct of the Hong Kong Bar Association 2018, available at https://www.hkba.org/content/code-conduct; (2) "A solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair - … (f) his duty to the court." - Chapter 1, Principle 1.02, The Hong Kong Solicitors' Guide to Professional Conduct 2014 (amended as at 20 July 2023); see also Chapter 10, Principle 10.03 (Duty to court); available at https://www.hklawsoc.org.hk/en/Support-Members/Professional-Support/Professional-Guide/The-hong-kong-solicitors-guide--to-professional-conduct--volume-1.

21 (1) Rules 9.3 & 9.4, Bar Standards Board Handbook 2020 (England & Wales), available at https://www.barstandardsboard.org.uk/the-bsb-handbook.html; (2) arts 2.1 & 2.2, Solicitors Regulation Authority (SRA) Code of Conduct (2018) (England & Wales), available at https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors.

22 [2005] EWCA Crim 177 (Court of Appeal, England & Wales).

23 [2005] EWHC 1638 (Ch).

24 [2005] NSWCA 110.

25 *Compañia de Navigación Palomar SA v De La Sala* (2017) SGHC 14.

26 *De La Sala v Compañia de Navigación Palomar SA* (2018) SGCA 16.

27 *Ibid*, at [135]-[138].

28 *HKSAR v Tse Tat Fung* [2010] HKCA 156, at [73].

29 Robert L Henry, *Procedure In Civil Law Jurisdictions: A Comparative Study*, 2 La L Rev 401-425 (1940).

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57 The tribunal had used its powers under arts 14.2, 14.6(ii) and 19.2 of the LCIA Rules to exclude the rule in *Browne* and independently to weigh the evidence "regardless of whether it [had] been expressly dealt with in cross-examination." - *BPY v MXV* [(2023] EWHC 82 (Comm), at [37], per Butcher J.

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59 "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award." - Section 68(1) of the 1996 Act.

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Choosing Arbitration or Litigation in Myanmar and Vietnam: Benefits and Pitfalls of Arbitration Agreements when Compared with Local Court Litigation in Developing Legal Ecosystems

Nishant Choudhary, Rohan Bishayee & Ngan Tran

This article attempts to bridge the gap between transactional and dispute resolution legal practice by addressing the need for awareness by contract drafters of the scope and consequences of dispute resolution clauses in contracts. This is, in the authors' view, particularly important where developing jurisdictions and their legal systems are involved. Myanmar and Vietnam are showcased as two practical examples of the problems that may arise.

Introduction

Most lawyers' careers divide into transactional and dispute resolution practice. While these two areas of the legal profession are entirely different, they form two sides of the same coin. Transactional business and dispute resolution are commonly segregated into different practice groups or specialisms by individual law firms, focusing on different market areas requiring legal representation.

Transactional lawyers work to avoid misunderstandings or situations that may later have to be resolved by litigation or arbitration. However, the traditional disconnect between

transactional lawyers and dispute lawyers in a law firm may lead to difficult issues of interpretation once a matter becomes litigious. This often happens to the detriment of the client's interests.

Drafting documents with dispute-related safeguards

When drafting transaction documents, it is important to consider the possibility of future litigation or arbitration. Legal counsel must therefore pay attention to the pros, cons and implications of litigation versus arbitration choices and recommend the best option for the client. Local jurisdictional peculiarities should be considered, such as whether local courts recognise foreign judgments and arbitral awards, the grounds for not enforcing them, and whether international awards may be opposed to the local jurisdiction's public policies and what those policies are. This discussion is thus not merely theoretical but can have far-reaching implications for the client and its case.

It is, therefore, important to contract drafters to take account of the following key considerations.

> "While … [transactional and dispute resolution practice] are entirely different, they form two sides of the same coin. … When drafting transaction documents, it is important to consider the possibility of future litigation or arbitration."

(1) Fork in the road (FITR) provisions: litigation or arbitration

Introduction

Generally, parties may choose between local or foreign litigation (where permissible) or locally seated or foreign international arbitration, depending on what was agreed commercially. While the usual default position for redressing a dispute is litigation at the venue of the defendant, the jurisdiction or foreign courts (where applicable) or arbitration must be selected explicitly by party agreement. Thus, deciding whether to opt for court litigation (whether local or foreign) or locally seated or international arbitration (as the case may be) is critical in drafting a comprehensive transactional agreement.

> "… [D]eciding whether to opt for court litigation (whether local or foreign) or locally seated or foreign international arbitration (as the case may be) is critical in drafting a comprehensive transactional agreement."

When deciding between litigation and arbitration, it is important to consider a number of factors. These include the following.

(1) Whether the judiciary or the arbitral tribunals appointed by arbitral institutions have the capacity and know-how to adjudicate or arbitrate upon disputes arising out of the transaction.
(2) Should the transaction fail and the parties find themselves in dispute, which is the more cost-effective and efficient process? Given the nature of the transaction, would a bespoke (*ad hoc*) or an administered arbitration suit their requirements, or would the court process suffice?
(3) Which is the more efficient and effective outcome from an enforcement perspective - a judgment (including a decree, where applicable) or an arbitral award?
(4) In any event, peculiarities of local law must be considered when deciding on this primary question.

> … [I]t is not certain whether arbitral tribunals or the courts in Myanmar have sufficiently extensive experience in dealing with complex commercial disputes.

Myanmar

For example, it is not certain whether arbitral tribunals or the courts in Myanmar have sufficiently extensive experience in dealing with complex commercial disputes. While the courts have experience of conventional personal and property disputes, the sophistication of disputes arising out of (for example) modern engineering procurement and construction (EPC) contracts may make them difficult to present before a local judge. While the Myanmar Arbitration Law 2016[1] (the 2016 Law) gives the parties liberty to choose the member(s) of an arbitral tribunal, any deadlock is to be adjudicated, and a default appointment made, by a court of law. The Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI)-led Myanmar Arbitration Center (the MAC) has only recently been established and the capabilities of MAC-approved arbitrators remain to be assessed, going forward. Similar considerations also apply with regard to the enforcement of outcomes in Myanmar, whether by way of judgment or award. It is against this background that parties to a transaction may (so far as possible) have to choose between a foreign court or foreign-seated international arbitration.

Further, despite the existence of arbitration clauses in contracts, local courts in Myanmar often permit civil suits to proceed instead of upholding arbitration agreements. This departure from agreed-upon arbitration mechanisms contributes to uncertainty and can lead to prolonged legal proceedings in the local court system, resulting in increased time and costs associated with dispute resolution.

> … [L]ocal courts in Myanmar often permit civil suits to proceed instead of upholding arbitration agreements. This departure from agreed-upon arbitration mechanisms contributes to uncertainty …

Vietnam

Similarly, there is a perception that Vietnam's domestic court system may not be sufficiently well equipped to handle most modern cross-border disputes, and that this can lead to unpredictable and arbitrary rulings. To address this issue, Vietnam has established local arbitral institutions such as the Vietnam International Arbitration Center (VIAC[2]), which has an array of internationally accredited arbitrators on its panel. The VIAC was established pursuant to a decision of the Prime Minister of Vietnam to combine the Vietnamese Foreign Trade Arbitration Council and the Maritime Arbitration Council. VIAC has been independent of government since Vietnam's Ordinance on Commercial Arbitration 2003, which was later replaced by the Law on Commercial Arbitration of 2010[3] (the 2010 Law). Arbitral awards rendered by VIAC tribunals are final, binding and may be recognised and enforced within Vietnam and in the other 171 countries that are Contracting States to the New York Convention.[4] The VIAC and other local arbitral institutions provide a viable alternative to both offshore international arbitration and to litigation (whether local or foreign).

> … [T]here is a perception that Vietnam's domestic court system may not be sufficiently well equipped to handle most modern cross-border disputes, and that this can lead to unpredictable and arbitrary rulings. … Vietnam has [therefore] established local arbitral institutions such as the Vietnam International Arbitration Center …, which has an array of internationally accredited arbitrators on its panel.

(2) Cross-border litigation

Litigation in cross-border transaction cases involves ascertaining the relevant jurisdiction for redressing disputes through the court process. A court may be located onshore (local) or offshore (foreign). In either case, however, litigation can be lengthy and complex, running through several instances of contested interlocutory proceedings before judgment is secured. Understanding the complexities and efficacies of civil procedure regulations governing court-driven dispute processes is therefore essential.

Myanmar

Section 13 of the Code of Civil Procedure 1909, as amended[5] (the 1909 Code), states that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, except where:

(1) it has not been pronounced by a court of competent jurisdiction;
(2) it has not been given on the merits of the case;
(3) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Myanmar in cases in which such law is applicable;
(4) the proceedings in which the judgment was obtained were contrary to natural justice;
(5) it has been obtained by fraud; or
(6) it sustains a claim founded on a breach of any law in force in Myanmar.

While, historically, there have been many examples of successful enforcement of foreign judgments in Myanmar, only limited examples of successful enforcement of foreign judgments following the reopening of the country's economy in 2013 have come to light. When seeking to enforce a foreign judgment in Myanmar, parties may encounter extended delays in the process, making it crucial to anticipate potential obstacles.

> … [L]itigation can be lengthy and complex … Understanding the complexities and efficacies of civil procedure regulations governing court-driven dispute processes is therefore essential.

Vietnam

By virtue of art 423 of the Vietnamese Civil Procedure Code 2015[6] (the 2015 Code), Vietnam only enforces foreign court judgments pursuant to international treaties concluded with the countries of origin of such judgments. In the absence of a bilateral or multilateral treaty, therefore, the recognition and enforcement of foreign judgments will be decided solely on a case by case basis and on the principle of reciprocity (*viz*, whether or not a court in the country of origin of the

judgment would recognise judgments of Vietnamese courts). This opens the possibility of considering the inclusion of an arbitration agreement in a transactional document signed with a Vietnamese counterparty.

> "When seeking to enforce a foreign judgment in Myanmar, parties may encounter extended delays in the process, making it crucial to anticipate potential obstacles."

(3) Locally seated or foreign arbitration

Once a decision has been made to choose arbitration, counsel must decide whether to opt for locally seated or foreign arbitration. Which of these options is preferable depends on (*inter alia*) the nature of the claim, the local procedural laws for enforcing foreign awards and the types of asset against which an award may have to be enforced.

Myanmar

Myanmar formally acceded to the New York Convention in 2013, marking a pivotal step in this jurisdiction. It subsequently enacted the 2016 Law, laying the foundation for a well-regulated arbitration framework based upon the original 1985 version of the UNCITRAL Model Law.

Pursuant to s 46(a) of the 2016 Law, both Myanmar-seated and foreign international arbitral awards are recognised and enforceable in Myanmar, subject to the grounds for refusal of recognition and enforcement set out in s 46(b) and (c). These are that:

(1) a party to the arbitration agreement was under some incapacity under the law applicable to it (s 46(b)(i));
(2) the arbitration agreement was not valid under the law to which the parties have agreed or, failing any indication thereon, under the laws of Myanmar or those of the country in which the award was made (as applicable) (s 46(b)(ii));
(3) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case (s 46(b)(iii));
(4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (s 46(b)(iv));
(5) the composition of the arbitral tribunal or the arbitral procedures were not in accordance with the agreement of the parties or with the 2016 Law or, absent such agreement, were not in accordance with the law of the country in which the arbitration took place (as applicable) (s 46(b)(v));
(6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which (or under the law of which) it was made (s 46(b)(vi));
(7) the subject-matter of the dispute was not arbitrable under the law of Myanmar (s 46(c)(i)); or
(8) the award conflicts with Myanmar's national interest (*viz*, public policy) (s 46(c)(ii)).

> "… Vietnam only enforces foreign court judgments pursuant to international treaties concluded with the countries of origin of such judgments. … This opens the possibility of considering the inclusion of an arbitration agreement in a transactional document signed with a Vietnamese counterparty."

Myanmar-seated awards may also be set aside, pursuant to s 41 of the 2016 Law, on grounds similar to those set out in s 46(b) and (c) in relation to refusal of enforcement. The following 'exceptions' (*viz*, provisos) should, however be noted:

(1) per s 41(a)(iv), if decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted may be set aside; and
(2) per s 41(a)(v), an agreement as to the composition of the tribunal or the arbitral procedures shall not be contrary to any provision of the 2016 Law from which the parties cannot derogate.

> "In practical terms, the term 'national interests' [public policy] in … the 2016 Law lacks a clear legal definition in the context of Myanmar's arbitration framework, thereby granting courts significant discretion ... to set aside a Myanmar-seated international award or refuse enforcement of a foreign award."

In practical terms, the term 'national interests' employed in ss 41(a)(vii) and 46(b)(ii) of the 2016 Law lacks a clear legal definition in the context of Myanmar's arbitration framework, thereby granting courts significant discretion in deciding whether to, respectively, set aside a Myanmar-seated international award or refuse enforcement of a foreign award.[7] The authors have not seen any court precedents or legislation that provide guidelines defining the term or its scope so as to prevent it becoming, in the words of Burrough J 200 years ago, an "unruly horse".[8] This ambiguity poses challenges for arbitration participants. The subjective interpretation of 'national interests' introduces unpredictability into enforcement, allowing courts to assess cases individually on the basis of Myanmar's broader strategic and economic considerations.

There have been only a limited number of successful instances of enforcement of foreign arbitral awards in Myanmar and the process itself may lead to prolonged delays. Opting for Myanmar-seated international arbitration through the MAC may therefore be the preferable route. This approach streamlines the recognition and enforcement of awards, offering a more reliable dispute resolution avenue within the jurisdiction. It should be noted, however, that an award must undergo an extensive execution process under Part II (ss 36-74) of the 1909 Code before it can be enforced in the Myanmar courts. Unfortunately, this process also faces notable challenges, marked by substantial backlogs, transparency issues and other inefficiencies within the court system.

Vietnam

Vietnam became a Contracting State to the New York Convention in 1995 and recognises foreign commercial arbitral awards on the basis of reciprocity in accordance with reservations made under art I.3 of the Convention. This is reflected in art 424 of the 2015 Code.

There are, however, a broad range of potential practical issues with regard to the recognition and enforcement of foreign arbitral awards in Vietnam. Under local procedural law,

recognition proceedings are adversarial, by virtue of art 458 of the 2015 Code. This means that the parties must present their respective cases concerning the procedure before the court will decide whether to grant or refuse recognition and enforcement of a foreign award under art 459 of the 2015 Code, which broadly reflects the grounds for refusal under art V of the New York Concention.

> “In practice, advisers tend to select foreign-seated international arbitration rather than litigation in Vietnam or Vietnam-seated international arbitration for large-sized international transactions.”

The 2010 Law also contains provisions concerning the ‘cancellation’ (*viz*, setting aside) and the enforcement of Vietnam-seated awards: see arts 68-71 of the 2010 Law (cancellation) and arts 66-67 of the 2010 Law and the Law on Enforcement of Civil Judgments 2008 (enforcement). In practice, advisers tend to select foreign-seated international arbitration rather than litigation in Vietnam or Vietnam-seated international arbitration for large-sized international transactions.

A foreign arbitral award must first be recognised in Vietnam before it can be enforced there. Recognising and enforcing foreign awards is a complex matter. Vietnamese procedural law stipulates specific cases in which foreign awards cannot be recognised or enforced.[9] Awards requiring enforcement in Vietnam must therefore be evaluated on a case-by-case basis, as local laws and practices can stifle the enforcement of foreign awards in the country. Albeit, in theory, every arbitral award rendered in another Contracting State to the New York Convention can be recognised and enforced in Vietnam,[10] practical issues with regard to enforcement are abundant. For example, in practice, Vietnamese courts have some discretion in interpreting the fundamental principles for deciding whether to recognise an award made by a foreign arbitral tribunal and have refused recognition of foreign awards on the basis of their discretionary interpretation of these principles. An arbitral award rendered by any tribunal in an offshore jurisdiction will be considered a foreign arbitral award under Vietnamese procedural law.[11] A detailed understanding of that procedural law is required in order to ascertain the potential hurdles to enforcement in each case.

> “A foreign arbitral award must first be recognised in Vietnam before it can be enforced there. A detailed understanding of … [Vietnamese] procedural law is required in order to ascertain the potential hurdles to enforcement in each case.”

In practice, the Vietnamese ecosystem for enforcing foreign awards and interim measures poses additional obstacles. For example, there is no effective system for information exchange between relevant Vietnamese authorities. Further, Vietnamese law does not recognise the right of a foreign

arbitral tribunal to order injunctions against parties or assets in Vietnam; thus, the enforceability in Vietnam of an order for an injunction by a foreign arbitrator is not assured. This can hamper seizure by a successful claimant of assets of the respondent that are subject to an award. Protracted back and forth communications with multiple State agencies or private institutions (such as award debtors' banks) may therefore be required to obtain the necessary supporting information.

> "The choice of a dispute resolution process and its inclusion in a contractual clause are crucial. Choosing clearly between court litigation and arbitration impacts upon the effectiveness of dispute resolution and is therefore pivotal."

Moreover, institutional co-operation cannot be guaranteed either. Because many Vietnamese stakeholders in enforcement proceedings are still predominantly unfamiliar with arbitration and the enforcement of awards resulting from the process, claimants must first unlock the required communication channels, which involves varying levels of effort and success. Vietnam's government and its subordinate institutions (such as the Vietnamese Supreme Court) are in the process of improving the understanding and speedy enforcement of offshore awards. Yet, recognising and enforcing foreign awards in Vietnam remains something of a feat. In this context, the choice of venue becomes an essential switch in achieving successful enforcement in Vietnam.

Conclusion

The choice of a dispute resolution process and its inclusion in a contractual clause are crucial. Choosing clearly between court litigation and arbitration impacts upon the effectiveness of dispute resolution and is therefore pivotal. Foreign litigation in developing jurisdictions is often challenging, due to regulatory gaps and limited understanding by local courts. Opting for arbitration, too, presents challenges in the enforcement of awards, particularly in developing offshore jurisdictions.

The selection of arbitral institutions and rules is also critical, as it will influence the outcome of a case. The dispute resolution clause therefore significantly affects a claimant's chances of recovery, requiring careful consideration of (*inter alia*) potential enforcement locales. Complexity increases with diverse dispute resolution clauses in multiple agreements.

> "Choosing between *ad hoc* and administered arbitration, or foreign and local litigation, or onshore and offshore arbitration, is crucial to the success of cross-border deals, particularly those involving parties from different jurisdictions."

Choosing between *ad hoc* and administered arbitration, or foreign and local litigation, or onshore and offshore arbitration, is crucial to the success of cross-border deals, particularly those involving parties from different jurisdictions. Recognition and enforcement hurdles are likely to arise, particularly where respondents are based in developing jurisdictions or public bodies are involved. Commercial factors, such as costs and enforcement timelines, must also be weighed in the balance. Tailoring dispute resolution clauses to each transaction is therefore essential for optimal results, emphasising the need for effective bespoke solutions at an early stage in a legal relationship.

> “Tailoring dispute resolution clauses to each transaction is … essential for optimal results, emphasising the need for effective bespoke solutions at an early stage in a legal relationship.”

1 *Editorial note*: Law No 5 of 2016, available at https://www.mlis.gov.mm/mLsView.do;jsessionid=8A2E6B90F83F1199F7453B49FBB58EDB?lawordSn=9668.

2 *Editorial note*: This should not be confused with the Vienna International Arbitration Centre, to which this initialism was originally attributed.

3 *Editorial note*: Available at https://www.viac.vn/images/Resources/Legal-Informative-Documents/54_2010_QH12_114053.doc.

4 *Editorial note*: See *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the ‘New York Convention’)*, available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2. In the case of the Netherlands, Denmark, the United Kingdom and the People’s Republic of China, the application of the Convention is extended to specified sub-statal entitles listed in, respectively, Notes (e)-(h) (notably, in the case of the PRC, the Hong Kong and Macao SARs).

5 *Editorial note*: Available at https://www.mlis.gov.mm/mLsView.do;jsessionid=0BB85F015DF4C704C45E075EA979DD18?lawordSn=16877. The 1909 Code was enacted when the then Burma was a province of British colonial India and continued in force following Burma’s independence in 1948.

6 *Editorial note*: Code No. 92/2015/QH13, available at https://english.luatvietnam.vn/code-no-92-2015-qh13-dated-november-25-2015-of-the-national-assembly-on-civil-procedure-101332-doc1.html.

7 *Editorial note*: Article 459.2(b) of the 2015 Code uses the expression “basic principles of law”.

8 *Editorial note*: See *Richardson v Mellish* (1824) 2 Bing 229. 251.

9 *Editorial note*: Article 459 of the 2015 Code.

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Moral Damages under International Investment Law: the Difficulty of 'Quantumising' Moral Harm

Doğan Gültutan

This article seeks to highlight pertinent issues relating to the legal basis of claims for moral damages in arbitrations under international investment law and on quantifying proven claims in a manner that accords with applicable principles of international law generally. Suggestions are made for future arbitral tribunals in considering, assessing and awarding such damages in investor-State cases.

Introduction

The recoverability of moral damages in investment arbitrations is a hotly debated matter.[1] A number of tribunals have nevertheless accepted that, as a matter of principle, moral damages may be recovered by investors, provided that certain threshold requirements are satisfied.[2] Matters of quantum are, however, difficult for tribunals to grapple with. Putting a price tag on moral harm is not an easy task. As such, certain tribunals have, unsurprisingly, refused or failed to engage properly with such claims, in most cases excusing such behaviour on evidential grounds.[3] This approach is not easy to square with the principle under international law that moral harm requires compensation in the usual way. Rather, it is a demonstration of certain tribunals' unwillingness to engage and/or unfamiliarity with the concept and what it entails.

> “… [C]ertain tribunals have, unsurprisingly, refused or failed to engage properly with such claims, in most cases excusing such behaviour on evidential grounds. This approach is not easy to square with the principle under international law that moral harm requires compensation in the usual way.”

The meaning of ‘moral harm’

A definitive statement as to what amounts to moral harm is a near-impossible task. However, a comprehensive and widely adopted definition has been attempted by Wittich, who explains it thus:

> “First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what could be called non-material damage of a ‘pathological’ character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, non-material damage would also cover minor consequences of a wrongful act, eg the affront associated with the mere fact of a breach or, as it is sometimes called, ‘legal injury’.”[4]

Broadly in support, and in an effort to lay down the international law rule that moral damages are recoverable as a matter of principle, the US-German Claims Commission in the *Lusitania Cases* (which concerned the sinking by a German submarine of the British ocean liner ‘Lusitania’ in May 1915, during the First World War, killing approximately 130 US nationals prior to the entry of the US into the war alongside the Allied forces), explained:

> “That one [who is] injured is, under the rules of international law, entitled to be compensated for an injury inflicted[,] resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty.”[5]

It is evident from the above that moral harm is ascribed a wide and general meaning, essentially capable of encompassing any form of harm that is not a material harm. It is worth noting that the definitions given above have been continuously cited in academic writings and in awards of international tribunals as acceptable definitions of ‘moral harm’.[6]

> “A definitive statement as to what amounts to moral harm is a near-impossible task. … [It] is ascribed a wide and general meaning, essentially capable of encompassing any form of harm that is not a material harm.”

The recoverability of moral damages

Until the *Desert Line* arbitral award in 2008,[7] few considered moral damages to be a head of loss recoverable in investment arbitration cases. The prevailing view among scholars, arbitrators and lawyers was that investment arbitrations exclusively concerned material harm to (usually) corporate, foreign investors. However, this ground-breaking award of US$1 million for moral harm sustained by claimants opened the floodgates, with moral damages claims being made in investment cases increasing exponentially in number ever since.[8]

> “Until the *Desert Line* arbitral award in 2008, … the prevailing view among scholars, arbitrators and lawyers was that investment arbitrations exclusively concerned material harm to (usually) corporate, foreign investors.”

In *Desert Line*, the claimant, an Omani company, had been contracted by the Republic of Yemen to construct asphalt roads in the country's interior. Yemen and Desert Line disagreed in respect of the actual works completed and their value, as a result of which Yemen refused to make certain payments Desert Line had demanded. After unsuccessful attempts to resolve the differences, Desert Line ceased operations and threatened to pull out of the project. Shortly thereafter, Yemeni armed rebel groups and militia invaded the construction sites and threatened Desert Line's personnel. Desert Line initially commenced legal proceedings before the Yemeni courts for (*inter alia*), the release of bank guarantees, but an agreement to arbitrate was later signed which was aimed at resolving the disputed matters between the parties following completion of the works. This resulted in the withdrawal of the lawsuit before the local courts and referral of the dispute to *ad hoc* local arbitration.

> “… [The] ground-breaking [*Desert Line*] award … for moral harm sustained by claimants [, however], opened the floodgates, with moral damages claims being made in investment cases increasing exponentially in number ever since.”

The two arbitrators ruled in favour of Desert Line, ordering Yemen to pay compensation in excess of US$100 million. Yemen, unsatisfied with the award, responded by arresting three of the company's personnel, who were detained for three days. Under some duress, Desert Line agreed to settle its dispute in return for a substantially lower sum. However, it later challenged the validity of the settlement agreement and sought full compensation. Yemen refused to pay additional sums, resulting in the commencement of a second set of arbitration proceedings, this time before an ICSID tribunal. Desert Line's claim included a claim for moral damages, premised on its executives having suffered stress and anxiety due to harassment, detentions and threats, intimidation of its executives in relation to the contracts, and the company itself suffering significant injury to its credit and reputation as well as loss of prestige.

The ICSID tribunal (Pierre Tercier (President), Jan Paulsson and Ahmed S El-Kosheri) ruled in Desert Line's favour, ordering that the initial arbitral award be strictly enforced and, in addition, awarding the company moral damages.[9] The tribunal declared that:

> "Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, *in exceptional circumstances*, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them."[10] (Emphasis added)

Although the tribunal acknowledged that "it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award",[11] such was not a reason to bar a moral damages claim in and of itself, drawing support from the *Lusitania Cases*.

> "Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. (*Desert Line v Yemen*)

The *Desert Line* tribunal's ruling concerning moral damages and its recoverability as a matter of customary international law was adhered to and followed in two other noteworthy cases. The first of these was the decision of an ICSID tribunal in *Lemire v Ukraine*.[12] It is arguably another most important arbitral award concerning the recoverability of moral damages and related principles, second only to the *Desert Line* decision. That case concerned Ukrainian State bodies' refusal to grant a US investor radio frequency licences and broadcasting channels after a dispute had arisen between them. However, the licences were ultimately extended by a court decree. A settlement agreement was entered into to resolve various matters. Ukraine alleged breaches of the terms of that agreement, giving rise to a dispute, following which the investor commenced ICSID proceedings in which it included a US$3 million claim for moral damages for harassment.

The tribunal ruled in the investor's favour and awarded compensation in the region of US$9 million, but dismissed the claim for moral damages, finding that the requisite exceptional circumstances had not been present to justify such an award.[13] Having considered in some level of detail the relevant authorities, in particular the *Desert Line* case, the tribunal in *Lemire* explained:

> "The conclusion which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that
>
> - the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

- the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- both cause and effect are grave or substantial."[14]

The tribunal reasoned that, in the circumstances, Mr Lemire was an experienced and seasoned entrepreneur and would therefore not have been subjected to substantive stress or anxiety to justify awarding moral damages.[15]

> "Any moral harm, however insignificant it may be, warrants fair and effective compensation."

The second noteworthy case and one which cements the principle enunciated in *Desert Line*, is the decision of an ICSID tribunal in *von Pezold v Zimbabwe*.[16] This is the second publicly known instance of moral damages having been awarded by an ICSID tribunal, again in the sum of US$1 million, for breach of international law obligations. The fact pattern concerned the invasion and unlawful settlement of farmland by local Zimbabweans (including purported 'war veterans' of the pre-1980 Rhodesian civil conflict, aided and encouraged by the State pursuant to its 'land reform' policy, resulting in unlawful expropriation of property. The claim for moral damages in that case was premised on threats of death and violence endured by the investor, his family and employees from the illegal settlers, firearms having been used and employees kidnapped, beaten and tortured. The tribunal made extensive references to the *Desert Line* and *Lemire* awards in considering its award of moral damages.[17] It confirmed that a State's obligation to provide reparation for an injury covers both material and moral damage, and that moral damages should only be awarded in exceptional circumstances.

More recently, an UNCITRAL tribunal in *Zhongshan v Nigeria*[18] awarded the claimant Chinese investor a total of US$75,000 as compensation for moral harm sustained by its employees and officers, resulting from threats, arrest and improper treatment, including physical assault, at the hands of the Nigerian police for a period of up to two weeks.[19] The tribunal (presided over by Lord Neuberger of Abbotsbury), finding that Nigeria had violated its treaty obligations to (*inter alia*) accord fair and equitable treatment in respect of the investment and not to expropriate unlawfully the investor's investments, explained that there was "no doubt that there were aspects of the … [relevant activities] on the part of organs of the Nigerian state which justify an award of moral damages … [especially given the] … indefensible and serious infringement of … [the chief finance officer's] human rights".[20] In an endeavour to justify the quantum awarded, the tribunal reasoned that the sum awarded represented "around USD 5,000 for each day of [the chief finance officer's] mistreatment plus a further sum to reflect the other inappropriate behaviour of representatives of Nigeria towards employees and a director".[211] Importantly, in its award the tribunal confirmed that "[moral damages] have been frequently recognised and awarded where appropriate in investor-state arbitration awards", citing *Desert Line* in support.[22]

> "The recognition by investment tribunals of entitlement to moral damages in international investment arbitrations is a welcome development. It ensures alignment with the rules and principles of public international law, of which it is a subset."

The recognition by investment tribunals of entitlement to moral damages in international investment arbitrations is a welcome development. It ensures alignment with the rules and principles of public international law, of which it is a subset. A claimant's entitlement to compensation for moral harm suffered due to an internationally wrongful act has been recognised for over a century. However, the imposition of an exceptional circumstances requirement runs against the general rules of public international law, resulting in the unfortunate fragmentation of the disciplines of international law. As Judge Greenwood powerfully declared in the *Diallo* case in the International Court of Justice (ICJ) -

> "[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions."[23]

To ensure that international law and its subsets continue as a unified, single code of laws and effectively addresses the legitimacy criticisms levelled against it, the path should be one of convergence, not fragmentation.[24] Any moral harm, however insignificant it may be, warrants fair and effective compensation.

"…[I]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals …" (*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, per Judge Greenwood)

Issues of quantum

The most difficult task an arbitral tribunal faces, once the infliction of moral harm and the presence of exceptional circumstances required for a claim for moral damages has been established to the satisfaction of the tribunal, is in respect of quantification. The generally accepted principle under international law is that "compensation should be commensurate to the injury".[25] In the words of the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case,[26] "reparation [for an internationally wrongful act] must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[27] However, the application of that seemingly clear and justifiable rule is not without its complications, as is demonstrated by the inconsistency in reasoning and quantum awarded in a number of investment cases discussed below.[28]

The inherently difficult nature of the task and covert attempts by investment tribunals to avoid direct engagement with the issue of quantification of moral harm is demonstrated by the awards in *Desert Line* and *von Pezold*.[29] It will be recalled that *Desert Line* was a case in which the investor and its employees were subjected to threats by armed persons and arrests at the hands of persons under governmental control and/or direction. Somewhat similarly, in *von Pezold* the investors and their employees endured death threats and violence at the hands of the illegal settlers in possession of firearms, who also resorted to kidnap, beating and torture, all at the encouragement of State apparatus. Perhaps reflecting that similarity in the fact pattern, in both cases the tribunals awarded the investors US$1 million as compensation for moral harm.

> "To ensure that international law and its subsets continue as a unified, single code of laws and effectively addresses the legitimacy criticisms levelled against it, the path should be one of convergence, not fragmentation."

What is striking, however, is that neither tribunal seemingly fully engaged with the quantification process or sought to justify the monetary sum it awarded. The *Desert Line* tribunal simply declared that the sum awarded was "more than symbolic yet modest in proportion to the vastness of the project".[30] The tribunal added no colour in respect of why it was sufficient that an award of moral harm compensation be more than symbolic, that is, whether this represented a low benchmark; nor did the tribunal explain why it considered that moral damages must be modest and also the relevance, if any, of the size of the investment or project that benefited from treaty protections. Although the tribunal referred with approval to the *Lusitania Cases*,[31] among other international law sources and authorities, its statement noted above appears to have deviated from established principles.

> "The generally accepted principle under international law is that "compensation should be commensurate to the injury" [per the *Lusitania Cases*]. What is striking, however, is that neither [the *Desert Line* nor the *von Pezold*] tribunal seemingly fully engaged with the quantification process or sought to justify the monetary sum it awarded."

A similar 'light touch' approach to the quantification of the moral damages claim was adopted by the *von Pezold* tribunal. There too the tribunal made an award of US$1 million as compensation for moral harm, finding a request for US$5 million by the investor excessive "in light of the decision in *Desert Line*".[32] The reasoning provided was that the conduct exposed by the claimant investor in that case and in *Desert Line* were analogous, hence the making of a monetarily equivalent award. It considered the sum awarded not significant but "appropriately reflect[ing] the wrongfulness of the actions that occurred in respect of the [company] staff".[33] The *von Pezold* tribunal was at pains to emphasise that such an approach had been adopted to ensure consistency among ICSID awards.[34] It is unfortunate, however, that the *von Pezold* tribunal did not seize the opportunity to consider the legal accuracy and appropriateness of the statements made by the *Desert Line* tribunal, in light of the established principles

of international law, and seek to justify its quantum award accordingly. In any event, it was incumbent on the tribunal to explain why moral harm compensation awarded in one case must necessarily be aligned with that in another case, even where the treatment to which the injured person or entity is exposed is analogous; it is possible for people and entities to be affected differently by treatment of same severity or nature. It is the harm to the injured claimant that should be the focus, not the nature of the act to which it has been subjected, though admittedly the latter will necessarily need to be factored into the analysis.

> “It is unfortunate … that the *von Pezold* tribunal did not seize the opportunity to consider the legal accuracy and appropriateness of the statements made by the *Desert Line* tribunal, in light of the established principles of international law, and seek to justify its quantum award accordingly.”

What is even more striking and difficult to justify is the award of a mere US$75,000 in *Zhongshan*[35] in circumstances and on a fact pattern that closely mirror both *Desert Line* and *von Pezold* cases. In fact, in *Desert Line* the company's personnel were detained for a period of three days, while in *Zhongshan* the unlawful arrest lasted 10 days. There was no attempt by the tribunal in *Zhongshan* to explain the departure from what was seemingly the established arbitral practice of making million- dollar moral damages awards. It would appear that the tribunal in *Zhongshan* considered million-dollar awards to be excessive and disproportionate, and opted to align itself more closely with the jurisprudence of international human rights tribunals, whose awards also number in the thousands as opposed to millions of dollars, euros etc bracket (discussed below). In fact, the tribunal in *Zhongshan* made express reference to the human rights violations committed by the Nigerian State, which arguably corroborates that understanding.[36]

> “What is even more striking and difficult to justify is the award of a mere US$75,000 in *Zhongshan* in circumstances and on a fact pattern that closely mirror both the *Desert Line* and *von Pezold* cases.”

It is suggested that a more appropriate course in dealing with moral damages claims in investment arbitrations would be for future tribunals to engage with the particular facts of each given case and determine a monetary sum that accurately reflects the moral harm suffered by the investor and its employees. Medical expert evidence could and should be utilised to assist tribunals in understanding the severity of the moral harm suffered in light of its impact on those afflicted. The jurisprudence of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR) offer richness of resources and practice in that respect, particularly the latter.[37] For example, in *Velásquez*, a case concerning the kidnapping and disappearance of a student by members of the armed forces in the 1980s, the IACtHR made its award for moral harm compensation once it was established by way of expert evidence from a psychiatrist that the kidnapped individual's family had “symptoms of fright, anguish, depression and withdrawal, all because of the disappearance”.[38] The total sum awarded in that case was 750,000 Honduran lempira (approximately US$30,380 at 2024 values). Along similar lines, compensation awarded by the ECHR figures in the thousands of US dollars, as opposed

to millions, despite such human rights cases involving much more egregious forms of harm. By way of example only, in a case involving the rape of an illegal immigrant by State actors in Greece, the ECHR awarded a mere €50,000 as compensation for moral harm.[39]

It is difficult to reconcile the divergent approaches of the international investment and human rights tribunals, particularly considering that both declare adherence to the same rule under international law, that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act … [and that] [i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[40] Inconsistency in their approach to and treatment of moral damages claims only helps to fuel the legitimacy crisis currently facing investment arbitrations.[41] It would appear that the approach of the UNCITRAL tribunal in *Zhongshan v Nigeria* is more aligned and convergent with the jurisprudence of international human rights courts and is therefore a step in the right direction. That said, it was unfortunate that the tribunal in that case did not seize the opportunity to distance itself explicitly from 'million-dollar awards', fully particularise its approach and considerations concerning the moral damages award, and thus aid future tribunals forced to grapple with such difficult issues.

Conclusion

The settled rules of public international law, of which international investment law is a subset, require that all forms of harm sustained be fully compensated. As the PCIJ stated in the *Factory at Chorzów* case, compensation awarded must "wipe-out all the consequences of the illegal act".[42] This necessarily calls for a case-by-case analysis, given that the consequences of any illegal act are likely to depend on the injured party and its circumstances. For that reason, an approach of forced alignment between decided cases in terms of monetary sums awarded is misjudged and a recipe for unfair treatment. It is unsurprising that most investment tribunals adopting such positions fail to justify their stance properly.

> "… [A] more appropriate course in dealing with moral damages claims in investment arbitrations would be for future tribunals to engage with the particular facts of each given case and determine a monetary sum that accurately reflects the moral harm suffered by the investor and its employees."

A better approach would be to utilise medical expertise to assess each injured party's moral harm sustained and make an award of damages with the benefit of such insight and expertise. Persons of the medical profession are best suited to assessing the extent of moral harm one may suffer. This is not a novel suggestion; the IACtHR often directs and considers medical experts' views before making a determination as to the appropriate level of damages to award. Investment tribunals need only to pay heed to such pragmatic and clearly more reasonable jurisprudence developed by the other sub-disciplines of international law. The suggested route would

not only provide for more just and fairer results, but would also address the accusations of a legitimacy crisis currently levelled against investor-State arbitration, given the divergent approaches demonstrated by various international courts and tribunals.[43]

1 See, for example, Marc Allepuz, *Moral Damages in International Investment Arbitration* (2013) 17(5) Spanish Arbitration Review 5-15; Conway Blake, *Moral Damages in Investment Arbitration: A Role for Human Rights?* (2012) 3(2) JIDS 371-407; Patrick Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes* (2010) 27(3) J Int'l Arb 247-276; Patrick Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes* (2012) 3(1) JIDS 205-242; Patrick Dumberry & Sebastien Cusson, *Wrong Direction: 'Exceptional Circumstances' and Moral Damages in International Investment Arbitration* (2014) 1(2) JDIA 33-75; Stephen Jagusch & Thomas Sebastian, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?* (2013) 29(1) Arb Int'l 45-62; Merryl Lawry-White, *Are moral damages an exceptional case?* (2012) 15(6) Int ALR 236-246.

2 See, for example, *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008); *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011); *Bernhard Friedrich Arnd Rüdiger von Pezold & Ors v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015).

3 See, for example, *Bernardus Henricus Funnekotter & Ors v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009); *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003); *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova*, SCC, Award (22 September 2005).

4 Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law* (2004) 15 Finnish Yearbook of International Law 321-368, at 329-330.

5 *Opinion in the Lusitania Cases (US v Germany)* (1 November 1923) (1923) VII RIAA 32, at 40.

6 See, for example, Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes* (note 1 above); *Desert Line v Yemen* (note 2 above), at [289].

7 *Desert Line v Yemen* (note 2 above).

8 See, for example, Patrick Dumberry, 'Moral Damages', in Christina Beharry (Ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (2018, Brill), p 142.

9 *Desert Line v Yemen* (note 2 above), at [289].

10 *Ibid*.

11 *Ibid*.

12 *Lemire v Ukraine* (note 2 above).

13 *Ibid*, at [326] *et seq*.

14 *Ibid*, at [333].

15 *Ibid*, at [336]-[338].

16 *Von Pezold v Zimbabwe* (note 2 above).

17 *Ibid*, at [908]-[915] (overall analysis) and [908]-[909] (as to exceptional circumstances).

18 *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*, UNCITRAL, Award (26 March 2021).

19 *Ibid*, at [33]-[39].

20 *Ibid*, at [177].

21 *Ibid*, at [178].

22 *Ibid*, at [136].

23 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation), Judgment [2012] ICJ Rep 324, at 394 (ICJ), per the Decalaration of Judge Greenwood at [8].

24 See, for example, Doğan Gültutan, *Moral Damages Under International Investment Law: The Path Towards Convergence* (2022, Kluwer Law International).

25 *Lusitania Cases* (note 5 above), p 40.

26 *Factory at Chorzów (Germany v Poland), Decision on Indemnity*, 1928 PCIJ (Ser A), No 17.

27 *Ibid*, at [125].

28 See Gültutan (note 24 above).

29 See, respectively, *Desert Line v Yemen* (note 2 above), and *von Pezold v Zimbabwe* (note 2 above).

30 *Desert Line v Yemen* (note 2 above), at [290].

31 *Lusitania Cases* (note 5 above).

32 *Von Pezold v Zimbabwe* (note 2 above), at [921].

33 *Ibid*, at [923].

34 *Ibid*, at [921].

35 *Zhongshan v Nigeria* (note 18 above).

36 *Ibid*, at [177].

37 See, for example, *Velásquez Rodríguez v Honduras* (Merits), Judgment, Inter-Am Ct HR (Ser C) No 4 (29 July 1988) (IACtHR); *Gonzales Lluy & Ors v Ecuador* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Inter-Am Ct HR (Ser C) No 102/13 (1 September 2015) (IACtHR); *Atala Riffo and Daughters v Chile* (Merits, Reparations and Costs), Judgment, Inter-Am Ct HR (Ser C) No 254 (24 February 2012) (IACtHR); *Aydin v Turkey*, Case No 57/1996/676/866 (Merits and Just Satisfaction), Judgment (25 September 1997) (ECHR); *Zontul v Greece* Case No 12297/07 (Merits and Just Satisfaction), Judgment (17 January 2012) (ECHR); Blake (note 1 above), at p 407.

38 *Velásquez v Honduras* (note 37 above), at [51].

39 *Zontul v Greece* (note 37 above).

40 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), art 31, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 20 July 2023).

41 See, for example, Thomas H Webster, *Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues* (2009) 25(4) Arb Int'l 469-514; David Collins, *The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions* (2016) 32(4) Arb Int'l 575-587; Malcolm Langford, Cosette D Creamer & Daniel Behn, 'Regime Responsiveness in International Economic Disputes', in Szilárd Gáspár-Szilágyi, Daniel Behn & Malcom Langford (Eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (2020, Cambridge University Press 2020), pp 245 and 267 *et seq*.

42 *Factory at Chorzów* (note 26 above).

43 Gültutan (note 24 above), pp 6 and 108.

Sports Arbitration in China: Establishment, Innovations and Prospects

An Shouzhi & Li Jilong

This article discusses the inception and development of statutory sports arbitration in the People's Republic of China since the promulgation of the Sports Law in 2005. Particular attention is devoted to the creation of the China Commission of Arbitration for Sports and its general Sports Arbitration Rules in 2023, the year in which the Sports Law was significantly recast. The authors argue that China should learn from initiatives of other countries, such as Japan, with regard to the development of specialist arbitration rules for particular types of dispute and the disclosure of awards.

Introduction

Historically, the inception of China's sports arbitration system can be traced back nearly 30 years, to the promulgation of the first Physical Culture and Sports Law of the People's Republic of China 1995[1] (the Sports Law, as amended in 2009 and 2016). Article 33 of the Sports Law as originally enacted (and now repealed) declared:

"Disputes arising in competitive sports activities shall be mediated and arbitrated by sports arbitration institutions. "Measures for the establishment of sports arbitration institutions and the scope of arbitration shall be prescribed separately by the State Council."[2]

However, particularly since the enactment of the PRC Legislation Law 2000[3] (the Legislation Law), both litigation and arbitration have been made subject exclusively to regulation by law. Consequently, the system of sports

arbitration can only be established through legislative measures, as the Standing Committee of the National People's Congress (SCNPC) exercises legislative power over judicial systems, pursuant to art 10 of the Legislation Law. Such power therefore cannot be delegated to the State Council as provided in art 33 of the original Sports Law, making that provision inconsistent with art 10 of the Legislation Law. In this context, the sports arbitration system, as a judicial system envisaged under the Sports Law, can only be established by the SCNPC.

> "Over the past two decades of rapid development, sports disputes in China have shown a noticeable trend toward increasing complexity and diversity."

Over the past two decades of rapid development, sports disputes in China have shown a noticeable trend toward increasing complexity and diversity. The previous dual system of sports dispute resolution processes, established by the People's Courts and internal dispute resolution mechanisms within the sports industry, became no longer adequate to address practically the demand for resolution of such disputes in an efficient, independent and specialised manner. Simultaneously, as China's arbitration system and legislation have advanced and grown in sophistication, there has recently been growing demand to amend the Sports Law in order to lay a clear legal foundation for and provide clear guidance on the establishment of a bespoke sports arbitration system.[4]

Establishing sports arbitration in China

Accordingly, on 24 June 2022, a recast Sports Law was officially promulgated, taking effect on 1 January 2023.[5] In this version of the Sports Law, a new Chapter 9, entitled 'Sports Arbitration' and comprising 10 articles (91-100), features prominently among the Law's 12 chapters. Chapter 9 clearly sets out the principles and scope of, and procedures for, sports arbitration. It also provides for the establishment of the China Commission of Arbitration for Sports (CCAS, albeit referred to as 'Sports Arbitration Committee' in art 93 of the Law) and elaborates upon the relationship between sports arbitration, internal dispute resolution mechanisms within sports organisations, other arbitration systems and the jurisdiction of the People's Courts.

Guided by the road map outlined in Chapter 9 of the recast Sports Law, the pace of establishment of China's sports arbitration system has noticeably accelerated. One month after the recast Law's effective date, the State Sports General Administration of China officially established the CCAS in Beijing.[6] Along with the establishment of the CCAS, a comprehensive set of foundational documents, including the Sports Arbitration Rules, the CCAS Regulations and documents relating to the CCAS panels of arbitrators, was concurrently released.[7]

> "… [A]s China's arbitration system and legislation have advanced and grown in sophistication, there has recently been a growing demand to amend the Sports Law in order to lay a clear legal foundation for and provide clear guidance on the establishment of a bespoke sports arbitration system."

According to a report by the Xinhua News Agency of the proceedings of the seventh plenary meeting of the CCAS held on 30 January 2024 to consider its 2023 annual work

report, 24 sports arbitration cases had been filed and registered with it since its establishment in 2023 and six cases had been adjudicated.[8] At the same time (though not referred to in the Xinhua report), a specialist arbitrator appointment committee (comprising professors Song Lu and Hongjun Ma, Dr Shouzhi An and professors Yi Zhao, Yuanxin Chen and Haiyan Huang) had selected and trained 101 general arbitrators[9] and 12 anti-doping arbitrators.[10] Furthermore, an online case filing platform had been launched and made accessible to parties, enabling such documents as notices of arbitration to be submitted through it.

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Innovations in China's system of sports arbitration

(1) Adherence to fundamental principles enshrined in the Arbitration Law

The sports arbitration system is the fourth type of arbitration mechanism established by statute in China, alongside existing mechanisms for civil and commercial arbitration, labour disputes arbitration and arbitration of disputes over rural land contract operations. Despite its unique characteristics, sports arbitration remains, in essence, one of the arbitration systems envisaged by the PRC's Arbitration Law 1994[11] (the Arbitration Law). In this regard, adherence to the fundamental principles outlined in the Arbitration Law is crucial, as these principles can serve as essential guidance in the evolution of sports arbitration.

The provisions contained in Chapter 9 of the recast Sports Law substantiate this assertion. Out of 10 articles in this chapter, at least four resonate with fundamental principles in China's Arbitration Law. Article 91 affirms the principle of conducting sports arbitration independently.[12] Article 97 confirms the final and binding force of sports arbitration awards.[13] Article 98 reiterates that the circumstances for revocation (setting aside) of an award as stipulated in the Arbitration Law apply equally to sports arbitration awards.[14] Finally, art 99 of the Sports Law stipulates that, akin to other arbitral awards, the parties involved may apply to a People's Court seeking enforcement of sports arbitration awards.[15]

Standing on the solid legal foundation laid by the Arbitration Law and relevant arbitration practice, it is anticipated that sports arbitration in China will progress smoothly and steadily.

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(2) Party autonomy as modified in China's sports arbitration

Party autonomy serves as a bedrock of the arbitration system and permeates every stage of the arbitration process. At the stage of initiating an arbitration, either party is at liberty to commence an arbitration on the basis of an arbitration agreement voluntarily concluded between them. In the realm of sports arbitration, art 92 of the amended Sports Law also adopts this approach as one of the methods of initiating sports arbitration.

However, considering the distinctive characteristics of the sports industry and the nature of its relationships and

relevant disputes, art 92 of the recast Sports Law goes beyond arbitration agreements by further permitting sports arbitration to be initiated on the basis of the governing regulations of sports associations and the rules governing sports events. Instruments such as these draw their inspiration, in effect, from the practices of international sports arbitration and can be traced back to the 1996 Olympic Games in Atlanta. The International Olympic Committee has mandated that all athletes, coaches and officials participating in an Olympiad must sign an arbitration agreement committing to submit all disputes to the jurisdiction of the Court of Arbitration for Sport (CAS), pursuant to art 61.2 of the Olympic Charter.[16] Failure to do so results in forfeiture of the right to participate in the games. Thus, applying this approach to sports arbitration in China, although athletes and others appear to sign arbitration agreements contained in the regulations of sports associations or rules governing sporting events voluntarily, such agreements are, in effect, compulsory in nature.[17]

> "… [C]onsidering the distinctive characteristics of the sports industry and the nature of its relationships and relevant disputes, art 92 of the recast Sports Law … [further permits] the initiation of sports arbitration on the basis of the governing regulations of sports associations and the rules governing sports events."

The method of initiating sports arbitration based upon arbitration clauses embedded in the regulations of sports associations or the rules of sporting events may arguably, to some extent, impede the principle of party autonomy in arbitration. At the same time, however, this approach to

initiating arbitration can function as an effective mechanism to compel sports associations to refer relevant disputes to sports arbitration rather than resolving them through an internal dispute resolution mechanism within the sports industry.

By imposing certain acceptable levels of compulsion both on athletes and sports associations, the modified concept of party autonomy and the dual mechanisms adopted by the recast Sports Law for initiating sports arbitration seem to be a best fit for the unique nature of the sports industry and its related disputes.

(3) Special procedures for China's sports arbitration

The diversity of possible disputes dictates that a single set of rules of arbitration procedure cannot meet the practical demands of parties seeking to resolve them. Thus, in the field of commercial arbitration, for example, major arbitral institutions have developed a variety of arbitration rules applicable to disputes of different types and amounts in dispute. Illustrative of this is Hong Kong International Arbitration Centre, which, in addition to its standard Administered Arbitration Rules, has formulated, for example, Short Form Arbitration Rules, Electronic Transaction Arbitration Rules and Small Claims and 'Documents Only' Procedures to fit different types of dispute.[18]

Similarly, art 100 of the recast Sports Law stipulates:

"Special sports arbitration procedures shall apply to disputes over sports events that need to be handled immediately.

"Special procedures are provided for by the Sports Arbitration Rules."[19]

It is anticipated that the special sports arbitration procedure established by the Sports Law will greatly assist arbitral tribunals to resolve, efficiently and conveniently, disputes arising during sports events. It is also foreseeable that, given the continuous development of China's sports arbitration system, further types of sports arbitration rules will be introduced in the future, providing more comprehensive guidance and mechanisms for the resolution of the various categories of sports dispute.

The prospects for China's sports arbitration system

Article 91 of the recast Sports Law states the purpose of establishing the sports arbitration system as resolving sports disputes promptly and fairly (impartially) and protecting the legitimate rights and interests of the parties concerned. It goes on to require that sports arbitration shall be conducted independently and free from interference by administrative organs, social organisations or individuals.

> "… [A]lthough athletes and others appear to sign arbitration agreements contained in the regulations of sports associations or rules governing sporting events voluntarily, such agreements are, in effect, compulsory in nature."

However, constrained by insufficient practical experience of sports arbitration, Chapter 9 of the Sports Law is limited to only 10 articles, which will in due course require certain areas of sports arbitration to be refined further. Standing in contrast with the newly established sports arbitration system in China, the neighbouring jurisdiction of Japan established the Japan Sports Arbitration Agency (JSAA)[20] in 2003. After just over two decades in operation, the JSAA has become the primary institution for resolving sports disputes in Japan. In this regard, the JSAA could serve as a valuable reference example for the further advancement of sports arbitration in China. In this regard, such prospects may be discussed from the following perspectives.

> "… [I]nitiating sports arbitration based upon arbitration clauses embedded in the regulations of sports associations or the rules of sporting events may … function as an effective mechanism to compel sports associations to refer relevant disputes to sports arbitration …"

(1) The civil nature of an independent sports arbitration system

Conducting arbitration independently and free from any external interference, as required by art 91 of the recast Sports Law, is the paramount objective of any arbitration regime, including the sports arbitration system.[21] A review of the organisational development of the JSAA shows that it dedicated 10 years to evolving from a regular association to a charitable foundation with independent legal personality. The pursuit of independence of arbitral institutions is also reflected in the evolutionary history of the Court of Arbitration for Sport.

By contrast, lead responsibility for the establishment of the CCAS and the formulation and scrutiny of the Sports Arbitration Rules currently lies predominantly with the State Sports General Administration of China. Within this context,

the general public and relevant parties are likely to harbour scepticism with regard to the independence and fairness of the CCAS and its rules, due to this organisation's primarily governmental nature and its lack of a civil or independent character.

On the other hand, however, it is noteworthy that the establishment of the sports arbitration system has been under consideration for many years, even if, due to multiple constraints, such a vision has been slow to materialise. From this perspective, opting for organisational leadership by the State Sports General Administration of China during the preparation or early establishment phase of the CCAS, in order to ensure the smooth implementation of this arbitration system, may arguably be viewed as a pragmatic compromise.

> "… [T]he modified concept of party autonomy and the dual mechanisms adopted by the recast Sports Law for initiating sports arbitration seem to be a best fit for the unique nature of the sports industry and its related disputes."

Looking ahead, when the sports arbitration system in China ultimately takes its final shape and puts its operational framework in place, a return to the fundamental principles underlying the civil nature of this arbitration system will be imperative. The withdrawal of administrative influence and the establishment of independent legal personality should be regarded as a crucial objective during the development of the CCAS sports arbitration system in China.

(2) Optimising the scope of CCAS sports arbitration

The current scope of CCAS sports arbitration is outlined by art 92 of the recast Sports Law. By comparison with the CAS and sports arbitration institutions in other countries, however, the scope of arbitration stipulated in that provision is relatively narrow. Moreover, adopting an exclusionary approach, the final paragraph of art 92 rigidly distinguishes arbitrable sports disputes generally from property-related and labour-related sports disputes.

Pursuant to the current scope of arbitration stipulated by art 92(1)-(3), most sports arbitration cases will mostly likely be initiated on the basis of the articles of association of sports organisations and the rules of sports events. The other manner of initiating sports arbitration stipulated under art 92, *viz* on the basis of an arbitration agreement, may therefore be of limited practical utility.[22] China's legislative approach, it may be argued, is that it is pragmatic and reasonable to narrow the scope of sports arbitration during the initial stage of its establishment and to review it at a later stage. It is, however, possible that the CCAS and arbitral tribunals may, while adhering to the overarching principles set forth in the Sports Law, endeavour to exercise discretion in considering the admissibility of applications for arbitration, where appropriate, on a case-by-case basis. By doing so, a certain flexibility could be vested in the institution and tribunals to respond effectively to practical demands made of the sports arbitration system by parties.

(3) Expanding the choice of arbitration rules on the basis of types of dispute

The CCAS has thus far issued only one set of effective arbitration rules of general application, namely the Sports Arbitration Rules 2023. Even taking into consideration the 'Special Procedures for Sports Arbitration' provisions stipulated in Chapter 7 of those rules (resolution of sports

disputes arising before or during major sports events and requiring immediate handling), this means that there are currently, in effect, only two sets of rules available for parties to consider adopting.

> "Looking ahead, … [t]he withdrawal of administrative influence and the establishment of independent legal personality should be regarded as a crucial objective during the development of the CCAS sports arbitration system in China."

By contrast, the JSAA has formulated six different sets of arbitration rules based upon the nature of particular disputes.[23] These are (1) the general Rules for Sports Arbitration; (2) the Rules for Doping Arbitration; (3) the Rules for Specific Sports Arbitration; (4) the Rules for Conformity Review Arbitration; (5) the Rules for Member Organization Sports Arbitration; and (6) the Rules for LPGA[24] Doping Arbitration. In addition to these six sets of arbitration rules, the JSAA also places emphasis on resolving disputes through mediation processes and thus has also issued Sports Mediation Rules.[25] It may be concluded from the above that the extensive sets of dispute resolution rules provided by the JSAA greatly facilitate the choice by parties of the most appropriate rules for the prompt resolution of their disputes.

Inspired by the example of the JSAA, it is imperative for the CCAS to gauge practical experiences from elsewhere and to introduce and apply further types of sports arbitration rules to govern the acceptance and adjudication of sports arbitration cases. Furthermore, as the CCAS has set up a dedicated list of anti-doping arbitrators, the formulation of a set of 'Anti-Doping Arbitration Rules' is also a great necessity.

(4) Confidentiality and disclosure of arbitral awards

The confidentiality of arbitration and the non-public nature of arbitral awards have long been considered as major characteristics distinguishing arbitration from litigation. The original rationale for maintaining confidentiality in arbitration stems from the wishes of parties to civil and commercial arbitrations who, in consideration of their own commercial interests and practices, are reluctant to publicise disputes that arise. Unlike civil and commercial business, however, the field of sports is characterised by a strong demand for public scrutiny, encompassing significant public interest. If sports arbitration awards are not disclosed, this may greatly hinder accurate understanding of the various sports rules by athletes, sports organisations and the general public and undermine the stability and consistency of policy interpretation.[26] For this reason, the JSAA adopted a long-standing policy of disclosing arbitral awards to the public after redacting sensitive information, having taken the initiative to publish three arbitral awards in 2003, the year of its establishment.[27]

> "By adopting … [the] approach [of disclosing sports arbitration awards], a positive mutual understanding between the CCAS, arbitration participants and the public could be established, promoting the sound development of and confidence in China's sports arbitration system."

In China, the sports arbitration system is in its nascent stage and scepticism persists in various quarters with regard to the practical effectiveness of this system. To address such concerns, it is submitted that the CCAS should seize the

opportunity to disclose sports arbitration awards in a timely and appropriate manner. By doing so, all relevant parties and even the public may be given opportunities to review awards and thus perceive fairness and justice in each sports arbitration case. By adopting this approach, a positive mutual understanding between the CCAS, arbitration participants and the public could be established, promoting the sound development of and confidence in China's sports arbitration system.

Conclusion

Concurrently with the promulgation of the recast Sports Law and the establishment of the sports arbitration system, an ongoing substantial revision of the Arbitration Law is also taking place in China.[28] Given the country's ambitions to develop further as an international arbitration hub, the future development of arbitration in this jurisdiction is greatly anticipated. Without a doubt, the future practice of sports arbitration (among other areas) is expected to emerge as a significant focal point.

> "… [T]he future development of arbitration in this jurisdiction is greatly anticipated. Without a doubt, … sports arbitration (among other areas) is expected to emerge as a significant focal point."

1 Available at; http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383721.htm# and, with annotations, at https://law.pkulaw.com/falv/66e54c04aef89931bdfb.html.

2 The translation is that which appears at the http://www.npc.gov.cn URL (note 1 above).

3 As amended in 2015 and 2023; available at http://en.moj.gov.cn/2023-12/15/c_948358.htm#:~:text=Article%201%20This%20Law%20is,of%20legislation%3B%20safeguard%20and%20develop.

4 Yu Shanxu, *Discussion on perfecting the internal dispute resolution system of sports associations under* [*sic*] *the background of establishing sports arbitration in China* (2022) 29(2) Journal of Physical Education 1-10.

5 Now renamed the 'Sports Law', available at https://www.sport.gov.cn/n10503/c24405484/content.html.

6 State Sports General Administration, *Sports Arbitration*, available at https://www.sport.gov.cn/tyzc/.

7 *Ibid.* As to the panels of arbitrators, see notes 9 and 10 below.

8 Wang Jinyu, *China Sports Arbitration Commission has accepted 24 sports arbitration applications* (Xinhua News Agency, 31 January 2024), available at https://app.xinhuanet.com/news/article.html?articleId=d65c2fcdf80cb43bd2292a979fbc09af.

9 The list of CCAS general arbitrators is available at https://www.sport.gov.cn/tyzc/.

10 The list of CCAS anti-doping arbitrators is also available at https://www.sport.gov.cn/tyzc/.

11 *Editorial note*: Available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383756.htm#. See generally art 2.

12 *Editorial note*: Cf art 8 of the Arbitration Law.

13 *Editorial note*: *Ibid*, arts 57 and 62.

14 *Editorial note*: *Ibid*, arts 58-61.

15 *Editorial note*: *Ibid*, arts 62-64.

16 Article 61.2 of the Olympic Charter (in force as from 17 July 2020) provides: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration." The Charter is available at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf.

17 Zhang Yujiesheng, *Review of the Mandatory Sports Arbitration in the Olympic Games* (2021) Journal of Sports and Science 03: 42-51.

18 These sets of rules are available at http://www.hkiac.org/arbitration/rules-practice-notes.

19 The CCAS Sports Arbitration Rules 2023 are available at https://www.sport.gov.cn/tyzc/n25137750/c25236364/content.html.

20 http://www.jsaa.jp/.

21 Li Zhi, *The Establishment of China's Independent Sports Arbitration System in the Context of Legal Reforms* (2022) Law Science 483(2): 162-175.

22 Zhang Jing, *Research on the Specific Application of the Scope of Accepting Cases of Sports Arbitration in China* (2023) 24(13) Contemporary Sports Technology 135-139.

23 Available at https://www.jsaa.jp/sportsrule/arbitration/index.html#t2.

24 *Editorial note*: The initialism 'LPGA' denotes the Ladies Professional Golfers Association of Japan.

25 Available at https://www.jsaa.jp/.

26 Jamie Calvy & Sharon Ndjibu, *Australian Arbitration Week Recap: Blood, Sweat and T … ribunals* (Kluwer Arbitration Blog, 12 October 2023), available at https://arbitrationblog.kluwerarbitration.com/2023/10/12/australian-arbitration-week-recap-blood-sweat-and-t-ribunals/.

27 Awards issued by the JSAA are available at http://www.jsaa.jp/award/index.html.

28 *Editorial note*: See *New and emerging dispute resolution legislation: Amendment of the PRC Arbitration Law* [2021] Asian DR 204; Yihua Chen, *Revision of China's Arbitration Law: A New Chapter* [2021] Asian DR 156-163.

Arbitration Versus Litigation in China - And the Winner Is?

Edward Lu, Dimitri Phillips & Jingyi Hu

This article discusses advantages, disadvantages and other factors, such as the law, business models, practices and culture, that influence the choices made by Chinese parties when deciding whether to arbitrate or litigate in Mainland China.

Introduction

The advantages and disadvantages of arbitration in general are well known, at least among lawyers, but what about in the eyes of Chinese parties specifically? While caseloads are steadily increasing for arbitral institutions in China,[1] notably among major institutions such as the China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC), the Shanghai International Arbitration Center (SHIAC), and Shenzhen Court of International Arbitration (SCIA),[2] such statistics do not *necessarily* show a preference in China for this form of dispute resolution. Setting to one side the preferences of foreign parties who end up arbitrating in China and the circumstances in which arbitration is not available to resolve certain commercial disputes, there are distinct pros and cons for Chinese commercial parties seeking to decide whether and when to choose arbitration over litigation to resolve disputes.

Common considerations

Arbitration has long been lauded as superior to litigation, at least by some and in certain circumstances, boasting privacy and confidentiality, greater flexibility and better finality and enforceability.

First, while court cases are, at least usually, partly public, commercial arbitrations are almost always private. This can protect disputants' interests in several respects - often,

both sides are happy to keep cases in confidence. Second, party autonomy means that parties can generally tailor the arbitration process to an extent and choose arbitrators with expertise in relevant fields. Third, arbitral awards are generally final and binding, with limited possibilities for appealing against or setting them aside. Recognition and enforcement of awards internationally benefit from the New York Convention 1958, which provides exclusive and limited grounds for resisting enforcement.

> "Arbitration has long been lauded as superior to litigation, at least by some and in certain circumstances, boasting privacy and confidentiality, greater flexibility, and better finality and enforceability."

Other purported advantages of arbitration are less clear or common. Although it was advertised (and likely was in reality) as having been more economical, many parties now deem arbitration more expensive; some say the same about the time it takes to resolve a dispute through arbitration, particularly when factoring in the time for enforcing an award. Even confidentiality, flexibility and enforceability are questionable. Enforcing an award often (if not usually) calls for court proceedings, rendering the dispute at least partly public after all. Arbitral institutions' rules have grown more elaborate while, on the other hand, parties sometimes complain about arbitrators taking too many liberties with procedural 'flexibilities'. Court judgments are increasingly becoming more widely enforceable across borders,[3] either via treaties or the principle of reciprocity. Furthermore, the greater ambit and efficiency of litigation in relation to certain types of case is difficult to gainsay - for example, in resolving disputes involving a web of parties and contracts (particularly if some of the relevant parties are not directly bound by contracts or some relevant contracts do not contain arbitration clauses).

> "Although it was advertised (and likely was in reality) as having been more economical, many parties now deem arbitration more expensive; some say the same about the time it takes to resolve a dispute through arbitration, particularly when factoring in the time for enforcing an award."

Limitations on arbitration under Chinese law

Before delving deeper into the perspectives of Chinese parties to arbitration, the limitations of this dispute resolution method under PRC law need to be considered.

First, except in maritime disputes, *ad hoc* arbitration is generally not permitted or recognised in China, although there have been a number of developments in this regard relatively recently.[4] In other words, if the seat of arbitration is

to be China, the arbitration usually has to be administered by an arbitral institution. Traditionally, only a Chinese arbitral institution may administer a China-seated arbitration, but this appears to be changing now, with PRC courts supportive of foreign institutions administering arbitrations within China.[5]

> "By comparison with most (if not all) other countries, differences as to the law, businesses models, general practice and culture in China generate unique factors which affect the calculations of Chinese parties considering whether to arbitrate or to litigate."

Second, as in many other jurisdictions, certain types of dispute are not arbitrable. Under PRC law, the most common types of non-arbitrable dispute include those involving marriage, adoption, guardianship and inheritance, as well as certain aspects of disputes relating to intellectual property (IP),[6] bankruptcy,[7] and antitrust (competition law).[8] If a party seeks to arbitrate such a dispute in China, either an arbitral institution will refuse the application, or a PRC court will (1) refuse to recognise the arbitration agreement, or (2) set aside and refuse to recognise a resulting award.

Third, under PRC law and court practice, if a dispute does not genuinely have one of a prescribed set of foreign-related elements, it is not permitted to be arbitrated outside China by local parties,[9] unless at least one of them is domiciled in a designated free trade zone.[10] Such disputes can, however, be arbitrated domestically. If a foreign arbitral award is obtained in relation to such a non-foreign-related dispute, a PRC court will likely refuse to enforce it.

All of the above are limiting factors for Chinese parties considering whether to arbitrate or litigate a dispute. Setting these to one aside, Chinese parties generally do or can consider a number of pros and cons in attempting to resolve disputes by arbitration instead of litigation.

Pros and cons of arbitration for Chinese parties

By comparison with most (if not all) other countries, differences as to the law, businesses models, general practice and culture in China generate unique factors which affect the calculations of Chinese parties considering whether to arbitrate or to litigate.

First, while the common pros and cons of arbitration discussed above apply to a certain extent in China, there are some important differences. For example, most court cases in China are less public than in jurisdictions such as those of the US and Europe. While the filing of a case is usually on the record, the parties' submissions usually are not, and a relatively small proportion of decisions are made public. That said, image is arguably more important in China than in many other places, so that Chinese parties may choose arbitration in an attempt to avoid even the least degree of 'bad press'. Similarly, arbitration may appear less confrontational, which accords better with Chinese sensibilities, though this difference may be fading over time. Of course, a Chinese party considering the option of litigation in a foreign court is likely, for these reasons, to prefer arbitration (whether in China or abroad).

> "… [I]mage is arguably more important in China than in many other places, so that Chinese parties may choose arbitration in an attempt to avoid even the least degree of 'bad press'."

Flexibility may be less of an advantage in China-seated arbitration because, on the one hand, court proceedings are usually less elaborate than in jurisdictions such as the US, while on the other hand, arbitrations (usually administered through arbitral institutions) can face uncommon procedural strictures. Another key difference between China and many other countries is the availability of or method for obtaining interim relief. PRC courts will not recognise or enforce interim relief measures ordered by arbitral tribunals (though foreign courts may enforce such measures); instead, parties must apply to the PRC courts (through the relevant arbitral institution) for interim measures in aid of arbitration proceedings, and the procedure may take longer than that for obtaining interim relief in a typical litigation proceeding.[11] When the choice is between a foreign court and arbitration, however, Chinese parties may prefer the latter, precisely because the proceedings may be more convenient (and, in arbitrations seated abroad, interim measures may be available directly from arbitral tribunals).

> “Flexibility may be less of an advantage in China-seated arbitration because … court proceedings are usually less elaborate …, while … arbitrations (usually administered through arbitral institutions) can face uncommon procedural strictures.”

Second, the difference in fees payable to a Chinese court and a Chinese arbitral institution (including to the arbitrators, and assuming the same disputed amount) is not significant to most parties. However, in China, legal costs (mostly being lawyers' fees) can generally be recovered in arbitration (following the 'costs follow the event' principle), whereas the courts tend to order that each party shall bear its own legal costs, except in limited circumstances or where the parties have agreed otherwise.

On the other hand, in some situations, the costs of going to litigation versus arbitration may be significant, and some parties may seek arbitration precisely to leverage the economics against adversaries.[12] For example, an ordinary consumer may have agreed to arbitration in a standard form contract with a big business, only to be discouraged from bringing a relatively small claim (say, for a few hundred renminbi) because the arbitral institution will charge five or even ten times the amount claimed (even if there is the prospect of recovering this expense upon victory), whereas a court might have charged a small fraction of this. For foreign arbitrations, the fees of the arbitral institution or the arbitrators may be much greater than what Chinese parties are accustomed or content to bear.

Third, differences in business models and culture may make some Chinese parties reluctant to opt out of the traditional dispute resolution method. For example, a significant proportion of business in China is carried out by State-owned entities (SOEs), which operate in accordance with special rules and practices, and under the close supervision of, if not 'management' by, government organs (in particular, the State-owned Asset Supervision and Administration Commission, or SASAC). On account of a large variety of

PRC regulations and 'guidelines'[13] as well as long-standing practices, personnel at SOEs are particularly vulnerable or sensitive to serious consequences if they are found to have performed their duties 'improperly'. Arbitration may be suspected of having been 'irregular' and thus 'improper' if an unfavourable award has been rendered against the SOE, since there is no chance of appeal and there are only minute chances of success in setting aside the award. SOEs are therefore generally more likely to resolve disputes through litigation, which is better known to them and subject to greater possibilities of review or appeal.

> "… [D]ifferences in business models and culture may make some Chinese parties reluctant to opt out of the traditional dispute resolution method. … SOEs are therefore generally more likely to resolve disputes through litigation, which is better known to them and subject to greater possibilities of review or appeal."

That said, arbitration has increasingly been encouraged by the PRC government recently. For example, even the SASAC, since issuing its Measures for the Administration of Cases Involving Legal Disputes with Central Enterprises in 2023,[14] has encouraged SOEs to handle cases through diversified dispute resolution mechanisms, such as arbitration, mediation and 'reconciliation' (*viz*, conciliation), in addition to litigation. As such, therefore, a greater number of SOEs may opt for arbitration in the coming years: this may have the effect of indirectly encouraging more private parties to do the same, even if they have previously refrained from doing so for reasons different from those applicable to SOEs.

The bottom line for Chinese parties seeking to arbitrate

The discussion above summarises some of the factors and limitations that may be involved in the choice between arbitration and litigation by Chinese parties. At present, there is no direct evidence about preferences but, of course, many more disputes are resolved in court. There are indications that arbitration is (or will become) more popular - even with encouragement from parts of the PRC government apparatus (including for SOEs) - but prevailing rules and practices in China (which differ greatly from many (if not all) other jurisdictions) mean that any preference for arbitration over litigation will likely remain limited to particular situations and circumstances.

First, in some business dealings, the common considerations of confidentiality and flexibility may still sway Chinese parties. As previously mentioned, relatively little 'disclosure' as such occurs through PRC court proceedings (at least by comparison with cases decided in common law jurisdictions), and arbitration does not guarantee complete confidentiality. However, Chinese parties' concern for loss of 'face' - not to mention the practical consequences of word getting out about a dispute where regulators, banks and others are concerned - may lead them to try arbitration in some cases.

> "Chinese parties' concern for loss of 'face' - not to mention the practical consequences of word getting out about a dispute where regulators, banks and others are concerned - may lead them to try arbitration in some cases."

Moreover, in some kinds of case, Chinese parties may believe they will get a 'better deal' from an arbitrator than a judge

in China. Aside from issues of subject-matter expertise and experience, arbitrators - even if they are among the large section of those who are lawyers solely trained in Chinese law - may take more 'liberal' views of business disputes compared to conservative judges. In the authors' experience, for example, PRC courts tend to reject making high or punitive awards of damages, perhaps more in the spirit of maintaining 'social harmony', whereas arbitrators are likelier to base their decisions more on law, micro-economics and pragmatism. Similarly, arbitration may seem a safer choice than litigation if the dispute involves novel legal issues.

In light of the above, it is no surprise that arbitration takes a greater share of certain types of dispute, while others are left to litigation (apart, that is, from disputes that are not arbitrable). For example, most financial and IP-related disputes in China are traditionally resolved through litigation,[15] whereas energy companies tend to resolve their disputes, particularly those involving long-term supply contracts which include price review clauses, through arbitration, mostly out of concern that court litigation may disclose business models and other sensitive information.[16]

> "PRC courts tend to reject making high or punitive awards of damages, perhaps more in the spirit of maintaining 'social harmony', whereas arbitrators are likelier to base their decisions more on law, micro-economics and pragmatism."

Second, if a Chinese party deals with a foreign business, particularly one without assets in China, it may choose arbitration as the dispute resolution method, and not only because the foreign party is likely to prefer it. Even in such cases, however, the Chinese party may push for arbitration through a Chinese institution and/or in the Chinese language. A further consideration, which some may be reluctant to mention, is difficulty or risk involved in finding legal counsel to compete with foreign counsel in certain types of international arbitration, though more and more PRC lawyers are successfully going head to head with their peers around the world these days.

Third, some types of Chinese party may try to use potential *cons* of arbitration as a dispute resolution strategy. For example, as explained above, relatively large companies may try to impose arbitration, either generally (such as under a standard form contract) or even in a far-away arbitral institution as a way to raise the bar against counterparties making claims.

> "… [A]rbitration is well established in China as one of the tools for dispute resolution."

Conclusion

In summary, arbitration is well established in China as one of the tools for dispute resolution. Although it may still generally be preferred only by those Chinese parties who are relatively sophisticated or have special considerations or needs, the growing number of such players may lead to the increased popularity of arbitration in China.

1 For the purposes of this article, the expressions 'China' and 'PRC' refer to what is conventionally called 'Mainland China' (大陆).

2 For example, CIETAC's annual caseload (foreign-related and domestic) increased from 1,256 in 2013 to 5,237 in 2023 (see http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en); SHIAC's annual caseload increased from 1,520 in 2019 to 4,879 in 2023 (see https://www.shiac.org/pc/SHIAC?moduleCode=annual_report).

3 See, for example, Yi Dai, Joel Evans & Michelle Zheng, *Shanghai Maritime Court Recognizes English Judgment in Unprecedented Ruling* (DaHui Lawyers, 8 September 2023), available at https://www.dahuilawyers.com/en/news-insights/shanghai-maritime-court-recognizes-english-judgment-in-unprecedented-ruling/.

4 Since 2016, parties registered in China's free trade zones have been permitted to submit disputes to *ad hoc* arbitration. See also the Arbitration Law of the People's Republic of China (Revised) (Draft for Comments), arts 91-93. *Editorial notes*: See (i) *Amendment of the PRC Arbitration Law* [2021] Asian DR 204; (ii) Yihua Chen, *Revision of*

China's Arbitration Law: A New Chapter [2021] Asian DR 156-163, at 160-161.

5 See, for example, (i) the Supreme People's Court letter of 25 March 2013 regarding *Anhui Province Longlide Packaging and Printing Co Ltd v BP Agnati Srl*, Min Si Ta Zi [2013] No 13, and (ii) *Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd*, Hu 01 Min Te [2020] No 83 (Shanghai No 1 Intermediate People's Court).

6 Arbitration Law of the People's Republic of China 1994, art 3, available at http://www.npc.gov.cn/npc/c2/c30834/201905/t20190521_278151.html. See also the most recently amended Civil Procedure Law of the People's Republic of China (September 2023), art 279, available at http://www.npc.gov.cn/npc/c2/c30834/202401/P020240108541839745616.pdf. *Editorial note*: See *Amended PRC Civil Procedure Law* [2023] Asian DR 216.

7 Enterprise Bankruptcy Law of the People's Republic of China 2006, art 3, available at https://www.gov.cn/flfg/2006-08/28/content_371296.htm.

8 See, for example, *Shell (China) Ltd v Hohhot Huili Material Co Ltd*, Zui Gao Fa Zhi Min Xia Zhong [2019] No 47 (Supreme People's Court).

9 Civil Procedure Law of the People's Republic of China (note 6 above), art 288.

10 *Opinions of the Supreme People's Court on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones* (Fa Fa [2016] No 34), art 9, available at https://cicc.court.gov.cn.

11 Civil Procedure Law of the People's Republic of China (note 6 above), article 289; Supreme People's Court, Judicial Interpretation, *Provisions of the Supreme People's Court on Several Issues concerning Cases of Property Preservation Handled by People's Courts* (Fa Shi [2016] No 22), art 3, available at https://www.lawinfochina.com.

12 For example, the minimum fee for CIETAC to accept a case is RMB 6,100, even for cases with only RMB 300 in dispute, for which the courts would charge only RMB 50.

13 See, for example, *Opinions of the General Office of the State Council on Establishing the System of Liability Investigation for Unlawful Operation and Investment of State-owned Enterprises*, available at https://www.gov.cn/zhengce/content/2016-08/23/content_5101590.htm; State Council press notice, *China to set up accountability system for SOEs* (23 August 2016), available at https://english.www.gov.cn/policies/latest_releases/2016/08/23/content_281475424065504.htm.

14 Measures for the Administration of Cases Involving Legal Disputes with Central Enterprises 2023, art 15, available at https://www.gov.cn/zhengce/202306/content_6888789.htm.

15 For insights into the traditional inclination toward courts for such disputes, as well as developments that may be shifting trends, see, for example, the Beijing Arbitration Commission's *Annual Observation on Intellectual Property Dispute Resolution in China* (2022) and *Annual Observation on Financial Dispute Resolution in China* (2023), both available at https://www.bjac.org.cn/.

16 See, for example, Lijun Cao, Yujuan Jiang & Jiaying Yan, *Energy disputes in China: main trends and developments* (Global Arbitration Review, 26 May 2023), available at https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/energy-disputes-in-china-main-trends-and-developments.

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Annulment of Arbitral Awards: the Qatar Perspective

Ahmed Durrani, Umang Singh & Masham Sheraz

This article discusses the infrastructure of arbitration in Qatar, with particular reference to (1) the setting aside and enforcement of Qatar-seated arbitral awards under its Arbitration Law 2017, which is based upon the UNCITRAL Model Law, (2) the enforcement of foreign awards, and (3) several illustrative decisions of Qatar's Court of Appeals on the setting aside of awards.

Introduction

The State of Qatar, a civil law jurisdiction, acceded to the New York Convention 1958 on 30 December 2002.[1] At the time of ratification of the Convention,[2] arbitrations in Qatar were governed by arts 190-210 of Law No 13 of 1990, the Civil and Commercial Procedure Law. These provisions remained in force until Qatar enacted Law No 2 of 2017, Promulgating the Civil and Commercial Arbitration Law[3] (the Arbitration Law), which is now the primary arbitration legislation in mainland Qatar.

A separate arbitration regime applies to arbitrations seated in the Qatar Financial Centre (QFC) - a business and financial centre with an independent legal framework - entitled the QFC Arbitration Regulations 2005. This article is limited to discussing developments in relation to the mainland Qatar Arbitration Law, primarily because jurisprudence under the QFC Arbitration Regulations is yet to develop.

Arbitration in Qatar

Since ratifying the New York Convention, Qatar has taken

a number of steps to encourage the use of arbitration. The first major step in this regard was the establishment of the Qatar International Centre for Conciliation and Arbitration (QICCA) by the Qatar Chamber of Commerce and Industry. QICCA is the sole permanent arbitration institution in Qatar. It was established to "create an efficient and swift mechanism to settle disputes between Qatari enterprises or between national companies and their foreign counterparts."[4] In 2012, QICCA issued its Rules of Arbitration (the QICCA Rules),[5] which are based upon the UNCITRAL Arbitration Rules 2010. Arbitration under the auspices of QICCA has been the most popular choice in Qatar, followed by the International Chamber of Commerce.

> "Since ratifying the New York Convention, Qatar has taken a number of steps to encourage the use of arbitration."

Another pivotal step in Qatar's development of arbitration was the enactment in March 2017 of the Arbitration Law. The Law is based upon the original 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and applies to all arbitrations seated in mainland Qatar and to the setting aside and enforcement of awards in such arbitrations, as well as to the recognition and enforcement of awards rendered in arbitrations seated outside Qatar.[6]

Annulment (setting aside) and enforcement of arbitral awards

Since the enactment of the Arbitration Law, the general perception of the Qatari courts' approach has been one of a 'pro-enforcement' stance. A primary reason for this position is the alignment of the Arbitration Law with the New York Convention, as discussed below.

Annulment under the Qatar Arbitration Law

Pursuant to art 33 of the Arbitration Law, an arbitral award cannot be appealed, but an application to set it aside may be filed before the 'Competent Court' within one month from the date on which the applicant party received the award.[7] The 'Competent Court' is defined by the Arbitration Law as the Civil and Commercial Arbitral Disputes Circuit in the Court of Appeals or the First Instance Circuit of the Civil and Commercial Court of the QFC in Doha, as expressly agreed by the parties.[8]

> "Another pivotal step in Qatar's development of arbitration was the enactment in March 2017 of the Qatar Arbitration Law … [, which] is based upon the original 1985 version of the UNCITRAL Model Law …"

The exclusive grounds for setting aside an arbitral award[9] under art 33(2) of the Arbitration Law mirror those set out in art 34(2)(a) of the UNCITRAL Model Law. Thus, upon an application by an aggrieved party, the Competent Court

may set aside an award if it is satisfied that (1) the arbitration agreement is invalid due to the incapacity of one of the parties at the time of the conclusion of the arbitration agreement; (2) the aggrieved party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its defence for other reasons beyond its control; (3) the award has decided matters outside the scope of, or in excess of, the arbitration agreement;[10] or (4) the composition or appointment of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or the Arbitration Law.[11]

> "Pursuant to art 33 of the Arbitration Law, an arbitral award cannot be appealed, but an application for setting aside may be filed before the 'Competent Court' within one month from the date on which the applicant party received the award … The exclusive grounds for setting aside … mirror those set out in art 34(2)(a) of the UNCITRAL Model Law."

Mirroring the exclusive grounds set out in art 34(2)(b) of the Model Law, the Competent Court may also set aside an arbitral award of its own accord under art 33(3) of the Arbitration Law if it is of the view that the subject-matter of the dispute is not arbitrable under Qatari law or if the award is in conflict with the public policy of Qatar.[12] The courts of Qatar have generally given a wide interpretation to the term 'public policy' or 'public order' (as these two expressions are used interchangeably by them), considering it to mean "the set of basic principles that govern the political system, social consensus, economic rules, and moral values on which the entity of society is based and by which the public good is achieved".[13]

> "Mirroring the exclusive grounds set out in art 34(2)(b) of the Model Law, the Competent Court may also set aside an arbitral award of its own accord under art 33(3) of the Arbitration Law if of the view that the subject-matter of the dispute is not arbitrable under Qatari law or if the award is in conflict with the public policy of Qatar."

There is no right of appeal against a decision of the Qatar Court of Appeals on an annulment application. This has also been confirmed by the Qatar Court of Cassation, which has held in multiple judgments that rulings of the Court of Appeals in matters concerning the setting aside of arbitral awards is not appealable.[14]

Enforcement under the Qatar Arbitration Law

The provisions governing the recognition and enforcement of arbitral awards are set out in arts 34 and 35 of the Arbitration Law, which generally mirror arts III-V of the New York Convention. Under art 34(1), an award issued in any country may be enforced, subject to satisfaction of the procedural requirements set out in art 31 of the Law. In order to enforce an arbitral award in Qatar, an application must be submitted in writing to the 'Competent Judge'. The term 'Competent Judge' is defined by the Arbitration Law to mean the enforcement judge in the First Instance Circuit or the enforcement judge in the Civil and Commercial

Court of the QFC, as expressly agreed by the parties.[15] The enforcement application must be accompanied by a copy of the arbitration agreement and the original award or a certified copy thereof (with a certified Arabic translation, if in any foreign language), and must be filed after the time limit for challenging the award has expired (which, in the case of a Qatar-seated award, is one month[16]).

Recognition and enforcement of an arbitral award may not be refused unless one of the exclusive grounds for refusal set out in art 35 of the Arbitration Law applies. These grounds are based on those provided by art V of the New York Convention. Thus, the Competent Judge may refuse enforcement of an award, on an application brought by the party against whom enforcement is sought, if such party can satisfy one of the five conditions set out in art 35(1) of the Arbitration Law (which corresponds to art V.1 of the New York Convention). Furthermore, the Competent Judge may refuse enforcement of his or her own accord, pursuant to art 35(2) of the Arbitration Law (which corresponds to art V.2 of the New York Convention), if the subject-matter of the dispute is not arbitrable under Qatari law or if the recognition or enforcement of such award would be contrary to the public policy of Qatar.[17]

> "The provisions governing the recognition and enforcement of arbitral awards are set out in arts 34 and 35 of the Arbitration Law, which generally mirror arts III-V of the New York Convention."

Annulment by the Qatari courts

For the first few years after the promulgation of the Arbitration Law, there were no reported cases in which the Qatari courts set aside arbitral awards. Over the past two years, however, a number of judgments setting aside awards under art 33 of the Arbitration Law have been handed down by the Court of Appeals. Several of these judgments are discussed below.

> "Recognition and enforcement of an arbitral award may not be refused unless one of the exclusive grounds for refusal set out in art 35 of the Arbitration Law applies. These grounds are based on those provided by art V of the New York Convention."

Case Nos 1715/2022[18] *and 1716/2022*[19]

These two applications were filed by the respondent in relation to two separate but concurrent sets of arbitral proceedings. It challenged procedural orders issued by the arbitral tribunals which directed the parties to deposit the entire proceeds of relevant bank guarantees into an escrow account. In the orders challenged, the tribunals had held that they had jurisdiction to determine the dispute and that the principle of *res judicata* did not impact upon their powers to grant interim measures. The tribunals had also rejected the respondent's contention that the claimant was not entitled to demand or recover the relevant guarantee sums, on the basis that the respondent had been amenable to extending the validity of the guarantees.

The respondent had challenged the validity of the procedural orders on the basis that they violated the applicable Qatari law in respect of jurisdiction and the validity of court rulings, and that the arbitral tribunal could not exercise jurisdiction over bank guarantee contracts since, pursuant to Qatari court rulings, they fell outside the scope of the arbitration agreement. In determining the respondent's challenge, the

Court of Appeals held that the respondent's challenge was meritorious as the arbitration agreement did not encompass matters related to the letters of guarantee and would not extend to matters which the parties had not agreed to be resolved through arbitration. The Court held further that the letter of guarantee, being an autonomous contractual relationship under the law, could not be subject to interim measures imposed by either judicial or arbitral bodies. Consequently, since the arbitral tribunals lacked authority to enact such measures, the Court of Appeals set aside the procedural orders in both matters.

These two cases represented one of the first instances in which the Court of Appeals set aside procedural orders on the basis that they fell outside the scope of the arbitration agreements and because the matter was not arbitrable under Qatari law. While both of these grounds permit the setting aside of awards under art 33 of the Arbitration Law and, in line with the New York Convention, refusal of enforcement under art 35 of the Law, these decisions will have wide-ranging implications on commercial arbitration in Qatar. In particular, it will be interesting to see whether any similar challenges are raised in the context of construction contracts, in which, although the obligation to procure bank guarantees or bonds arises under the underlying contract(s), those instruments themselves would constitute separate contracts between banks and beneficiaries.

Case No 1760/2022[20]

In this case, an arbitral award issued in respect of a rental dispute was challenged on the basis that it had been rendered after the prescribed timeframe and that the dispute was not arbitrable because the Rental Disputes Settlement Committee (part of the Qatari court structure) was the body exclusively mandated to decide rental disputes.

The Court of Appeals set aside the award on the basis that it was in breach of public order. It held that the Rental Disputes Settlement Committee had exclusive competence to regulate rental disputes (so that the dispute was not arbitrable) and that, since this was a matter of public order, the Committee's jurisdiction could not be ousted by way of an arbitration agreement.

This decision is surprising, not least because no plea as to lack of jurisdiction had been made by the respondent during the course of the arbitration. Additionally, it is understood that the Rental Disputes Settlement Committee represents an administrative division within the Qatari court structure, such that rental and lease-related disputes are filed before and decided by the Committee, as opposed to the Court of First Instance. This does not, however, mean that rental disputes cannot be arbitrated. An analogous administrative division is the Investment and Trade Court, in which all commercial cases that are to be litigated are filed, but this does not prevent businesses from arbitrating their commercial disputes (eg, construction disputes).

Case No 1856/2022[21]

In this case, an arbitral award was challenged on the basis that it obliged the applicant to pay five per cent simple interest on the amounts awarded, in line with UAE law. The award was alleged to be usurious and therefore in breach of Qatari public order. The applicant also claimed that the interest could not be considered as compensation because the award already contained a sanction for non-compliance in the form of a sum of €50,000 as compensation for non-payment of debt.

The Court of Appeals accepted the applicant's case that the award of simple interest in these circumstances was against Qatari public order because the arbitral tribunal had awarded it despite having been aware that the underlying agreement was governed by Qatari law. However, the Court only partially set aside the award, limiting it to the operative part relating to the award of interest challenged, and refused to set aside the remainder.

The ruling of the Court of Appeals in this matter is important for three reasons. First, the Court will not hesitate in partially setting aside an award, a power contemplated in the proviso to art 33(2)(c) of the Arbitration Law. Secondly, even where one part of an award is held to be against public order, this does not mean that the entire award is also deemed to contravene it. Third, in respect of post-award interest, the Court of Appeals, in considering that this could not be awarded, contradicted previous rulings of the Court that had upheld an award of interest as compensation for non-payment of an award debt. That said, this decision of the Court can be rationalised on the footing that the award had already made provision for a separate sum as a sanction or compensation for non-satisfaction of the award debt. From a practical perspective, it remains to be seen whether the Court of Appeals would be willing to refuse future public order challenges against post-award interest in circumstances where such interest is the only compensation awarded by arbitral tribunals for non-satisfaction of an award debt.

Case No 1938/2022[22]

The application in this case was filed pursuant to art 33(2)(b) of the Arbitration Law on the basis that the arbitral award had been issued without the participation of, and due notice to, the applicant. Interestingly, however, the matter in dispute addressed by the arbitral award concerned the termination of a rental agreement. The Court of Appeals held that, since the subject-matter concerned a rental dispute, the dispute was not arbitrable. The Court therefore set aside the award on public order grounds of its own volition, as it is so entitled to do under art 33(3) of the Arbitration Law.

This decision is important for two reasons. First, it shows that the Court of Appeals will not hesitate in raising public order grounds of its own accord. Secondly, this judgment is consistent with the principle in Case No 1760/2022 (discussed above [23]).

> "The recent judgments of the Qatar Court of Appeals do not alter its perceived pro-enforcement stance but, rather, signal the Court's inclination to adopt a more nuanced approach toward complex and important questions of public order."

However, for any future rental disputes that relate to arbitration agreements post-dating these judgments, it will be intriguing to see whether any arbitral tribunals would accept jurisdiction over the arbitrations that flow from them. Should they choose to do so, it would raise the question of

whether a subsequent challenge for annulment based on the same grounds of arbitrability and public order might lead to a different decision by the Court of Appeals, on the basis that the Rental Disputes Settlement Committee represents an administrative division within the Qatari court structure and does not preclude rental disputes from being arbitrated.

> "While the Qatar Arbitration Law is still relatively new, the Qatari arbitration regime is striving to align itself with internationally recognised principles and best practices. … Qatar's evolving arbitration landscape reflects a commitment to cement Qatar further as a regional and global leader in arbitration."

Conclusion

While the Qatar Arbitration Law is still relatively new, the Qatari arbitration regime is striving to align itself with internationally recognised principles and best practices. This includes the development of an environment and infrastructure that are conducive to arbitration, backed by a court system that is robust and generally pro-enforcement. The recent judgments of the Qatar Court of Appeals do not alter its perceived pro-enforcement stance but, rather, signal the Court's inclination to adopt a more nuanced approach toward complex and important questions of public order. While it will be interesting to see how Qatari jurisprudence develops in relation to more heavily debated public order matters, such as awards of interest as compensation and the non-arbitrability of rental disputes, Qatar's evolving arbitration landscape reflects a commitment to cement Qatar further as a regional and global leader in arbitration.

1 List of Contracting States under the New York Convention, available at https://www.newyorkconvention.org/list+of+contracting+states.

2 Through Decree No 29 of 2003 Ratifying the Accession of the State of Qatar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 15 March 2003, available at https://www.almeezan.qa/LawPage.aspx?id=1022&language=en.

3 Available at https://www.qicdrc.gov.qa/sites/default/files/2021-12/law_02_2017_booklet.pdf.

4 QICCA booklet, Rules of Conciliation and Arbitration (May 2012), 'Introduction' (p 6), available at https://qicca.org/wp-content/uploads/2016/08/QICCA_Rules_Eng.pdf.

5 *Ibid.*

6 Article 2(1) of the Arbitration Law.

7 *Ibid*, art 33(4).

8 *Ibid*, art 1.

9 *Editorial note*: Despite the use of the term 'award' in s 33 of the Arbitration Law, the Court of Appeals has set aside a tribunal's procedural orders in Case Nos 1715/2022 and 1716/2022: see pp 96-97 below.

10 Article 33(2)(c) of the Arbitration Law, which provides: "[I]f it is possible to separate the parts of the award that are related to [the] Arbitration from the parts unrelated to [the] Arbitration, only the latter parts shall be set aside".

11 *Ibid*, art 33(2).

12 *Ibid*, art 33(3).

13 Qatar Court of Cassation, Appeal No 348/2015 (17 November 2015).

14 Qatar Court of Cassation, Ruling Nos 420/2018 (25 December 2018), 126/2019 (16 April 2019) and 427/202 (4 November 2020).

15 Article 1 of the Arbitration Law.

16 *Ibid*, art 33(4).

17 With regard to which, see the previous discussion on the setting aside of awards on this ground under art 33(3) of the Arbitration Law at p 95 above.

18 Order No 1568023791425-1 (31 October 2022), issued in Case No 2022/1715/Appeal/Arbitral Awards/Plenary, Court of Appeals, Eighth Civil and Commercial Circuit.

19 Order No 1568023791459-1 (31 October 2022), issued in Case No 2022/1716/Appeal/Arbitral Awards/Plenary, Court of Appeals, Eighth Civil and Commercial Circuit.

20 Order No 1571240215632-1 (27 February 2023), issued in Case No 2022/1760/Appeal/Arbitral Awards/Plenary, Court of Appeals, Eighth Civil and Commercial Circuit.

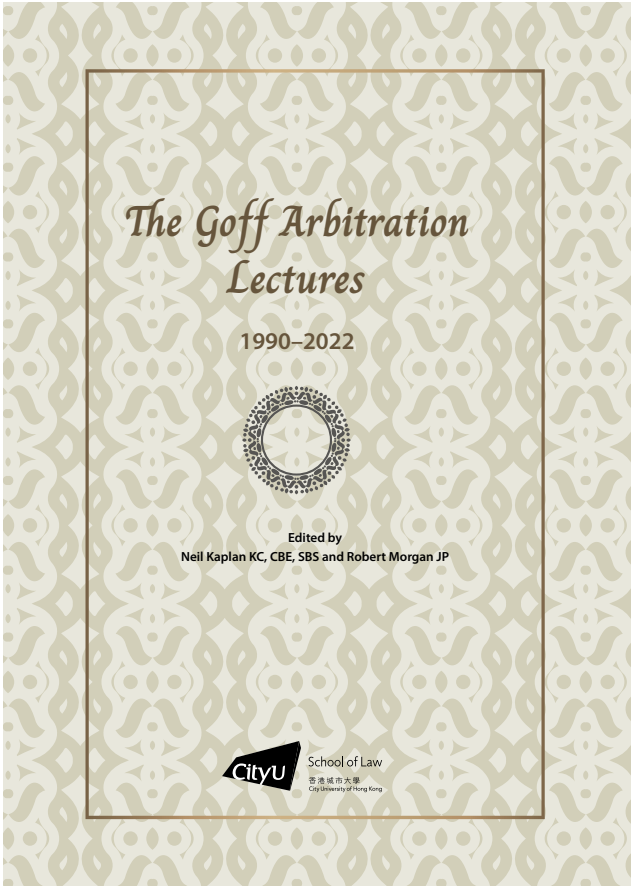
21 Order No 1571968345946-1 (20 March 2023), issued in Case No 2022/1938/Appeal/Arbitral Awards/Plenary, the Court of Appeals, Eighth Civil and Commercial Circuit.

22 Order issued in Case No 2022/1938/Appeal/Arbitral Awards/Plenary (20 March 2023), Court of Appeals, Eighth Civil and Commercial Circuit.

23 See p 97 above.

The Goff Arbitration Lectures 1990-2022[1]

Reviewed by Joel Evans



The *Goff Arbitration Lectures* contains an illuminating and highly insightful series of 27 Goff Lectures delivered in Hong Kong over a 32-year period by some of the world's most distinguished legal practitioners, many of whom have served at the highest levels of their respective judiciaries. This compendium therefore provides a timeless insight into the development of international arbitration over the past three decades, and does so from the perspective of those at the very pinnacle of the profession.

Ever since its inauguration in 1990 by the City University of Hong Kong and the first lecture, entitled 'Future Imperfect', delivered by the late Lord Goff of Chieveley (a Lord of Appeal in Ordinary at the time and one of the finest judges the UK has ever produced), the Goff Lecture series has become a cherished event in the Hong Kong legal calendar and a forum in which some of the most thought-provoking issues facing arbitration have been addressed and examined by world-leading arbitration specialists. The compendium immortalises these lectures so that students and practitioners alike may benefit from the treasure chest of knowledge that can be found within. The diversity of jurisdictions and experience of the lecturers themselves means that the compendium really offers something for everyone, which is most befitting of a profession that aspires to be truly international.

Publication of the compendium is most timely, given that Hong Kong will soon be hosting the renowned ICCA Congress in May 2024. The reviewer believes it is a valuable source of pre-reading for those attending the Congress, who will no doubt find some inspiration from its contents. Furthermore, having enjoyed over 30 years of critical acclaim, the time was quite right for the collection and publication of the Goff Lectures. By chronicling them in this way, the compendium provides both an enduring resource and a collection of lectures that are as relevant now as the day they were first delivered. Co-Editor Neil Kaplan KC is therefore quite right in saying, "How could we not publish a collection of lectures from the who's who of international arbitration and spanning globally such formative years as 1990 to 2022?"[2]

The 27 lectures contained in the compendium cover a fascinating breadth of topics, ranging from arbitrability, the enforcement of arbitral awards, good faith, public policy and arbitrator independence, to name but a few. Several of the lectures have also been updated by the original lecturers themselves, in order to take account of subsequent developments in the field, thereby further cementing their relevance to the practice of international arbitration today. What readers may find particularly interesting is the way in which the lecturers have grappled with their respective topics in a manner that very much reflects the key issues of the day. The lectures therefore provide a unique snapshot into some of the most complex topics involving arbitration over the past three decades. The compendium will therefore

be of great interest to historians of arbitration, who will no doubt appreciate the approach the lecturers have taken in relation to their chosen subjects.

The compendium benefits from the huge depth of insight offered by the lecturers in question, who include the late Sir Thomas Bingham, Stephen Schwebel, Lord Jonathan Mance, the late Pierre Lalive, Gary Born, Lucy Reed and Neil Kaplan KC (who is also a Co-Editor of the book), to name but a few. The quality of the lectures contained within makes it a difficult and almost entirely superfluous exercise to single out any one speaker. Notwithstanding this fact, however, the reviewer particularly enjoyed reading the lecture given by the late Johnny Veeder QC in 2001, entitled 'The Lawyer's Duty to Arbitrate in Good Faith'. This lecture is a fascinating reminder of the importance of good faith in international arbitration, which is examined through the lens of relevant practical examples. The reviewer also very much enjoyed reading Gary Born's 2015 lecture, entitled 'The Right to Arbitrate: Historical and Contemporary Perspectives', which is a captivating account of the historic preference for arbitration as a mechanism for resolving disputes, alongside the crucial relationship arbitration has with the rule of law. The reviewer very much agrees with Born when he says that the right to arbitrate "has properly been founded on constitutionally-protected liberties - freedom of contract, freedom of association and other individual rights"[3] which undoubtedly complement the rule of law.

Finally, the reviewer also found the 'Arbitration and Public Policy' lecture given by Robert French in 2016 particularly thought-provoking, as it addressed the occasionally under-appreciated public policy environment that informs the legal regimes governing arbitration and the legal criteria for setting aside and refusing recognition and enforcement of arbitral awards.

In conclusion, the *Goff Arbitration Lectures* is an engaging and highly relevant piece of arbitration literature that provides a memorable account of the highly respected Goff Lectures since their inception 34 years ago. In collating them into a single volume, the Co-Editors have created an ageless resource that will be a reference point for future practitioners seeking an insight into some of the most relevant issues with which international arbitration has had to grapple.

As international arbitration continues to develop and reinvent itself to meet the demands of its current users, the reviewer feels it necessary to quote the very words of Lord Goff who, when delivering the first lecture in the series 34 years ago, observed that "there is no perfect solution to our problems, only a series of temporary solutions which may in due course themselves require to be modified or abandoned as circumstances change."[4] The reviewer believes this perfectly encapsulates the approach that will allow arbitration to continue to maintain its position as the most popular means for the resolution of cross-border disputes.

1 Neil Kaplan KC, CBE, SBS & Robert Morgan JP, (2024, City University of Hong Kong), ISBN 978-962-442-469-0, vi + 497 pp, softcover.

2 *Ibid*, p iv.

3 *Ibid*, p 378.

4 *Ibid*, p 1.

Institutional news: HKIAC

Appointment of new Secretary-General

Ms Joanne Lau took office as Secretary-General to HKIAC with effect from 26 February 2024.[1] Ms Lau was a Hong Kong-based member of international law firm Allen & Overy from 2012 until 2024 (becoming an arbitration partner in 2021). Described by HKIAC as a "seasoned arbitration specialist",[2] Ms Lau is experienced as counsel and as an arbitrator in international commercial and investor-State arbitration across the Asia region. She has previously been involved with the HKIAC for some time, having served as Co-Chair of the HK45 Committee (2020-2022) and as a member of the Centre's Proceedings Committee.

Ms Lau succeeds Dr Mariel Dimsey, who has returned to private practice as local managing partner of international law firm CMS.

New and emerging dispute resolution legislation

Hong Kong: reciprocal enforcement of judgments with Mainland China

The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) took effect on 29 January 2024, bringing into operation the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region 2019.[3] The Ordinance provides for the mutual recognition and enforcement of most judgments in civil and commercial matters that are regarded as such under Chinese and Hong Kong law and relate to contracts having a connection with Mainland China. It also extends to judgments of lower courts and tribunals and to non-monetary as well as monetary relief, such as injunctions and specific performance.

People's Republic of China

(1) Amendments to the Civil Procedure Law

On 1 September 2023, the Standing Committee of the National People's Congress of the PRC approved amendments to the Civil Procedure Law (CPL). These took effect on 1 January 2024, the first major substantive revision to the CPL in 30 years.[4] While concerned primarily with reforms affecting the jurisdiction and increased flexibility of procedures before PRC courts in foreign-related cases - potentially appealing to users who might otherwise have contemplated China-seated arbitration - the amendments also contain provisions of relevance to the recognition and enforcement of arbitral awards. These are as follows.

Firstly, article 304 of the amended CPL changes the definition of 'foreign award' from one which is rendered by a foreign arbitral institution to one which takes effect outside China. In line with the introduction of the concept of the seat of the arbitration in the draft Arbitration Law of 2021, this means that China will henceforth view foreign awards as having been issued at the seat of the arbitration.

Secondly, the range of PRC courts in which recognition and enforcement of foreign awards may be sought has been extended to include any Intermediate People's Courts having an "appropriate connection to the dispute" and so is no longer limited to courts situated in places where award debtors are domiciled or their assets located.

(2) Foreign State Immunity Law 2023

The PRC Law on the Immunity of Foreign States of 1 September 2023[5] came into effect on 1 January 2024. The Law permits foreign States to be sued in the PRC courts in respect of their commercial assets and transactions and parties to enforce judgments against those assets. Hong Kong is constitutionally required by arts 13 and 18 of the Basic Law and relevant decisions of the Standing Committee of the National People's Congress of the PRC to apply the 2023 Law in the SAR.

India: Mediation Act 2023

The Mediation Act 2023 (No 32 of 2023)[6] received the assent of the President of India on 14 September 2023 and was gazetted the following day. The 2023 Act will come into force on a date to be notified by the central government. The Act makes detailed provision as to mediation in India in a manner akin to the comprehensive mediation legislation of Malaysia but not, by contrast, the more piecemeal legislation of Hong Kong.

The 2023 Act applies to (*inter alia*) (1) stand-alone mediation, pre-litigation mediation and conciliation conducted in India, and (2) commercial disputes between (i) parties resident, incorporated or having their place of business in India, and (ii) commercial disputes between such parties and the central or a state government. The Act does not apply to (*inter alia*) disputes involving regulated subject-matter, such as competition, telecommunications, electricity, securities, the environment and taxation, nor does it apply to non-commercial disputes by or against the central government or its agencies.

The 2023 Act contains provisions relating to a number of matters, which include the following:

(1) definitions of 'mediator';
(2) mediation service providers;
(3) the making of a 'mediation agreement' (*viz*, an agreement to mediate);
(4) appointment of mediators;
(5) qualifications of mediators;
(6) termination of a mediator's mandate;
(7) privilege, confidentiality and admissibility of documents;
(8) pre-litigation mediation;
(9) interim relief by the courts pending pre-litigation mediation;
(10) mediation proceedings: place, role of mediators, process and time limits;
(11) the making and form of mediated settlement agreements;
(12) challenges to and enforcement of mediated settlement agreements; and
(13) the creation of a statutory regulator, the Mediation Council of India.

Although India has signed the United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation 2018, the 2023 Act contains no provision ratifying the Convention. It is unclear whether this omission was deliberate or inadvertent.

Papua New Guinea: new Arbitration Acts

Papua New Guinea has passed new arbitration legislation to replace the pre-independence Arbitration Act 1951, which was based on the English Arbitration Act 1889. The new regime now has separate legislation for international and domestic arbitration. This consists of, respectively, (i) the International Arbitration Act 2024, which adopts the UNCITRAL Model Law (though it is currently unclear which version and whether the new Act will apply to commercial arbitration only) to govern PNG-seated international arbitrations; and (ii) the Domestic Arbitration Act 2024 which, as its name suggests, applies only to domestic arbitrations.

Details of both pieces of legislation are currently unavailable. A further News section item on them will therefore be published in due course.

New and emerging dispute resolution rules

Hong Kong International Arbitration Centre Administered Arbitration Rules

The HKIAC Rules Revision Committee is currently considering amendments to the Administered Arbitration Rules 2018. The Committee has decided that the existing rules have worked well and do not require a complete overhaul, but that a number of amendments should be made to reflect (1) HKIAC's experience in implementing them, and (2) arbitration developments in Hong Kong and overseas since 2018. In this regard, the Committee launched a public consultation exercise on the proposed amendments on 23 January 2024; the consultation period ended on 23 February 2024.[7]

The proposed amendments have been published by HKIAC in the form of the text of the 2018 Rules with the amendments incorporated in tracked changes format for ease of reference.[8] In addition to drafting points, they concern the following matters:

(1) encouragement of greater diversity in arbitral appointments;
(2) enhancement of the mechanism for single arbitration under multiple contracts;
(3) clarification of the arbitral tribunal's powers to address preliminary issues;
(4) clarification of the powers of emergency arbitrators;
(5) provisions relating to information security; and
(6) provisions to enhance HKIAC's role in relation to matters affecting the integrity of the arbitral process, including as to (i) the appointment of arbitrators, (ii) revocation of an arbitrator's mandate, and (iii) determination of the tribunal's fees.

CIETAC Arbitration Rules 2024

CIETAC has launched its Arbitration Rules 2024, which came into effect on 1 January 2024.[9] Replacing the 2015 Rules, the 2024 Rules make major changes aimed at improving the efficiency of and fostering innovation in CIETAC arbitration proceedings, while at the same time enhancing their fairness, flexibility and transparency, and maintaining alignment with worldwide practice developments and standards. Key provisions include:

(1) a power for CIETAC to override party agreement on formation of the arbitral tribunal and to determine the procedure therefor where the agreement is manifestly unfair or unjust or where a party abuses its rights in such a way as to cause undue delay;
(2) a power for CIETAC to provide administrative and support services to *ad hoc* arbitrations (including as to the appointment and challenge of arbitrators and scrutiny of draft awards);
(3) unless a law or the parties' agreement provides otherwise, CIETAC may accept an application for arbitration notwithstanding failure to comply with a multi-tiered dispute resolution (or escalation) clause requiring pre-arbitral negotiation or mediation;
(4) in line with the *Kompetenz-Kompetenz* principle and diverging from the PRC Arbitration Law 1994 (which limits the power to rule on jurisdiction to an arbitration commission or a court), an arbitral tribunal may be delegated the power to make such a ruling where deemed necessary;
(5) the making and disclosure of third party funding arrangements;
(6) consolidated arbitration under multiple contracts involving related subject-matter is permitted;
(7) application for joinder of additional parties by a claimant after the commencement of an arbitration is permitted;
(8) on the application of a party, the tribunal may dismiss a claim or counterclaim that is manifestly without legal merit or outside the tribunal's jurisdiction (an early dismissal mechanism influenced by UNCITRAL[10]);
(9) the tribunal may make an interim (partial) award on any issue, either on its own initiative or on the application of a party;
(10) the appointment of an emergency arbitrator may be ordered by the Arbitration Court of CIETAC with a view to the grant of interim and conservatory measures prior to the constitution of the main tribunal;
(11) CIETAC may, where appropriate, forward applications for interim and conservatory measures to courts outside of Mainland China;
(12) unless the law applicable to the arbitration otherwise provides, CIETAC, its staff members, arbitrators, emergency arbitrators and relevant persons engaged by the tribunal (eg, tribunal secretaries and experts) are immune from civil liability for acts and omissions in connection with the arbitration and/or any obligation to testify in relation to the arbitration; and
(13) with regard to technological aspects, the Rules (i) prioritise the making of submissions and communications online, and (ii) permit the tribunal, following consultation with the parties, to determine whether to conduct a hearing in person or remotely, either by videoconference or by any other suitable means of communication.

Abu Dhabi International Arbitration Centre (arbitrateAD)

On 20 December 2023, the Abu Dhabi Chamber of Commerce and Industry launched the Abu Dhabi International Arbitration Centre (branded as 'arbitrateAD'). The governance structure and arbitration rules of arbitrateAD replaced those of the former Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) with effect from 1 February 2024.[11] An organ of the new Centre, the arbitrateAD Court of Arbitration, will administer arbitration proceedings under the arbitrateAD Arbitration Rules, but will also serve as the appointing authority in *ad hoc* proceedings.[12]

At the time of writing, however, the arbitrateAD Arbitration Rules are still in preparation, though they were intended to replace the ADCCAC's Procedural Regulations of Arbitration with effect from 1 February 2024. The arbitrateAD Arbitration Rules will therefore be summarised in a forthcoming issue of *Asian Dispute Review*.

Cases commenced before that date will continue to be determined pursuant to the ADCCAC's Procedural Regulations. Cases commenced after that date (including, it appears, disputes referable under the ADCCAC Procedural Regulations) will be administered under the arbitrateAD Rules.

It is not clear at present whether the arbitrateAD Rules will stipulate 'onshore' Abu Dhabi or the Abu Dhabi Global Market financial free zone (ADGM) as the default seat of arbitration, failing party agreement.

New and emerging dispute resolution guidance

IBA Guidelines on Conflicts of Interest in International Arbitration 2024

On 5 February 2024, the International Bar Association released the latest version of its Guidelines on Conflicts of Interest in International Arbitration,[13] superseding that of 2014, together with a document setting out a side-by-side comparison of the 2014 and 2024 versions for ease of reference.[14] Like the 2014 version, which reflected the evolution of best practice in disclosure of conflicts of interest since the original version of 2004 rather than substantially departing from it, the 2024 version reflects the same approach. In addition to expanding the scope of the duty of disclosure for arbitrators, the 2024 version of the Guidelines emphasises the overarching importance of the General Standards in assessing conflicts of interest, extends a duty of due diligence to parties to arbitrations in light of changes to the structure and practice of law firms and makes adjustments reflecting (i) the influence of third party funding (TPF), (ii) the effect of previous practice by an arbitrator as an expert, and (iii) recent leading case law.

Salient features of the 2024 Guidelines include the following.

(1) Under the General Standards, (i) parties must disclose any direct or indirect relationship between arbitrators and (a) persons or entities over which they have a controlling influence, and (b) persons or entities which parties believe arbitrators should take into account in making disclosures. The latter includes providers of TPF; (ii) a party is presumed to have learned of any fact or circumstance that a reasonable enquiry would have yielded, so that the right to raise an objection based on these is waived if not raised within 30 days; and (iii) failure to disclose certain circumstances does not necessarily mean that a conflict of interest exists.

(2) Changes to the 'traffic light' list system, so that (i) the non-waivable Red List now makes clear that instances in which an arbitrator cannot act include where he or she currently advises a party or affiliate of a party and that arbitrator's law firm derives significant income from providing that advice; (ii) cases falling within the waivable Orange List now include where (a) an arbitrator currently acts (or has acted within the last three years) as an expert for a party or an affiliate in an unrelated matter; (b) an arbitrator and counsel for one party currently serve together as co-arbitrators in another arbitration; (c) an expert who is appearing in the arbitration has been instructed in another arbitration by an arbitrator who is appearing as counsel in the latter case; (d) an arbitrator has been appointed by one of the parties to assist in mock trials on two or more occasions during the past three years; (e) an arbitrator publicly advocates an opinion relating to the case through social media or online professional networking platforms (such as LinkedIn); and (iii) the Green List now includes cases where an arbitrator has heard testimony from an expert appointed in the present arbitration who also acted as expert before the arbitrator in a previous arbitration.

Accession to international dispute resolution agreements

Hague Convention

As foreshadowed in the January 2024 issue of *Asian Dispute Review*,[15] the United Kingdom signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 [16] on 12 January 2024. Legislation to ratify the Convention, together with associated rules of court, will be enacted in due course.

This brings the number of signatories to the Hague Convention to 36, of which 29 (28 States plus the European Union) have ratified it.[17] The Convention took general effect on 1 September 2023.[18]

Singapore Mediation Convention

Following the accessions listed below, the United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation 2018 is now effective or will shortly become so in 14 Contracting States.[19]

Japan: ratified on 1 October 2023; accession took effect on 1 April 2024.
Nigeria: ratified on 27 November 2023; accession will take effect on 27 May 2024.[20]
Sri Lanka: ratified on 28 February 2024; accession will take effect on 28 August 2024.

Adoption of the UNCITRAL Model Law

Nigeria adopted the 2006 version of the UNCITRAL Model Law on 26 May 2023, pursuant to the Arbitration and Mediation Act 2023. The Act applies to Nigeria-seated international commercial arbitration and 'inter-state' (*viz* intra-Nigerian federal) commercial arbitration.

Papua New Guinea has adopted the Model Law, pursuant to its International Arbitration Act 2024 (details of the date of adoption, the version adopted and the extent of its application remain to be announced: see *Papua New Guinea: new Arbitration Acts* (p 103 above).

These adoptions bring to 125 the total number of Model Law jurisdictions, which comprise 89 States and 36 sub-statal entities.[21] [22]

Surveys and reports

(1) China Business Law Journal

On 28 February 2024, the *China Business Law Journal* published a survey of important developments and focal points in international arbitration in China and the wider Asia region in the form of commentaries under the collective title of *Gears changing*.[23] Written by representative officers of the seven foremost arbitral institutions in the PRC, the commentaries address a wide range of issues, including the internationalisation of arbitral institutions, arbitrators' fees, institutional branding, innovations in arbitration rules, the use of information technology, the Belt and Road Initiative, arbitral diversity, emergency arbitrators and party autonomy.

The authors and their contributions are as follows:

Jiang Lili (BAC/BIAC) - 'Path to internationalisation of arbitration in China'
Wang Chengjie (CIETAC) - 'Innovative rules, upgraded mechanism'
Li Hu (CMAC) - 'Swift winds of change sailing foreign-related maritime arbitration'
Yang Ling (HKIAC) - 'The 'Asian century' of arbitration'
Vera He & Donna Huang (ICC) - 'Emergency arbitrator: a helping hand in times of need'
Liu Xiaochun (SCIA) - 'Back to the essence: party autonomy'
Wang Weijun (SHIAC) - 'A barometer for the business environment'

(2) Delos Dispute Resolution

As part of its *Guide to Arbitration Places* (GAP),[24] Delos has published a chapter for Hong Kong by Peter Yuen, Olga Boltenko and Xiongchao Chen.[25] Taking the form of a Q&A session on a wide range of topics, the survey contains information and analytical comment on (*inter alia*) arbitration law, the courts and powers of intervention, legal expertise, rights of representation, arbitration agreements, the conduct of arbitrations, the powers of arbitral tribunals, interim measures of protection, recognition and enforcement of arbitral awards and challenges to awards.

1 For an interview with Ms Lau, see *Cover Story: Face to Face with Joanne Lau, Secretary-General, Hong Kong International Arbitration Centre* (Hong Kong Lawyer, March 2024), available at https://www.hk-lawyer.org/content/face-face-joanne-lau-secretary-general-hong-kong-international-arbitration-centre.

2 HKIAC press release, *HKIAC welcomes new Secretary-General* (18 January 2024), available at https://www.hkiac.org/news/hkiac-welcomes-new-secretary-general. See also Ben Rigby, *Allen & Overy partner departs to head up Hong Kong International Arbitration Centre* (The Global Legal Post, 19 January 2024), available at https://www.globallegalpost.com/news/allen-overy-partner-departs-to-head-up-hong-kong-international-arbitration-centre-2034698965.

3 See *Reciprocal enforcement of judgments between Mainland China and Hong Kong* [2019] Asian DR 88-89. See also Lucia Brancaccio, *The New Hong Kong-Mainland Reciprocal Enforcement of Judgments Regime Took Effect on Jan 29* (China Briefing, 29 January 2024), available at https://www.china-briefing.com/news/the-new-hong-kong-chinese-mainland-reciprocal-enforcement-judgments-regime-an-overview/.

4 Available at http://www.lawinfochina.com/display.aspx?lib=law&id=41817. For commentary, see Debevoise & Plimpton, *China's New Civil Procedure Law On Foreign-Related Cases Comes Into Force* (Debevoise in Depth, 4 January 2024), available at https://www.debevoise.com/insights/publications/2024/01/chinas-new-civil-procedure-law-on-foreignrelated.

5 See *Law on the Immunity of Foreign States* [2023] Asian DR 216. See also Debevoise & Plimpton, *China's New Foreign State Immunity Law Targets Commercial Assets and Transactions* (Debevoise in Depth, 16 January 2024), available at https://www.debevoise.com/insights/publications/2024/01/chinas-new-foreign-state-immunity-law-targets.

6 Available at https://egazette.gov.in/WriteReadData/2023/248775.pdf. For detailed commentaries, see (1) Lexology, *Mediation Act, 2023: Salient Features* (20 September 2023), available at https://www.lexology.com/library/detail.aspx?g=cd359486-ea89-404c-

8887-edcdace936c0; (2) Clyde & Co, *A forward plunge in the realm of alternate dispute resolution - the Mediation Act*, 2023 (26 September 2023), available at https://www.clydeco.com/en/insights/2023/09/a-forward-plunge-in-the-realm-of-alternate-dispute; (3) Nishith Desai Associates, Decoding the Mediation Act, 2023 (4 September 2023), available at https://www.nishithdesai.com/NewsDetails/10748; and (4) Apoorva Misra & Nishant Rewalia, *Mediation Act 2023 latest amendments: A complete guide* (Bar and Bench, 18 October 2023), available at https://www.barandbench.com/law-firms/view-point/mediation-act-2023-latest-amendments-guide.

7 See HKIAC press release, *HKIAC consults on proposed amendments to Administered Arbitration Rules 2018* (23 January 2024), available at https://www.hkiac.org/news/public-consultation-proposed-amendments-2018-hkiac-administered-arbitration-rules.

8 Available at https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20Rules%20-%20Public%20Consultation%20Draft_tracked.pdf. For a commentary, see Bird & Bird, *HKIAC Opens Public Consultation for Proposed Amendments to the Administered Arbitration Rules* (Lexology, 7 February 2024), available at https://www.lexology.com/library/detail.aspx?g=5934e107-4d27-4dc3-8bfa-9257ae0d5707#.

9 The text of the Rules is published at http://www.cietac.org/index.php?m=Page&a=index&id=531&l=en. For commentaries, see (1) Tao Yi, Qu Zhujun & Zhao Jian, *The CIETAC Arbitration Rules 2024 Comes [sic] Into Force* (Kluwer Arbitration Blog, 1 January 2024), available at https://arbitrationblog.kluwerarbitration.com/2024/01/01/the-cietac-arbitration-rules-2024-comes-into-force/, replicated by CIETAC at https://www.ccpit.org/a/20240101/202401015vfj.html; and (2) Herbert Smith Freehills, *New CIETAC Rules Come into Effect* (HSF Arbitration Notes, 1 January 2024), available at https://hsfnotes.com/arbitration/2024/01/01/new-cietac-rules-come-into-effect/.

10 See United Nations General Assembly, *Report of the United Nations Commission on International Trade Law, Fifty-sixth session* (3-21 July 2023), A78/17, Annex VII (pp 92-93), available at https://uncitral.un.org/sites/uncitral.un.org/files/report_of_uncitral_fifty-fifth_session.pdf.

11 See Abu Dhabi Chamber press release, *Abu Dhabi Chamber of Commerce and Industry Launches Abu Dhabi International Arbitration Centre* (20 December 2023), available at https://www.abudhabichamber.ae/Media-Centre/News/AbuDhabi_Chamber_Lanches_ArbitrateAD. For commentaries, see (1) Pinsent Masons, *Abu Dhabi International Arbitration Centre launched in 'timely' reform* (4 January 2024), available at https://www.pinsentmasons.com/out-law/news/abu-dhabi-international-arbitration-centre-launched#; and (2) Clyde & Co, *A New Player in Town - Abu Dhabi launches arbitrateAD* (10 January 2024), available at https://www.clydeco.com/en/insights/2024/01/a-new-player-in-town-abu-dhabi-launches-arbitratea.

12 See Abu Dhabi Chamber press release, *arbitrateAD to accept new cases as of Thursday, 1 February 2024* (29 January 2024), available at https://www.abudhabichamber.ae/Media-Centre/News/AbuDhabi_Chamber_arbitrateAD_2024.

13 Available at https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024.

14 *IBA Guidelines on Conflicts of Interest in International Arbitration (Compare 2014 and 2024 Versions)*, available at https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-comparison-2014-2024.

15 [2024] Asian DR 41.

16 HCCH 41 (2 July 2019), available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=137. See (1) Law Society press release, *UK signs up to Hague 19 Convention* (15 January 2024, available at https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/uk-signs-up-to-hague-19-convention; (2) Michael Cross, *'Significant step forward' as Hague Convention signed* (The Law Society Gazette, 12 January 2004), available at https://www.lawgazette.co.uk/news/significant-step-forward-as-hague-convention-signed/5118400.article; (3) Louise Freeman *et al, Hague Convention makes commercial sense* (The Law Society Gazette, 19 January 2024), available at https://www.lawgazette.co.uk/practice-points/hague-convention-makes-commercial-sense/5118478.article#; and (4) Ben Rigby, *UK signs Hague-19 Convention in boost to litigation landscape* (The Global Legal Post, 18 January 2024), available at https://www.globallegalpost.com/news/uk-signs-hague-19-convention-in-boost-to-litigation-landscape-528474060.

17 https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

18 *Ibid.*

19 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

20 See Chukwuma Okoli, *Nigeria ratifies the Singapore Convention on Mediation* (Conflict of Laws.net, 2 December 2023), available at https://conflictoflaws.net/2023/nigeria-ratifies-the-singapore-convention-on-mediation/.

21 *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006*, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. NB: This list is not up to date at the time of writing.

22 'Sub-statal entities' denotes (i) separate law districts within otherwise unitary States (such as the PRC and the UK), whether or not such States are themselves Model Law jurisdictions; (ii) states, provinces and other types of law district within federal States, whether or not a federal State is itself a Model Law jurisdiction (such as Australia, Canada, the UAE and the US); and (iii) overseas territories of the UK.

23 Available at https://law.asia/china-arbitration-institutions-revisit-development-focal-points/.

24 Available at https://delosdr.org/gap.

25 Delos, *Guide to Arbitration Places*, 'Hong Kong' (August 2023), available at https://delosdr.org/wp-content/uploads/2019/10/Delos-GAP-2nd-edn-Hong-Kong.pdf.

Contributor to this issue's News section:

Robert Morgan

HKIAC

ICCA 2024
Hong Kong

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

OPENING EVENT - 5:30PM – 9:30PM, 5 MAY (SUNDAY)

REGISTRATION
26TH ICCA CONGRESS OPENING CEREMONY
OPENING COCKTAIL RECEPTION

6 MAY (MONDAY)

PANEL 1: WELCOME REMARKS - 09.30AM – 10.45AM

Chiann Bao
Audley Sheppard KC

Prof Bryant G Garth
Prof Chin Leng Lim

PANEL 2: THE ARBITRATOR - 11:15AM-12:30PM

Commentators:
Aisha Abdallah
Chris Campbell, Elliott Geisinger

Rapporteur:
Prof João Ilhão Moreira

Speakers:
Hon Justice Mimmie Chan,
Neil Kaplan CBE KC SBS,
V K Rajah SC

PANEL 3: DECISION-MAKING AND BIASES – 02.00PM – 03.15PM

Moderator:
Patricia Saiz González

Speakers:
Sheila Ahuja
Prof Stavros Brekoulakis
Prof Rachel Cahill-O'Callaghan
Dr Henry Forbes Smith KC
Hon Judge Dominique Hascher

PANEL 4: SOCIOLOGY AND EDUCATION – 02.00PM – 03.15PM

Moderator:
Prof Julian DM Lew KC

Speakers:
Ginta Ahrel
Prof Kun Fan
Prof Joshua Karton
Nudrat B. Majeed
Jonathan Wood

PANEL 5: JUDGING THE NEW YORK CONVENTION – 03.45PM – 05.00PM

Moderator:
Prof Andrés Jana

Rapporteur:
Shirin Gurdova

Commentators:
Lindsay Gastrell
Barton Legum
Guled Yusuf

Speakers: Senior judges

PANEL 6: CULTURE, LOCALISATION AND REGIONALISM – 03.45PM – 05.00PM

Moderator:
Evgeniya Goriatcheva

Speakers:
Prof Mohamed S Abdel Wahab
Prof Giorgio F Colombo
Prof Won Kidane
Fei Lu
Ruth Teitelbaum

PANEL 7: LAUNCH OF THE 2ND EDITION OF ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION – 05.00PM – 05:20PM

Speaker: Prof Albert Jan van den Berg and Erica Stein

*Programme accurate as of 22 March 2024

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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

7 MAY (TUESDAY)

PANEL 8: THE ADVOCATE – 09.30AM – 10.45AM

Moderator:
Mark W Friedman

Speakers:
Victor Dawes SC
Karl Hennessee
The Hon Justice Dato Mary Lim FCJ
Noradèle Radjai

PANEL 9: PROCEDURES AND BEHAVIOURS – 11.15AM – 12.30PM

Moderator:
Maanas Jain

Speakers:
Susan Ahern
Gourab Banerji SA
Kap-You (Kevin) Kim
Aisha Nadar
David W Rivkin

PANEL 10: IT'S (NOT) JUST SEMANTICS – THE HIDDEN POWER OF LANGUAGE – 11.15AM – 12.30PM

Moderator:
May Tai

Speakers:
Samaa Haridi
Jern-Fei Ng KC
Lei Shi
Rainbow Willard

PANEL 11: INTER-PERSONAL CONDUCT AND ETHICS – 02.00PM – 03.15PM

Moderator:
Abby Cohen Smutny

Speakers:
Funke Adekoya
Hyung-Sik (Brandon) Bang
Nicolás Gálvez Solis
Matthew Gearing KC
Jonathan Lim

PANEL 12: DISPUTE RESOLUTION AND THE GLOBAL COMMUNITY – 02.00PM – 03.15PM

Moderator:
Judith Levine
Annette Magnusson

Speakers:
Catherine Amirfar
Prof Petra Butler
Martin Doe
Dyalá Jiménez

PANEL 13: WORKING IN AN ADVERSARIAL ENVIRONMENT – 03.45PM – 05.00PM

Moderator:
Amanda Lee

Speakers:
Kathryn Britten
Daniel Kalderimis
Yoko Maeda
Prof Giacomo Rojas Elgueta
Emi Rowse (Igusa)

PANEL 14: COSTS AND ECONOMICS – 03.45PM – 05.00PM

Moderator:
Aloysius (Louie) Llamzon
Thomas Stouten

Speakers:
Prof Crina Baltag
Rodrigo Garcia da Fonseca
Joanne Lau
Ruth Stackpool-Moore

PANEL 15: INTERNATIONAL ARBITRATION: AN AI ENDEAVOUR – 10.00AM – 11.30AM, 8 MAY (WED)

Moderator:
Michael McIlwrath

Speakers:
Christopher Bogart
Emily Hay
Rahim Moloo
Maxim Osadchiy
Winnie Tam SC

PANEL 16: CLOSING SESSION – 12.00PM – 01.00PM

Keynote Address: Richard Susskind KC
Closing remarks: Chiann Bao and Audley Sheppard KC
Invitation to Madrid: ICCA 2026 Madrid Host Committee

*Programme accurate as of 22 March 2024

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Hong Kong
5-8 May 2024

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