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EDITORIAL

This issue of *Asian Dispute Review* commences with an updated version (with Cameron Sim) of the text of a keynote address delivered by David W Rivkin to GAR Live: Hong Kong 2021 at the Hong Kong Arbitration Week 2021. Konstantin Voropaev then provides a commentary on the experience of and prospects for mediation in the Commonwealth of Independent States (CIS) from Russian and Kazakhstani perspectives.

Next, Iris Ng discusses the place and roles of alternative dispute resolution (ADR) in climate change-related disputes, while Reynold Orsua discusses how to resolve such disputes through ADR. Both Ms Ng and Mr Orsua are the winners of the inaugural HK45 essay competition (under the Hong Kong/Global and Asia Emerging Economies categories respectively), on the theme, *Is there any room for ADR in climate change disputes?* The competition judges included the Hon Mr Justice Robert Tang (a former Permanent Judge and current Non-Permanent Judge of the Hong Kong Court of Final Appeal), Mr Neil Kaplan (a former judge of the then Supreme Court of Hong Kong and a past Chairman of the HKIAC), Ms Chiann Bao (a past Secretary General of HKIAC) and Ms Sarah Grimmer (the current Secretary General of HKIAC).

For the In-house Counsel Focus article, Yang Ling discusses the development and acceptance of the concept of the seat of arbitration in Mainland China. Matrika Niraula, Mohammed Talib and Alix Povey then present developments in international arbitration and mediation in Nepal for the Jurisdiction Focus article.

The book review is by Ng Jern-Fei QC, who reviews *International Arbitration: When East Meets West: Liber Amicorum Michael Moser* (edited by Neil Kaplan, Michael Pryles and Chiann Bao). This issue concludes with the News section written by Robert Morgan.

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The Role of the Courts Outside the Seat of Arbitration: Achieving the Proper Balance Between Support and Interference

David W Rivkin & Cameron Sim

This article discusses the issues and problems inherent in judicial intervention in the international arbitration process and the matters that need to be considered by foreign courts in attempting to strike a balance between necessary support and unwanted interference. It is derived from the Keynote Address presented by David W Rivkin at GAR Live Hong Kong on 28 October 2021, during Hong Kong Arbitration Week.

Introduction

In the Hong Kong Chief Executive's October 2021 Policy Address, the Hong Kong SAR government affirmed its commitment to continuing to develop the strength of Hong Kong as a seat of international arbitration.[1] The stated aim of positioning Hong Kong as the centre for international dispute resolution services in the Asia-Pacific region is to be commended.

Of particular note was the SAR government's commitment to exploring ways to improve the mechanism for wholly-owned Hong Kong enterprises trading in the Greater Bay Area to choose Hong Kong law as the applicable law to their commercial arrangements, and to be permitted to select Hong Kong as the seat of arbitration in the event that disputes arise. In light of the significant benefits of Hong Kong arbitration for foreign parties conducting business in the People's Republic of China, improving this mechanism will help continue to position Hong Kong as a leading centre for international dispute resolution.

The SAR government's commitment follows the very successful implementation of recent arrangements between Hong Kong and Mainland China, perhaps most significantly the Interim Measures Arrangement 2020.[2] This enables parties to certain Hong Kong-seated arbitrations, including those administered by HKIAC, the ICC or CIETAC, to obtain interim measures from Mainland Chinese courts. As at 3 January 2022, it has been utilised 60 times[3] since it came into force over two years ago. With more arrangements on the horizon, it is clear that Hong Kong will continue to remain an important and attractive seat of international arbitration not only in the Asia-Pacific, but globally as well.

The role of the courts of the seat in supporting arbitration

The Interim Measures Arrangement 2020 also highlights that international arbitration does not exist in a vacuum. Courts are often vital to the proper functioning of arbitral proceedings. Indeed, a strong, internationally-respected court system is critical for a jurisdiction to be an attractive and vital seat of arbitration.

"Courts are often vital to the proper functioning of arbitral proceedings. Indeed, a strong, internationally-respected court system is critical for a jurisdiction to be an attractive and vital seat of arbitration."

This is reflected in the second of the Chartered Institute of Arbitrators' Centenary Principles,[4] known as the London Principles. It provides that an effective, efficient and safe seat must have "[a]n independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes".[5] The strong support of arbitration by Hong Kong courts is one of the main reasons why Hong Kong is one of the leading seats in the world.

In some quarters, there remains a sentiment that arbitration practitioners do not want to have anything to do with the courts. In 2014, Chief Justice Allsop of the Federal Court of Australia and Justice Croft of the Supreme Court of Victoria published an article entitled *Judicial Support of Arbitration*.[6] Their Honours noted that –

> "[t]here is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process generally constitutes unwanted interference. But the reality is that arbitration would not survive without the courts".[7]

The latter proposition is uncontroversial. A lack of, or insufficient, judicial support for arbitration would only serve to damage the efficacy of the arbitral process. The support of courts is integral to the success of international arbitration.

However, with respect to their Honours, the former proposition does not necessarily reflect the experience of contemporary international arbitration practitioners. Those who have been involved in international arbitration over many years are unlikely to consider that, at least in every instance, court involvement in the arbitral process amounts to unwanted interference. Experienced arbitration practitioners generally do not labour under some form of anti-court hostility. This may have surfaced in years past, when arbitration practitioners were seeking, and sometimes struggling, to justify the legitimacy of arbitration as a viable alternative to court litigation. However, we have moved well past those days.

The role of the courts outside the seat in supporting arbitration

As evidenced by the popularity of the Interim Measures Arrangement, courts based outside the seat can play an important role in supporting arbitration. What, though, is

the proper role of courts outside the seat of arbitration in supporting the arbitral process?

> "Experienced arbitration practitioners generally do not labour under some form of anti-court hostility. … [W]e have moved well past those days."

When it comes to the enforcement of arbitration agreements or arbitral awards, the role of foreign courts is uncontroversial. There is no debate that foreign courts have a positive role to play in these instances. When foreign courts enforce arbitration agreements or arbitral awards, they are not interfering with the powers of the arbitral tribunal or the courts of the seat.

However, the proper role of foreign courts is less clear where they are called upon to issue measures to protect a party's rights pending the outcome of an arbitration. Most commonly, these protections take the form of measures aimed at preserving assets or evidence located in the jurisdiction of the foreign court.

The vital role that courts outside the seat can play should not be overlooked or diminished. This does not entail, however, that foreign courts should throw caution to the wind when it comes to issuing measures in support of arbitrations seated elsewhere. As Gary Born has observed:

> "Even if a national court has the power to issue provisional measures in connection with a foreign arbitration, there are strong reasons for exercising such authority with circumspection. When a court in State A issues provisional measures in connection with an arbitration seated in State B, it runs a double risk, of acting at cross-purposes with (a) the arbitral proceedings, and (b) the (limited) supervisory jurisdiction of the courts of the arbitral seat. In these circumstances, courts have rightly demonstrated caution in granting provisional measures."[8]

Caution is certainly appropriate. Arbitration requires a certain level of court support, including from foreign courts, but too much involvement leads to interference. Thus, there is a need for courts to achieve a proper balance between supporting and interfering with arbitral proceedings taking place elsewhere.

The history of the relationship between courts and arbitral tribunals explains why we are at this juncture. This relationship has not always been straightforward. There have been three distinct phases.

> "The vital role that courts outside the seat can play should not be overlooked or diminished. This does not entail, however, that foreign courts should throw caution to the wind when it comes to issuing measures in support of arbitrations seated elsewhere."

The first phase, which coincided with the rise of international arbitration as a popular method of dispute resolution, could best be described as a relationship based on suspicion and distrust. Courts tended to guard their own jurisdiction and powers jealously. Judges did not always consider that arbitrators were up to the job. As Singapore's Chief Justice Sundaresh Menon has observed, "in earlier times, the courts had been suspicious of the ability of private tribunals to dispense justice with integrity."[9]

Fortunately, we moved on from this phase of suspicion and distrust to a second phase based on collaboration and co-

operation. Judicial suspicion morphed into judicial deference. During this period, jurisdictions sought to position themselves as pro-arbitration, by introducing legislation aimed at reducing intervention by the courts, both in the arbitral process and in arbitral awards.

The second phase is embodied in art 5 of the UNCITRAL Model Law. This provides that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." In other words, the courts should defer to arbitral tribunals unless there is a statutorily-prescribed reason to intervene. The Model Law goes on to state in art 17J that "[a] court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of th[e] State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration." The reference here to "specific features of international arbitration" is an attempt to identify that there must be appropriate boundaries before courts will issue interim measures in support of arbitration.

We are now in a third phase, in which it remains unclear precisely what these boundaries are. In many jurisdictions, courts and tribunals peacefully co-exist. The amount of support that courts provide for arbitration is largely considered to be settled. But upon closer scrutiny, it is apparent that the issue as to when judicial action constitutes support or interference has not been finally settled.

In a speech in 2018, Hong Kong's former Chief Justice Geoffrey Ma observed that "the courts are a fundamental part of the arbitral process".[10] Chief Justice Ma referred to the relationship between the courts and arbitral tribunals as described in David Bateson and Edmund Wan's commentary, *Ways to Resolve a Dispute*.[11] According to those commentators, "[t]he role of the courts is confined to occasions where it is obvious that either the arbitral process needs assistance or that there has been, or is likely to be, an obvious denial of justice."[12]

> "The reference … [in art 17J of the UNCITRAL Model Law] to "specific features of international arbitration" is an attempt to identify that there must be appropriate boundaries before courts will issue interim measures in support of arbitration. … [I]t remains unclear precisely what these boundaries are."

Defining the parameters of 'obviousness' in this context is not straightforward. When is it obvious that the arbitral process needs assistance? When will there be an obvious denial of justice? There is clearly a tension at play here. That tension centres on when judicial support of arbitration undermines the autonomy of the system, or conversely, when judicial inaction undermines its efficacy.

In considering these important issues, if a foreign court is empowered to grant the requested measure, it should consider the timing, manner and degree of that measure in assessing whether it will support the arbitral process or is required to secure justice.

It is undeniable that there are situations where foreign court

support clearly may be critical to the success of an arbitration, by enabling the enforcement of a right by providing an appropriate remedy, without which the right would be defeated. By way of example, in cases where fraud has been committed, and the wrongdoer does not comply with the tribunal's orders, it may be necessary for a party to invoke judicial power in support of arbitral proceedings. The threat of adverse inferences and peremptory orders from the tribunal may be insufficient to secure the wrongdoer's compliance. Instead, a party may need to turn to the courts to seek, among other relief, disclosure or freezing orders. In such circumstances, the assistance of courts is entirely consistent with efforts to secure rights and to ensure that there are assets against which an arbitral award can be enforced.

It is also undeniable that there are some foreign court orders that constitute interference. For example, orders enjoining arbitrators issued by foreign courts clearly constitute interference in the arbitral process and the supervisory jurisdiction of the courts of the seat.

> "It is undeniable that there are situations where foreign court support clearly may be critical to the success of an arbitration … It is also undeniable that there are some foreign court orders that constitute interference."

How, then, can the proper balance be achieved between necessary support and unwanted interference? Is there an appropriate standard to guide foreign court involvement?

The intent of the parties to resolve their dispute through arbitration is central to the appropriateness of foreign court involvement in the arbitral process. Where it is clear that the parties have agreed to arbitration, it follows that they should also be seen to have agreed that arbitration should be an effective process and that effective remedies should be available. If, without foreign court involvement, the arbitral process would be rendered ineffective, or remedies rendered unattainable, then foreign court involvement may be seen as supportive. If, without foreign court involvement, the arbitral process would continue to be effective, and remedies would remain available, then foreign court involvement may potentially be seen as interference.

When a foreign court is approached by a party for assistance, in the first instance it should ask itself a straightforward question before becoming involved: why has the party come to us and not to the tribunal or the courts of the seat? Once a court understands why its assistance is or is not needed, it should be clear as to whether any steps it takes will amount to support or interference with the foreign-seated arbitration. Where the court has jurisdiction over a party's assets (and the courts of the seat do not), for example, the court may more readily conclude that its assistance is needed. Whether assistance can be provided will of course depend on the laws the court is bound to apply.

Legal frameworks

Whether courts are empowered to issue interim measures in support of prospective or actual arbitrations will depend on the legal framework governing this issue in each respective jurisdiction. On examination, there is no universal approach.

Articles 1(2) and 9 of the UNCITRAL Model Law provide that the existence of an arbitration agreement does not preclude a party from applying to a court for interim measures. There is no suggestion in these provisions that a party would be limited to applying for such measures in the courts of the seat of arbitration.

Under s 45(5) of the Hong Kong Arbitration Ordinance (Cap 609), Hong Kong courts are empowered to grant interim measures in support of arbitral proceedings taking place

both within and outside Hong Kong (including in respect of arbitration proceedings in Mainland China). As set out by Mimmie Chan J in *Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd*,[13] in considering whether to issue measures in respect of a foreign-seated arbitration, the court must consider whether it would be unjust and inconvenient to grant the relief sought.

> "When a foreign court is approached by a party for assistance, in the first instance it should ask itself a straightforward question before becoming involved: why has the party come to us and not to the tribunal or the courts of the seat?"

This is slightly different from the position in England & Wales. Under s 44 of the UK Arbitration Act 1996, the court is empowered to issue interim measures in aid of arbitration only in cases of urgency or where the tribunal is unable to act.

In the US, the Federal Arbitration Act 1925 is silent about whether courts are empowered to grant interim measures in aid of foreign-seated arbitrations. There have been several instances of lower US courts granting such measures.[14]

In Russia, the courts are empowered to issue injunctions in support of foreign-seated arbitrations, although the Russian courts tend to hesitate in issuing such measures. In addition, interim orders of arbitral tribunals are not enforceable in Russia, increasing the need for parties to turn to courts to obtain interim measures in support of their claims in arbitration.

In Mainland China, with the exception of certain arbitrations seated in Hong Kong pursuant to the Interim Measures Arrangement 2020, the courts are not empowered to issue interim measures in support of foreign-seated arbitrations. Further, the 2021 consultation draft of the revised PRC Arbitration Law focuses on the powers of arbitral tribunals in granting interim measures, rather than the power of Mainland Chinese courts to grant interim measures in support of foreign-seated arbitrations.[15] There does not currently appear to be an appetite to extend Mainland Chinese courts' powers in this regard.

Two main conclusions may be drawn from these rather different frameworks.

First, the maintenance of concurrent jurisdiction between courts and arbitral tribunals is always going to give rise to tensions, and differences of opinion, as to when it is appropriate for courts to exercise their powers in support of arbitrations. This tension is heightened for courts outside the arbitral seat, with the added dimension that they may be seen to be interfering not only in the arbitral process, but also in the supervisory jurisdiction of the courts of the seat.

> "Whether courts are empowered to issue interim measures in support of prospective or actual arbitrations will depend on the legal framework governing this issue in each respective jurisdiction. On examination, there is no universal approach."

Second, there is no way to resolve this tension. This generates uncertainty for parties, but this uncertainty is unavoidable and is the price to pay for a system aimed at the vindication of rights. In considering why a party has turned to the foreign court, the intention of the parties in submitting to arbitration

is key. In examining the timing, manner and degree of a requested measure to assess whether it is needed, courts should focus on securing justice for the parties. Such inquiries always entail an unavoidable element of uncertainty.

Support versus interference by foreign courts

There are recent examples of these shades of grey in the context of (1) emergency arbitration, and (2) discovery applications made under s 1782 of 28 United States Code (USC).[16]

(1) Emergency arbitration

Before the advent of emergency arbitration, there may have been less concern by courts that issuing interim measures in support of arbitration would amount to interference with the process. Where interim measures were urgently required, and those measures could not await constitution of the tribunal, it may have been more obvious as to when the arbitral process required judicial assistance and when there would have been a denial of justice in the absence of this assistance.

Emergency arbitration is now well-embedded in the majority of arbitration rules as a procedure available to obtain interim measures within the realm of arbitration while awaiting the constitution of the arbitral tribunal. As a result of the advent of emergency arbitration, the question as to when foreign court support in respect of arbitral proceedings will interfere with the arbitral process is likely to arise with greater frequency.

One issue that courts have already grappled with is whether the availability of emergency arbitration means that parties should be confined to that process if urgent interim measures are required pending the constitution of the arbitral tribunal.

“As a result of the advent of emergency arbitration, the question as to when foreign court support in respect of arbitral proceedings will interfere with the arbitral process is likely to arise with greater frequency.”

In the English case of *Gerald Metals SA v Timis*,[17] the High Court suggested that if emergency arbitration were available to the claimant, that in itself might limit the power of the court to issue interim measures prior to tribunal formation. In other words, if emergency arbitration is available, the court may be more reluctant to assist. Presumably, the rationale for this approach is that assisting in these circumstances would amount to interference with the arbitral process, as instead of turning to the courts, a party could instead be turning to an emergency arbitrator.

In India, in the case of *Ashwani Minda v U-Shin Ltd*,[181] and along similar lines, the Delhi High Court held that the parties' agreement to the JCAA Rules evinced an intention to confer an emergency arbitrator with exclusive jurisdiction to determine applications for pre-tribunal relief.

In this context, foreign courts may be faced with applications for urgent interim measures in circumstances where the parties are bound to an arbitration agreement containing arbitration rules that permit emergency arbitration. If, as is almost always the case, the emergency arbitration rules expressly preserve concurrent jurisdiction between the emergency arbitrator and the courts, consideration may need to be given as to whether issuing interim measures in support of foreign-seated arbitrations amounts to interference with the arbitral process or, alternatively, whether issuing such measures to protect rights pending their determination by arbitral tribunals is in fact supportive of the process.

These scenarios give rise to difficult issues. What if a party requires *ex parte* relief that would not be available before the courts of the seat, but would be available from a foreign court? What if a party requires a remedy, such as an anti-suit injunction, that would not be available from the courts of the seat, but would be available from an arbitral tribunal or a foreign court? Or what if a party ultimately needs to enforce the interim relief in a jurisdiction where it is unclear if emergency arbitration decisions are enforceable?

When a foreign court asks itself why a party has turned to it for assistance in such circumstances, it may not always be clear where the balance between support and interference lies. Ultimately, foreign courts will need to assess whether failing to assist might interfere with the arbitral process - either by enabling parties to take steps ultimately to defeat the vindication of rights or by conferring rights on parties that in agreeing to arbitration they had not intended to have - or whether it is aiding in the enforcement of rights to which the parties had agreed.

> "When a foreign court asks itself why a party has turned to it for assistance in such circumstances, it may not always be clear where the balance between support and interference lies."

(2) Section 1782 applications

There has been recent discussion as to whether s 1782 of 28 USC permits discovery in connection with an international commercial arbitration. Following the recent withdrawal of the appeal in *Servotronics Inc v Rolls-Royce PLC*,[19] we are still awaiting the US Supreme Court's resolution of the circuit split on this issue. The split centres on whether an international arbitral tribunal falls within the scope of a "foreign or international tribunal" for the purposes of s 1782. If it does, then in certain circumstances it would be permissible to pursue s 1782 applications to obtain documents or subpoenas for use in international arbitration proceedings.

The discretionary factors currently considered in s 1782 discovery applications may bear relevance to the question as to when foreign court action amounts to support or interference in arbitration. Under the test outlined by the Supreme Court in *Intel Corp v Advanced Micro Devices Inc*,[20] in deciding whether to permit discovery, courts may consider whether the foreign court would be receptive to US federal court assistance.

While framed differently, this is similar to the question courts outside the seat of arbitration should consider when they are approached by a party for assistance, namely why the party has approached the court. In answering that question, foreign courts may consider whether the tribunal, or the courts of the seat, will be receptive to assistance. They will not be receptive if that assistance amounts to interference.

As a matter of comity, foreign courts may choose to pay deference to the courts of the seat. However, if it appears that the arbitral tribunal may be receptive, but the courts of the seat may not, there will be an additional layer of complexity as to whether foreign court assistance amounts to support or interference in the arbitral process.

> "Courts and arbitral tribunals serve complementary functions in assisting in the resolution of disputes, and courts will continue to strive to find the right balance between support and interference."

Conclusion

This article has not attempted to set out conclusively when

measures issued by courts in respect of foreign-seated arbitrations should be permissible. In posing the question as to how to achieve the proper balance between support and interference, the authors' aim has simply been to provoke further discussion about this topic and to provide some guidance on how these issues may be resolved. Courts and arbitral tribunals serve complementary functions in assisting in the resolution of disputes, and courts will continue to strive to find the right balance between support and interference.

1 Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, *The Chief Executive's 2021 Policy Address: Building a Bright Future Together* (6 October 2021), available at https://www.policyaddress.gov.hk/2021/eng/pdf/PA2021.pdf (accessed 15 November 2021).

2 Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region 2020.

3 This data has been confirmed by: HKIAC.

4 CIArb, *London Centenary Principles 2015*, available at https://www.ciarb.org/media/4357/london-centenary-principles.pdf (accessed 15 November 2021).

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6 The Hon Chief Justice J Allsop and the Hon Justice C Croft, *Judicial Support of Arbitration* (28 March 2014), available at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20140328 (accessed 15 November 2021).

7 *Ibid*, citing J Lurie, *Court Intervention in Arbitration: Support or Interference?* (2010) 76(3) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 447-453.

8 Gary B Born, *International Commercial Arbitration* (3rd Edn, 2021), para 17.04, p 2751.

9 The Hon Chief Justice S Menon, *Judicial Attitudes towards Arbitration and Mediation in Singapore* (25 October 2013), para 4. available at https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/judicial-attitudes-to-arbitration-and-mediation-in-singapore.pdf (accessed 15 November 2021).

10 The Hon Chief Justice G Ma, *Speech by The Honourable Chief Justice Geoffrey Ma at the Hong Kong Forum: 60th Anniversary of the New York Convention* (20 September 2018), para 10, available at https://www.hkcfa.hk/filemanager/speech/en/upload/1211/CJ%20Speech%2020%20September%202018.pdf (accessed 15 November 2021).

11 In Geoffrey Ma & Denis Brock, *Arbitration in Hong Kong: A Practical Guide* (4th Edn, 2017, Sweet & Maxwell/Thomson Reuters), ch 4.

12 *Ibid*, para 4.148.

13 [2016] 3 HKC 44.

14 Born, *op cit* (note 8 above), para 17.04, p 2748.

15 Consultation draft of the revised Arbitration Law of the People's Republic of China (30 July 2021), available at http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html (in Chinese only) (accessed 15 November 2021).

16 28 USC 1782.

17 [2016] EWHC 2327 (Ch).

18 2020 SCC OnLine Del 721.

19 975 F 3d 689 (7th Cir 2020); *Servotronics Inc v Boeing Co*, 954 F 3d 209 (4th Cir 2020).

20 542 US 241 (2004).

Mediation in CIS countries: Russian and Kazakhstani Experience

Konstantin Voropaev

This article discusses the tentative and piecemeal development of mediation in countries of the Commonwealth of Independent States since 2010, in particular in Russia and Kazakhstan. Reasons are given for why mediation has not taken off as much as might have been expected in those countries - primarily, legislative weaknesses and difficulties in appointing mediators - and suggestions are made as to what may be done to remedy this situation.

Introduction: the emergence of mediation in CIS countries

The process of conciliation or mediation in resolving economic and other disputes originated with the Phoenician civilisation, as well as in Ancient Babylon.[1] The practice of reconciliation with the help of a mediator was also known in Africa.[2] In Anglo-Saxon countries, mediation has become fairly widespread and is a sustained mechanism for dispute resolution.[3] In recent years, mediators have regularly been recruited in the employment field to resolve speedily disputes that could lead to strikes, mass layoffs and temporary plant closures. For example, the United States established the Federal Mediation and Conciliation Service[4] in 1947; this organisation still exists today.

Mediation processes are less familiar to countries with a civil law system. This comment applies particularly to post-Soviet countries. Relatively recently, the legislative bodies of member countries of the Commonwealth of Independent States (CIS) began to implement mediation mechanisms as part of their national legislation. One of the goals of the CIS is to carry forward alternative dispute resolution (ADR) as the method for resolving legal matters. The CIS Treaty on the Free Trade Area 2011[5] requires the consideration and resolution of issues as to the practical implementation of the dispute settlement procedure.[6]

Mediation as an ADR mechanism is actively developing and is finding increasing numbers of supporters in many CIS

member States, even though it does not have a legal basis in all countries. In particular, specific laws on mediation have become integral parts of Russian and Kazakhstani legislation, while at the same time there are no similar legal provisions in Tajikistan[7] and Turkmenistan.[8]

> "Mediation as an ADR mechanism is actively developing and is finding increasing numbers of supporters in many CIS member States, even though it does not have a legal basis in all countries."

Analysis of special laws on mediation that do exist in these countries shows that they are similar as to key points, while at the same time a number of specific problems exist that are unique to each country. The position in Russia and Kazakhstan is illuminative.

The Russian Federation

Until 2010, mediation activity in Russia was regulated by agreements on the provision of legal services or could even be based on verbal agreements. At the same time, however, mediators (though not yet at that time referred to as such) took a great risk in accepting appointments because there were no guarantees as to remuneration. The situation changed radically with the adoption in 2010 of the Federal Law 'On an Alternative Dispute Resolution Procedure with the Participation of a Mediator',[9] which legalised mediation in dispute resolution. From that moment onward, parties to a dispute were able to formalise legally the involvement of a mediator to resolve it.

During the 2019 procedural reform of the civil and arbitration processes,[10] existing reconciliation processes were subjected to certain changes, including mediation, judicial conciliation and the conclusion of amicable agreements. However, mediation as an ADR mechanism still remains under-used in Russia by comparison with the traditional litigation process. There are several reasons for this.

Lack of motivation

Russian legislation does not in any way motivate or compel litigants to resort to out-of-court dispute resolution processes, including mediation. The pre-trial dispute settlement procedure provided for is in effect more of a fiction than a properly working mechanism. Plaintiffs, as a rule, perceive these norms as technical, requiring them to follow the law formally in order to avoid adverse consequences associated with leaving a statement of claim unprogressed or unreturned.

The position taken by the Supreme Court of the Russian Federation introduced sufficient uncertainty in this regard.[11] The highest court indicated that, if a statement of claim is accepted for proceedings by the trial court, the claim would be adjudicated, even if it transpired that the plaintiff had not observed the prescribed pre-trial procedure for resolving the dispute. The Supreme Court's position contradicts the provisions of the procedural law,[12] indicating a need to leave the claim unconsidered if it turns out that it was accepted by the court in violation of the mandatory pre-trial order. Subsequent rulings adopted by the Supreme Court also did not, in any way, enhance the status of mediation.

> "…[M]ediation as an ADR mechanism still remains under-used in Russia by comparison with the traditional litigation process."

Moreover, according to the legislation[13] of both Russia and Kazakhstan, a mediated settlement agreement comprises

a civil law transaction aimed at establishing, changing or terminating the rights and obligations of the parties. In the case of non-performance or improper performance of such an agreement, the party who violated it is liable for any infringements. Thus, when concluding a mediated settlement agreement, the obligation that arose from non-performance of the original substantive obligations between the parties is terminated and replaced by new obligations.

> “Russian legislation does not in any way motivate or compel litigants to resort to out-of-court dispute resolution processes, including mediation. The pre-trial dispute settlement procedure provided for is in effect more of a fiction than a properly working mechanism.”

Consequently, where a mediated settlement agreement is concluded, non-performance or improper performance of it confers on parties the right to invoke the same methods for protecting their rights as in the case of violation of any other civil contract, including to sue and defend judicially.

The need to go to court where a mediated settlement agreement is not fulfilled looks unattractive, however; it diminishes the advantages and meaning of mediation because the core purpose of the process is to avoid litigation and resolve a dispute privately and speedily.

Difficulties in agreeing a mediator

Another problematic aspect of mediation in Russia is insufficiency of the rules on impartiality and independence of candidate mediators.

According to the law,[14] the appointment of mediators must be agreed by the parties to the dispute, but very often this is obviously difficult to achieve where a dispute has arisen. The parties can no longer resolve their dispute in a peaceful way, yet they need to agree on who will resolve it. The almost complete absence of norms as to mediator candidacy also exacerbates the difficulties of reaching an agreement to mediate.

From a practical point of view, the mechanism stipulated in the ICC Mediation Rules[15] appears quite suitable. Article 5 provides a guideline for disputing parties regarding the procedure for selecting a mediator. Simultaneously, these rules provide that a third party (in this case the ICC International Centre for ADR) may select a mediator if the parties cannot agree. What should happen, however, where parties decide to attempt to settle a case on an entirely *ad hoc* basis? This question remains unresolved by the Russian legislation.

Illegal ‘cash out’ transactions facilitated through mediation

The year 2021 has witnessed an emerging trend whereby mediation has been used to achieve illegal purposes. More specifically, mediated settlement agreements have become a tool for facilitating the illegal cashing out of funds. The responsible executive body[16] recorded a surge in the cashing out of money through such mediation documents, in the form of notarised agreements that allow a dispute to be settled without a trial.

> What should happen, however, where parties decide to attempt to settle a case on an entirely *ad hoc* basis? This question remains unresolved by the Russian legislation.

The legal position may be summarised as follows. Credit institutions are presented with notarised mediated settlement agreements for execution, pursuant to which legal entities are obliged to pay the debt to individuals or legal entities under a cession agreement (a legal obligation to pay). By virtue of the law, notarised original or copy mediated settlement agreements are among such executory documents. Credit institutions transfer funds under them to legal entities or individuals. If a transferee is a party to such an agreement, the funds are subsequently cashed out to it.

Work contracts that exhibit signs of being fictitious are often used as the basis for such documents. At the same time, 'debtors' bear the characteristics of 'fly by night' companies.

What can be done, in practical terms, to combat this form of fraud? Mediators should be required to screen the companies involved in the dispute for signs that they are 'fly by night' companies. Such signs include, for example, a short period of actual activity by such a company and discrepancies between the scale of the business and the amounts involved in and the nature of the dispute arising from the legal relationship.

Mediator v judicial reconciler

As mentioned previously, the mediation process has rarely been applied to any great degree since the adoption of the relevant law in 2010.[17] The process of judicial reconciliation has since come to aid in the development of alternative methods of resolving disputes.

Judicial conciliation has been one of the conciliation processes enshrined in the procedural legislation of Russia since 2019.[18] The idea of judicial conciliation took shape a little later than the entry into force of special legislation on mediation (2010), so there are several differences between these processes.

Firstly, judicial conciliation cannot be used as a method for resolving non-legal disputes, while mediation can be applied to any disputes, whether or not they have been referred to a state court.

> Judicial conciliation has been one of the conciliation processes enshrined in the procedural legislation of Russia since 2019. … [It cannot, however,] be used as a method for resolving non-legal disputes, while mediation can be applied to any disputes, whether or not they have been referred to a state court.

Secondly, the procedural legislation contains provisions stating that a judicial conciliation procedure can be carried out at any stage of litigation, both during consideration of the case in court and at the time of enforcement proceedings. Judicial conciliation is therefore always carried out in parallel with the judicial process. By contrast, mediation may be used to settle legal disputes at any time, whether before, during or after the litigation process and in enforcement proceedings.

Thirdly, the law provides for an extremely wide range of persons who can act as mediators. Mediation can be conducted on a non-professional basis (ie, by persons other than lawyers);

in fact, it allows participation by any individuals who have reached the age of maturity, have full legal capacity and have no criminal record. In judicial conciliation, by contrast, only a retired judge can be appointed as a judicial conciliator.

Fourthly, judicial conciliation is free of charge to parties and is funded by the state treasury. Mediation can be carried out either free of charge or on a reimbursable basis, at the discretion of the mediator; the latter option is more common.

The parallel existence of several 'reconciliation' mechanisms should theoretically mean that those processes complement each other in achieving the common goal of resolving legal disputes. To achieve the objectives of reconciliation in the consideration of disputes by the courts, not one but several such processes are required in order to meet the needs of the participants in the process. However, the pluralism of reconciliation mechanisms should not be an end in itself, since a quantitative increase *per se* does not necessarily mean qualitative growth. Furthermore, alternative ways of resolving a dispute in Russia unfortunately remain at the margins of the legal system.

Kazakhstan

By contrast with the position in Russia, what are the causes of mediation's retardation in Kazakhstan?

General issues

The main problem in applying the mediation process in Kazakhstan is the insufficient number of professional mediators throughout the country. Kazakhstan is a very large country and the remoteness of the location of mediators from the courts is another reason why parties cannot easily resort to mediation.

Another problem is the lack of basic training of non-professional mediators in the field, which can lead to incorrect application of the legislation when concluding a mediated settlement agreement.

There are also the issues of the largely rural population's lack of awareness of mediation and the incidence of excessive fee rates for mediators' services, which are often beyond villagers' means.

At the same time, it was proclaimed at the highest state level in 2009[19] that it was necessary to consolidate a variety of ways and means of reaching a compromise between parties to private legal conflicts (mediation and other mechanisms), both in and out of court.

This was followed by a 2012 message of the President of Kazakhstan,[20] in which it was noted that the main vector for the further development of the judicial and legal system was the widespread use of conciliation and mediation processes. Such use of alternative settlement of disputes between parties was seen both as the foundation of civil society and as the path to democracy and civilisation.

> "Judicial conciliation is … always carried out in parallel with the judicial process. By contrast, mediation may be used to settle legal disputes at any time, whether before, during or after the litigation process and in enforcement proceedings."

> “… [T]he pluralism of reconciliation mechanisms should not be an end in itself, since a quantitative increase *per se* does not necessarily mean qualitative growth. Furthermore, alternative ways of resolving a dispute in Russia unfortunately remain at the margins of the legal system.”

From a practical point of view, however, there are several legislative *lacunae* that further hinder the progress and spread of mediation in Kazakhstan.

Legislative gaps

Firstly, suspended conditions of mediated settlement agreements are prohibited by the law of Kazakhstan.[21] The legislature does not prohibit the conclusion of a mediated settlement agreement with suspensive conditions for the mediator, but at the same time prohibits its approval by the court. As a general rule, a transaction is considered completed under a suspensive condition if the parties have made the existence of rights and obligations dependent on circumstances relative to which it is unknown whether or not they will occur.[22]

Secondly, there is the impossibility of recognising transactions as invalid by virtue of a mediated settlement agreement. Invalid transactions under the civil law of Kazakhstan[23] are divided into void and contentious.[24] In order to declare a contentious transaction invalid, a court decision that has entered into force is necessary.[25] A mediated settlement agreement approved by the court is, by its legal nature and as a matter of law, a transaction but obviously is not a court decision. In this regard, a mediated settlement agreement recognising a transaction as invalid cannot substitute for a court decision to the same effect.

Thirdly, the court may terminate litigation proceedings if there is an effective and legally enforceable mediated settlement agreement between the same parties, on the same subject, and on the same grounds, providing for the termination of the proceedings pursuant to that agreement.[26] By way of illustration of problems that may arise, let us assume that there is a dispute as to payment under a franchising agreement that is currently before the court. During the litigation, the parties decide to settle the dispute by mediation. During the mediation process, they reach agreement in relation to one or more further and related legal issues - for example, as to issues relating to reputation and to the franchisor’s trade mark. In the case described, the parties have not formally been deprived of the opportunity of raising the reputation and trademark issues before the court, since such claims have not previously been submitted to the court. However, as those issues have been resolved by the mediated settlement agreement, it appears that there is no scope to raise them before the court.

Conclusion

Unfortunately, there are no publicly available complete statistics on the number of mediations conducted in Russia and Kazakhstan. One can find information revealing that, in Kazakhstan in 2012, 122 civil cases were concluded via mediation, while in 2013 this figure was 1,276, while in 2014 the number stood at 5,090 cases. In 2016, the number of completed mediation cases increased to 19,805.[271] In Russia, mediation settled only 1,187 cases in 2018, while in 2019 the number was 1,041 cases - constituting 0.0072% and 0.005% respectively of all cases considered.[28]

While acknowledging the fact that mediation has developed in CIS countries, the pace of development leaves much to be desired.

> “While acknowledging the fact that mediation has developed in CIS countries, the pace of development leaves much to be desired. … [P]owerful promotion of mediation is needed. … Moreover, state support would be necessary …”

Of course, powerful promotion of mediation is needed. People should understand that it is cheaper and more effective for them to settle a dispute by mediation and mediators should be given more opportunities to help them. Moreover, state support would be necessary; it may most effectively take the form of creating conditions for the promotion of mediation through improvements to legislation and other public legal mechanisms.

1 Cyril Chern, *International Commercial Mediation* (2008, Informa Law), p 2.

2 *Ibid*.

3 Nadja Alexander, *International And Comparative Mediation* (2009, Kluwer Law International), p 127.

4 *Our History - Federal Mediation And Conciliation Service* (Federal Mediation and Conciliation Service, 2021), available at https://www.fmcs.gov/aboutus/our-history/ (accessed 29 September 2021).

5 Saint Petersburg, 18 October 2011.

6 *Ibid*, Appendix 4, ‘Dispute Resolution Rules’.

7 A Working Group created in Tajikistan is currently preparing a draft Law of the Republic of Tajikistan ‘On Mediation’ which will in the near future become the basis for the establishment of the mediation process in that country.

8 The legislation of Turkmenistan does not currently provide for mediation as a way of resolving disputes. It should be noted, however, that this country periodically hosts events dedicated to mediation and the experience of foreign countries. Moreover, at the initiative of foreign organisations, educational events on mediation and other alternative ways of resolving disputes are held at higher educational institutions. There is, therefore, hope that mediation will also make an appearance in Turkmenistan in due course.

9 Adopted by the State Duma on 7 July 2010 and approved by the Federation Council on 14 July 2010.

10 One of the main events of 2019 was the commencement of work by new courts of appeal and cassation courts of general jurisdiction in the Russian Federation and the ‘procedural revolution’ that took place along with it. These events simultaneously became the final stage of a large-scale judicial reform process in Russia.

11 Review of judicial practice of the Supreme Court of the Russian Federation, No 4 (2015), approved by the Presidium of the Supreme Court of the Russian Federation on 23 December 2015.

12 These rules are laid down by art 148 of the Commercial Procedure Code of the Russian Federation and art 222 of the Code of Civil Procedure of the Russian Federation.

13 This rule is stipulated by art 12 of the Russian Federal Law ‘On an Alternative Dispute Resolution Procedure with the Participation of a Mediator’ (note 9 above) and art 27 of the Law of the Republic of Kazakhstan ‘On Mediation’.

14 Article 9 of the Federal Law ‘On an Alternative Dispute Resolution Procedure with the Participation of a Mediator’ (note 9 above).

15 ICC Mediation Rules 2014, available at https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/ (accessed 28 September 2021).

16 The Federal Financial Monitoring Service of the Russian Federation is responsible for this type of activity.

17 Note 9 above.

18 Federal Law of 26 July 2019, No 197-FZ ‘On Amendments to Certain Legislative Acts of the Russian Federation’.

19 Decree of the President of the Republic of Kazakhstan of 24 August 2009, No 858, ‘On the Concept of Legal Policy of the Republic of Kazakhstan for the Period from 2010 to 2020’.

20 Message from President of the Republic of Kazakhstan Nursultan Nazarbayev to the people of Kazakhstan, *STRATEGY ‘Kazakhstan-2050’ The new political course of the established state* (14 December 2012).

21 Article 180, para 4 of the Civil Procedure Code of Kazakhstan stipulates that the execution of an agreement on the settlement of a dispute by way of mediation is carried out in accordance with the rules for the execution of a mediated settlement agreement. In tandem with this, pursuant to art 176, para 3 of the Civil Procedure Code, the conclusion of such an agreement under a suspensive condition is not allowed.

22 Article 150 of the Civil Code of Kazakhstan.

23 *Ibid*, art 157.

24 *Editorial note*: The latter is essentially equivalent to ‘voidable’ under the common law.

25 *Ibid*.

26 Paragraph 2 Article 277 of the Civil Procedure Code of Kazakhstan.

27 Dariga Ospanova, *Mediation Issues In The Republic Of Kazakhstan* (2021) 42 InterConf, available at https://doi.org/10.51582/interconf.19-20.02.2021.058 (accessed 5 October 2021).

28 *Most Of The Civil And Administrative Cases in 2019 are Related to the Collection Of Various Debts From Citizens* (Advgazeta.ru, 2021), available at https://www.advgazeta.ru/obzory-i-analitika/bolshinstvo-grazhdanskikh-i-administrativnykh-del-v-2019-g-svyazany-so-vzyskaniem-razlichnykh-dolgov-s-grazhdan/ (accessed 5 October 2021).

Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes

Iris Ng

This article discusses how litigation and alternative dispute resolution may redress climate change-related disputes. While not ruling out litigation, the difficulties of adjudicating complex scientific questions underlying climate change and the very fact-specific nature of such disputes can militate against its general adoption. By contrast, ADR is seen as more amenable by performing three separate and distinct roles: as an alternative to litigation, as a supportive mechanism, or as a transformative agent. The article is the first of two winning essays on the subject submitted to the inaugural 2021 Essay Competition of HK45, HKIAC's young arbitration practitioners group.

Introduction

In Ernest Hemingway's novel *The Sun Also Rises* (1926), one of the characters explains how he became bankrupt. "Two ways. Gradually and then suddenly." This description of a slow lead-up to precipitous decline aptly describes the scenario Earth currently faces. It is at a tipping point. The impact of human-induced climate change is hitting home hard, triggering a flurry of fault-finding and mutual blame. So far as the inevitable legal claims are concerned, an enduring narrative is that of the environmental crusader making a stand for justice in the courts. Yet, that narrative is incomplete, for there is no single paradigm of dispute or disputant that is amenable to a 'one size fits all' approach. Because the reality is much more complex, there is plenty of room for alternative dispute resolution (ADR) in the forms of arbitration and mediation. ADR can play important *alternative*, *supportive* and *transformative* roles in resolving climate change disputes, which may be defined broadly as disputes arising out of or in relation to the effects of climate change and climate change policy.[1]

The litigation narrative

Court litigation of climate change disputes is on the rise,[2]

galvanised by a spate of recent successes. In May 2021, the Hague District Court ruled that Royal Dutch Shell had to "reduce its CO2 output and those of its suppliers and buyers by the end of 2030 by a net of 45 per cent based on 2019 levels".[3] In February 2021, in the wake of several rulings by the highest French administrative court that revealed "an intensification of control and compliance with the State's obligations" in connection with climate change,[4] the Paris Administrative Tribunal ruled that the French government had failed to meet its carbon emission reduction commitments under the Paris Agreement 2015. The Tribunal ordered a further investigation to determine the mitigation and prevention measures that it could enjoin the government to adopt.[5]

There have also been 'losses', though even court losses count as publicity 'wins';[6] the public nature of court hearings means that the mere fact of having launched an action and having it heard can raise awareness and exert pressure on regulators or corporations.[7]

> "ADR can play important *alternative*, *supportive* and *transformative* roles in resolving climate change disputes, which may be defined broadly as disputes arising out of or in relation to the effect of climate change and climate change policy."

The full story

The litigation narrative presents an incomplete, and therefore inaccurate, picture of reality because it disregards the complexity of climate change disputes. In truth, there is no quintessential 'climate change dispute' and even while climate change disputes share common features, the interplay of these in each case is fact-specific. Thus, depending on the circumstances, the parties involved may prefer litigation over ADR or vice versa.

> "Court litigation of climate change disputes is on the rise, galvanised by a spate of recent successes. … There have also been 'losses', though even court losses count as publicity 'wins'; the public nature of court hearings means that the mere fact of having launched an action and having it heard can raise awareness and exert pressure on regulators or corporations."

(1) No quintessential climate change dispute or disputant

Climate change can feature *directly* or *indirectly* in a dispute.[8] In either situation, the rights allegedly breached can arise under varied branches of law, ranging from the international (eg, under human rights law, bilateral investment treaties) to the domestic (eg, under constitutional, contract or tort law).

'Direct' cases involve claimants, who have allegedly suffered the ill-effects of climate change or climate change policy, and brought claims against respondents for either their *regressive actions* (doing too little for, or actively undermining, the environment) or allegedly *unfair affirmative actions* (preferring 'green' options to the detriment of less environmentally-friendly alternatives).[9] The former type of claim arose in *Lliuya v RWE AG*,[10] in which a farmer sued an energy company for its role in global warming and contribution to sea level rise and increased flood risk for his locality. An example of the latter type of claim is *Rockhopper Exploration Plc v Italy*,[11] in which a

foreign investor with interests in a hydrocarbon deposit sued the Italian government for denial of its concession following domestic environmental reforms.

> "… [T]here is no quintessential 'climate change dispute' and even while climate change disputes share common features, the interplay of these in each case is fact-specific. Thus, depending on the circumstances, the parties involved may prefer litigation over ADR or vice versa."

'Indirect' cases refer to those in which claimants do not seek redress for harm arising from climate change but in which the dispute otherwise has a *climate change nexus*. As an illustration, a party may allege that a sea level rise constitutes a *force majeure* event that releases it from its previously negotiated contractual rights[12] or excuses its conduct from being an internationally wrongful act.[13] Disputes may also be brought over the use of resources endangered by climate change,[14] or for breach of environment-related disclosure or reporting obligations.[15]

The above discussion also illustrates how there are a *range of actors*, including States, corporations, individuals and non-governmental organisations. Each actor has different priorities and goals,[16] which collectively influence its assessment of the appropriate form of and forum for dispute resolution.[17]

(2) No fixed inference can be drawn from shared characteristics

Climate change disputes frequently involve *scientific uncertainty* in proving causation of existing damage or predicting future impacts, a strong *public interest element*, and *polycentricity*.[18] Even so, the mere presence of these characteristics cannot support the inference that disputants would prefer one type of dispute resolution mechanism over another.

First, the argument goes that scientific uncertainty nudges parties towards mediation. If parties are uncertain about the strength of their position and ability to persuade judges or juries, they would prefer mediation because it offers increased control over the outcome.[19] This analysis, however, ignores how respondents can thrive on uncertainty, especially if they have the financial resources to outspend and outlast claimants. If they cast sufficient doubt on the claimants' case, the latter cannot discharge their burden of proof. An infamous example is how the tobacco industry "manufacture[d] uncertainty" by commissioning research to question the validity of scientific evidence, thereby delaying regulation for decades.[20]

> "… [T]here are a *range of actors*, including States, corporations, individuals and non-governmental organisations. Each actor has different priorities and goals,[21] which collectively influence its assessment of the appropriate form of and forum for dispute resolution."

Secondly, it is thought that a strong public interest element lends itself to litigation, due to considerations of *transparency* that promote public awareness, and *legitimacy* of decision-making by formal officer-holders. Transparency is not, however, unique to court proceedings. Confidentiality in ADR is imposed for the parties' benefit and can be waived.[22] Additionally, legitimacy is not a given, even for courts. 'Captive' courts or tribunals that are answerable to the agencies whose decisions they review - such as the United States Environmental Appeal Board - are vulnerable to the perception that they lack independence and

impartiality, regardless of whether this is true in practice.[23] The concern of legitimacy is even more acute for 'gatekept' courts, such as the Dhaka Environmental Court, which only hears claims that pass the pre-selection/referral process of the Bangladesh Department of Environment.[24]

Thirdly, some contend that where issues are polycentric, in the sense of the decision-maker having broad discretion as to policy considerations,[25] adjudicative mechanisms are inappropriate due to the lack of legal or justiciable standards. Even accepting the soundness of this general proposition, as a matter of litigation strategy claimants can isolate a specific aspect of a decision-maker's decision for challenge on procedural grounds rather than taking issue with the merits. An example is the court challenge to the British government's plans to expand London Heathrow Airport, mounted on traditional judicial review grounds.[26] This rendered a *prima facie* polycentric decision amenable to adjudicative resolution.

Accordingly, the complexity of climate change disputes means there is no way to conclude categorically that court litigation is always best.

The roles of ADR in climate change disputes

Having argued that there is room for ADR in climate change disputes, it is necessary to identify three specific ways in which ADR has a role to play - as an *alternative* to litigation, as a *supportive* mechanism, or as a *transformative* agent.

(1) ADR as an alternative to litigation

Adjudicative ADR (arbitration) can serve as a genuine alternative or substitute where court litigation is unavailable or undesirable but parties require a legal solution.

Recourse to courts may be unavailable or undesirable for a variety of reasons. Parties may fail to meet requirements as to standing, making it more challenging to establish standing in climate change disputes because of the difficulty in demonstrating sufficient connection to harm.[27] Alternatively, parties may not be comfortable with bringing their disputes to court because of actual or perceived partiality, as discussed above. Yet another factor against court dispute resolution is lack of judicial expertise with regard to complex climate change science.[28] This can be a significant deterrent, as may be seen from the cautionary tale of the Environmental Chamber (Chamber) of the International Court of Justice. The Chamber was established to hear environmental cases in 1993. It was abolished in 2006 without having determined a single case. The Chamber's under-utilisation has been partially attributed to how parties could not choose the judges, so that there was no guarantee of proficiency *vis-à-vis* scientific and technical issues.[29]

> "… [T]he complexity of climate change disputes means there is no way to conclude categorically that court litigation is always best. … [There are] three specific ways in which ADR has a role to play - as an *alternative* to litigation, as a *supportive* mechanism, or as a *transformative* agent."

Where court proceedings are not an option, arbitration is a viable alternative. The advantages of arbitration are manifold.[30] Since these have been comprehensively discussed elsewhere,[31] this section addresses three perceived problems which demonstrate how arbitration should not be ruled out as an alternative.

(a) Jurisdiction

Because arbitration is consensual, there is little hope of arbitrating with a non-consenting party. Consent is, however, no hurdle where there is a pre-existing arbitration agreement

(in this regard, ADR is already frequently adopted in commercial contracts concerning energy, land use, urban development, infrastructure and industry).[32] Where there is no pre-existing agreement, however, it is up to the prospective respondent to agree to arbitrate. Yet, there is some cause for optimism that prospective respondents will see benefits to arbitrating climate change disputes. These include (1) prevention of multiple proceedings by agreeing to arbitrate with claimants collectively, (2) risk minimisation by opting for the 'known quantity' of international arbitration, and (3) reputational benefits from coming across as reasonable corporate citizens ready to shoulder responsibility if held liable.[33]

"… [T]here is some cause for optimism that prospective respondents will see benefits to arbitrating climate change disputes. These include (1) prevention of multiple proceedings by agreeing to arbitrate with claimants collectively, (2) risk minimisation by opting for the 'known quantity' of international arbitration, and (3) reputational benefits from coming across as reasonable corporate citizens ready to shoulder responsibility if held liable."

(b) Transparency and public participation

Confidentiality is for the parties' benefit and may be waived, such as by agreeing to open hearings or publication of the award. In this regard, the promulgation of the Hague Rules on Business and Human Rights Arbitration 2019 (BHR Rules) has made it easier for parties to adopt transparent procedures. The BHR Rules contain extensive provisions addressing transparency and public participation modelled on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014. Documents are made available by default.[34] Hearings are generally public.[35] Provision is made for non-party participation,[36] with the arbitral tribunal being empowered to accept non-parties' written submissions even if arbitrating parties disagree.[37]

(c) Costs

Given that costs are routinely identified as the worst feature of arbitration,[38] one might assume that high expenses are a practical obstacle to arbitration. Before jumping to conclusions, however, the following counter-arguments should be considered.

(1) Litigation costs vary significantly by jurisdiction, with features of the legal environment (eg, common law versus civil law, extent of discovery obligations) being relevant to costs.[39] In that light, arbitration may not always come off worse, especially considering how parties have a hand in crafting arbitral procedure (hence the efficiency of proceedings or the incurral of costs) through their choice of tribunal, *lex arbitri* and institutional rules.

(2) Costs depend also on the principle of costs allocation that is applied, such as 'costs follow the event' or 'pay your own way'.[40] Compared to litigation, parties likewise have a greater say in arbitration as to the applicable principles.

(3) While legal aid may be available for domestic suits, the liberalisation of third-party funding regimes for arbitration in leading arbitral seats such as Hong Kong and Singapore[41] offers possibilities for arbitration funding too. In light of these, cost considerations alone should not foreclose the choice of arbitration.

It is recognised that non-arbitrability of subject-matter[42] can limit the use of arbitration in climate change disputes. Regardless, not every case implicates non-arbitrable subject-matter: in fact, 'indirect' climate change cases are highly unlikely to do so. Thus, for many climate change disputes, arbitration remains a viable alternative.

(2) ADR's supportive role

Facilitative and non-mandated ADR (mediation) serves as a useful complement[43] to litigation.

Under the 'multi-door courthouse' approach, ADR services are offered alongside judicial ones.[44] A prominent example is the New Zealand Environment Court (EC) constituted under the Resource Management Act 1991 (RMA). Under s 268 of the RMA, at any time after proceedings are lodged, the EC may "for the purpose of facilitating the resolution of any matter ask a member of the [EC] or another person to conduct an ADR process", including mediation.[45] Through the EC's "pragmatic approach to ADR", about 75% of the EC's cases are resolved without litigation.[46]

> "Confidentiality is for the parties' benefit and may be waived, such as by agreeing to open hearings or publication of the award. In this regard, … the Hague Rules on Business and Human Rights Arbitration 2019 … [have] made it easier for parties to adopt transparent procedures ... [as they] contain extensive provisions addressing transparency and public participation …"

The benefits of an integrated approach to litigation and ADR are manifold.[47] The early use of non-adjudicative forms of ADR can save time and costs. Mediation also permits parties to devise 'win-win' solutions outside of the usual judicial remedies, in a way that promotes ownership over the dispute and its outcome, and preserves the parties' relationships. Even where disputes cannot be entirely resolved, mediation can narrow the issue for judicial attention and encourage parties to assess their options realistically.[48]

> "… [T]he liberalisation of third-party funding regimes for arbitration in leading arbitral seats such as Hong Kong and Singapore offers possibilities for arbitration funding too. In light of these, cost considerations alone should not foreclose the choice of arbitration."

Admittedly, mediation is *not always* appropriate. A clear instance in which it cannot deliver is where parties seek a binding legal precedent. Another situation is where the dispute arises from incompatible fundamental values, such that meaningful compromise becomes impossible.[49] Again, however, leaving aside these categories of case, parties can benefit from harnessing the synergies of litigation and mediation for more holistic and satisfactory dispute resolution.

(3) ADR's transformative potential

Finally, ADR can play a transformative role to broaden and deepen the prevailing climate change discourse, by moving away from the strict dichotomy of commercial or contractual rights on the one hand and environmental issues on the other, so as to acknowledge the reality of interconnectedness instead.

The role of the private sector in climate change mitigation has moved "from marginal to central"; the sheer size of corporations and the magnitude of capital and investment flows means that priorities established and initiatives implemented by private actors can have decisive impacts.[50] It cannot suffice to disclaim responsibility by asserting the pursuit of 'private' goals as distinct from the furtherance of 'public' agenda items like climate change.

To that end, through ADR a new legal counter-narrative of interconnected rights and obligations can be developed. Arbitral jurisprudence can be developed in a climate-conscious way by referencing environmental considerations as appropriate. Techniques include discussing industry best practices as part of the *lex mercatoria*,[51] or referencing domestic environmental legislation as a limit on what are 'lawful investments' (an approach upheld in a recent challenge[52]). In mediation, greater attention may be paid to 'unrepresented interests' such as the environment.[53] Responsibility falls on the mediator, as the architect of the process, to encourage fuller consideration by parties of the true extent of the climate change repercussions at issue.

This is not to say that individual arbitrators or mediators have a moral responsibility to decide in a 'pro-environment' way. Rather, their responsibility lies in "promoting the reasoned discourse that sows the seeds for increasingly rational responses".[541] In this way, ADR facilitates incremental building of momentum in support of climate change action.

Conclusion

Climate change is a "wicked problem", involving great scientific and economic complexity, pervasive uncertainty and profound ethical issues.[55] Multi-pronged creative solutions are necessary, which is precisely what ADR offers. Accordingly, the answer to whether there is room for ADR in climate change disputes is a resounding "yes". [561]

"Multi-pronged creative solutions are necessary, which is precisely what ADR offers. Accordingly, the answer to whether there is room for ADR in climate change disputes is a resounding "yes"."

* This article is written in the author's personal capacity. The opinions expressed are entirely the author's own and do not reflect the views of the Attorney-General's Chambers of Singapore.

1 ICC Arbitration and ADR Commission, *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (2019) (ICC Report), para 2.1, available at https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/.

2 J Setzer & R Byrnes, *Global trends in climate change litigation: 2020 snapshot*, Grantham Research Institute on Climate Change and the Environment (2020) (Grantham Report), p 1.

3 *Shell ordered to slash carbon emissions in landmark Dutch ruling*, The Straits Times (27 May 2021). See also *State of the Netherlands v Urgenda Foundation* (2019), in which the Netherlands Supreme Court held that the Dutch government was obliged to reduce carbon emissions by at least 25% by 2020 compared with 1990 levels: Civil Division No 19/00135 (20 December 2019), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (accessed 22 May 2021). (Unless otherwise stated, all online articles referred to below were accessed on this date.)

4 N Autet *et al*, *The Case of the Century: The French Administrative Court issues a groundbreaking ruling on state responsibility for climate change*, Gibson Dunn (26 February 2021), available at https://www.gibsondunn.com/the-case-of-the-century-the-french-administrative-court-issues-a-groundbreaking-ruling-on-state-responsibility-for-climate-change/.

5 *Ibid*.

6 CM Baker, H Stebbing & C Dowling, *Climate-related disputes: Adaptation and innovation*, Norton Rose Fulbright International Arbitration Report (October 2018), p 14.

7 L Elborough, *International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change* (2017) 21 New Zealand Journal of Environmental Law 89-132, at 125 (Elborough).

8 F Bonke, *Tuesday for Future - Arbitration and Climate Change: DIS40 Autumn Conference*, Kluwer Arbitration Blog (2 October 2019) (Bonke), available at http://arbitrationblog.kluwerarbitration.com/2019/10/02/tuesday-for-future-arbitration-and-climate-change-dis40-autumn-conference/?doing_wp_cron=1576593707.7617468833923339843750.

9 See also R de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time* (2017) 8 Journal of International Dispute Settlement 179-215, at 188 (de Paor).

10 Case No 2 O 285/15, Essen Regional Court, available at http://climatecasechart.com/climate-change-litigation/non-us-case/lliuya-v-rwe-ag/.

11 *Rockhopper Exploration Plc et al v Republic of Italy*, ICSID Case No ARB/17/14 (extant).

12 J Levine & N Swan, 'Climate Change Dispute Options', in MJ Moser & C Bao (Eds), *Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions* (2021, Kluwer Law International), p 330 (Levine).

13 International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (2001, UN General Assembly, A/RES/62/61), art 23.

14 See disputes concerning resources cited in Bonke (note 8 above): eg, *Iron Rhine Arbitration (Belgium v Netherlands)*, Award of 24 May 2005; *Indus Waters Kishenganga (Pakistan v India)*, Award of 20 December 2013.

15 Grantham Report (note 2 above), p 19.

16 J Harder, *Environmental Mediation: The Promise and the Challenge* (1995) 19 Environmental Law and Policy Journal 29-43, at 30.

17 To consider just one example, even the archetypical 'concerned individuals' are not a homogenous group. Some may predominantly seek individual redress, such as compensation or an apology. Others may seek to drive broader change, whether by nudging governments toward more ambitious climate change mitigation targets or pursuing the repeal of legislation. Yet others commence proceedings for purely strategic reasons, such as delay tactics to render time-sensitive issues moot.

18 M Hawkins, *Local Government Mediation - The Ugly Duckling of RMA Resolution* (2016) 20 New Zealand Journal of Environmental Law 239-277, at 247–248 (Hawkins); E Davies, *Recommendations for Effectively Resolving Climate Change Disputes against Investors* (2020) 1 Carbon & Climate Law Review 49-55, at 50; T Foley, *Non-Adversarial Resolution of Environmental Disputes Mediation in the Land and Environment Court of New South Wales: A Case Study* (1999) 8 Griffith Law Review 333-349, at 344.

19 A Knaster, *Resolving Conflicts Over Climate Change Solutions: Making the Case for Mediation* (2010) 10 Pepperdine Dispute Resolution Law Journal 465-521, at 479.

20 D Michaels & C Monforton, *Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment* (2005) 95 American Journal of Public Health Supplement 1, S39-S48, at S40.

21 Harder (note 16 above), p 30.

22 For example, parties sometimes agree to the publication of awards without redaction, or the unsealing of the relevant court case file in setting aside or enforcement proceedings.

23 BJ Preston, *Characteristics of successful environmental courts and tribunals* (2014) 26 Journal of Environmental Law 365-393 (loose-leaf version at 9) (Preston).

24 *Ibid*, at 4.

25 Lord Harry Woolf *et al*, *De Smith's Judicial Review* (8th Edn, 2018, Sweet & Maxwell), para 1-044.

26 Principally, failure to take climate obligations into account as relevant considerations: *R (on the application of Plan B Earth Ltd) v Secretary of State for Transport and others* [2020] UKSC 52 (UK Supreme Court).

27 International Bar Association (IBA), Climate Change Justice and Human Rights Task Force Report (July 2014), *Achieving Justice and Human Rights in an Era of Climate Disruption*, p 68 (IBA Report).

28 Although this might be alleviated by recourse to specially constituted environmental courts, defendants may view such tribunals "with suspicion as being excessively pro-environment, similar to how the WTO is often accused of being excessively pro-trade": de Paor (note 9 above), p 199.

29 IBA Report (note 27 above) at pp 84–85.

30 *For example,* ability to appoint arbitrators with climate change expertise, and factors promoting procedural flexibility and efficiency (such as the appointment of emergency arbitrators and the issuance of multiple partial awards to deal with time-sensitive matters): IBA Report (note 27 above), Part V; T Cummins, T Karalis & L McKenzie, *Making the most of Arbitration to resolve Green Technology Disputes*, *Ashurst International Arbitration Update* (4 February 2020), available at https://www.ashurst.com/en/news-and-insights/legal-updates/making-the-most-of-arbitration-to-resolve-green-technology-disputes/.

31 IBA Report (note 27 above).

32 ICC Commission Report (note 1 above), para 5.1.

33 *Ibid*, para 5.82.

34 BHR Rules, art 40.

35 *Ibid*, art 41.

36 There is no restriction on the types of non-party that may be involved, with States, public interest groups and other interested parties all having the potential to be heard.

37 Article 28 of the BHR Rules permits the tribunal to call for submissions "[a]fter consultation with the parties", which suggests that parties do not have a veto.

38 Queen Mary University of London and White & Case, *2018 International Arbitration Survey: Evolution of International Arbitration*, p 2. See also the *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*. The *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* did not, however, pose the same question to participants.

39 US Chamber Institute for Legal Reform, *International Comparisons of Litigation Costs Canada, Europe, Japan, and the United States* (June 2013) at p 5, available at https://instituteforlegalreform.com/wp-content/uploads/media/ILR_NERA_Study_International_Liability_Costs-update.pdf; SA Cueto, *International Litigation Costs: A Comparative Study*, Cueto Law Group (4 June 2013), available at http://internationalbusinesslawadvisor.com/international-litigation/.

40 SD Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (2019, Oxford University Press), p 184.

41 LS Chan, *Third-Party Funding - Taking Stock*, Singapore Law Gazette (November 2018), available at https://lawgazette.com.sg/feature/third-party-funding-taking-stock/.

42 For example, adjudication on breach of constitutional rights. See *Alexander v Gardner-Denver Co*, 415 US 36 (1974) at 58 ("the resolution of statutory or constitutional issues is a primary responsibility of courts").

43 Harder (note 16 above), p 30; S Higgs, *The Potential for Mediation to Resolve Environmental and Natural Resources Disputes* (2007) 1 American Journal of Meditation 101, at 124.

44 Preston (note 23 above), p 20.

45 RMA s 268(4).

46 Hawkins (note 18 above), p 256.

47 Preston (note 23 above), p 20.

48 C Voigt, *Environmental Mediation and the Resource Management Act 1991 Resolving Resource Management Problems or Compromising the Environment?* (2002) 8 Auckland University Law Review 912-949, at 924.

49 D J Amy, *The Politics of Environmental Mediation* (1983) 11 Ecology Law Quarterly 1-19, at 15–16.

50 A Magnusson, 'New Arbitration Frontiers: Climate Change', in JE Kalicki & MA Raouf (Eds), *Evolution and Adaptation: The Future of International Arbitration* (2019, Kluwer Law International) p 1027.

51 ICC Commission Report (note 1 above), para 5.64.

52 *Cortec Mining Kenya Ltd, Cortec (Pty) Ltd and Stirling Capital Ltd v Republic of Kenya*, ICSID Case No ARB/15/29, Award (22 October 2018) at [333]. Upheld in the Decision on Application for Annulment of 19 March 2021 at [144] (reading an implicit legality requirement into the bilateral investment treaty was not "so untenable that it cannot be supported by reasonable arguments" as to amount to a manifest excess of powers).

53 R Lyster, *Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking* (1998) 20 Sydney Law Review 579-598, at 591.

54 Preston (note 23 above), at p 23.

55 *A Wicked Problem: Controlling Global Climate Change*, World Bank (30 September 2014), available at https://www.worldbank.org/en/news/feature/2014/09/30/a-wicked-problem-controlling-global-climate-change.

Resolving Climate Change-Related Disputes Through Alternative Modes of Dispute Resolution

Reynold Orsua

This article discusses dispute resolution mechanisms and their pros and cons as an integral and 'interconnected' element in the wider suite of initiatives - both international and domestic - aimed at tackling global climate change. These include not only 'pure' climate change regulatory mechanisms but also provisions in, for example, bilateral investment treaties. The article is the second of two winning essays on climate change-related dispute resolution originally submitted to the inaugural 2021 Essay Competition of HK45, HKIAC's young arbitration practitioners group.

Introduction

In his Address to the 66th United Nations (UN) General Assembly in 2011, former UN Secretary General Ban Ki-moon stated that -

> "[w]e must connect the dots between climate change, water scarcity, energy shortages, global health, food security and women's empowerment. Solutions to one problem must be solutions for all."[1]

This statement encapsulates the 'interconnected' nature of the issue of climate change as it relates to other social issues. A co-related factor is the undeniable necessity of devising concrete actions and interdisciplinary approaches to address this issue. The continuing threat of climate change and its associated risks necessitates rapid transitions in activities having an environmental impact in order to contribute to the reduction of global temperatures by cutting down greenhouse gas emissions. This involves (*inter alia*) promoting renewable

energy systems, achieving energy efficiency in business, industries and households, and the strict implementation of environmental regulations. Responsibility for addressing climate change must trickle down from State level to all key stakeholders in order to achieve the climate change goal set by the Paris Agreement 2015: to limit the increase in global temperature to below two degrees Celsius by comparison with pre-industrial levels through "nationally determined voluntary contributions" of State parties.

Based on the *2018 Global Sustainable Investment Review*, sustainable investments in the major markets stood at US$30.7 trillion globally at the start of 2018, a 34% increase in two years.[2] Furthermore, even general investments and activities having environmental impacts are increasingly subjected to environmental regulations in a variety of jurisdictions that have enacted domestic laws to comply with their commitment under the Paris Agreement. The transition is also expected to have an impact on general commercial contracts in the sectors of energy, infrastructure, transport, agriculture and other land use and food production, as well as industry, including manufacturing and processing.[3] The Grantham Research Institute on Climate Change and the Environment reports that 2,252 climate laws and policies have been adopted so far by States and regional groupings worldwide.[4] These include laws providing incentives for renewable energy production in the form of feed-in tariffs and which regulate air and water quality and land use. These laws and policies can also require compliance with environmental standards that affect businesses and contracts.

With regard to investor-State dispute settlement, the inclusion of environmental language in international investment agreements, both bilateral and multilateral, is also gaining traction. The most progressive example of this is the Bilateral Investment Treaty (BIT) between Morocco and Nigeria,[5] which makes express reference to the right of State parties to regulate and introduce new measures relating to investments in their respective territories in order to address environmental concerns. The model BITs of the United States[6] and the Netherlands[7] likewise make reference to the reservation of regulatory rights of host States, showing an increasing awareness of the importance of environmental protection in international investments.

> "In investment treaties, the inclusion of environmental language in international investment agreements, both bilateral and multilateral, is … gaining traction … [and] show[s] an increasing awareness of the importance of environmental protection in international investments."

Dispute resolution mechanisms and climate change-related disputes

In light of increasing awareness of and efforts expended toward addressing climate change, appropriate dispute resolution mechanisms to resolve cases that may arise both from these initiatives and from activities related to the climate change agenda must inevitably be considered. In this regard, the ICC Commission on Arbitration and ADR Report[8] has identified the following sources from which climate change-related disputes may arise:

(1) contracts relating to the implementation of energy or other systems transition, mitigation or adaptation measures, in line with commitments under the Paris Agreement;
(2) contracts without any specific climate-related purpose or subject-matter, but under which a dispute involves or gives rise to a climate or related environmental issue; and
(3) submission or other specific agreements entered into to resolve existing climate change or related environmental disputes potentially involving impacted groups or populations.[9]

> "In light of increasing awareness of and efforts expended toward addressing climate change, appropriate dispute resolution mechanisms to resolve cases that may arise both from these initiatives and from activities related to the climate change agenda must inevitably be considered."

Admittedly, disputes arising under commercial contracts and investment treaty obligations are not the only possible forms of 'climate change-related dispute', since this term should be broadly interpreted and understood. It therefore includes cases that may arise from the violation of domestic laws and regulations intended to address climate change, and their co-relative State-level criminal and civil penalties against persons, both natural and juridical. These cases will still have to go through the respective litigation systems of each State. Questions on the validity and constitutionality of certain governmental actions, even in relation to commercial contracts, can only be resolved through court litigation, given that nullification of public laws and regulations is within the exclusive jurisdiction of State courts.

These types of climate change-related dispute should not, however, diminish the promise of alternative modes of dispute resolution in relation to commercial contracts, both international and domestic, which are the more prevalent sources of disputes. Alternative dispute resolution (ADR) may be the most acceptable and practical mechanism for resolving climate change-related disputes between parties who have shown a preference for a process *in lieu* of litigation. There is, therefore, greater reason for promoting ADR in resolving such disputes, particularly those arising under investment and cross-border commercial contracts.

In summary, the foregoing discussion confirms three main points with regard to climate change-related disputes.

(1) Climate change is a multi-faceted issue that remains a pressing concern for States. As such, there is also a global expectation that States will contribute to addressing it.

(2) Increasing awareness of the necessity of addressing climate change is expected to bring about (i) an upward trend in green investments and commercial contracts intended to comply with State commitments under the Paris Agreement, and (ii) an increase in the regulation of industries and activities having environmental and climate change impacts.

(3) Climate change-related disputes will most likely stem from those investments and contracts having the greatest impacts, thus advancing climate change alleviation efforts, in addition to promoting domestic legal enforcement of laws and policies that are reserved exclusively to litigation, albeit within in a narrower scope.

> "[The term] 'climate change-related dispute' … should be broadly interpreted and understood. It therefore includes cases that may arise from the violation of domestic laws and regulations intended to address climate change, and their co-relative State-level criminal and civil penalties against persons, both natural and juridical."

While litigation remains a mode of resolving specific types of climate change-related dispute, including those cases enumerated by the ICC Commission Report, it may not be

acceptable for many parties since it is incorporated within a national framework. This becomes an issue if one of the parties is a national, a domestic corporation or the State itself in the place where the litigation is conducted. In addition to the issue of possible partiality, delays in litigation and the lack of expertise of national judges in technical and commercial matters, particularly in emerging economies, may also be reasons why parties shy away from litigation.

"In addition to the issue of possible partiality, delays in litigation and the lack of expertise of national judges in technical and commercial matters, particularly in emerging economies, may also be reasons why parties shy away from litigation."

In any event, alternative modes of dispute resolution arguably fare worse than litigation in creating norm-setting pronouncements that may apply even to non-parties in cases falling within a specific national framework. The best example of this is the *Urgenda* case, in which the Netherlands Supreme Court ruled that the Dutch government was obliged to take measures to prevent climate change and to reduce its greenhouse gas emissions.[10] However, even the judgment of a court in a case such as this still necessitates the adoption of specific strategies, such as encouraging investments and commercial activities that could result in types of climate change-related dispute being better addressed by ADR. In other words, the promise of litigation in relation to climate change-related disputes remains at a more ideal- and policy-based level when compared with the real and practical impact of ADR mechanisms. There is, therefore, sufficient room for ADR in resolving a wide range of climate change-related disputes.

"… [T]he promise of litigation in relation to climate change-related disputes remains at a more ideal- and policy-based level when compared with the real and practical impact of ADR mechanisms. There is, therefore, sufficient room for ADR in resolving a wide range of climate change-related disputes."

Arbitration

In particular, arbitration as a private form of litigation remains a preferred mode of ADR worldwide. This mode has enjoyed increasing global acceptance and preference among States and private entities, particularly in cross-border matters. As early as 2015, the International Bar Association (IBA) Subcommittee on Arbitration reported that there had been a rise in the use of arbitration as a dispute resolution mechanism in all regions.[11] More recently, the *2021 International Arbitration Survey*[12] has shown that international arbitration remains the preferred mode of dispute resolution, either on a stand-alone basis or in conjunction with other alternative modes of dispute resolution. In relation to sectors or industries that may be the source of climate change-related disputes, the ICC Commission on Arbitration and ADR Report stated in 2019 that arbitration and ADR are well-established in resolving environmental disputes and that, since 2007, an average of three new environmental protection cases per year had been registered with the ICC, with up to six in some years.[13] It is also mentions that other arbitral institutions had published similar statistics.[14] Further, insofar as international investment agreements are concerned, the OECD Working Papers on International Investment 2012/02 reported that international arbitration had become a common feature of investment treaties, with only 6.5% of the

treaties in their sample not having provided for international arbitration.[15] It is likewise expected that this level of popularity and acceptance will be replicated at the domestic level, owing to the promise and advantages of arbitration *per se*, particularly in developing countries with uncertain litigation frameworks.

The worldwide acceptability of arbitration as a mode of dispute resolution is mainly due to its flexibility. Parties are free to choose their arbitrators and may also opt to appoint experts in a specific climate change-related field. In this regard, the Permanent Court of Arbitration maintains a list of environmental experts from which parties may choose their arbitrators.[16] This may not be the case in litigation, where judges are mainly 'generalists' and so may need training or the help of a neutral expert to understand technical matters and issues in order to resolve these cases properly. The flexibility of arbitration also extends to the ability of the parties to choose (*inter alia*) the seat, the procedure to be applied and the governing law(s).

> "In relation to sectors or industries that may be the source of climate change-related disputes, the ICC Commission Report stated in 2019 that arbitration and ADR are well-established in resolving environmental disputes …"

Notably, arbitral institutions have also considered the increasing number of environment-related disputes and are working to maximise the availability of arbitration in resolving them. It should be noted that arbitration has a reputation for providing neutral arbitrators who are insulated from political pressure when compared with judges, who work within a governmental framework.

> "Parties are free to choose their arbitrators and may also opt to appoint experts in a specific climate change-related field. … This may not be the case in litigation, where judges are mainly 'generalists' and so may require training or the help of a neutral expert to understand technical matters and issues in order to resolve these cases properly."

Arbitration generally seeks the prompt resolution of disputes by comparison with litigation, which may take more time as a result of procedural requirements and congested court dockets, particularly in developing countries. Arbitration likewise provides for urgent relief by way of interim measures of protection and emergency arbitration, which can address the need for time-sensitive resolution of a matter in a climate change-related dispute. Finally, it should be emphasised that foreign arbitral awards obtain recognition and enforcement in the 169 jurisdictions that have so far acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This remains the most widely accepted instrument of its kind by comparison with the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019.

Mediation

Mediation is also an alternative but non-judicial mode of dispute resolution that can be utilised in addressing climate change-related disputes. It can be a more flexible mode of resolving such disputes. Parties may opt to appoint a mediator who is an expert on the specific matter involved in the dispute

in order better to facilitate a mutually acceptable settlement agreement between and among the parties involved. The biggest obstacle, however, remains the willingness of parties to undergo this process, since they would most likely opt not to compromise once a dispute has arisen.

> "Mediation … can be a more flexible mode of resolving such disputes. The biggest obstacle [to it], however, remains the willingness of parties to undergo this process, since they would most likely opt not to compromise once a dispute has arisen."

Mediation can be included, along with arbitration, as part of a multi-tiered dispute resolution mechanism. Currently, parties remain likely to submit mediated settlement agreements to an arbitral tribunal in order to enforce them as arbitral awards. This is primarily because awards are more widely recognised and enforced under the New York Convention, as previously discussed. This is, however, a matter which the Singapore Mediation Convention 2018 seeks to address by providing for the direct enforceability of mediated settlement agreements along broadly similar lines to awards.[17]

The suitability of ADR

All this is not to say, however, that ADR is a panacea for all climate change-related disputes. It is recognised that costs and delays have sometimes been considered to be factors militating against arbitration, particularly when pitted against the litigation systems of developed nations. Furthermore, the confidentiality of arbitral and mediation proceedings has also been used to demonstrate lack of transparency compared with the publicised decisions of courts in litigation. This feature may, however, be viewed in a different perspective because it is in fact one of the reasons why parties prefer to arbitrate and mediate - that is, to control public disclosures. The applicability of and general preference of parties for ADR in commercial and investment contracts - particularly in the fields of energy, infrastructure, land use and the various industries in which climate change-related disputes would most likely arise - should be utilised and promoted.

Conclusion

The foregoing discussion shows the promise of ADR in addressing climate change-related disputes. While litigation has its own advantages and disadvantages, the use of ADR should be maximised, particularly in areas in which it is currently widely accepted. Efforts should be made to promote and enhance its acceptability with the aim of efficiently and effectively resolving such disputes.

> "While litigation has its own advantages and disadvantages, the use of ADR should be maximised, particularly in areas in which it is currently widely accepted. Efforts should be made to promote and enhance its acceptability with the aim of efficiently and effectively resolving such disputes."

1 *We the Peoples*, 21 September 2011, available at https://www.un.org/sg/en/content/sg/speeches/2011-09-21/address-66th-general-assembly-we-peoples.

2 *2018 Global Sustainable Investment Review* by the Global Sustainable Investment Alliance (GSIA), p 3, available at http://www.gsi-alliance.org/wp content/uploads/2019/06/GSIR_Review2018F.pdf.

3 ICC Commission on Arbitration and ADR Report, *Resolving Climate Change Related Disputes through Arbitration and ADR* (ICC Commission Report), p 9, available at https://iccwbo.org/content/

uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.

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7 Netherlands Draft Model BIT; available at https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

8 Note 3 above.

9 *Ibid*, p 8.

10 *State of the Netherlands v Urgenda Foundation*, Case No 19/00135 (20 December 2019), available at https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Dutch-State-to-reduce-greenhouse-gas-emissions-by-25-by-the-end-of-2020.aspx.

11 IBA Arb40 Subcommittee, *The Current State and Future of International Arbitration: Regional Perspectives*, p 9 (September 2015), available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=2102CA46-3D4A-48E5-AA20-3F784BE214CA.

12 Queen Mary University of London and White & Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

13 ICC Commission Report (note 3 above), p 16.

14 *Ibid*.

15 Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, OECD Working Papers on International Investment 2012/02, *Dispute Settlement Provisions in International Investment Agreements*, p 11, available at https://www.oecd.org/daf/inv/investment-policy/wp-2012_2.pdf.

16 List of Specialized Panel of Arbitrators of the Permanent Court of Arbitration, available at https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-environmental-disputes/.

17 United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation 2018 (effective 12 September 2020).

The Seat of Arbitration: The Development of this Concept in Mainland China

Yang Ling

This article describes the gradual development of the concept of the seat of arbitration in Mainland China, from initial non-recognition by the courts, to its implied application in judicial practice and government policies, to its explicit acceptance in the current (2021) Draft Amendment to the Chinese Arbitration Law 1994.

Introduction

On 30 July 2021, the Ministry of Justice (MoJ) of the People's Republic of China (PRC) released a Draft Amendment to the Chinese Arbitration Law 1994 (the Draft Amendment) for public consultation.[1] If enacted, it signals that the concept of the seat of arbitration will be formally introduced in Chinese arbitration legislation, providing solid legislative support to its judicial application and further aligning it with internationally recognised standards and practices.

Non-recognition of the seat of arbitration under the current Arbitration Law

Although the international arbitration community generally agrees that the nationality of arbitral awards should be based on the seat of arbitration, the current Chinese Arbitration Law 1994 (Arbitration Law) and judicial practice have for a long time applied a test based on the *place of the arbitration commission* rather than the seat.

Article 16 of the Arbitration Law stipulates that a valid arbitration agreement shall contain a reference to a designated arbitration commission. Accordingly, in the landmark *Züblin* case (2004), an arbitration clause which provided that "[a]rbitration: [International Chamber of Commerce] ("ICC") Rules, Shanghai shall apply" was held by the PRC Supreme People's Court (SPC) to be invalid on the ground that the clause did not specify a proper arbitral institution under Chinese law.[2]

> "If enacted, … [the Draft Amendment] signals that the concept of the seat of arbitration will be formally introduced in Chinese arbitration legislation, providing solid legislative support to its judicial application and further aligning it with internationally recognised standards and practices."

Furthermore, art 57 of the Arbitration Law provides that "[a] party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located." Articles 237 and 273 of the PRC Civil Procedure Law 1991, as amended in 2017 (the Civil Procedure Law) provide that a party may apply to a competent People's Court for the enforcement of an arbitral award made by a domestic or foreign-related arbitration commission. However, no provision is made as to the competent court in relation to the setting aside of an award made in an arbitration administered by a foreign arbitral institution.

In addition, art 18 of the PRC Law on the Application of Laws to Foreign-Related Civil Relationships 2010 provides that "the laws [of the place] in which the arbitration commission is located or the law of the seat of arbitration shall apply" where the parties have not chosen by agreement the law applicable to the arbitration agreement.

It appears from the most relevant laws on arbitration in Mainland China listed above that the location of an arbitral institution carries the preponderance of weight, compared with the seat of arbitration.

Progressive recognition of the seat by the PRC judiciary

In recent decades, however, the seat of arbitration has been increasingly recognised by the Chinese judiciary, particularly the SPC.

To begin with, the way in which the arrangements for mutual enforcement of awards between Mainland China and Hong Kong have evolved serves as a good example. From 1995 to 2009, the institutional test of the place of arbitration was dominant both in law and in the SPC's practice. In 1999, the SPC signed an arrangement for the mutual enforcement of arbitral awards between Mainland China and Hong Kong (the Enforcement Arrangement 1999).[3] While a 'Hong Kong award' under this Arrangement refers to an award made in Hong Kong in accordance with the Hong Kong Arbitration Ordinance (Cap 609), a 'Mainland award' is defined as an award made by a Mainland arbitral institution, a list of which shall be provided by the State Council. The most well-known case of a Mainland court's decision under the Enforcement Arrangement 1999 was handed down in 2004. In its reply to the Shanxi High People's Court in a case concerning an award made by an ICC tribunal in Hong Kong, the SPC held that the nationality of the award was French, on the ground that the ICC was an arbitral institution established in France.[4]

> "In recent decades, … the seat of arbitration has been increasingly recognised by the Chinese judiciary, particularly the SPC. … Although Mainland China is not a case law precedent-based jurisdiction, decisions of the SPC are persuasive for lower courts."

The position changed significantly in 2009. A Notice issued by the SPC on *Issues Concerning the Enforcement of Hong Kong Arbitral Awards in Mainland China* confirmed that awards made in Hong Kong by overseas institutions, such as the ICC, were to be regarded as Hong Kong awards rather than French awards and were to be subject to the Enforcement Arrangement 1999.[5] This clearly indicates the application of the seat test. A Supplementary Arrangement to the Enforcement Arrangement 1999 was promulgated in November 2020. This makes further changes to the original Arrangement by defining 'Mainland awards' as those made in accordance with the Arbitration Law and no longer applies the institutional test.[6]

> "A Supplementary Arrangement to the Enforcement Arrangement 1999 … promulgated in November 2020 … makes further changes to the original Arrangement by defining 'Mainland awards' as those made in accordance with the Arbitration Law and no longer applies the institutional test."

Further, leading cases provide another prism through which to observe jurisprudential developments on the seat of arbitration in Mainland China. Although Mainland China is not a case law precedent-based jurisdiction, decisions of the SPC are persuasive in lower courts.

In *Degao Steel* (2009), the disputed award was made in Beijing by an ICC tribunal.[7] The Ningbo Intermediate People's Court held that the award was a "non-domestic award" under the New York Convention 1958, in essence rejecting the concept of the seat of arbitration. It is worth noting, however, that the ruling could not be regarded as representing the SPC's view, since it was never referred to the SPC under the Mainland's pre-reporting arrangements for the enforcement of awards.

> "… [The] *Longlide* [case] (2013) … was the first time that the SPC had ever confirmed as valid an arbitration agreement which subjected parties to case administration by an overseas arbitral institution but specified the seat of arbitration to be a Mainland Chinese city."

In *Longlide* (2013), the arbitration agreement stipulated that the dispute was to be submitted to the ICC and arbitrated in Shanghai.[8] The SPC held that the parties had selected a specific arbitral institution, so that, in accordance with art 16 of the Arbitration Law, the arbitration agreement was valid. This was the first time that the SPC had ever confirmed as valid an arbitration agreement which subjected parties to case administration by an overseas arbitral institution but specified the seat of arbitration to be a Mainland Chinese city.

In *Daesung Industrial* (2020), the arbitration clause provided that the dispute was to be arbitrated by a Singapore International Arbitration Centre (SIAC) tribunal in Shanghai.[9] The Shanghai No 1 Intermediate People's Court held that the arbitration clause was valid, on the ground that the parties had selected a specific arbitral institution in accordance with the Arbitration Law. This was the second case in which the SPC confirmed the validity of an arbitration agreement specifying a Mainland Chinese city as the seat, but with the arbitration administered by an overseas arbitral institution.

In *Brentwood* (2020), the seat of arbitration approach was adopted by the SPC for the first time to determine the nationality of the award. In this case, the parties agreed that disputes were to be referred to the ICC and arbitrated at the place of the project (ie, Guangzhou).[10] The Guangzhou Intermediate People's Court held that (1) an arbitral award made under the auspices of a foreign arbitral institution in Mainland China may be regarded as a Chinese foreign-related arbitral award rather than a French award, and (2) in accordance with art 273 of the Civil Procedure Law, a party may apply for its enforcement to the Intermediate People's Court either (i) at the place of the respondent's residence, or (ii) where the respondent's property is located.

All of the latter three cases discussed above were reported to and the validity of their subject arbitration agreements recognised by the SPC. *Longlide* and *Dacheng Industrial* confirmed the validity of arbitration agreements that subject parties to arbitration in Mainland China administered by overseas arbitral institutions, while *Brentwood* provided further guidance for determining the nationality of arbitral awards and the legal basis for their enforcement.

> "… [T]he policies … [and] the opinions of the SPC discussed above … did not and could not, in and of themselves, change any current law or the SPC's practice relating to the seat of arbitration."

The Chinese government 's attitude to foreign arbitral institutions

During the past five years, the Chinese government has issued several policy decisions in Shanghai, Beijing, and Hainan to support overseas arbitral institutions in conducting business in Mainland China. Accordingly, the SPC has issued opinions supporting the establishment of representative offices by overseas arbitral institutions in Mainland China.

In 2015, the State Council issued the Master Plan for the China (Shanghai) Pilot Free Trade Zone (the FTZ), allowing international arbitral institutions to open offices in the FTZ. Echoing the Master Plan, the SPC issued its *Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones* in 2016. Between 2015 and 2016, HKIAC, SIAC and the ICC each established representative offices in Shanghai. This was closely followed by the Master Plan for the China (Shanghai) Pilot Free Trade Zone Lin-gang Special Area and the Master Plan for the China (Beijing) Pilot Free Trade Zone.

The most frequently asked question with regard to these policies is whether they demonstrate that Mainland China is now opening its doors to foreign arbitral institutions. Some may be inclined to think this way. It may well be, however, that foreign-related cases could always have been submitted to overseas arbitral institutions under Chinese law from as early as the 1950s, so that, in reality, nothing substantial has changed.

Another frequently raised question is whether Chinese law has resolved the issue of whether foreign arbitral institutions can administer cases seated in Mainland China. Again, neither the policies nor the opinions of the SPC discussed above have categorically answered this question, meaning that they did not and could not, in and of themselves, change any current law or the SPC's practice relating to the seat of arbitration.

> "The Draft Amendment, if enacted, appears to recognise and introduce the concept of the seat of arbitration."

Bringing the seat of arbitration into the Draft Amendment

The Draft Amendment, if enacted, appears to recognise and introduce the concept of the seat of arbitration.

Article 27 provides for the nationality of an arbitral award, stating that "an arbitral award shall be deemed to be the award made at the seat of arbitration." This seems to echo the *Brentwood* decision, making clear from a legislative perspective that an arbitral award made in Mainland China by a foreign arbitral institution is a Chinese foreign-related arbitral award. Thus, parties to the award may apply directly to a competent Chinese court for its enforcement under the Civil Procedure Law rather than under the New York Convention.

> "… [Pursuant to art 21 of the Draft Amendment,] the point raised in the *Longlide* and *Daesung Industrial* cases about whether an agreement to designate a foreign arbitral institution could constitute a valid choice of "a designated arbitration commission" would cease to exist in legislative terms."

Article 21 of the Draft Amendment stipulates that an arbitration agreement is valid only if there is a mutual intention by the parties to arbitrate expressed in writing. This indicates that the requirement of "a designated arbitration commission" for an arbitration agreement to be valid will be removed. Correspondingly, the point raised in the *Longlide* and *Daesung Industrial* cases about whether an agreement to designate a foreign arbitral institution could constitute a valid choice of "a designated arbitration commission" would cease to exist in legislative terms.

Article 77 of the Draft Amendment provides that "a party may apply for setting aside an arbitral award to the intermediate people's court in the seat of arbitration." This makes clear that the seat of arbitration will also become an exclusive connection point in other regards, including determinations by competent courts as to the setting aside of awards.

There are, however, several remaining issues left unresolved by the Draft Amendment with regard to PRC-seated arbitration administered by foreign arbitral institutions. Thus, for example, it is still uncertain:

(1) whether parties to these arbitrations are equally eligible to seek interim measures in Mainland courts as those in cases administered by Mainland arbitral institutions;

(2) which court would be competent to set aside awards handed down in such arbitrations;

(3) whether, except with regard to special provisions for arbitration involving foreign elements, the competent court would assist and supervise such arbitrations in the same manner as domestic arbitrations; and

(4) whether parties to PRC-seated arbitrations administered by designated Hong Kong arbitral institutions may seek interim relief under the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region 2020.

Conclusion

The introduction of the concept of the seat of arbitration by the Draft Amendment clarifies the nationality of arbitral awards in Mainland-seated arbitrations administered by foreign arbitral institutions. It also simplifies the requirements as to validity of arbitration agreements and establishes connection points for determining the law applicable to arbitration agreements and the competent assisting or supervising courts.

By including the seat of arbitration, the Draft Amendment echoes existing judicial practice and government policies with regard to the law applicable to PRC-seated arbitrations administered by foreign arbitral institutions. At the time of writing, further steps still need to be taken by the MoJ and other Chinese government departments to enable the Draft Amendment finally to be passed by the National People's Congress of the PRC. Nevertheless, the fact that the Draft Amendment introduces the concept of the seat of arbitration is an extremely exciting development and welcome news to all arbitration practitioners.

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1 *Arbitration Law of the People's Republic of China (2021 Amendment) (Draft for Comments)*, available at http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html. *Editorial note*: See also Yihua Chen, *Revision of China's Arbitration Law: A New Chapter* [2021] Asian DR 156-163; *New and emerging dispute resolution legislation: Amendment of the PRC Arbitration Law* [2021] Asian DR 204.

2 *Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woke General Engineering Rubber Co Ltd for Determining the Validity of the Arbitration Agreement* [2003] Min Si Ta Zi No 23.

3 Arrangement of the Supreme People's Court for the Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (1999), available at http://www.court.gov.cn/shenpan-xiangqing-108.html.

4 *Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case of Wei Mao International (Hong Kong) Co Ltd v Shanxi Tianli Industrial Co Ltd of Not Executing the Final Award 10334/AMW/BWD/TE of the International Court of Arbitration of International Chamber of Commerce* [2004] Min Si Ta Zi No 6.

5 *Notice of the Supreme People's Court on Issues Related to the Enforcement of Hong Kong Arbitral Awards in Mainland China*, Fa [2009] No 415.

6 Supplemental Arrangement of the Supreme People's Court for the Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (2021), available at http://www.court.gov.cn/fabu-xiangqing-303291.html.

7 *DUFERCO SA v Ningbo Arts & Crafts Import & Export Co Ltd* [2008] Yong Zhong Jian Zi No 4. The arbitration agreement stipulated that the dispute was to be submitted to the International Court of Arbitration of the International Chamber of Commerce (ICC) and arbitrated in China.

8 *Reply of the Supreme People's Court to the Request for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Anhui Long Li De Packaging and Printing Co Ltd v BP Agnati SRL* [2013] Min Ta Zi No 13. In the arbitration agreement, the parties agreed both that disputes should be referred to the ICC International Court of Arbitration and that "the place of jurisdiction shall be Shanghai, China."

9 *Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd* [2020] Hu 01 Min Te No 83. The arbitration clause stipulated that the "dispute shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai."

10 *Brentwood Industries v Guangdong Fa-anlong Mechanical Equipment Manufacture Co Ltd* [2015] Sui Zhong Fa Min Si Chu Zi No 62. The arbitration agreement stipulated that the dispute was to be submitted to the ICC International Court of Arbitration for arbitration at the site of the project.

Nepal: The Rise of ADR on Paths Less Travelled

Matrika Niraula, Mohammed Talib & Alix Povey

This article discusses the current state of arbitration and mediation in Nepal, primarily by reference to its dispute resolution legislation and institutions. The potential development of the country as a seat of international arbitration, in light of China's Belt and Road Initiative in particular, is also highlighted.

Introduction

Nepal has a long history of alternative dispute resolution (ADR) and, as in other Asian countries, its roots stem from the practice of local communities of turning to village elders who would resolve disputes through consultation with the conflicting parties. The practice was formalised by the Arbitration Act 1981, which was then replaced by the Arbitration Act 1999 (the 1999 Act).[1] This legislation is supplemented by a number of other laws and by the ratification in 1998 of the New York Convention 1958.

Nepal has enacted and amended a number of domestic laws to promote and strengthen ADR practices in the country.[2] These include the Contract Act 2000, the Company Act 2006, the Mediation Act 2011[3] and the Foreign Investment and Technology Transfer Act 2019.

ADR is the preferred dispute resolution method in Nepal, due in part to its long-established place in the country's culture and history and its role and nature in nurturing relationships. For these reasons, as well as reasons of economy and

accessibility, it is a more popular method of dispute resolution than litigation, particularly in more rural areas.

The 1999 Act

Nepal's 1999 Act is largely considered to have been inspired by the UNCITRAL Model Law. It incorporates and gives effect to a number of core principles of arbitration: these include *Kompetenz-Kompetenz* (s 16(1)), separability (s 16(3)), arbitral confidentiality (s 9), a pro-enforcement approach to domestic and foreign arbitral awards and limited grounds for setting them aside (ss 32 and 34 respectively), and review of awards by the High Court on the ground of public policy (s 30).

By reducing court involvement in arbitration, facilitating the effective enforcement of awards and creating a platform for Nepal-seated international arbitration, the 1999 Act has proved to be a durable and effective framework for arbitration in the country. This has been particularly important in the context of s 40(5) of the Foreign Investment and Technology Transfer Act 2019,[4] which gives a statutory right to foreign investors to have disputes resolved by arbitration seated in Nepal and governed by Nepali law but conducted under the UNCITRAL Arbitration Rules.

> "ADR is the preferred dispute resolution method in Nepal, due in part to its long-established place in the country's culture and history and its role and nature in nurturing relationships."

Given its age, however, there still remain a number of areas in which the 1999 Act could better reflect international best practice. The most relevant of these, in this context, is that the Act is influenced by the domestic approach to arbitration in Nepal and does not contain a separate regime for international arbitration. There is also no provision for institutional arbitration and the 1999 Act fails to incorporate many provisions of the Model Law.[5] Having said that, however, an international arbitration or mediation can be conducted under the institutional rules of an arbitration or ADR centre or appropriate *ad hoc* rules if the parties so agree.

> "By reducing court involvement in arbitration, facilitating the effective enforcement of awards and creating a platform for Nepal-seated international arbitration, the 1999 Act has proved to be a durable and effective framework for arbitration in the country."

The influence on the 1999 Act of the domestic approach to arbitration means that it includes a number of provisions intended to address the expectations of local parties. Some of the more significant additions to the requirements of the Model Law that are found in the Act, which are not usually found in other jurisdictions, include the following:

(1) under s 6, the process of appointing arbitrators must commence within 30 days from the date when the dispute arises;

(2) under s 9, the arbitrator's signature must be affixed to two copies of a written oath of impartiality and honesty, a copy of which must be submitted to the High Court. This consists of a short declaration set out in the Schedule to the Act confirming that the arbitrator is capable of carrying out the reference in an impartial and honest manner;

(3) under s 10, arbitrators must have certain 'characteristics' and anyone who cannot satisfy these requirements cannot sit as an arbitrator (eg, a person who has ever been bankrupt or insolvent);

(4) under s 24, arbitrators are ordinarily required to reach their decision within 120 days of final submission of the pleadings. An award must be in writing and include the details prescribed in the arbitration agreement. Under s 27, if the arbitration agreement is silent on the matter, the award must contain at least the following:
   (i) a brief description of the dispute referred to arbitration;
   (ii) a statement showing how jurisdiction over the arbitration has been established;
   (iii) the arbitrator's decision and the grounds and reasons for reaching it;
   (iv) the claim(s) to which the award applies and the amount(s) that must be paid;
   (v) any interest payable on the amount(s) claimed; and
   (vi) the place of the arbitration and the date of the award;
(5) under s 28, arbitrators are required to read out their decisions in the presence of the parties and thereafter to provide them with a written copy of the award; and
(6) under s 42, arbitrators are required to maintain a case file, containing all of the documents in the arbitration in chronological order. After completion of the arbitration, they are required to submit the file to the District Court for its records. The case file shall, however, remain confidential and no copies of any documents may be given to anyone other than the parties without their approval.

Provisions of the 1999 Act as to the recovery of costs are not clear. This is a matter for agreement of the parties or, failing such agreement, for the tribunal to rule upon. Although ss 35 and 36 respectively provide for the recovery of costs of the arbitration and of arbitrators' fees, recovery is not usually considered to extend to legal costs that the parties may have incurred in the proceedings. Having said that, however, the language of s 35 of the 1999 Act is not definitive and there may be room for argument about the recovery of these costs, depending on the circumstances.

Dispute resolution institutions in Nepal

As mentioned previously, there is little recognition of the role of dispute resolution institutions under the 1999 Act. Under s 7 of the Act, the default appointing authority remains the High Court. Institutional arbitrations have often struggled to meet the specific requirements of the Act arising out of its domestic context, while those requirements are not well known to international institutions or international arbitrators.

> "There is … no provision for institutional arbitration … Having said that, however, an arbitration or mediation can be conducted under the institutional rules of an arbitration or ADR centre or appropriate ad *hoc rules* if the parties so agree."

Despite the 1999 Act making no provision for institutional arbitration, Nepal has two main dispute resolution centres, the Nepal International ADR Center (NIAC) and the Nepal Council of Arbitration (NEPCA) both of which administer arbitrations. NEPCA is the older of these two institutions, having been established in 1991. Established in 2013, the NIAC has undergone a major overhaul in the past year and is now emerging as a dynamic modern centre with a view to bringing arbitration in Nepal on to the international stage. It delivers domestic, cross-border and international dispute resolution services with a focus on arbitration and mediation, including hybrid versions such as Med-Arb, Arb-Med and Arb-Med-Arb. It has its own set of arbitration rules,[6] which were devised in line with the UNCITRAL Arbitration Rules, as well as mediation rules that were developed together with the Kathmandu Commercial Mediation Centre (KCMC).[7] The NIAC is also a constituent member of the Asia-Pacific Centre for Arbitration and Mediation (APCAM), which caters to the requirements of international and cross-border business disputes and helps the business community to

resolve disputes using mediation and arbitration, as well as their combined forms, which can be exercised using APCAM's Arbitration Rules[8] and Mediation Rules.[9] This approach encourages the standardisation of dispute resolution rules and gives greater certainty to those resolving disputes under their remit.

> "Established in 2013, the NIAC has undergone a major overhaul in the past year and is now emerging as a dynamic modern centre with a view to bringing arbitration in Nepal on to the international stage."

One of the key areas in which arbitral institutions can make a difference in Nepal is in providing training for the legal community, providing know-how and familiarity for the business community and facilitating policy change in discussion with the government and judiciary. As a result, as well as administering disputes, the NIAC also provides training in dispute resolution. It collaborates with the Kathmandu University School of Law (KUSL) and Kathmandu School of Law (Purwanchal University, Nepal) in academic research. It also collaborates with a variety of think tanks as well as corporate and commercial groups to create awareness on relevant issues in dispute resolution. It acts as a bridge with the private sector, encompassing banks, corporate houses, entrepreneurs, construction agencies, businesses and the government, so as to create greater awareness and facilitate discussions on improving Nepal's approach to ADR. Most recently, in July 2021, the NIAC tapped into international expertise on arbitration by entering into a Memorandum of Understanding with international law firm Pinsent Masons to enable it to co-opt international best practice and experience to assist the development of arbitration in Nepal.[10]

The evolution of arbitration in Nepal

While arbitration has proved historically to be a popular method of dispute resolution in Nepal, mediation and hybrid versions of arbitration and mediation are gaining increasing popularity. Arbitration is increasingly being viewed with a critical eye as an equally if not more expensive version of litigation, as well as being more likely to break the relationship between disputing parties. Indeed, with court interventions and the lengthy delays that are involved in them, other dispute resolution methods are being looked to for speedier and less costly resolution.

> "Arbitration is increasingly being viewed with a critical eye as an equally if not more expensive version of litigation, as well as being more likely to break the relationship between disputing parties. … Thus, Nepal also practises and encourages the use of hybrid dispute resolution, such as Med-Arb, Arb-Med and Arb-Med-Arb …"

Thus, Nepal also practises and encourages the use of hybrid dispute resolution, such as Med-Arb, Arb-Med and Arb-Med-Arb, with its usage formalised in the NIAC's arbitration and mediation rules.[11] As well as giving greater autonomy in the process to parties, they also can be more flexible and efficient as well as combining the extra advantages of confidentiality and neutrality with enforceability and finality. They also have the added benefit of being able to help maintain relationships between the parties who are currently in disagreement. Despite this tradition, there is no provision in the 1999 Act that explicitly recognises the use of hybrid forms of dispute

resolution. It should be noted, however, that s 40 of the Act makes provision for the parties to compromise, a matter covered by s 3 of the Mediation Act 2011. Where they go to mediation, the terms of their compromise can be included in the award in the arbitration.

Arbitration under the Belt and Road Initiative

Nepal has a policy of non-alignment on the global stage, which is important given its geographical location. It pursues a policy of 'balanced relations' with both China and India. It promoted the establishment of the South Asian Association for Regional Cooperation (SAARC) and hosts that organisation's permanent secretariat in Kathmandu. Nepal has also signed a Treaty of Peace and Friendship with both India and China and maintains its neutrality between both of these giants.

Nepal has signed up to China's Belt and Road Initiative (BRI) and Nepali arbitration is closely aligned with it. The BRI holds great potential for Nepal and is likely to attract capital to the country's infrastructure sector, with China being one of the major investors. Priority areas for investment are manufacturing, tourism, services, energy and agriculture, as well as, in the infrastructure sector, railways, roads, bridges, airports, hydropower plants and agricultural projects. The most recent agreement between Nepal and China to build a railway line from Kerung to Kathmandu is likely to bring more opportunities for economic growth, as well as enhanced potential to create complex legal issues. Nepal has also signed an agreement with India for a railway line between Raxual and Kathmandu that is also likely to bring about more growth within the country.

"Nepal has signed up to China's Belt and Road Initiative (BRI) and Nepali arbitration is closely aligned with it."

The BRI is, however, a path to be navigated carefully, no more so than for Nepal, given how it is geographically and economically situated. While a few projects have been a mapped out, they have faced slow progress, given challenges that have been faced by Nepal over the past six years in particular and, more recently, for the world at large. So, while the BRI has great potential and could be a real catalyst for progress and growth in Nepal, it could also be a stumbling block if not navigated with caution.

Alongside the rapid infrastructure development of Nepal as part of the BRI, the country is also one of the fastest growing economies worldwide. Having said that, however, it is ranked 170th in GDP per capita.[12] While Nepal is strong in some sectors, it does not have a robust infrastructure. As it is a landlocked country and has few tangible natural resources and a rugged geography, its economic growth and development face challenges.

Conclusion: Nepali arbitration - ascending ever higher

With all the previously discussed potential opportunities ahead, arbitration in Nepal will continue to develop and strengthen over the next few years. The NIAC will be well situated to assist in resolving disputes that arise from the challenges the country will face in the future. While the NIAC has its work cut out, it can nevertheless become a leading light to other developing dispute resolution centres worldwide. It has on its panel some very experienced arbitrators, mediators and neutrals who are also accredited with APCAM and are therefore also in a position to act in international disputes. The NIAC has strong roots and, with this foundation, is on course to be a strong player in the field of dispute resolution.

Nepal and, in particular, the NIAC is not currently the most common or immediately obvious choice as a seat of arbitration. However, it could increasingly be considered for this purpose in the future, given its neutrality, geographical location and budding emergence on the international arbitration stage, all of which would give Nepal a good starting point for growth into a robust hub for arbitration.

> While the NIAC has its work cut out, it can nevertheless become a leading light to other developing dispute resolution centres worldwide.

1 Available at https://cn.nepalembassy.gov.np/wp-content/uploads/2017/11/arbitration-act-2055-1999.pdf.

2 Matrika Niraula, *Introduction to Leading ADR Centers* (2016) 3 ADR Commercial Law Journal 97-105, at 104.

3 Available at http://extwprlegs1.fao.org/docs/pdf/nep137757.pdf.

4 Available at https://investmentpolicy.unctad.org/investment-laws/laws/313/nepal-foreign-investment-and-technology-transfer-act-2019-2075-.

5 Prof Dr Bharat B Karki, 'Changing Dimensions of Legal Regime of Commercial Arbitration in Nepal', in Nepal Bar Council, *Annual Survey of Nepalese Law* (vol IV, 2003), pp 11-12.

6 NIAC Arbitration Rules 2021, available at https://niac.asia/rules/niac-arbitration-rules-2077-in-english-2/.

7 NIAC KCMC Mediation Rules 2021, available at https://niac.asia/rules/niacs-kcmc-mediation-rules/ (in Nepali only).

8 APCAM Arbitration Rules 2020, available at https://apcam.asia/arbitration-rules/.

9 APCAM Mediation Rules 2020, available at https://apcam.asia/mediation-rules/.

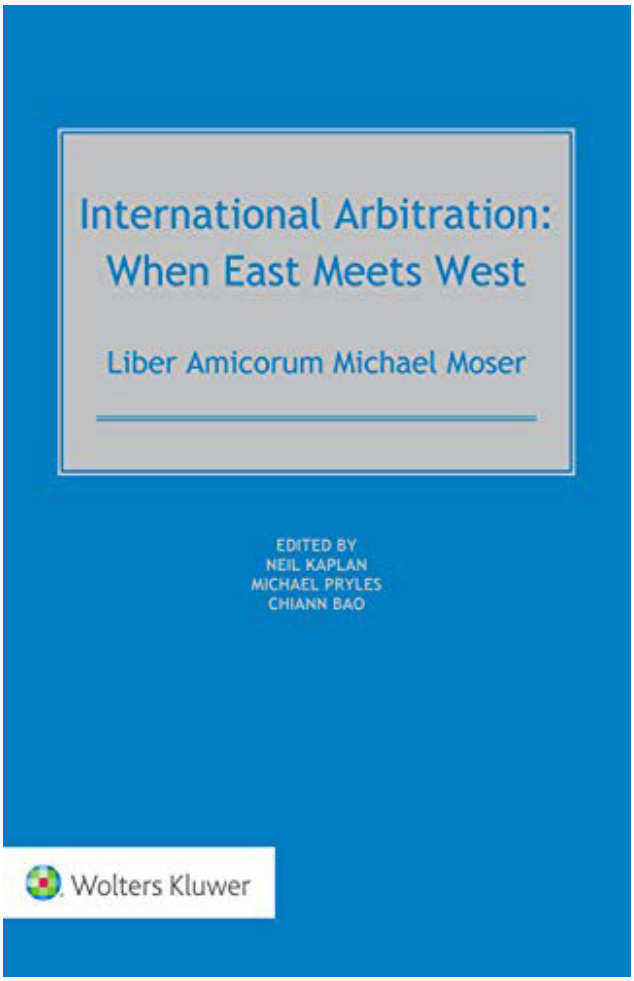
10 *Editorial note*: See NIAC press notice, *Nepal International ADR Center (NIAC) Signs MOU with Pinsent Masons* (7 July 2021), available at https://niac.asia/announcements/nepal-international-adr-center-niac-signs-mou-with-pinsent-masons/.

11 See notes 6 and 7 above.

12 Nepal Economy Ranking: by GDP and 60 other indicators (source: Georank – www.georank.org).

International Arbitration: When East Meets West[1] Liber Amicorum Michael Moser

Reviewed by Ng Jern-Fei QC



Dr Michael Moser is synonymous with international arbitration. We are living through what many have termed the Asian Century.[2] The eastward shift of the epicentre of international arbitration accompanying the dawn of the Asian Century is in no small part due to the efforts of many thought leaders over the decades. This book is a fitting tribute to one of those intellectual giants.

A former Chairman of Hong Kong International Arbitration Centre (HKIAC), Michael is an Austrian citizen who trained as an American lawyer and is a polyglot who counts Putonghua and German among the languages in which he is fluent. His long and distinguished career in international arbitration, particularly in Asia, is reflected in the illustrious cast of authors who have assembled to contribute to this *Liber Amicorum*.

The book comprises 25 chapters and starts fittingly with a chapter by Cao Lijun on the influence of Chinese culture on Chinese arbitration, with an erudite discussion on the historic origins of many of the concepts that underpin Chinese arbitration and mediation. Chapter 2, by John Choong and Chan Yong Wei, highlights the repertoire of interim measures available in Hong Kong and Mainland China in support of arbitration.

The geographical ambit of the book then broadens in Chapter 3, in which Donald Donovan, Lord Goldsmith, David W Rivkin and Christopher Tahbaz conduct a masterly survey of the growth of arbitration in Asia. It does so by tracking the pace of development of arbitration law and institutions in the region and demonstrating how Asia is increasingly at the vanguard of arbitral innovation as well as how courts in Asian seats are now setting the pace in terms of their thought leadership on arbitration doctrine. As an example, the authors cite the Singapore Court of Appeal's decision in *Tomolugen Holdings Ltd v Silica Investors Ltd*.[3]

Chapter 3 ends with an analysis of Belt and Road Initiative (BRI)-related developments in the arbitration sphere, which provides a neat *segué* into Chapter 4, in which Justin D'Agostino, with his customary panache, masterfully meshes together the focus in Cao Lijun's Chapter 1 on the influence of Chinese culture in Chinese arbitration with Messrs Donovan *et al*'s data-driven analysis of Asian arbitral growth trends to produce a thoughtful piece on the extent to which BRI-related disputes would serve as a catalyst to spur the growth of mixed-mode dispute resolution in Asia.

The focus then shifts in Chapter 5, in which Nils Eliasson provides expert analysis on Chinese outbound investment treaties, with a useful commentary of some of the leading decisions concerning Chinese BITs, such as *Tza Yap Shum v Republic of Peru*[4] and *Sanum Investments Ltd v Laos*[5] with a user-friendly table at pp 71-74 that distils the key features of Chinese BITs and FTAs with more than 30 countries. In a similar vein, in a later section of the book, Chapter 21 by Erica Stein focuses on the evolution of BITs between China and the EU.

Chapters 6 and 7 contain contributions from two other titans of arbitration, Bernard Hanotiau and Sally Harpole, on, respectively, the arbitrator's duty to render justice and the extent to which Pacific Rim jurisdictions have opened their doors to international lawyers in arbitration. Maintaining focus on the role that arbitrators have to play in the arbitral process, Nikolaus Pitkowitz deals in Chapter 18 with the arbitrator's duty to challenge corruption, while in Chapter 19, Klaus Sachs studies the different methods in which international arbitration could be made more efficient.

Chapter 8, by Cameron Hassall, Matthew Brown and Tiger Lin address a very topical subject, namely the availability of appellate review in international commercial arbitration. The authors get off the starting blocks with a thought-provoking *entrée* at [8.03] which questions the orthodoxy that finality in arbitration is necessarily a good thing. The chapter then navigates its way through the different forms of appeal currently available to parties to international commercial arbitration, namely appeals to (1) a senior national court [8.04(A)] and (2) an appellate tribunal. Chapter 24 by David Williams and Anna Kirk is of a similar genre, with its survey of the approaches adopted in different Asia-Pacific jurisdictions to appeals on questions of law.

Chapters 9 and 10 spotlight, respectively, Michael Moser's connection with Sweden (authored by Kaj Hobér) and his journey in mediation in the 'Triple-A' regions of America, Austria and Asia (authored by Günther Horvath, Katherine Khan and Niamh Leinwather). The latter devotes a section (at [10.04]) on the enforcement of mediated settlement agreements in the context of the Singapore Convention, complementing the views expressed in Chapter 23 by Hiroyuki Tezuka on the rise of Arb-Med in the era of that convention.

In Chapter 11, Benjamin Hughes and Daniel Ling deftly discuss the tension that occasionally arises between party autonomy in the constitution of the arbitral tribunal and procedural efficiency in the context of cases conducted under expedited procedures. It is a gripping analysis of a subject that has generated judicial decisions and academic commentary in recent years, with the tension reaching a tipping point in the diametrically opposite conclusions reached on the topic by the Singapore High Court in *AQZ v ARA*[6] and the Shanghai First Intermediate Court in *Nobles Resources Pte Ltd v Good Credit International Trade Co Ltd*.[7]

Dr Michael Hwang SC devotes Chapter 12 to the innovative idea of using witness conferencing for the purpose of eliciting evidence from witnesses of fact. Dr Hwang skilfully seeks to slay the sacred cow that factual witnesses can only ever be examined by way of conventional cross-examination, punctuating his observations with healthy dollops of personal anecdotes drawn from his many years

of experience as arbitrator and counsel. Staying with the theme of witness evidence, Kap-You (Kevin) Kim and Mino Han lay out in Chapter 13 a helpful series of principles for a proposed witness protocol in international arbitration.

The 'East meets West' theme of this book continues in Chapter 14, in which Christopher Lau highlights specific aspects of the DIS Arbitration Rules and the German Code of Civil Procedure relating to early conflict resolution that merit incorporation in arbitration rules in Asia. Chapter 15, by Dr Julian DM Lew examines the extent to which the Prague Rules could provide a more efficient means of conducting an arbitration as an alternative to the IBA Rules. Nigel Li, in Chapter 16, then discusses how philosophies of East and West converge in ADR.

The book shifts focus in Chapter 17, in which Ning Fei and Shengchang Wang analyse the ways in which China has opened its doors to foreign arbitral institutions, with insightful commentary on some of the more recent judicial decisions on the subject, such as that of the Supreme People's Court in *Anhui Long Li De Packaging and Printing Co Ltd v BP Agnati SRL*.[8] Building on this in Chapter 20, Helen Shi skilfully dissects the different respects in which the Chinese courts have adopted an arbitration-friendly approach toward international arbitration with a particular emphasis on (1) the use of the validation principle in determining the validity of arbitration agreements, (2) the availability of interim measures in support of arbitration, and (3) the enforcement of awards from hybrid arbitrations.

Chapter 22, by the peerless Jingzhou Tao, charts the emergence of international commercial courts all across Asia as an alternative to arbitration and, at [22.03], provides a detailed comparison of the key features of international commercial courts, with a specific highlight on the emerging breed of international judges in these courts, such as in the Singapore International Commercial Court.
The closing salvo in this *magnum opus* is fittingly delivered in Chapter 25, in which Friven Yeoh and Nathaniel Lai wrestle with the thorny subject of disclosure of international commercial arbitration and state secrecy laws in China. Written in an engaging and didactic style, it is a useful toolkit that helps practitioners navigate the subject in a user-friendly manner.

The sheer breadth of topics covered by this book and the assemblage of heavyweights and rising stars who have contributed to it is a testament to its editors who, between them, have skilfully managed to weave the various essays into a tapestry of work that will do much to add to the growth of arbitral knowledge in Asia. More than anything else, however, it is a fitting tribute to the person whose work this book celebrates - the incomparable Michael Moser.

1 Neil Kaplan, Michael Pryles & Chiann Bao (2021, Kluwer Law International), ISBN 9789403520551, v+314 pp, casebound. Also available as an e-book.

2 Valentina Romei & John Reed, *The Asian Century Is Set to Begin*, Financial Times (25 March 2019), cited in this volume by Donald Donovan *et al* at [3.02], n 2.

3 [2016] 1 SLR 373.

4 Decision on Jurisdiction and Competence, dated 19 June 2009 (ICSID Case No ARB/07/6).

5 [2016] SGCA 57.

6 [2015] SGHC 49, at [132].

7 [2016] Shanghai No 1 Intermediate People's Court (Hu 01 Xie Wai Ren No 1), 11 August 2017.

8 No 13 Min Si Ta Zi, 25 March 2013.

New and emerging dispute resolution rules

UNCITRAL

On 9 July 2021, UNCITRAL adopted its Expedited Arbitration Rules 2021, which took effect on 19 September 2021.[2] The provisions of the Rules are explained in an advance copy of UNCITRAL's *Explanatory Note to the UNCITRAL Expedited Arbitration Rules*.[3] Arbitrations may only be held under the Rules if the parties expressly so agree. Key features include (1) a requirement on parties and arbitrators to conduct arbitrations expeditiously; (2) a wide discretion for tribunals to order any appropriate technological means of conducting proceedings; (3) appointment of sole arbitrators as a default; (4) discretion of tribunals to dispense with oral hearings; (5) awards to be made within six months of the date of constitution of the tribunal, unless the tribunal decides otherwise; and (6) applicability of the Rules to investment arbitrations by party agreement.

PRIME Finance

On 6 December 2021, PRIME Finance (the Panel of Recognised International Market Experts in Finance, based in The Hague) issued the PRIME Finance Arbitration Rules 2022 (the 2022 Rules), which took effect on 1 January 2022.[4] The 2022 rules, which replace those of 2016, provide for the arbitration of a wide range of financial and banking disputes, including those concerning derivatives, investment and advisory banking, financing, private equity, asset management, sustainable finance, sovereign lending and information technology supporting banking and financial services (fintech). Like the 2016 Rules, the 2022 Rules closely follow the UNCITRAL Arbitration Rules and provide for the administration of arbitrations by the Permanent Court of Arbitration. Key matters on which the 2022 Rules focus include the following:

(1) efficiency and expedition;
(2) transparency;
(3) concurrent hearing, joinder and consolidation of complex multi-party or multi-contract disputes;
(4) expedited proceedings where amounts claimed do not exceed €4 million;
(5) early determination;
(6) emergency arbitration;
(7) tribunal assistance with settlement;
(8) disclosure of third party funding arrangements; and
(9) encouraging the publication of arbitral awards.

Vienna International Arbitration Centre (VIAC)

On 1 July 2021, the VIAC issued several sets of arbitration and mediation rules. These are (1) the revised Rules of Arbitration and Mediation 2021 (the 2021 Rules), and (2) the new Vienna Investment Arbitration and Mediation Rules 2021 (the 2021 Investment Arbitration Rules).[5] Both sets of rules apply to proceedings commenced on or after 1 July 2021. The 2021 Rules contain provisions aimed at (*inter alia*) encouraging remote hearings and the issuance of awards in electronic form, the making of party costs awards prior to a final award, and a three-month time limit for rendering awards. The 2021 Investment Arbitration Rules contain (*inter alia*) provisions on the appointment of arbitrators, early dismissal of claims in arbitration proceedings, a six-month time limit for rendering awards and joinder of third parties in arbitration proceedings but only in relation to a dispute arising out of a contract.

Hong Kong Arbitration Week 2021

The annual Hong Kong Arbitration Week for 2021 was held on 25-28 October 2021. Summaries of papers given at the ADR in Asia Conference and other events, perspectives on the events and interviews with participants are available at Kluwer Arbitration Blog.[1] Hong Kong Arbitration Week for 2022 is scheduled to be held on 24-27 October 2022.

British Virgin Islands International Arbitration Centre (BVIIAC)

On 19 November 2021, the BVIIAC announced the launch of its revised Arbitration Rules 2021, which had taken effect on 16 November 2021.[6] The 2021 Rules, which are intended to reflect COVID-19 era and general international arbitration best practice, make new provision for (*inter alia*) emergency arbitration, expedited procedures, joinder and consolidation, the use of remote hearing platforms, electronic filing of submissions and tribunal secretaries. The Rules are of particular significance to Asian (and particularly Chinese) parties, for which the use of BVI trusts and corporate holding structures are widespread, and reflect input given at the drafting stage by leading Hong Kong practitioners.

HKSAR Development Bureau

On 5 October 2021, the Development Bureau (DevB) of the HKSAR government issued Technical Circular (Works) No 6/2021, *Security of Payment Provisions in Public Works Contracts* (the Circular), which took effect on that date.[7]

The Circular prescribes the mandatory incorporation of security of payment (SoP) provisions into all public works contracts, *viz* those carried out under HKSAR government conditions of contract. All contractors engaged in such works must comply with SoP requirements (which seek to protect cash flow by outlawing 'pay when paid' or 'pay if paid' clauses) and amend their sub-contracts to comply with them. The SoP scheme will apply in two stages: (1) with effect from 31 December 2021, to tenders from the following categories of contractor listed in the DevB List of Approved Contractors for Public Works:[8] (i) 'Group B' contractors, for contracts valued at up to HK$400 million, and (ii) 'Group C' contractors, for contracts exceeding HK$400 million in value; and (2) with effect from 1 April 2022, to other contractors listed in that DevB list or in its List of Approved Suppliers of Materials and Specialist Contractors for Public Works.[9]

With regard to adjudication, the Circular provides that (1) a payment dispute between a contractor and a sub-contractor or between an employer, contractor or sub-contractor may be referred to adjudication; (2) a determination must, unless the parties otherwise agree, be issued by the adjudicator within 55 days of his or her appointment; and (3) the paying party shall pay the amount determined within 30 days of notification of the adjudicator's decision.

The Circular also states that the DevB has formulated an SoP Framework and scope of application for a wider system of SoP and adjudication under a projected Construction Industry Security of Payment Ordinance. The framework is set out at Annex A of the Circular.

New and emerging dispute resolution practice guidance and standards

Proposed Code of Practice for Third Party Funding in Mediation

The HKSAR Department of Justice (DoJ) has issued a *Proposed Code of Practice for Third Party Funding of Mediation*,[10] which followed a two-month consultation process launched by the DoJ in August 2021. The Code of Practice (the Code) imposes a number of standards and practice requirements on third party funders in mediation, pursuant to the modified version of Part 10A of the Arbitration Ordinance (Cap 609) as applied to mediation by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (No 6 of 2017). They include (1) requirements as to clear stipulations in funding agreements concerning information to parties and as to the content of agreements; (2) duties to manage and disclose any conflicts of interest; (3) duties to observe confidentiality and privilege requirements; (4) grounds whereby a funder may terminate a funding agreement where it reasonably (i) ceases to be satisfied about the merits of conducting a mediation, or (ii) believes there has been a material change in the funded party's prospects of reaching a settlement with the counterparty, or (iii) believes that the funded party has committed a material breach of the funding agreement; and (5) a duty to provide an effective complaints procedure for funded parties.

International arbitration in Dubai

In a surprise move, on 14 September 2021, the ruler of Dubai issued Decree No 34 of 2021, which took effect on 20 September 2021. The effect of the Decree is to abolish the Dubai International Financial Centre Arbitration Institute (DAI) and the Emirates Maritime Arbitration Centre and subsume them into an overhauled Dubai International Arbitration Centre (DIAC).[11] It is, however, unclear whether (1) the DIFC-LCIA Arbitration Centre will remain in existence or the DIAC will assume DIFC's responsibilities fully, and (2) parties will be able to continue arbitrating and mediating under the DIFC-LCIA Arbitration Rules 2021, the most recent version of which took effect on 1 January 2021. The DIFC and the LCIA have been unable to agree upon how to wind up the DIFC-LCIA Arbitration Centre and on how existing cases should be administered.

Reform of the English Arbitration Act 1996

The Law Commission of England & Wales announced on 30 November 2021 that it will launch a review of the Arbitration Act 1996 during the first quarter of 2022, with a view to issuing a consultation paper late in the year.[12] The precise scope of the review has yet to be determined, but the Law Commission indicates that possible areas for consideration will include (1) summary dismissal of unmeritorious claims and defences; (2) court powers in support of arbitration; (3) procedure for challenging jurisdiction awards; (4) availability of appeals on a point of law; (5) confidentiality and privacy; and (6) electronic service of documents, electronic arbitral awards and virtual hearings.

Reforms to the 1996 Act resulting from the review would very likely be relevant to possible future reform of the arbitration laws of Asian and Asia-Pacific jurisdictions that are based wholly or substantially on English law.

Reports

Success fees in Hong Kong arbitration

The Law Reform Commission of Hong Kong (LRC) has recommendedS abolition of the current prohibition on outcome-related fee structures (ORFSs, also known as success fees) in arbitration and related court proceedings conducted by lawyers within and outside of the HKSAR. The purpose of this recommendation is to bring the HKSAR into line with other major arbitral seats. In its December 2021 report, entitled *Outcome Related Fee Structures for Arbitration*[13] (which followed extensive research by an LRC sub-committee and public consultation), the LRC proposes to permit three categories of ORFS, *viz* (1) a conditional fee agreement (CFA), whereby a lawyer would be entitled to an additional success fee where proceedings result in a successful outcome for the client; (2) a damages-based agreement (DBA), whereby a percentage of any monetary award would be payable to the lawyer; and (3) an hybrid DBA, whereby the lawyer would be paid an additional fee only where the client obtains a 'financial benefit', together with discounted fees for legal services rendered. The report also recommends that the enabling legislation should specify, on a non-exhaustive basis, the grounds on which an ORFS agreement may be terminated prior to the conclusion of an arbitration.

At the time of writing, a decision whether to adopt the report is awaited from the Department of Justice. Any changes made pursuant to the report would be implemented by amendments to (1) the Arbitration Ordinance (Cap 609) and the Legal Practitioners Ordinance (Cap 159), together with their subsidiary legislation; (2) the *Hong Kong Solicitors' Guide to Professional Conduct*; and (3) the *Code of Conduct* of the Hong Kong Bar Association.

Validity of smart contracts

On 25 November 2021, the Law Commission of England & Wales issued a paper in the form of an 'Advice to Government'[14] in which it concluded that the existing law of England & Wales may facilitate and support the use of self-executing 'smart' contracts, such as those governed by blockchain and crypto arrangements. The Law Commission's position supports that of the UK Jurisdiction Taskforce (chaired by the English Master of the Rolls), which on 22 April 2021 launched the Digital Dispute Resolution Rules 2021. These rules may be adopted by parties to blockchain and crypto arrangements worldwide.[15] Challenges to an arbitral tribunal's jurisdiction and to the recognition and enforcement of awards on jurisdictional, arbitrability or public policy grounds in blockchain- and crypto-related disputes would be less likely to succeed.

Surveys and reviews

(1) Arbitration and mediation in Hong Kong

The latest version of the 'National Report: Hong Kong', co-authored by Dr Michael Moser and Robert Morgan, has been published in the ICCA *International Handbook on Commercial Arbitration*.[16]

(2) Expert Evidence in International Arbitration

Bryan Cave Leighton Paisner (BCLP) published its *Annual Arbitration Survey 2021: Expert Evidence in International Arbitration - Saving the Party-Appointed Expert* on 1 October 2021.[17] BCLP invited 289 respondents worldwide (arbitrators, corporate counsel, external lawyers, officers of arbitral institutions, academics and expert witnesses) to comment on whether (*inter alia*) (1) it was appropriate to appoint party-appointed experts (96% of respondents considered that it was), (2) parties had a right to do so (84% agreed that they did), (3) party appointees were truly independent and what sanctions should be imposed against 'hired guns' (62% favoured financial sanctions), and (4) there were any alternatives to party appointments (58% favoured tribunal-appointed experts, albeit not overwhelmingly).

(3) Construction Arbitration

Global Arbitration Review (GAR) has issued a survey questionnaire and responses entitled *Construction Arbitration*.[18] The survey is worldwide in scope but attention may be focused on Asian and Asia-Pacific jurisdictions, specifically Australia, China, India, Japan, Malaysia and South Korea. Hong Kong is not, however, included. Among the topics addressed are (1) choice of laws, seat, arbitrator and language), (2) good faith, (3) time bars, (4) courts and arbitral tribunals, (5) expert witnesses, (6) settlement offers, and (7) privilege.

(4) The Asia-Pacific Arbitration Review 2022

This publication, also by GAR, contains updates and commentaries by 35 practitioners on construction and infrastructure disputes in the region, the state of ISDS and trends in commercial arbitration.[19] The jurisdictions covered by this publication are Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam.

Disability inclusion and international arbitration

Pursuant to a call by the President of the ICC International Court of Arbitration, Ms Claudia Salomon, the ICC established a Task Force on Disability Inclusion and International Arbitration in May 2021. According to the ICC:[20]

"The Task Force's mission is to study and analyse the ways in which ICC can meet the needs of those in the international arbitration community who may need accommodations or changes for the way they work. It will also draw up a series of recommendations for increasing disability inclusion. The guidelines, which are expected to be launched in June 2022, will underscore the imperative to shift the burden from the person with a disability to ensure equal participation in conversations on how to advance inclusion, at all stages of the arbitration process as well as in other international arbitration activities and events."

1 http://arbitrationblog.kluwerarbitration.com/category/hk-arbitration-week/.

2 Available at https://uncitral.un.org/en/content/expedited-arbitration-rules.

3 Currently available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/explanatory_note_to_the_expedited_rules_advance_copy.pdf.

4 Available at https://primefinancedisputes.org/page/p-r-i-m-e-finance-arbitration-rules.

5 Both sets of rules are available at https://www.viac.eu/en/.

6 See BVIIAC press release, *BVIIAC Announces Updated 2021 Rules to Address the Future of International Arbitration* (19 November 2021, available at https://bviiac.org/Media-News/Press-Releases/Article/ID/122/BVI-IAC-Announces-Updated-2021-Rules-to-Address-the-Future-of-International-Arbitration). The 2021 Rules are available at https://www.bviiac.org/Arbitration/Arbitration-Rules/BVI-IAC-2021-Rules.

7 Available at https://www.devb.gov.hk/filemanager/technicalcirculars/en/upload/386/1/C-2021-06-01.pdf.

8 See https://www.devb.gov.hk/en/construction_sector_matters/contractors/contractor/index.html.

9 See https://www.devb.gov.hk/en/construction_sector_matters/contractors/supplier/index.html.

10 Available at https://www.doj.gov.hk/pdf/Proposed_CoP_for_TPF_of_Mediation_e.pdf.

11 Sources: CMS Law-Now, *DIAC takes it all: the integration of Dubai's arbitration institutions* (23 September 2021), available at https://www.cms-lawnow.com/ealerts/2021/09/diac-takes-it-all-the-integration-of-dubais-arbitration-institutions; Ben Rigby, *Dubai's legal community stunned by sweeping shake-up of arbitral institutions* (The Global Legal Post, 24 September 2021), available at https://www.globallegalpost.com/news/dubais-legal-community-stunned-by-sweeping-shake-up-of-arbitral-institutions-1285091354; Hadef & Partners, *New light shed on future of Dubai arbitration - Clarifying Decree No 34 of 2021 concerning Dubai International Arbitration Centre* (12 October 2021), available at https://www.hadefpartners.com/News/535/New-light-shed-on-future-of-Dubai-arbitration-%E2%80%93-clarifying-Decree-No.-34-of-2021-concerning-Dubai-International-Arbitration-Centre; Ben Rigby, *Joint venture partners fail to agree way forward for DIFC-LCIA Arbitration Centre* (The Global Legal Post, 13 October 2021), available at https://www.globallegalpost.com/news/joint-venture-partners-fail-to-agree-way-forward-for-difc-lcia-arbitration-centre-310419360; and Enrico Vergani & Lorenzo Melchionda, *A new landscape for commercial and maritime arbitration in Dubai* (The Global Legal Post, 3 November 2021), available at https://www.globallegalpost.com/news/a-new-landscape-for-commercial-and-maritime-arbitration-in-dubai-429998383.

12 Available at https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/.

13 LRC press release, *LRC releases report on outcome related fee structures for arbitration* (15 December 2021), available at https://www.info.gov.hk/gia/general/202112/15/P2021121500401.htm. The report and an Executive Summary are both available at https://www.hkreform.gov.hk/en/publications/rorfsa.htm.

14 Law Commission press release, *The Law of England & Wales can accommodate smart contracts, concludes Law Commission* (25 November 2021, available at https://www.lawcom.gov.uk/the-law-of-england-and-wales-can-accommodate-smart-legal-contracts-concludes-law-commission/). See also the Law Commission's note, *Smart Contracts*, available at https://www.lawcom.gov.uk/project/smart-contracts/, from which the full and summary papers, entitled *Smart Legal Contracts: Advice to Government*, may also be downloaded. See also, for comment, Poomintr Sooksripaisarnkit, *Establishing jurisdiction in the context of smart legal contracts - the English Law Commission's Advice to Government* (5 December 2021), available at https://conflictoflaws.net/2021/establishing-jurisdiction-in-the-context-of-smart-legal-contracts-the-english-law-commissions-advice-to-government/.

15 *Arbitration of digital disputes in 'smart' contracts* [2021] Asian DR 145.

16 *Supplement 116* (June 2021, published September 2021).

17 BCLP press release, *BCLP Annual Arbitration Survey 2021: Expert Evidence in International Arbitration* (1 October 2021), available at https://www.bclplaw.com/en-GB/insights/bclp-arbitration-survey-2021-expert-evidence-in-international-arbitration.html. The survey may be downloaded at the same URL.

18 Available at https://globalarbitrationreview.com/insight/know-how/construction-arbitration.

19 Available *gratis* at https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022.

20 ICC press release, *ICC names new Disability and Inclusion Task Force leadership* (3 December 2021), available at https://iccwbo.org/media-wall/news-speeches/icc-names-new-disability-and-inclusion-task-force-leadership/.

Contributor to this issue's News section:

Robert Morgan

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