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EDITORIAL

This issue of *Asian Dispute Review* commences with a commentary by Yihua Chen on the draft revision of China's Arbitration Law, which seeks to modernise the arbitration regime in Mainland China. Wilson Wei Huo then examines the possible impacts on international commercial arbitration of the newly-promulgated PRC Anti-Foreign Sanctions Law 2021.

Next, Swee Siang, Yap Chun Kai and Suchitra Kumar discuss the ways in which international arbitration in Singapore has coped during the COVID-19 pandemic. Aditha Narayan Vijayaraghavan and Akash Santosh Loya follow with a discussion of the overlapping concepts of 'venue' and 'seat' in Indian arbitration.

For the In-house Counsel Focus article, Byron Perez discusses the newly-adopted UNCITRAL Expedited Arbitration Rules 2021 against the backdrop of the Expedited Procedure under the HKIAC Administered Arbitration Rules 2018. Tony Budidjaja then presents developments in international arbitration in Indonesia for the Jurisdiction Focus article.

The book review for this issue is by Jane Willems, who reviews Jianlong Yu and Lijun Cao's *A Guide to the CIETAC Arbitration Rules*. This issue concludes with the News section written by Robert Morgan.

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Revision of China's Arbitration Law: A New Chapter

Yihua Chen

This article comments upon a 'Draft Revision' of China's Arbitration Law 1994 released for public consultation on 31 July 2021. In addition to highlighting key provisions of the draft, which introduces some significant changes to arbitration law and practice, the author comments on a number of provisions meriting future research and on how China's domestic and foreign-related arbitration regimes can be refined further.

Introduction

China's Ministry of Justice has recently released a consultation draft of revisions to the Chinese Arbitration Law 1994[1] (hereinafter the Draft Revision). This document is guided by *Several Opinions on Improving the Arbitration System to Strengthen the Credibility of Arbitration*, issued by the Communist Party of China Central Committee and the State Council in 2019 to modernise China's arbitration system and enhance its credibility.

General principles

The Draft Revision introduces a number of new general principles to the existing Arbitration Law. These include (1) an obligation to arbitrate in good faith (art 4); (2) court functions of support and supervision of the arbitration process (art 10); (3) the *Kompetenz-Kompetenz* doctrine (art 28); (4) equality of treatment (art 29); (5) party autonomy regarding arbitral proceedings (art 30); (6) an obligation to avoid undue delay and expense (*ibid*); and (7) privacy of the arbitral process (*ibid*).

Guided by these principles, the Draft Revision has developed further 'pro-arbitration' provisions aimed at (1) respecting and affirming parties' freedom to enter into arbitration agreements

and to agree upon arbitral procedures; (2) providing mechanisms for the enforcement of such agreements; and (3) prescribing procedures for confirming and enforcing arbitral awards. In general, these guiding principles arguably go a long way toward making Chinese arbitration law maximally supportive of international arbitration practice.

It is worthy of note that the principle of judicial non-intervention in arbitral proceedings is not so well reflected in the Draft Revision. While art 10 provides that "people's courts support and supervise arbitration in accordance with law", it is difficult to tell where the boundaries of the court's judicial power lie in arbitral proceedings. As a matter of legislative technique, it would be desirable to specify under which provisions of a revised Arbitration Law a national court may exercise its judicial functions, whether by way of assistance or supervision. The core value of arbitration is to respect the parties' freedom to decide how their dispute will be resolved. It would therefore be helpful to add to art 10 of the Revised Draft the wording, 'in matters governed by this Law, no court shall intervene except where so provided in this law".

> "… [A] number of new general principles [added by the Draft Revision] … include (1) an obligation to arbitrate in good faith …; (2) court functions of support and supervision of the arbitration process …; (3) the *Kompetenz-Kompetenz* doctrine …; (4) equality of treatment …; (5) party autonomy regarding arbitral proceedings …; (6) an obligation to avoid undue delay and expense …; and (7) privacy of the arbitral process …"

> "Guided by … [the general] principles, the Draft Revision has developed further 'pro-arbitration' provisions aimed at (1) respecting and affirming parties' freedom to enter into arbitration agreements and to agree upon arbitral procedures; (2) providing mechanisms for the enforcement of such agreements; and (3) prescribing procedures for confirming and enforcing arbitral awards."

Apart from the foregoing, art 30 of the Revised Draft affirms the parties' autonomy to agree upon arbitral procedures or arbitration rules and, failing such agreement, the tribunal's authority to decide upon applicable procedures, subject to mandatory rules to the contrary. The boundary between party autonomy and mandatory rules is not, however, very clear. For example, art 37 provides for the matters that must be set out in a request for arbitration, though this issue would seem to be more appropriately left to party autonomy or arbitration rules. Further, art 35 provides that "arbitral proceedings commence on the date on which the arbitral institution receives a request for arbitration", whereas it would also seem to be more flexible and appropriate to leave this matter to the freedom of the parties. It is therefore suggested that the phrase "unless otherwise agreed by the parties" should be added to these draft provisions to distinguish between mandatory and non-mandatory provisions and to give more procedural freedom to the parties.

> "… [Article] 30 of the Revised Draft affirms the parties' autonomy to agree upon arbitral procedures or arbitration rules and, failing such agreement, the tribunal's authority to decide on applicable procedures, subject to mandatory rules to the contrary. The boundary between party autonomy and mandatory rules is not, however, very clear."

Allowing overseas arbitral institutions to engage in foreign-related arbitration in China

Prior to the Draft Revision, a pilot project to allow overseas arbitral institutions to engage in foreign-related arbitration business in designated areas, such as Shanghai and Beijing, had already begun.[2] The aim of the Draft Revision is to open up the foreign-related arbitration market fully to overseas arbitral institutions, provided that they are registered with appropriate judicial administrative departments (art 12). This would allay uncertainties about the validity of arbitration agreements choosing China as the place of arbitration but designating an overseas-seated arbitral institution to administer a reference. The existing 1994 Law determines the nationality of an arbitral award by reference to the country in which the arbitral institution is located.[3] An award rendered under such an arbitration agreement therefore cannot be considered a domestic award as it is administered by an overseas institution. Furthermore, China applies the reciprocity reservation under the New York Convention 1958, whereby it has declared that only awards made in other Contracting States will be recognised and enforced there.[4] Such an award therefore cannot be considered a foreign award either. Although one might argue that such an award is a 'non-domestic' or 'foreign' award,[5] a number of different judicial rulings have resulted in uncertainty and unpredictability as to China's arbitration practice, thus undermining its credibility.[6] This revision is therefore of great significance to the practice of foreign-related arbitration in China.

It is also worth noting that art 12 of Revised Draft removes the legislative barrier to overseas arbitral institutions establishing branches or offices in China, though this also means that those institutions without them are still prohibited from administering arbitrations in China. Legal counsel should therefore be mindful of this when advising clients as to the nomination of an overseas arbitral institution to administer their arbitrations. Alternatively, the legislature should further clarify whether this is the purpose of the legislation.

Introducing the concept of the seat of arbitration

Article 27 of the Draft Revision provides that in the case of domestic arbitrations, "the parties may agree on the place of arbitration in the arbitration agreement. If the parties do not agree on the place of arbitration or if the agreement is unclear, the place of arbitration shall be the seat of the arbitral institution administering the case." In relation to foreign-related arbitrations, art 91 provides that "if the parties do not agree on the place [ie, seat] of arbitration or if the agreement is unclear, the arbitral tribunal shall determine the place of arbitration in accordance with the circumstances of the case". This distinction is justified because, under the Draft Revision, *ad hoc* arbitration is currently available only in foreign-related arbitrations.

Introducing the concept of the seat of the arbitration also implies a change in the old-fashioned approach of determining the nationality of an arbitral award by reference to that of the seat of an arbitral institution. By way of example, this would prevent an ICC arbitral award made in Hong Kong being a French award rather than a Hong Kong award.[7] Thus, adopting a correct territorial approach to awards is crucial to the alignment of Chinese arbitration law with mainstream international legislation and, in particular, with the New York Convention.

Less demanding form requirements for arbitration agreements

Article 21 of the Draft Revision relaxes formal requirements for arbitration agreements. Under art 16 of the existing 1994 Law, a valid arbitration agreement shall contain (1) the expression of an intention to arbitrate; (2) the matters agreed to be referred to arbitration; and (3) the selected arbitration commission.[8] The Draft Revision has simplified the requirements as to form, stipulating that only the expression of intention to refer disputes to arbitration is required, subject to generally applicable principles of contract formation (art 22). Article 21 further recognises the concept of a party's tacit acceptance of the existence of an arbitration agreement where it does not raise jurisdictional objections.

With regard to indefinite arbitration agreements, art 35 provides that, where the parties fail to agree on a specific arbitration institution, they may conclude a supplementary agreement or, failing such agreement, the arbitration institution in which the case was first entertained shall administer the case. Where the parties fail to agree on the seat of the arbitration, arts 27 and 91, discussed earlier, provide guidance.

> "The aim of the Draft Revision is to open up the foreign-related arbitration market fully to overseas arbitral institutions, provided that they are registered with appropriate judicial administrative departments …"

With regard to the law applicable to a foreign-related arbitration agreement, the Draft Revision provides that the law applicable to that agreement shall be either the law chosen by the parties or the law of the arbitral seat. If neither can be demonstrated, the court may apply Chinese law to determine the validity of the agreement (art 91). The application of the law of the arbitral seat is consistent with international practice; however, the application of Chinese law as a miscellaneous provision is not. Although China now endeavours to make its arbitration system as supportive as possible of international arbitration, and while the validity of arbitration agreements will more likely be upheld under Chinese law, there is a potential risk that the application of Chinese law by courts might overlook the parties' implied choice of law.

Accordingly, if the legislature aims at fully respecting parties' intention to arbitrate, it is suggested that it should adopt the so-called 'favour principle',[9] which provides that "the arbitration agreement is valid if it is (i) under the laws [*sic*] chosen by the parties; (ii) under the law of the place of arbitration; or (iii) in the absence of a choice of law by the parties, under the law governing the legal relationship to which the arbitration agreement relates." On the one hand, this approach may help to avoid confusion over choice of law rules; on the other hand, it may align well with art 91 of the Draft Revision, which provides that the place of arbitration may be determined by the tribunal. Further, this suggestion is also consistent with the aim of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases* (26 December 2017),[10] which is to uphold to the maximum possible extent the validity of arbitration agreements, thus reducing instability caused by major changes in the law.

Introducing *Kompetenz-Kompetenz*

The Draft Revision also introduces the *Kompetenz-Kompetenz* principle into Chinese law for the first time. Article 28 provides that an arbitral tribunal shall consider and decide upon the existence and validity of the arbitration agreement or on its jurisdiction, while an arbitration institution may determine questions of existence and validity on the basis of *prima facie* evidence before a tribunal is constituted. Furthermore, a court shall not determine questions of the existence and validity of an arbitration agreement or of the tribunal's jurisdiction without a party having first raised this before the tribunal or arbitration institution. This reflects internationally accepted policy of avoiding judicial interference with the tribunal's competence.

> "… [A] court shall not determine questions of the existence and validity of an arbitration agreement or of the tribunal's jurisdiction without a party having first raised this before the arbitral tribunal or institution. This reflects internationally accepted policy of avoiding judicial interference with the tribunal's competence."

Paralleling most arbitration legislation,[11] parties who are not satisfied with a decision on a jurisdictional challenge may apply for a judicial review. By contrast, however, a party that is dissatisfied with the court's decision may request a second review by a higher court, but only if the lower court rules that the arbitration agreement is invalid or that the tribunal has no jurisdiction. These provisions of the Draft Revision generally seek to facilitate and promote the the use of arbitration to the maximum extent.

The authority of arbitrators to grant interim measures

The Draft Revision authorises arbitrators to order interim measures, a power that, under art 101 of the PRC Civil Procedure Law 2017, is currently reserved exclusively to national courts. More specifically, the interim measures provided for in the Draft Revision include asset preservation, evidence preservation, conduct preservation and other short-term measures deemed necessary by the tribunal (art 43). In relation to applications for asset preservation and conduct preservation, an applicant must show that the conduct of other parties or other reasons may make the award unenforceable, difficult to enforce or cause damage to the applicant (art 44). In relation to applications for evidence preservation, an applicant must show that the evidence is likely to be lost or become difficult to obtain later (art 45). With regard to other interim measures, the tribunal must comprehensively consider the necessity and feasibility of ordering interim measures (art 47). In any event, a party applying for interim measures shall provide security and be liable for any damage to the other party if such measures are wrongfully granted (art 47). Other related provisions include the right of a party to apply for court-ordered provisional measures (art 46), the power of the tribunal to modify, suspend or terminate a granted order (art 48), court assistance in the enforcement of tribunal-ordered interim measures (arts 47 and 48) and emergency arbitrations (art 49). The pro-arbitration attitude of national courts is very evident from these provisions.

> "The Draft Revision authorises arbitrators to order interim measures, … [which] include asset preservation, evidence preservation, conduct preservation and other short-term measures deemed necessary by the tribunal …"

Introducing *ad hoc* arbitration

Ad hoc arbitration is introduced by the Draft Revision, albeit permitted at the moment only for foreign-related arbitrations (art 91). To assist the conduct of *ad hoc* arbitration, the intermediate court at the place of arbitration, the place where the party is situated or the place with which the dispute is closely connected is required to (1) designate an arbitration institution for the parties, (2) appoint a tribunal where the parties fail to do so in a timely manner, and (3) deal with challenges to arbitrators (art 92). An arbitrator who disagrees with the award is not required to sign it, but shall issue a written and signed dissenting opinion and serve it on the parties (art 93).

The most controversial matter is that an original *ad hoc* arbitral award and the record of its service on the parties shall be deposited with the intermediate court at the seat of the arbitration within 30 days after the date of service. This seems to be a mandatory requirement. Does it mean that *ad hoc* awards could be set aside or refused recognition and enforcement on the ground of non-deposit? It is submitted that this deposit requirement is unnecessary, as leading arbitration legislation elsewhere does not provide for it. Further, where an *ad hoc* award needs to be enforced outside of China, the requirement becomes even less necessary. There is no need for this extra level of judicial supervision. The deposit requirement should therefore be deleted or left to the agreement of the parties.

> "*Ad hoc* arbitration is introduced by the Draft Revision, albeit permitted at the moment only for foreign-related arbitrations …"

Grounds for setting aside and non-enforcement of awards

The Draft Revision has made great changes to the mechanisms for setting aside and non-enforcement of awards. Article 77 seeks to unify the separate setting aside and non-enforcement procedures that currently apply to domestic and foreign-related awards. If enacted, domestic awards may be made subject to less substantive review in setting aside cases concerned, while foreign-related awards will be made subject to two new grounds of review in addition to those currently in existence: (1) that the award was procured by fraud, such as malicious collusion or fabrication of evidence, and (2) that an arbitrator accepted a bribe, engaged in deception for personal gain or perverted the law in making a ruling.

With regard to recognition and enforcement of awards, the Draft Revision eliminates the procedure for refusing to enforce an award at the request of the parties, while retaining only the discretion of the court to review it on a public policy basis (art 82) as a ground for judicial supervision of awards. The table below shows the differences between the current arbitration law and the Draft Revision in this regard.

Table of comparisons between provisions under current law and under the Draft Revision

	Arbitration Law 1994 (AL) Civil Procedure Law 2017 (CPL)		Draft Revision 2021 (Draft)
	Domestic awards	Foreign-related awards	Domestic and foreign-related awards
Grounds for setting aside	1. No valid arbitration agreement. 2. Excess of arbitral authority. 3. Composition of the tribunal or arbitral procedures violate the law of the seat. 4. Fabricated evidence. 5. Material evidence that would have had an influence on the decision of the tribunal was concealed by a party. 6. Arbitrators have accepted bribes, resorted to deception for personal gain or perverted the law in ruling. 7. Award violates public policy. (AL, art 58)	1. No valid arbitration agreement. 2. Excess of arbitral authority. 3. Composition of the tribunal or arbitral procedures not in accordance with arbitration rules. 4. Party denied an opportunity to present case 5. Award violates public policy. (AL, art 70; CPL, art 274)	1. No valid arbitration agreement. 2. Excess of arbitral authority. 3. Composition of the arbitral tribunal or arbitral procedures not in accordance with parties' agreement or the law of the seat. 4. Party denied an opportunity to present case. 5. Award procured by fraud, such as malicious collusion and fabricating evidence. 6. Arbitrators have accepted bribes, resorted to deception for personal gain or perverted the law in ruling. 7. Award violates public policy. (Draft, art 77)
Grounds for non-enforcement	*Ibid* (AL, art 62; CPL, art 237)	*Ibid* (AL, art 71; CPL, art 274)	*Award violates public policy.* (Draft, arts 82 and 83)

With regard to domestic arbitration, since the CPL 2017 removed the grounds of review for incorrect application of the law by the arbitral tribunal, the Draft Revision removes the ground of review for concealment by a party of important evidence that would have had an influence on the decision of the tribunal, further reducing the court's substantive review of the award.

> "The Draft Revision has made great changes to the mechanisms for setting aside and non-enforcement of awards. Article 77 seeks to unify the separate setting aside and non-enforcement procedures that currently apply to domestic and foreign-related awards."

It is, however, controversial whether it is necessary to retain the two new grounds as independent grounds for setting aside an award. The procurement of an award may be considered to fall within the head of public policy, as indicated in the drafting history of the UNCITRAL Model Law.[12] As to bribery, corruption or other misconduct by arbitrators, this can always be claimed together with arbitrator bias or lack of independence or impartiality within other grounds.[13] Thus, even absent express provision, claims that an award has been procured by fraud or arbitrator bias may still be considered as a potential basis for annulment.

What also needs to be also considered is the time limit for applying to set aside an award on the grounds of fraud or falsification of evidence. Unlike other procedural grounds, this situation will usually be discovered by parties after an award has been made, so it seems somewhat harsh for this ground for setting aside to be subject to a requirement that it must be raised within three months of the service of the award, rather than after the parties have become aware of it.[14]

With regard to removing the procedure for non-enforcement at the request of the parties, it is controversial whether the protection of dual remedies for the parties should be retained. It is submitted that the new provision is a good attempt to promote the efficiency of the arbitration process, although it will place a higher demand on the professionalism and credibility of the court charged with setting aside an award. By avoiding situations in which courts may rule differently in setting aside and non-enforcement proceedings, this approach helps to improve the credibility and consistency of the Chinese arbitration system. It is also the approach taken by some developed arbitration jurisdictions, such as the Netherlands and France.[15] One point to note is that because in practice parties may agree to waive the right to bring an action for setting aside, consideration could be given to adding the right to allow parties to appeal against an enforcement order on art 77 grounds.

Legislative style of the Draft Revision

The Draft Revision does not adjust the existing legislative style of the Arbitration Law, which remains the main body of legislation governing arbitration in China, along with a separate chapter making special provision for foreign-related arbitrations conducted in China. Due to the particularities of arbitration in China, arbitral awards are divided into (1) foreign awards that are enforceable under the New York Convention 1958; (2) domestic awards; (3) foreign-related awards made in Mainland China; and (4) awards made in Hong Kong, Macao and Taiwan. For the sake of completeness and with regard to legislative practice in other countries, it is recommended that the concept of arbitral awards under Chinese law involving different jurisdictions be clarified in the General Provisions chapter of the Draft Revision and that specific provisions on enforcement procedures for different types of award be added to the chapter on enforcement.

Conclusion

The Draft Revision introduces many innovations aimed at maximising the support of Chinese arbitration law for domestic and international arbitration practice. It therefore clearly emphasises the role of domestic courts in facilitating and supporting the arbitration process. A general point for further improvement is that the parties should be given more freedom or flexibility to decide how to resolve their disputes. Overall, the author is very confident that the current revision of the Arbitration Law will have a positive impact on stimulating the dynamics of the Chinese arbitration market.

“The Draft Revision introduces many innovations aimed at maximising the support of Chinese arbitration law for domestic and international arbitration practice. It therefore clearly emphasises the role of domestic courts in facilitating and supporting the arbitration process … [and] will have a positive impact on stimulating the dynamics of the Chinese arbitration market.”

1 The present Arbitration Law of the PRC (the 1994 Law) was first promulgated in 1994, followed by two minor revisions in 2009 and 2017. Reference is also made in this article to the Civil Procedure Law 2017 (CPL 2017) with regard to the current law as to setting aside and refusal of recognition and enforcement of awards. The term ‘China’ in this article denotes only Mainland China, excluding Hong Kong, Macao and Taiwan. *Editorial note*: See also *Amendment of the PRC Arbitration Law* at p 204 below,

2 See, for example, Shanghai Municipal Bureau of Justice, *Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-gang Special Area of China (Shanghai) Pilot Free Trade Zone* (21 October 2021), available at http://sfj.sh.gov.cn/2020jcgk_gfxwj/20201102/93cb5f7fd32e48229600d46caef2839f.html (accessed 9 September 2021) and Beijing Municipal Bureau of Justice, *Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone* (29 December 2020), available at http://sfj.beijing.gov.cn/sfj/zwgk/zcfg59/10913870/index.html (accessed 9 September 2021). *Editorial note*: As to the earlier initiatives, see (1) *Opening up to foreign arbitral institutions in Beijing* [2021] Asian DR 98, and (2) *Foreign arbitral institutions in the Shanghai Pilot Free Trade Zone* [2020] Asian DR 47.

3 1994 Law, arts 10 and 66; CPL 2017, arts 237 and 283.

4 18th session of the Standing Committee of the Sixth National People’s Congress, *China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2 December 1986).

5 With regard to cases in which the validity of such arbitration agreements is not confirmed, see, for example, *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*, No 23 [2003] Civil Division IV of the Supreme People’s Court; *Reply of the Supreme People’s Court on Request for Instructions Re Arbitration Clause Validity in the Distribution Agreement between Amoi Electronics Co Ltd and Belgium Products Co Ltd*, No 5 [2009] Civil Division IV of the Supreme People’s Court. With regard to cases in which the validity of such arbitration agreements is upheld, see, for example, *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*, No 13 [2013] Civil Division IV of the Supreme People’s Court; *Reply to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Ningbo Beilun Li Cheng Lubricating Oil Co Ltd and Formal Venture Corp*, No 74 [2013] Civil Division IV of the Supreme People’s Court.

6 With regard to discussions on the validity of arbitration agreements where foreign arbitral institutions administer arbitrations in Mainland China, see, for example, Kun Fan, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China* (2011) 28(4) Journal of International Arbitration 343-353, at 343; Qingming Li, 《境外仲裁机构在中国内地仲裁的法律问题研究》(*Legal Study on Overseas Arbitration Institutions Administering Arbitrations in Mainland China*), 3 [2016] 《环球法律评论》 (Global Law Review) 181-192, at 181.

7 *Letter of Reply of the Supreme People’s Court to the Request for Instructions on the Case of Not Executing the Final Award 10334/AMW/BWD/TE of the International Court of Arbitration of International Chamber of Commerce*, No 6 [2004] Civil Division IV of the Supreme People’s Court.

8 Article 16 of the 1994 Law.

9 Examples of the favour principle or the validation principle include art 178(2) of the Swiss Private International Law Act and Section 10: 166 of the Dutch Civil Code.

10 [2017] Fa Shi No 22 (Supreme People’s Court), arts 14 and 15, whereby, if the parties do not choose the law applicable to the arbitration agreement, the court may apply the law of the arbitral seat or the law of the seat of the arbitration institution. If the application of the two would lead to a different result, the court shall apply the law that confirms the validity of the arbitration agreement.

11 Such as art 16.3 of the UNICTRAL Model Law on International Commercial Arbitration.

12 See Gary B Born, *International Commercial Arbitration* (3rd Edn, 2021, Kluwer Law International), pp 3627-3632.

13 *Ibid*, pp 3562-3565.

14 Article 78 of the Draft Revision, which provides: “Where the parties apply for setting aside the award, they shall do so within three months from the date of service of the award.”

15 Such as art 1062 of the Dutch Code of Civil Procedure and art 1518 of the French Code of Civil Procedure.

The Impact of the PRC Anti-Foreign Sanctions Law 2021 on International Commercial Arbitration

Wilson Wei Huo

This article discusses the PRC Anti-Foreign Sanctions Law 2021 and seeks to analyse its possible impacts on international commercial arbitration in light of recent precedents on unilateral sanctions, including the PRC's sanctions against London's Essex Court Chambers and the United States, and those of the European Union against Russia and Iran. It also provides advice on these matters for arbitration practitioners and other relevant participants.

Introduction

On 23 July 2021, the Ministry of Foreign Affairs of the People's Republic of China (China or PRC) announced sanctions against seven US persons and entities, including former US Secretary of Commerce Wilbur L Ross, Jr,[1] under the PRC Anti-Foreign Sanctions Law 2021 (the AFSL). This is the first time the AFSL has been applied since its promulgation and coming into force on 10 June 2021.

The AFSL provides legal authority for China to respond to foreign unilateral sanctions imposed on it and, where considered appropriate, to take proactive countermeasures. The AFSL will therefore certainly have a significant impact on international economic and trade activities. As one of the major methods of resolving international commercial disputes, international arbitration is bound to be affected by the AFSL in many ways; the latter therefore deserves particular attention from arbitration practitioners.

Countermeasures: Their targets, obligatory subjects and consequences of violation

The title of a law is always the 'label' of its main purpose. The word 'anti' in the AFSL's title clearly indicates that the primary legislative objective is countering, responding to and opposing

so-called 'unilateral sanctions' imposed against China by foreign governments. By its nature, the AFSL is a "defensive measure to deal with and counter suppression against China by certain Western countries", and is not aimed at aggressively waving the stick of sanctions. This is consistent with China's long-standing commitment to a peaceful foreign policy and exemplifies a legal theory in Chinese traditional culture - namely, to gain mastery by striking the other side only after he has struck.

Although the AFSL was drafted, read and enacted in a relatively short period of time, it contains a broad range of provisions on the scope, targets and obligatory subjects of countermeasures, as well as on the consequences of violating it. It thereby provides a flexible 'policy toolbox' for leveraging the power of countermeasures.

> "The AFSL provides legal authority for China to respond to foreign unilateral sanctions imposed on it and, where considered appropriate, to take proactive countermeasures."

(1) Who are the 'targets' of countermeasures?

The AFSL establishes a countermeasure target management system based on an anti-sanctions list. Pursuant to arts 3 and 4, the individuals or organisations that may be added to the anti-sanctions list include (1) individuals and organisations who are directly or indirectly involved in formulating, deciding upon and implemening discriminatory restrictive measures against Chinese citizens or organisations; (2) spouses and immediate family members of aforementioned individuals; (3) organisations in which aforementioned individuals serve as senior management or as the actual controllers; and (4) senior management or actual controllers of the aforementioned organisations.

> "As one of the major methods of resolving international commercial disputes, international arbitration is bound to be affected by the AFSL in many ways; the latter therefore deserves particular attention from arbitration practitioners."

(2) What are 'countermeasures'?

Pursuant to art 6 of the AFSL, countermeasures that can be taken by relevant departments of the State Council, depending upon their respective responsibilities and divisions, include (1) refusal of visa applications, denial of entry, cancellation of visas, or expulsion; (2) attaching, seizing or freezing movables, immovables and other types of asset of targeted individuals and organisations that are located within PRC territory; (3) prohibiting or restricting organisations and individuals within PRC territory from engaging in relevant transactions, co-operation or other activities with individuals and organisations who are subject to countermeasures; and (4) other necessary measures.

Notably, art 6 of the AFSL merely sets out the general principles governing the countermeasures that relevant departments of the State Council may announce. Further clarifications are expected to be made through more detailed and extensive supplementary rules and regulations addressing questions arising. For example, does 'denial of entry' under art 6(1) apply to the Hong Kong Special Administrative Region (HKSAR) and Macao Special Administrative Region (Macao SAR)? How would countermeasures be made effective in

these SARs? Would the AFSL's legal effect in the SARs be achieved by adding it into Annex III (National Laws to be Applied) of the Basic Law of each SAR or by stipulating its applicability to each SAR on a case-by-case basis where the relevant departments announce specific countermeasures? By way of illustration by reference to the sanctions imposed on relevant UK individuals and businesses by the Ministry of Foreign Affairs on 26 March 2021, the sanction of denial of entry expressly states that it covers both the HKSAR and Macao SARs.[2] Further, another key issue is how the terms 'transaction' and 'co-operation' would be properly interpreted under art 6(3) of the AFSL - would "all and any" financial transactions and "all and any" types of co-operation fall within the scope of the countermeasures?

> "…[T]he AFSL … contains a broad range of provisions on the scope, targets and obligatory subjects of countermeasures, as well as on the consequences of violating it. It thereby provides a flexible 'policy toolbox' for leveraging the power of countermeasures."

(3) The 'obligatory subjects', consequences of violation, possible 'long-arm' jurisdiction and the primacy of countermeasures

The AFSL defines the obligatory subjects and consequences of its violation by reference to three key provisions:

(1) organisations and individuals within PRC territory shall implement the countermeasures taken by relevant departments of the State Council (art 11);
(2) no organisation or individual may implement or assist in the implementation of discriminatory restrictive measures of any foreign State against Chinese citizens or organisations (art 12); and
(3) any organisation or individual failing to implement or co-operate with the implementation of any countermeasures shall bear legal liability in accordance with the law (art 14). Although art 14 does not expressly specify the extent of 'legal liability' for such violations, it is certain that (i) it allows for the extra-territorial application of the AFSL, and (ii) both domestic and foreign organisations and individuals will face direct liability for violations of the AFSL and relevant laws if they fail to implement or co-operate with the implementation of countermeasures.

Further, art 13 of the AFSL contains provisions authorising the promulgation of administrative regulations and departmental rules to the effect that, "in addition to the provisions of AFSL, the relevant laws, administrative regulations, and departmental rules may stipulate the adoption of other necessary countermeasures". Before the enactment of the AFSL, the PRC Ministry of Commerce (MOFCOM) had promulgated *Provisions on the Unreliable Entity List* and *Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures* (in September 2020 and January 2021 respectively). In this regard, art 13 of the AFSL provides clearer and more solid legislative authority for these two sets of MOFCOM regulations and redresses the absence under them of countermeasures against foreign sanctions.

The impact of the AFSL on international commercial arbitration

China's important position in international economic and trade activities means that Chinese elements are increasingly permeating international commercial arbitration. In light of such events as the imposition by the PRC Ministry of Foreign Affairs of sanctions against London's Essex Court Chambers and the United States and by the European Union (EU) against Russia and Iran, it is submitted that, in international commercial arbitration cases in which Chinese countermeasures are

involved, the AFSL may have a significant impact on (*inter alia*) the commencement of arbitration proceedings, the composition of the arbitral tribunal, the hearing and the recognition and enforcement of arbitral awards.

> "[Article] 6 of the AFSL merely sets out the general principles governing the countermeasures that relevant departments of the State Council may announce. Further clarifications are expected to be made through more detailed and extensive supplementary rules and regulations addressing questions arising."

(1) Impact of the AFSL on the commencement of arbitration proceedings

Impact of countermeasures on the validity of arbitration agreements

Firstly, there is the issue of the impact of countermeasures on the validity of arbitration agreements, which are the corollary of party autonomy. Arbitration has been widely acknowledged and accepted by the international community as a common method of dispute resolution and China has always maintained a pro-arbitration attitude and stance. Unless otherwise provided by applicable laws, the writer believes that countermeasures taken by relevant Chinese authorities pursuant to the AFSL will not, in principle, affect the validity of arbitration agreements signed by targets of countermeasures.

Notably, while countermeasures may not impact upon the validity of an arbitration agreement in principle, they may inevitably hinder the parties' willingness and determination to commence arbitration proceedings. For example, the writer's law firm represented a Mainland Chinese company in a Hong Kong-seated arbitration that involved an international sale of goods dispute with an Iranian company. The Chinese company, after weighing the impact of the US sanctions against Iran on the arbitration proceedings and in particular on any subsequent application for recognition and enforcement of the arbitral award in Iran, finally decided to suspend initiating arbitration proceedings against the Iranian company.

> "… [I]n international commercial arbitration cases in which Chinese countermeasures are involved, the AFSL may have a significant impact on (*inter alia*) the commencement of arbitration proceedings, the composition of the arbitral tribunal, the hearing and the recognition and enforcement of arbitral awards."

Impact of countermeasures on the functions of arbitral institutions

Secondly, countermeasures may affect the registration and administration of arbitration cases by arbitral institutions. As mentioned previously, because the connotation and meaning of the terms 'transaction' and 'co-operation' under art 6(3) of the AFSL are ambiguous, it is unclear whether an arbitral institution's acceptance of arbitration claims and charging of arbitration fees to relevant parties who are on the countermeasures list would fall within that provision. It is therefore open to an arbitral institution to refuse or adjourn

an application for arbitration pending the grant of permission by the relevant authority. As an illustration, a worldwide survey conducted by the Russian Arbitration Association in 2016 on more than 160 lawyers and arbitrators showed that where a sanctioned person was a party to an arbitration case, 5% and 17% of the interviewees respectively reported having encountered refusal or adjournment of arbitration applications by the arbitral institutions.

> "… [B]ecause the connotation and meaning of the terms 'transaction' and 'co-operation' under art 6(3) of the AFSL are ambiguous, it is unclear whether an arbitral institution's acceptance of arbitration claims and charging of arbitration fees to relevant parties who are on the countermeasures list would fall within that provision."

Effect of countermeasures on arbitral fees

Thirdly, countermeasures may affect payment of arbitration fees. If a party to the arbitration is the target of countermeasures, a bank's handling of the payment of these fees may constitute a 'transaction' or 'co-operation' prohibited or restricted by art 6(3) of the AFSL. It would therefore come as no surprise for the bank to decline or withhold payments.[3] In this regard, it is worth noting that the AFSL has no exemption provisions for countermeasures, so it is unclear whether supplementary provisions or specialised countermeasures would allow leeway for countermeasure targets to apply for 'exemption' to allow them to participate in necessary legal activities. For example, where an EU-sanctioned Russian party intends to initiate arbitration with ICC, LCIA, SCC or other EU-seated arbitral institutions, it may apply to the relevant EU authorities for exemption and the relevant arbitral institution will provide that party with the necessary information to assist it in doing so.[4]

(2) Impact of the AFSL on the composition of the arbitral tribunal, the arbitration hearing and relevant participants in the arbitration

If the Chinese authorities place a party to an arbitration on the countermeasures list, the members of an arbitral tribunal may be unwilling to accept that party's nomination or may resign their appointments on their own initiative. Obviously, the tribunal may have at least two concerns: (1) whether the charging of its own arbitral fees constitutes a 'transaction' under art 6(3) of the AFSL; and (2) whether its administration, management, adjudication and participation in the arbitration process, including convening procedural meetings, soliciting the parties' opinions on the arrangements for arbitration procedures and organising hearings would be construed as 'co-operation' under art 6(3). If either or both of these activities are so defined, the tribunal would inevitably face a dilemma: if the arbitration continues, it would violate the AFSL and be held legally liable, whereas if it complies with the AFSL it would be obliged to resign. For example, in arbitration cases involving sanctions against Russian subjects by the US or the EU, some arbitrators have refused party appointments or resigned halfway through the proceedings where parties have become the subject of sanctions.

Compared with the sanctions imposed on parties to arbitrations, those imposed on arbitrators and their institutions may be relatively rare. If, however, arbitrators and their institutions directly or indirectly participate in formulating, deciding upon and implementing discriminatory sanctions against Chinese individuals and organisations, they may also become targets of China's countermeasures. In such a case, parties may request the replacement of an arbitrator after constitution of the tribunal and an arbitral institution may refuse a party nomination. For example, in an ICC arbitration case in which

counsel from Essex Court Chambers served as the sole arbitrator, the Chinese party challenged the arbitrator on the basis of relevant Chinese sanctions. Although the arbitrator changed e-mail address from that of Essex Court Chambers to his private e-mail and stated that the remuneration paid by ICC could be directly remitted to his personal account, the ICC nevertheless decided to replace him. Even if an arbitrator is not replaced, he or she may be unable to attend hearings held in Mainland China pursuant to a relevant countermeasure, such as 'denial of entry', unless he or she obtains authorisation from the competent authority or 'exemption' to participate in the arbitration proceedings.

> "… [I]t is worth noting that the AFSL has no exemption provisions for countermeasures, so it is unclear whether supplementary provisions or specialised countermeasures would allow leeway for countermeasure targets to apply for 'exemption' to allow them to participate in necessary legal activities."

Further, countermeasures under the AFSL may also have an impact on the involvement of other participants in arbitration proceedings. For example, the provision of (*inter alia*) legal services by lawyers, document or hearing room translation services by translators, or the provision of hearing room space by arbitral institutions and hotels may all be considered as 'transactions' or 'co-operation' under art 6 of the AFSL.

(3) Impact on the enforcement of arbitral awards

Could an arbitral award be enforced in China in the event that it should conflict with the countermeasures announced under the AFSL (a Conflicting Award, such as one ordering a party to pay the contract price to a target of the countermeasures)? Pursuant to art V of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (New York Convention), art 274 of the PRC Civil Procedure Law and other relevant provisions, possible grounds for refusal to enforce a Conflicting Award lie principally in non-arbitrability and violation of public policy.

With regard to whether the subject-matter of a Conflicting Award is arbitrable, non-arbitrable matters pursuant to art 3 of the PRC Arbitration Law 1994 include (1) disputes concerning marriage, adoption, guardianship, custody and support, or inheritance; and (2) administrative matters that should be settled by relevant administrative institutions. However, for contract disputes and other property rights and interests disputes between civil entities, it is unlikely that arbitrability would be lost if one party were to become the target of countermeasures by relevant authorities under the AFSL, unless such countermeasures explicitly exclude the right of the parties to submit to arbitration disputes relating to targets of the countermeasures.

> "If the Chinese authorities place a party to an arbitration on the countermeasures list, the members of an arbitral tribunal may be unwilling to accept that party's nomination or may resign their appointments on their own initiative."

With regard to whether a Conflicting Award would violate Chinese public policy, although there is no clear definition of 'public policy' in China's arbitration legislation and relevant judicial interpretations, Chinese courts have taken a very prudent and conservative position on refusing the

enforcement of arbitral awards on this ground. Only in the case of infringement of fundamental legal principles, fundamental social interests, national sovereignty, judicial sovereignty, good customs or the jurisdiction of the Chinese courts can public policy be applied to refuse enforcement of an arbitral award. As derived from the legislative purpose stated in art 1 of the AFSL, the relevant countermeasures are aimed at "safeguarding national sovereignty, security, and development interests and protecting the legitimate rights and interests of our citizens and organisations; and to strengthen the enforcement and deterrent effect of countermeasures and reflect the nature of sovereign acts of the state." In addition, art 7 of the AFSL stipulates that countermeasures taken by relevant departments of the State Council shall be final. Accordingly, countermeasures reflect national sovereignty to a certain extent and have the attribute of public policy. As such, therefore, it is possible that an application to enforce a Conflicting Award would be refused by Chinese courts on the ground of public policy.

> "… [P]ossible grounds for refusal to enforce a Conflicting Award lie principally in non-arbitrability and violation of public policy. … Even if an arbitral award can be recognised and enforced, however, its enforcement may be hindered by relevant countermeasures."

However, it should be noted that due to the broad definition of 'countermeasures' under the AFSL, the content, severity and duration of different countermeasures announced by relevant departments of the State Council may vary significantly (for example, prohibiting a countermeasure target's entry to and exit from PRC territory but not 'transactions' or 'co-operation' with it). The courts are expected to continue their prudent and conservative stance on determining an alleged violation of public policy on the basis of case-specific analysis instead of a 'one size fits all' approach. In particular, the courts should consider the specific content of the countermeasure(s) involved in the arbitral award, accurately identify the types of interest it protects, and specifically determine whether and to what extent the award violates the countermeasure(s) and whether such violation necessarily constitutes a violation of public policy. The Supreme People's Court has yet to give additional clarity in this regard in further rulings to standardise implementation of the AFSL and to moderate and guide the expectations of domestic and international arbitration practitioners.

Even if an arbitral award can be recognised and enforced, however, its enforcement may be hindered by relevant countermeasures. For example, if the assets of the person subject to enforcement in China are attached, seized or frozen in advance by the relevant authorities pursuant to the AFSL, the enforcement procedure may be sterilised by a finding of 'no enforceable property'.

Conclusion: Advising the international arbitration community on AFSL impacts

To address effectively the possible impact of the AFSL on international commercial arbitration, ensure the efficient conduct of arbitrations affected by it and to avoid the risks of possible legal liability for ignoring or disregarding it, the following advice is offered.

Firstly, parties to arbitrations should pay close attention to the application of anti-sanctions legislation in China to the cases in which they are involved. Through due diligence work or other appropriate means, they may identify whether other parties, arbitrators and/or other relevant participants in arbitrations are on the anti-sanctions list announced under the AFSL. Where this is the case, it would be necessary for them to assess further the compliance risks and address proactively the compliance requirements, such as (*inter alia*) challenging nominated arbitrators.

Secondly, arbitrators should also be aware of whether any parties to arbitrations are subject to AFSL countermeasures before accepting appointments. In the event that an arbitration involves a countermeasure-targeted party, the tribunal should consider whether and to what extent the countermeasures apply to the case, as well as their impact on the arbitration proceedings and on the subsequent recognition and enforcement of the award. Other arbitration participants, such as legal representatives, factual witnesses and expert witnesses, should likewise pay attention to the sanctions imposed on parties to the arbitration in order to avoid legal and ethical risks.

Finally, arbitral institutions, particularly those conducting arbitral activities in China, should also pay close attention to changes in China's anti-sanctions laws and regulations, carefully evaluate the potential impact of relevant countermeasures on the registration and administration of arbitration cases, and establish necessary communication and co-ordination mechanisms with relevant authorities in China. Additionally, arbitral institutions may also publish practice guides or reports to address arbitration practitioners' concerns about countermeasures and assist in the administration and/or management of sanctions-related arbitration proceedings.

1 Ministry of Foreign Affairs of the PRC, *Foreign Ministry Spokesman Answers Reporters' Questions on China's Decision to Impose Sanctions on US Persons and Entities* (20 July 2021), available at https://www.fmprc.gov.cn/web/fyrbt_673021/t1894663.shtml (in Chinese only, accessed 17 August 2021).

2 Ministry of Foreign Affairs of the PRC, *Foreign Ministry Spokesperson Announces That China Will Impose Sanctions on Relevant UK Personnel and Entities* (26 March 2021), available at http://new.fmprc.gov.cn/web/fyrbt_673021/t1864363.shtml (in Chinese only, accessed 17 August 2021).

3 *Ibid.*

4 ICC, LCIA & SCC, *The Potential Impact of the EU Sanctions against Russia on International Arbitration Administered by EU-Based Institutions* (20 August 2015), available at https://www.lcia.org/News/the-potential-impact-of-the-eu-sanctions-against-russia-on-inter.aspx (accessed 17 August 2021).

The Resilience of Singapore Arbitration Amidst the COVID-19 Pandemic

Boey Swee Siang, Yap Chun Kai & Suchitra Kumar

This article explores the resilience and growth of arbitration in Singapore in the face of the COVID-19 pandemic. It focuses on (*inter alia*) the use and impact of remote hearings, steps taken by Singapore's international arbitral institutions to increase its global outreach and its world rankings in international arbitration user surveys, growth in institutional arbitration filings, and reform proposals for legislation and arbitration rules.

Introduction

Amidst a global pandemic that has forever altered so many aspects of everyday life, arbitration in Singapore nonetheless remains as attractive a mode of dispute resolution as it was prior to the outbreak. Notwithstanding the devastating economic impact of COVID-19, which saw the Singapore economy contract by 5.8% in 2020 (its worst performance since gaining independence in 1965),[1] positive developments in arbitration in Singapore (and indeed within the region) continued apace in 2020 and 2021.

Remote hearings

The onset of the pandemic brought with it unprecedented restrictions and change. Across the globe, governments imposed lockdowns and social distancing measures, and closed borders to foreign entrants. In Singapore, the government imposed a strict 'circuit breaker' lockdown to control the spread of the pandemic from April to June 2020. The subsequent easing of measures was implemented only gradually and with caution, in order to manage the spread of COVID-19.

Dispute resolution institutions in Singapore responded to these measures and made swift adaptations to their internal operations. Most notably, the infrastructure for remote hearings was promptly expanded to allow parties and arbitrators the option of conducting their hearings without the need for physical attendance. Physical hearings that did take place were

also calibrated in such a manner as to ensure compliance with the requisite safe distancing measures. Singapore's primary arbitration base, Maxwell Chambers, was proactive with its early investment in hybrid and virtual hearing solutions, providing state-of-the-art video and conference capabilities and seamless add-ons relating to interpretation, document management and remote transcription.[2] To facilitate the implementation of these digital capabilities, the Singapore International Arbitration Centre (SIAC) also sought special permission from the relevant authorities to maintain a limited cohort of staff in the office during the initial stages of the pandemic. The prompt implementation of remote hearing capabilities at the onset of COVID-19 (from as early as March 2020)[3] paid off; the use of Maxwell Chambers' now-popular virtual hearing feature is expected to be heavily utilised even in a post-pandemic world.

> "Dispute resolution institutions in Singapore responded to … [restriction easing] measures and made swift adaptations to their internal operations. Most notably, the infrastructure for remote hearings was promptly expanded to allow parties and arbitrators the option of conducting their hearings without the need for physical attendance."

While arbitrations administered by the SIAC have always allowed for the use of remote hearing platforms (such as, for example, the conduct of preliminary meetings by way of tele- or video-conferencing, and the giving of some witness evidence remotely), the conditions caused by the pandemic have forced the conduct of proceedings to switch either fully or partially to virtual hearings. Rule 19.1 of the SIAC Rules 2016 (6th Edn) (SIAC Rules) confers broad discretion on arbitral tribunals to conduct hearings in the manner that they deem fit, requiring only that they "consult with the parties to ensure the fair, expeditious, economical and final resolution of the dispute". This provision empowers tribunals to conduct arbitration proceedings remotely whenever appropriate and has been useful in facilitating the move toward virtual hearings in the era of COVID-19.

> "Rule 19.1 of the SIAC Rules 2016 (6th Edn) … empowers tribunals to conduct arbitration proceedings remotely whenever appropriate and has been useful in facilitating the move toward virtual hearings in the era of COVID-19."

To address the growing need for guidance concerning the conduct of virtual hearings and the use of non-physical means of communication during arbitration proceedings, the SIAC released, in August 2020, the *SIAC Guides - Taking Your Arbitration Remote*,[4] the first in a series of guides created by the SIAC to assist all relevant parties (users, arbitrators, colleagues and stakeholders) in the conduct of arbitration cases. *Taking Your Arbitration Remote* sets out checklists and notes for users to ensure the proper conduct of virtual hearings. These deal with important preliminary issues (such as costs, applicable laws, access to appropriate hardware and software, connectivity, the appropriate platform, confidentiality and data security); pre-hearing preparations (*inter alia*, number of participants, logistical arrangements, document accessibility, hearing etiquette and contingency plans); and matters that may arise on the day of the hearing. There are also useful appendices that seek to provide guidance on (1) choosing the right remote

hearing platform, (2) remote hearing procedural orders and (3) remote hearing etiquette. These checklists and appendices assist parties with important legal and logistical matters in order to ensure that proceedings are conducted efficiently and in compliance with the necessary procedural considerations, and also serve to assist the SIAC's users in navigating any technical difficulties.

> "[The] *Taking Your Arbitration Remote* guide sets out checklists and notes for users to ensure the proper conduct of virtual hearings. These deal with important preliminary issues …; pre-hearing preparations …; and matters that may arise on the day of the hearing … [in order to] assist parties with important legal and logistical matters …"

At the time of writing (October 2021), the Singapore government has declared COVID-19 as endemic and that it is no longer pursuing a 'COVID zero' strategy. With the pandemic continuing to loom large for the foreseeable future, therefore, it appears that remote hearings will be here to stay for quite a while yet. Arbitration users have grown accustomed to remote hearings and will rightly expect arbitral institutions to be able to support such hearings.

International outreach

Singapore has not allowed the pandemic to slow down its substantial efforts to facilitate and expand its international outreach for arbitration.

In April 2020, owing to prevailing government restrictions that prevented the conduct of physical seminars, the SIAC launched a webinar series on international arbitration. Since then, more than 100 webinars have been conducted, some of which have been in partnership with other reputable arbitral institutions, such as the New York International Arbitration Center (NYIAC), the Indian Council of Arbitration (ICA) and the China International Economic and Trade Arbitration Commission (CIETAC).[5]

Another notable international initiative has been a joint statement issued by 13 arbitral institutions (including the SIAC) in April 2020. In an effort to boost commercial confidence in arbitration as a viable means of dispute resolution, these institutions shared their joint commitment to ensuring that arbitration remains a stable means of dispute resolution amidst an unstable global situation, through collaboration and the use of digital technologies.[6]

December 2020 was also a notable month for the SIAC because it opened a representative office for the Americas in New York - its fifth representative office overall and the first outside Asia.[7] This significant development underscored the point that the SIAC is an international player and not only a regional one, capable of competing with more established arbitral institutions globally.

> "Arbitration users have grown accustomed to remote hearings and will rightly expect arbitral institutions to be able to support such hearings."

In May 2020, Maxwell Chambers entered into an International Arbitration Centre Alliance (the Alliance) with Arbitration Place of Toronto and Ottawa and the International Dispute Resolution Centre of London. The Alliance allows for the pooling of manpower and technical expertise between these institutions for the purposes of promoting expediency and minimising recurrent challenges to the conduct of foreign hearings remotely, such as time zone differences and

scheduling issues. For example, member institutions are able to tap into the facilities of their allied institutions, if and when required by their users, thereby allowing the latter to attend at a facility closest to them. This accords much more convenience to users in the relevant jurisdictions as it obviates the need to travel long distances to attend arbitration hearings. The Alliance also allows member institutions to offer hybrid and even fully remote arrangements routinely.[8]

Legislative review

As part of its continuous push to build on its reputation as a global dispute resolution hub, Singapore regularly reviews and enhances legislation relevant to arbitration. This process has continued uninterrupted during the pandemic. The International Arbitration Act (Cap 143A, 2002 Rev Ed) (IAA) was recently amended by the introduction of two new provisions that came into force on 1 December 2020: ss 9B (to provide for a default mode of appointing arbitral tribunals in multi-party arbitrations) and 12(1)(j) (to enhance the powers of tribunals and the courts to enforce the obligation of confidentiality).

> "The Alliance allows for the pooling of manpower and technical expertise … for the purposes of promoting expediency and minimising recurrent challenges to the conduct of foreign hearings remotely … [M]ember institutions are able to tap into the facilities of the allied institutions … [It also allows them] to offer hybrid and even fully remote arrangements routinely."

The Ministry of Law has indicated that a slew of other legislative amendments remain under consideration, including proposals to allow parties to (1) appeal to the court on a question of law arising out of an arbitral award, provided that they have agreed to opt into such a mechanism, and (2) agree to waive or limit the grounds for annulling an award.[9]

> "The Ministry of Law has indicated that a slew of other legislative amendments remain under consideration, including proposals to allow parties to (1) appeal to the Court on a question of law arising out of an arbitral award, provided that they have agreed to opt into such mechanism, and (2) agree to waive or limit the grounds for annulling an award."

Continued growth

In 2020, 1,080 case filings were made with the SIAC - a record high which marked the first time that the number of case filings had exceeded 1,000. The total quantum in dispute in these cases amounted to US$8.49 billion (SG$ 11.25 billion), representing a 4.9% increase from 2019. Additionally, parties from 60 jurisdictions (both civil and common law) chose to arbitrate at the SIAC in 2020, underscoring its position as a premier international arbitral institution.

In May 2021, it was announced in the Queen Mary University of London and White & Case *2021 International Arbitration Survey* (2021 QMUL Survey)[10] that the SIAC ranked as the most preferred arbitral institution in the Asia-Pacific, and second among the world's top five arbitral institutions.[11] This was an improvement from the SIAC's previous positions in QMUL surveys - in 2018, it was ranked as the third most preferred

arbitral institution globally[12] and, in 2014, as the fourth most preferred.[13] This steady growth has not gone unnoticed:[14] it has been noted that Singapore's world-class facilities, professional expertise and, most importantly, well-planned response to and prompt handling of the uncharted waters presented by COVID-19, has spurred its rise as a preferred arbitration hub.[15]

The 2021 QMUL Survey highlighted in stark terms the impact of COVID-19 on the manner in which arbitration hearings are now conducted. In particular, 72% of respondents to that survey indicated that they had made use of virtual hearing options, which was in stark contrast to the 62% who reported that they had never used such technology in 2018. Interestingly, 25% of respondents indicated that they would be willing to forgo in-person hearings entirely, while 79% expressed the view that they would rather proceed with virtual hearings than postpone their hearings for in-person sessions.[16] These results suggest that, while most arbitration users have not voluntarily opted for remote hearings, having been forced by the logistical difficulties and restrictions relating to in-person hearings during the pandemic, they have generally warmed over time to the idea of arbitral proceedings being conducted remotely.

> "[The] results [of the 2021 QMUL Survey] … suggest that, while most arbitration users have not voluntarily opted for remote hearings, … they have generally warmed over time to the idea of arbitral proceedings being conducted remotely."

Forthcoming developments

A number of forthcoming developments that will affect Singapore arbitration have recently been announced. These include revisions to the SIAC Rules that are expected to be released in late 2021. The SIAC has announced that the next (7th) edition of the SIAC Rules will introduce "state-of-the-art revisions" designed to serve better the parties who agree to arbitrate under the auspices of the SIAC. The amendments are expected to address (*inter alia*) expedited and emergency arbitration procedures and the consolidation of claims, and to reflect recent developments in international arbitration rules.[17]

> "A number of forthcoming developments that will affect Singapore arbitration have been announced, … [including] "state-of-the-art revisions" [to the SIAC Rules]."

Further, on 21 June 2021, the Singapore Ministry of Law announced that the third-party funding (TPF) framework will be extended to cover domestic arbitrations, court proceedings arising from or connected with domestic arbitrations, proceedings commenced in the Singapore International Commercial Court (SICC) and appeals therefrom, and mediation proceedings relating to any of the these matters.[18] Prior to the announcement, TPF had, since 2017, only been permitted for international arbitration proceedings and related court and mediation proceedings. Market reaction to this news has been positive, with third-party funders having, also since 2017, set up a local presence in Singapore and businesses having expressed a keen interest in exploring alternative disputes-financing arrangements.

Conclusion

Arbitration as an alternative dispute resolution mechanism continues to be attractive for commercial parties, and Singapore has taken active measures to build on its good reputation as a seat for international arbitrations, even in the midst of the upheaval wrought by the worldwide pandemic. It has become increasingly common for businesses (particularly those keen on ensuring confidentiality in their disputes) to include arbitration clauses in their agreements. The COVID-19

pandemic has not blunted this trend; instead, it appears to have accelerated the continued rise of arbitration in Singapore.

> “ … Singapore has taken active measures to build on its good reputation as a seat for international arbitrations, even in the midst of the upheaval wrought by the worldwide pandemic. It has become increasingly common for businesses … to include arbitration clauses in their agreements. The COVID-19 pandemic has not blunted this trend … [and] Singapore arbitration practitioners have every reason to be optimistic of further growth. ”

The developments discussed in this article are testament to Singapore's continued drive to position itself as the seat of choice for parties seeking to resolve disputes via arbitration. The resilience and initiative of Singapore's arbitral institutions in the midst of a severe global pandemic augurs well for the road ahead. Singapore arbitration practitioners have every reason to be optimistic of further growth.

1 Ovais Subhani, *Singapore economy shrinks 5.8% in 2020 after contraction eases to 3.8% in Q4: Flash data*, The Straits Times (4 January 2021), available at https://www.straitstimes.com/business/economy/singapore-economy-shrinks-58-in-2020-after-contraction-eases-to-38-in-q4-flash-data (accessed 10 October 2021).

2 Maxwell Chambers, *Hybrid and Virtual Hearings*, available at https://www.maxwellchambers.com/2020/06/24/hybrid-and-virtual-hearings/ (accessed 10 October 2021). See also Rachel Tan Xi'en, *Does a Right to a Physical Hearing Exist in International Arbitration?* in The ICCA Reports, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Singapore-Right-to-a-Physical-Hearing-Report.pdf, p 12 (accessed 10 October 2021).

3 KC Vijayan, *Maxwell Chambers turns to virtual hearings amid Covid-19*, The Straits Times (19 October 2020), available at https://www.straitstimes.com/singapore/maxwell-chambers-turns-to-virtual-hearings-amid-covid-19 (accessed 10 October 2021).

4 SIAC Secretariat, *SIAC Guides - Taking Your Arbitration Remote* (August 2020), available at https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20(August%202020).pdf (accessed 10 October 2021).

5 SIAC, *SIAC International Arbitration Webinar Series 2020*, available at https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-01-20-47/siac-international-arbitration-webinar-series-2020 (accessed 10 October 2021) and *SIAC International Arbitration Webinar Series 2021*, available at https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-01-20-47/siac-international-arbitration-webinar-series-2021 (accessed 10 October 2021).

6 ICC, *Arbitral Institutions COVID-19 Joint Statement*, available at https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/ (accessed 10 October 2021).

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Overlapping Concepts of 'Venue' and 'Seat' in India: Decoding an Enigma

Aditha Narayan Vijayaraghavan & Akash Santosh Loya

This article discusses (1) the differences between the terms 'venue' and 'seat' of arbitration in India and (2) divergent approaches that have been applied by the Indian courts in deciding precisely what they mean and when references to 'venue' in arbitration clauses should be construed as 'seat' for the purpose of identifying which national court should have jurisdiction to supervise arbitral proceedings and awards.

Introduction

The term 'venue' is construed in the context of international commercial arbitrations as merely a convenient physical or geographical place for conducting arbitral proceedings. By contrast, the term 'seat' has been construed as the juridical place of an arbitration, the courts of which would have supervisory jurisdiction over the arbitral proceedings.

This distinction was correctly recognised by the Supreme Court of India (Supreme Court) in *Bharat Aluminium Company Ltd v Kaiser Aluminium Technical Services Ltd*[1] (*BALCO*). The Supreme Court, citing with approval the decisions of the English Court of Appeal in *Naviera Amazonica Peruana SA v Compania International de Seguros del Peru*[2] and *Union of India v McDonnell Douglas Corpn*,[3] held that while the 'seat' is the centre of gravity of arbitral proceedings, this would not necessarily entail that all of those proceedings should be conducted physically at the seat of arbitration. In so holding, the Supreme Court impliedly recognised the difference between 'seat' and 'venue'.

> "The term 'venue' is construed in the context of international commercial arbitrations as merely a convenient physical or geographical place for conducting arbitral proceedings. By contrast, the term 'seat' has been construed as the juridical place of an arbitration, the courts of which would have supervisory jurisdiction over the arbitral proceedings."

Post-*BALCO* decisions of both the Supreme Court and of India's High Courts on ascertaining the seat of the arbitration have, however, expressed ambiguous and inconsistent opinions with regard to this distinction. The courts' divergent positions are revealed by a summary of the relevant case law.

When 'venue' or 'place' of arbitration, supplemented by an additional factor, can be construed as a 'seat'

In *Enercon (India) Ltd v Enercon GmbH*[4] (*Enercon*), the Supreme Court, in considering *BALCO*, held that the terms 'venue' and 'seat' could not be construed as being one and the same. The 'venue' of the underlying arbitration in *Enercon* was expressly stated to be 'London'. The Court found, however, that the seat was India because Indian law was (1) the substantive law governing the contract, (2) the law governing the arbitration agreement and (3) the law governing the conduct of the arbitration.

The Supreme Court subsequently reiterated this position in *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd*[5] (*Indus*) In that case, the 'venue' of the arbitration was stipulated as Mumbai, India. Further, the parties had agreed to submit disputes to the exclusive jurisdiction of the Mumbai courts. It was also recognised that the designation of 'seat' of arbitration was akin to an exclusive jurisdiction clause in litigation, so that only the courts of the seat had jurisdiction to entertain any dispute pertaining to the arbitration proceedings, irrespective of where the cause of action arose. Mumbai was therefore construed to be the 'seat' of the arbitration.

The Supreme Court dealt once again with the conundrum of 'venue' and 'seat' in *Mankashi Impex Pvt Ltd v Airvisual Pvt Ltd.*[6] (*Mankashi Impex*). In that case, the dispute resolution clause provided that:

(1) the courts of New Delhi would have jurisdiction over the present case;
(2) the "place of arbitration" would be Hong Kong; and
(3) any dispute would be "referred to and finally resolved by arbitration administered in Hong Kong."

> "The Supreme Court [in *BALCO*] … held that while the 'seat' is the centre of gravity of arbitral proceedings, this would not necessarily entail that all arbitral proceedings should be conducted physically at the seat of arbitration."

In its decision, the Supreme Court emphasised yet again the difference between the concepts of 'venue' and 'seat'. It held categorically that Hong Kong should not be construed as the seat of arbitration merely because it was stipulated as the

'place' of arbitration, as such a stipulation was not sufficient in itself to give Hong Kong the status of seat of arbitration. However, such a stipulation, coupled with the fact that the arbitration would be "administered in Hong Kong", indicated that the seat of the arbitration was intended to be Hong Kong.

> "Post-*BALCO* decisions of both the Supreme Court and of India's High Courts on ascertaining the seat of the arbitration have … expressed ambiguous and inconsistent opinions with regard to … the distinction [between the venue and the seat]."

When 'venue' or 'place' of arbitration by itself amounts to 'seat'

A number of diverging opinions of Indian courts have, by contrast, construed 'venue' as 'seat'. The first decision deserving of attention is that of the Indian Supreme Court in *Brahmani River Pellets Ltd v Kamachi Industries Ltd*[7] (*Brahmani River Pellets*). In this case, the dispute resolution clause provided for 'Bhuvaneshwar' to be the venue of the arbitration. The Court held that 'Bhuvaneshwar' should be construed as the 'seat' of the arbitration. In so doing, reliance was placed on the decisions in *BALCO* and *Indus*, several decisions of the English courts and opinions of a number of jurists.

This issue arose again in the Supreme Court's decision in *BGS SGS Soma JV v NHPC Ltd*[8] (*Soma*), in which the arbitration agreement read: "Arbitration proceedings shall be held at New Delhi/Faridabad …" It was held that the reference to "Delhi/Faridabad" should be construed as a reference to the seat because (1) the wording "arbitration proceedings" should include the entire arbitration proceedings and not simply the venue, and (2) if the parties intended 'venue' to be construed in this way, wording such as "Tribunals are to meet or have witnesses, etc" would have been used where hearings were to take place at the 'venue'.

It is interesting to note that the Supreme Court in *Soma* not only laid down the law in relation to the proposition that designation of 'venue' ought to be construed as the 'seat', but also held that its decision in *Union of India v Hardy Exploration and Production (India) Inc*[9] (*Hardy Exploration*) was bad in law. The Court had held in *Hardy Exploration* that 'venue' could be construed as 'seat' only if certain additional concomitant factors were also present (as stated in the decisions referred to in the previous section of this article). *Hardy Exploration* was declared to be bad law because it did not appear to conform with *BALCO*, which recognised the principle as laid down in *Roger Shashoua v Mukesh Sharma*.[10] In this regard, however, it is pertinent to note further that the *Mankashi Impex* decision was rendered after the position in *Soma* had been pointed out to the Court. It could therefore be argued that the position referred to in the previous section of this article does not stand implicitly overruled, as *Mankashi Impex* considered and interpreted *Soma. Per contra,* however, it may also be argued that the *Mankashi Impex* decision was *per incuriam* in having failed to consider the *ratio* of *Soma.*

In *Noy Vallensina Engineering SPA v Jindal Drugs Ltd,*[11] which also dealt with this conundrum in a post-award scenario, the Supreme Court subsequently also construed the designation of London as the 'place' to be the 'seat' because the arbitration proceedings were conducted and the award was rendered in London.

> "A number of diverging opinions of Indian courts have, by contrast, construed 'venue' as 'seat'."

This decision was followed by the Supreme Court's decision in *Inox Renewables Ltd v Jayesh Electricals Ltd*.[12] In this case, a change of venue was held to amount to a change in court's jurisdiction for the purpose of initiating proceedings to set aside the award. This constituted an implied conclusion that the 'seat' was to be construed as 'venue' because only the courts of the seat had jurisdiction to entertain setting aside proceedings.

Further, the decision of the Madras High Court in *Balapreetham Guest House Pvt Ltd v Mypreferred Transformation and Hospitality Pvt Ltd*[13] may also be noted for its interesting reasoning. In that case, the place of arbitration was stipulated as New Delhi and the courts of Chennai were conferred with exclusive jurisdiction. Drawing a distinction between the subject of the agreement and the subject of arbitration, the Madras High Court held that the seat of arbitration was New Delhi and that the courts of New Delhi had jurisdiction over the arbitration proceedings. Only in a case in which the parties decided to waive their right to arbitrate and file a lawsuit would the courts of Chennai acquire jurisdiction. Reliance was placed on *Soma* in arriving at this conclusion.

> "Drawing a distinction between the subject of the agreement and the subject of arbitration, the Madras High Court [in *Balapreetham Guest House Pvt Ltd v Mypreferred Transformation and Hospitality Pvt Ltd*] held that the seat of arbitration was New Delhi and that the courts of New Delhi had jurisdiction over the arbitration proceedings."

The position that 'venue' ought to be construed as 'seat' was also recognised by the English courts in *Process & Industrial Development Ltd v Federal Republic of Nigeria*,[14] in which London was construed as the seat despite having been stipulated as the 'venue' and in the absence of any other factors. Similarly, the Singapore Court of Appeal[15] and the Swiss Federal Tribunal[16] have also construed the mere mention of a place in the arbitration clause as meaning 'seat', even in the absence of any other supporting factors categorically expressing that intention.

> "… [T]here exists a lot of ambiguity in the judicial approaches discussed previously. These demonstrate that the issue of determining the seat has become an entirely fact-centric exercise and is governed by the whims and fancies of the court's discretion."

Stirring up the hornets' nest

It is evident that there exists a lot of ambiguity in the judicial approaches discussed previously. These demonstrate that the issue of determining the seat has become an entirely fact-centric exercise and is governed by the whims and fancies of the court's discretion.

It is the authors' opinion that the both of these approaches lack objective analysis and would have unfair repercussions for parties, for the reasons discussed below.

(1) The parties to the cases were aware of the distinction between 'venue' and 'seat' pursuant to the *BALCO* decision in 2012. Despite this, the deliberate usage of the term

'venue' and the omission of the term 'seat' simply meant that the parties did not intend 'venue' to be construed as 'seat', irrespective of the presence of the additional factors. Further, this approach would also derogate from the commercial wisdom of the parties.

(2) The parties' right to approach appropriate fora on the basis of India's Code of Civil Procedure 1908 may stand affected. This is because they would have stipulated 'venue' or deliberately omitted any mention of 'seat', pursuant to the *BALCO* decision, solely to keep access to those fora available.

(3) Lastly, since the law laid down by the Indian Supreme Court applies retrospectively, it would materially affect those decisions rendered by the various High Courts that followed the *Hardy Exploration* decision. The plight of the parties to those decisions would remain uncertain and unnecessarily lead to the reopening of numerous proceedings.

> "… [T]he construction of every arbitration agreement in order to ascertain the 'seat' of arbitration would be contested heavily by the parties before the courts, including the Supreme Court. … [T]he 'venue+additional factor' approach would lead to a fact-centric exercise, making the interpretation of arbitration agreements extremely uncertain."

The way forward

The position raised by the decisions discussed above would create a situation in which the construction of every arbitration agreement in order to ascertain the 'seat' of arbitration would be contested heavily by the parties before the courts, including the Supreme Court. Further, the adoption of the 'venue+additional factor' approach would lead to a fact-centric exercise, making the interpretation of arbitration agreements extremely uncertain.

> "… [T]he Indian government should amend the Arbitration and Conciliation Act 1996 … to define the terms 'venue' and 'seat', and make an explicit provision to confer exclusive jurisdiction on the courts of the 'seat' alone."

Thus, to allay concerns about pending controversies, it is best that the Indian government should amend the Arbitration and Conciliation Act 1996 (the 1996 Act) to define the terms 'venue' and 'seat', and make an explicit provision to confer exclusive jurisdiction on the courts of the 'seat' alone.

Alternatively, and until the proposed legislative exercise is carried out, it is submitted that the Indian Supreme Court should adopt the following approach.

(1) The seat of arbitration should be construed and the courts of the seat should have jurisdiction only where there is an express and unambiguous expression of 'seat' of arbitration. Deference should be given to construing 'venue' as the 'seat' of arbitration, with or without the assistance of additional factors.

(2) In the case of domestic arbitrations, if parties fail to designate clearly a seat of arbitration, the courts conferred with exclusive jurisdiction in accordance with the terms

of the contract should be considered as the courts of the seat. Further, in the absence of an exclusive jurisdiction clause, the courts of the place where the cause of action arose should be construed as the courts of the seat and parties ought to have liberty to approach any of those fora. In this respect, it is pertinent to note that once a party elects to approach a particular forum that has the power to exercise jurisdiction over the dispute, the parties are barred from approaching any other courts in light of s 42 of the 1996 Act.

(3) In the case of international commercial arbitrations, if the parties fail to designate clearly a seat of arbitration, then the country whose laws govern the contract ought to be construed as the seat of arbitration. This is consistent with the practices adopted by the English[17] and Singaporean courts.[18] This approach has also been adopted by the Indian Supreme Court in *NTPC v Singer & Co* (*NTPC*),[19] but in an open-ended manner. It was held in that case that the law governing the contract would govern the arbitration agreement, provided there was no contrary intention to that effect. This decision, when read in light of *BALCO*, would mean that stipulation of the seat makes the contractual law inapplicable. The effect of the *NTPC* decision should, however, be further clarified to mean that only clear, unambiguous and express stipulation of 'seat' would make the contractual law inapplicable.

> "The seat of arbitration should be construed [by the Supreme Court] and the courts of the seat should have jurisdiction only where there is an express and unambiguous expression of 'seat' of arbitration."

The judicial approach proposed above would provide utmost certainty to the parties to contracts, prevent protracted litigation and ensure consistency of approach.

Conclusion

The enigma of 'seat' and 'venue' discussed in this arrticle is certainly an impediment to making India a hub of arbitration. Thus, the Indian government's objective of making India an arbitral hub, as evidenced by the *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (the *Srikrishna Report*, 2017),[20] can only be achieved when the grey areas have been addressed and settled through proactive joint efforts by the legislature and the judiciary. These efforts would therefore be pivotal both to achieving the government's aim and to resolving the enigma.

1 (2012) 9 SCC 552.

2 [1988] 1 Lloyd's Rep 116 (CA, England & Wales).

3 [1993] 2 Lloyd's Rep 48.

4 Civil Appeal No 2086 of 2014, judgment of 14 February 2014.

5 (2017) 7 SCC 678.

6 Arbitration Petition No 32 of 2018 (Order dated 3 May 2020, SC).

7 2019 SCC Online SC 929 (Civil Appeal No 5850 of 2019).

8 (2019) 17 SCALE 369.

9 (2018) 7 SCC 374.

10 Civil Appeal Nos 2841-2843 of 2017 (Order dated 4 July 2017, (SC).

11 (2021) 1 SCC 382.

12 Civil Appeal No 1556 of 2021 (Order dated 13 April 2021, SC).

13 OP No 438 of 2020 (Order dated 19 March 2021, Madras HC). See also *Raman Deep Singh Taneja v Crown Realtech Pvt Ltd*, Arb P 444/2017 (Order dated 23 November 2017, Delhi HC).

14 [2019] EWHC 2241.

15 See *BNA v BNB* [2019] SGCA 84; *ST Group Co Ltd v Sanum Investments Ltd* [2019] SGCA 65.

16 Decision no 4A_376/2008, judgment of 5 December 2008, 27 ASA Bull 762 (2009).

17 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

18 See *BCY v BCZ* [2016] SGHC 249.

19 (1992) 3 SCC 551.

20 30 July 2017, available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (last visited 23 April 2021). *Editorial note*: For discussion and a summary respectively of this report, see Kshama Loya, Ashish Kabra & Vyapak Desai, *Arbitration in India: The Srikrishna Report - A Critique* [2018] Asian DR 4-10 and *India: reform of arbitral institutions and arbitration law - Report of the High Level Committee on Making India Hub of Arbitration* [2018] Asian DR 46.

The UNCITRAL Expedited Arbitration Rules 2021

Byron Perez[1]

This article provides an overview of key provisions of the newly adopted UNCITRAL Expedited Arbitration Rules 2021 and how they interact with the newly revised UNCITRAL Arbitration Rules 2021, of which they form part, emphasising their significance to *ad hoc* arbitrations. In so doing, it compares and contrasts, by way of background and practice commentary, the Expedited Procedure under the HKIAC Administered Arbitration Rules 2018.

Introduction

On 21 July 2021, after almost two and half years of debates and consultations among States members of the United Nations Commission on International Trade Law (UNCITRAL or the Commission) through Working Group II, the Commission adopted the final text of the UNCITRAL Expedited Arbitration Rules 2021 (the EA Rules).[2] During the drafting process, the Commission received inputs on best practices in expedited arbitration from academics, international arbitration practitioners (arbitrators and counsel alike), international organisations and arbitral institutions, including Hong Kong International Arbitration Centre (HKIAC).[3] In particular, the arbitral institutions shared practical experience and observations from administering expedited arbitrations conducted pursuant to their own rules.

The adoption of the EA Rules is a welcome development in *ad hoc* international arbitration. Parties to *ad hoc* arbitrations do not have the benefit of an arbitral institution supervising the proceedings to ensure that they progress expeditiously and swiftly. The EA Rules now give parties to such arbitrations a streamlined and simplified procedure for resolving their disputes, allowing them to save time and costs, in keeping with the efficiency and speed advantages of arbitration over court proceedings.

> "Parties to *ad hoc* arbitrations do not have the benefit of an arbitral institution supervising the proceedings to ensure that they progress expeditiously and swiftly. The EA Rules now give … [them] a streamlined and simplified procedure for resolving their disputes, … in keeping with the efficiency and speed advantages of arbitration over court proceedings."

In this article, comparisons and contrasts will be drawn with practice under, principally, the HKIAC Administered Arbitration Rules (HKIAC Rules), which are based on the previous edition of the UNCITRAL Arbitration Rules.

The HKIAC Expedited Procedure has, since its initial introduction in the 2013 edition of HKIAC's Administered Arbitration Rules,[4] proved to be a popular mechanism among users, and HKIAC has developed expertise in administering arbitrations under it. At the time of writing, 61 expedited proceedings have been completed. The median and mean duration of HKIAC expedited arbitrations is 5.8 months and 5.9 months respectively.

Application of the Rules

Introduction

The EA Rules, which comprise 16 articles, form part of the revised UNCITRAL Arbitration Rules (revised UNCITRAL Rules) adopted in 2021, which took effect on 19 September 2021. The EA Rules form an appendix thereto.[5] The adoption of the EA Rules necessitated the addition of art 1(5) to the revised UNCITRAL Rules. This provides that "[t]he Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree" to adopt the revised UNCITRAL Rules as the procedural rules for their arbitrations.

Article 1 of the EA Rules provides:

> "Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Rules ("Expedited Rules"), such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Expedited Rules and subject to such modification as the parties may agree."

> "The EA Rules, which comprise 16 articles, form part of the revised UNCITRAL Arbitration Rules … adopted in 2021, which took effect on 19 September 2021. The EA Rules form an appendix thereto."

Requirements

EA Rules

By virtue of art 1, the only requirement for the EA Rules to apply to an arbitration is the express agreement of parties to their application. Absent such agreement, only the revised UNCITRAL Rules *per se* will apply to an arbitration. However, the parties remain free to agree subsequently to the application of the EA Rules, even after a dispute has arisen.

HKIAC Rules

The sole requirement of party agreement under the EA Rules is in contrast to the requirements for the application of an expedited procedure under the rules of arbitral institutions. For example, art 42.1 of the HKIAC Rules provides that, prior to the constitution of the tribunal, a party may apply to HKIAC for the arbitration to be conducted under the Expedited Procedure:

(1) where the amount in dispute representing the aggregate of any claim and counterclaim (or any set-off defence or cross-claim) does not exceed HK$25,000,000;[6]

(2) where the parties so agree; or

(3) in cases of exceptional urgency.

In such cases, however, the Expedited Procedure does not automatically apply because HKIAC retains a discretion whether or not to grant an application after due consideration of the grounds relied upon by an applicant.[7] At the time of writing, HKIAC has received 128 applications for Expedited Procedure arbitrations; of these applications, 99 have been granted and 29 rejected.

> "… [T]he only requirement for the EA Rules to apply to an arbitration is the express agreement of parties to their application. Absent such agreement, only the revised UNCITRAL Rules *per se* will apply to an arbitration. … This sole requirement of party agreement is in contrast to the requirements for the application of an expedited procedure under the rules of arbitral institutions."

The discretionary power of HKIAC with regard to applications for Expedited Procedure arbitration is illustrated by the following examples. Firstly, in a case in which the amount in dispute did not exceed HK$25,000,000, HKIAC refused to grant the application for Expedited Procedure on the ground that the dispute was factually and legally complex, rendering the Expedited Procedure unsuitable. Secondly, in a case where an applicant party alleged that the parties had agreed to Expedited Procedure arbitration, HKIAC scrutinised the alleged agreement and invited the other party to confirm whether that prior agreement had been made. Thirdly, in cases in which 'exceptional urgency' is invoked, HKIAC has adopted a two-stage inquiry process to determine whether (1) the case is urgent and, if so, (2) the urgency is exceptional. The threshold for establishing 'exceptional urgency' is relatively high: to date, of the five applications under this criterion, only one has been granted.

Only 14 applications for Expedited Procedure arbitration grounded on party agreement have been granted by HKIAC to date, a relatively low number out of the total applications for Expedited Procedure at the time of writing, *viz* 128. While it may be too early to tell, the relatively low number of expedited arbitrations by party agreement that HKIAC has seen suggests that the number of such arbitrations under the EA Rules may be similarly limited.

> "… [T]he [HKIAC] Expedited Procedure does not automatically apply because HKIAC retains a discretion whether or not to grant an application after due consideration of the grounds relied upon by an applicant."

Interplay of the EA Rules and the revised UNCITRAL Rules

EA Rules

What can be gleaned further from art 1 of the EA Rules is their interplay with the revised UNCITRAL Rules. The Commission explains:

> "The phrase "as modified by these Expedited Rules" [in art 1 of the EA Rules] means that rules in the [revised UNCITRAL Rules] and the Expedited Rules need to be read in conjunction for the proper conduct of the proceedings. The rules in the … [UNCITRAL Arbitration Rules] are either supplemented or replaced by those in the Expedited Rules."[8]

To assist parties, the Commission has included a footnote to art 1 of the EA Rules specifying those provisions of the revised UNCITRAL Rules that do not apply to expedited arbitration, unless otherwise agreed by the parties.[9] These changes simplify and shorten the procedure, furthering the purpose of the EA Rules.

Finally, parties who have agreed to arbitrate under the EA Rules retain the flexibility to tailor the rules and procedure to suit their proceedings.

HKIAC Rules

Article 42.2 of the HKIAC Rules provides that where HKIAC has granted an application for Expedited Procedure arbitration, the proceedings shall be conducted in accordance with the HKIAC Rules, subject to the modifications stated in art 42.2(a)-(f), which set out the streamlined procedure applicable to expedited arbitrations.

Constitution of the tribunal

EA Rules

Article 7 of the EA Rules provides that there shall be a sole arbitrator in expedited proceedings, unless otherwise agreed by the parties. Article 8(1) provides that the sole arbitrator shall be appointed jointly by the parties.

Article 8(2) of the EA Rules provides that, where the parties are unable to agree jointly on the appointment of a sole arbitrator, one shall be appointed by the appointing authority upon the request of a party. The EA Rules allow parties to agree on the appointing authority. Absent agreement on this within 15 days after a proposal to designate an appointing authority has been received by all other parties, art 6(1) provides that a party may request the Secretary-General of the Permanent Court of Arbitration (PCA) to designate an appointing authority or to serve as the appointing authority. This contrasts with art 6(2) of the previous UNCITRAL Arbitration Rules, under which the timeframe was 30 days.

HKIAC, ICC and SIAC rules

Article 42.2(a) of the HKIAC Rules likewise provides that there shall be a sole arbitrator in an expedited arbitration, unless the arbitration agreement provides for three arbitrators. Where an arbitration agreement provides for a three-member tribunal, HKIAC shall, pursuant to art 42.2(b), invite the parties to agree to refer the dispute to a sole arbitrator. Where the parties do not so agree, the case shall be referred to three arbitrators in accordance with their agreement. Where parties to an expedited arbitration under the HKIAC Rules are unable to agree jointly on the designation of a sole arbitrator, HKIAC shall appoint that arbitrator.

> "Article 7 of the EA Rules provides that there shall be a sole arbitrator in expedited proceedings, unless otherwise agreed by the parties. … Article 42.2(a) of the HKIAC Rules likewise provides that there shall be a sole arbitrator in an expedited arbitration, unless the arbitration agreement provides for three arbitrators."

Practices under the EA Rules and the HKIAC Rules align in terms of referring the dispute to a three-member tribunal if that is what the parties have agreed and they do not subsequently agree to appoint a sole arbitrator. This differs from the practice of other arbitration institutions.

With regard to the practice of the Court of Arbitration of the International Chamber of Commerce (ICC), a sole arbitrator may be appointed in expedited proceedings notwithstanding any contrary provision of the arbitration agreement.[10]

Rule 5.2(b) of the Singapore International Arbitration Centre Rules 2013, 5th Edn (SIAC Rules) provided for referral of a case under expedited arbitration to a sole arbitrator, unless otherwise determined by the President of the SIAC. This provision was carried over to the SIAC Rules 2016, 6th Edn. However, these rules provide further in r 5.3 that "[b]y agreeing to arbitration under the Rules, the parties agree, that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms."

The inclusion of r 5.3 in the SIAC Rules follows the refusal by a Mainland Chinese court to enforce an SIAC award in *Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co Ltd*.[11] In that case, the underlying arbitration agreement provided for a three-member tribunal. Upon application by the claimant, the SIAC granted the application for arbitration under the Expedited Procedure and appointed a sole arbitrator. The Shanghai Intermediate People's Court refused enforcement of the award on the ground that the tribunal had been constituted contrary to the agreement of the parties, *viz* that a sole arbitrator had been appointed instead of a three-member tribunal. The Court held that the use of expedited proceedings should not preclude the right of the parties to a three-member tribunal in accordance with the arbitration agreement and that the SIAC's decision-making power should be exercised with sufficient regard to the will of the parties as to the constitution of the tribunal.

Conduct of the arbitration

EA Rules

As their name suggests, the EA Rules, in art 3, emphasise the duty of the parties and the tribunal in an expedited arbitration to conduct it in an expeditious manner with a view to the swift resolution of the dispute. This is particularly important in *ad hoc* arbitrations, in which there is no administering institution to monitor the progress of the case and to expedite the proceedings further.[12]

Article 3(3) recognises the ability of the tribunal to "utilize any technological means as it considers appropriate to conduct the proceedings, including to communicate with the parties and to hold consultations and hearings remotely."

Article 11 provides that the tribunal, following consultation with the parties and absent a request to hold hearings, has a discretionary power not to hold a hearing. Where the tribunal decides that no hearing shall be conducted, the arbitration shall be conducted on the basis of documents and materials submitted by the parties. Where, however, the parties have agreed to hold a hearing, that agreement is binding on the tribunal.[12]

Article 14 vests discretion in the tribunal to decide that the statements of claim and defence are sufficient, *viz*, that no further submissions may be made by the parties.

> "… [T]he EA Rules … emphasise the duty of the parties and the tribunal in an expedited arbitration to conduct it in an expeditious manner with a view to the swift resolution of the dispute. The HKIAC Rules … contain provisions designed to reinforce the streamlined nature of arbitration under their Expedited Procedure."

Article 15 also grants the tribunal discretion with regard to the taking of evidence in an expedited arbitration, including the power to reject any request for production of evidence.

HKIAC Rules

Parties and tribunals are expected under the HKIAC Rules to participate fully and to do everything necessary to ensure the fair and efficient conduct of an expedited arbitration with a view to the early resolution of the dispute. The HKIAC Rules therefore contain provisions designed to reinforce the streamlined nature of arbitration under their Expedited Procedure. Article 42.2(d) provides that the parties are "in principle … entitled to submit one Statement of Claim and one Statement of Defence (and Counterclaim) and, where applicable, one Statement of Defence in reply to the Counterclaim."Article 42.2(f) also vests power in the tribunal to decide the dispute on the basis of documentary evidence only, unless it is deemed appropriate to hold one or more hearings. If, however, a party requests that a hearing be conducted, the tribunal will hold a hearing.

Time limit for rendering an award

EA Rules

In keeping with their purpose of providing parties with a streamlined and expeditious mechanism for resolving disputes, the EA Rules provide in art 16(1) that the tribunal shall issue its award within six months from the date of the constitution of the tribunal. Where the parties so agree, a different time limit shall apply for issuance of the award.

Article 16(2) of the EA Rules also allows the tribunal itself to extend the art 16(1) time limit, but only in exceptional circumstances and after having consulted the parties as to their views. Where the tribunal so decides, the extended period shall not exceed a total of nine months from the date of its constitution. The EA Rules do not define what constitutes 'exceptional circumstances', thus vesting in the tribunal the power to determine whether particular circumstances are exceptional or not. Further, art 16(2) does not require the tribunal to give reasons for extending the art 16(1) time limit; this is aimed at providing flexibility, particularly where only a short extension of time is ordered.[14]

In cases where the tribunal foresees the risk that it will not be able to issue the award within nine months, art 16(3) provides that the tribunal shall propose a final extended time limit to the parties, giving reasons for the extension sought. The extension shall apply only if all parties agree to the proposal. Where no such agreement is reached, art 16(4) provides that a party may request the tribunal to rule that the EA Rules shall no longer apply to the arbitration and that it shall continue in accordance with the revised UNCITRAL Rules.

HKIAC Rules

In expedited arbitrations under the HKIAC Rules, art 42.2(f) provides that, subject to any lien, the award shall be communicated to the parties within six months from the date when HKIAC transmitted the case file to the tribunal. In exceptional circumstances, the power to extend the six-month time limit rests with HKIAC. Another important distinction between the EA Rules and the HKIAC Rules is that the latter does not provide for a limit on the total time extension.

Discontinuance of expedited proceedings

EA Rules

In the same manner that parties may agree to the application of the EA Rules to their arbitration, they may also agree subsequently and at any time during the proceedings that the arbitration shall no longer be conducted under those rules. This is recognised by art 2(1). Article 2(2) also provides that a party may request the tribunal to disapply the EA Rules to the arbitration. Where the EA Rules are no longer to apply to an arbitration, art 2(3) provides that the tribunal shall continue in office and proceed to conduct the arbitration pursuant to the revised UNCITRAL Rules.

Where the tribunal is asked to rule on discontinuance, the requesting party must show the existence of "exceptional circumstances". This entails the provision of convincing and justifiable reasons and that the tribunal should grant the request only in limited circumstances. The following is a non-exhaustive list of factors that tribunals should consider when considering a request to disapply the EA Rules:

(1) the urgency of the case;
(2) the stage of the proceedings at which the request is made;
(3) the complexity of the dispute;
(4) the anticipated amount in dispute;
(5) the terms of the parties' agreement to expedited arbitration and whether the current circumstances could have been foreseeable at the time of the agreement; and
(6) the consequences of the determination on the proceedings.[15]

HKIAC Rules

Article 42.3 of the HKIAC Rules provides that a party may request HKIAC to disapply the Expedited Procedure on the ground that "new circumstances that have arisen" *after* HKIAC had decided that the Expedited Procedure shall apply. Article 42.3 is a new provision of the HKIAC Rules, introduced to provide an express basis for disapplication the Expedited Procedure.

Where a party makes such a request, HKIAC shall consult the other parties and the tribunal before considering whether the circumstances alleged in support of the request to disapply are "new circumstances" and whether they warrant the disapplication of the Expedited Procedure. The HKIAC Rules do not provide a definition of or what constitutes "new circumstances", thus leaving their assessment to be made by HKIAC on a case-by-case basis.

Conclusion

As a product of collaboration between States, arbitration practitioners and arbitral institutions, the EA Rules provide parties with a "streamlined and simplified procedure with a shortened timeframe" for resolving disputes while at the same time balancing the need for efficiency in *ad hoc* arbitrations and the due process rights of parties to present their case.[16] Parties to *ad hoc* arbitrations may now avail themselves of the benefits of expedited arbitration that were previously available only to users of administered arbitration, such as those before the HKIAC. As the manner in which parties resolve their

disputes becomes more sophisticated, the EA Rules offer an important option for the efficient and expeditious resolution of *ad hoc* international arbitrations.

1 The author was a Hong Kong International Arbitration Centre (HKIAC) delegate to the 71st (New York), 72nd (Vienna), 73rd (New York), and 74th (Vienna) Sessions of UNCITRAL Working Group II, together with HKIAC Deputy Secretary-General Joe Liu and HKIAC Managing Counsel Eric Ng. He is grateful to HKIAC Secretary-General Ms Sarah Grimmer and HKIAC Deputy Counsel Ms Sicen Hu for their comments.

2 For an advance copy of the EA Rules, see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_ear-e_website.pdf (last accessed: 23 September 2021).

3 The full list of institutions, including HKIAC, that responded to the questionnaire on expedited arbitration circulated by UNCITRAL Working Group II may be found at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses_to_questionnaire_27_september.pdf (last accessed 6 October 2021).

4 The Expedited Procedure is now contained in art 41 of the HKIAC Administered Arbitration Rules 2018 (the HKIAC Rules).

5 *Editorial note*: The revised UNCITRAL Rules as so modified do not currently appear in the UNCITRAL website.

6 HK$25,000,000 is the threshold currently prescribed by HKIAC in its website. Unlike the 2013 edition, the 2018 edition of the HKIAC Rules does not fix a monetary threshold and refers instead to the applicable amount stated in the HKIAC website. This approach allows HKIAC to update the monetary threshold if and when it considers this appropriate, without the need to amend the HKIAC Rules.

7 Article 42.2 of the HKIAC Rules.

8 See UNCITRAL, *Explanatory Note to the UNCITRAL Expedited Arbitration Rules – Note by the Secretariat*, para 7, available at https://undocs.org/A/CN.9/WG.II/WP.219 (last accessed: 23 September 2021).

9 See the following provisions of the revised UNCITRAL Rules: (1) art 3(4)(a)-(b) on the contents of the Notice of Arbitration; (ii) art 6(2) on the request to the Secretary-General of the Permanent Court of Arbitration to designate an appointing authority; (3) art 7 on the number of arbitrators; (4) art 8(1) on the appointment of a sole arbitrator by the appointing authority; (5) art 20(1), in the first sentence, on communication of the statement of claim; (6) art 21(1), in the first sentence, on communication of the statement of defence; (7) art 21(3) on the respondent's counterclaim or set-off; (8) art 22 on amendments to the claim or defence; and (9) art 27(2), in the second sentence, on witness statements.

10 Article 2(1) of Annex VI (Expedited Procedure Rules) to the ICC Rules of Arbitration 2021.

11 *Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co Ltd* (2016) Hu 01 Xie Wai Ren No 1, available at https://res.cloudinary.com/lbresearch/image/upload/v1504105750/Noble_Resources_v._Good_Credit_oqc1di.pdf.

12 Draft *Explanatory Note to the UNCITRAL Expedited Arbitration Rules* (A/CN.9/WG/II/WP/219) 28 July 2021, paras 19-20, available at https://undocs.org/A/CN.9/WG.II/WP.219 (last accessed 23 September 2021).

13 *Ibid*, paras 71, 75.

14 *Ibid*, para 85.

15 *Ibid*, paras 12-13.

16 *Ibid*, para 1.

Country Update: Commercial Arbitration in Indonesia

Tony Budidjaja

This article provides a commentary on arbitration law and practice under Indonesia's first national dispute resolution legislation, Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution, in light of decisions of the Supreme Court and the Constitutional Court. It also focuses on difficulties arising from the registration, enforcement and annulment of awards, the role of arbitral and ADR institutions in the dispute resolution landscape and challenges to the acceptance of institutional arbitration.

Background

The practice of arbitration has existed in Indonesia since the mid-19th century. Prior to the country's independence, it was governed by arts 615-651 of the former Dutch Code of Civil Procedure for Europeans (*Reglement op 'de Rechtsvordering* or colonial *RV*). The national legal system continued to recognise arbitration following independence. Under the Indonesian Constitution of 1945, former Dutch laws not conflicting with it would remain valid, if not fully binding and at least as guidelines, unless and until superseded by laws of the Republic of Indonesia.

Prior to 1999, however, arbitration was usually considered a pre-litigation dispute resolution process. Article 15 of Law No 1 of 1950 on the Structure, Power and Judicial Process of the Supreme Court empowered Indonesia's Supreme Court (the Supreme Court) to adjudicate appeals against arbitral awards. Thus, until the enactment of Indonesia's first

national law on arbitration in 1999, State courts continued to dominate the dispute resolution landscape.

Current arbitration legislation

The key Indonesian legislation on arbitration today is Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (the 1999 Law or the Law).[1] Enacted and promulgated on 12 August 1999, it replaced arts 615-651 of the colonial *RV*.

It is important to note that the 1999 Law did not adopt the UNCITRAL Model Law on International Commercial Arbitration. Further, apart from provisions governing the enforcement of awards, it applies only to 'domestic' and not 'international' arbitration. It therefore does not deal with many important current issues in international arbitration, such as multi-party arbitration, expedited procedures, emergency arbitration and the enforcement of emergency awards, and third-party funding.

> "… [T]he 1999 Law did not adopt the UNCITRAL Model Law on International Commercial Arbitration. Further, apart from provisions governing the enforcement of awards, it applies only to 'domestic' and not 'international' arbitration."

Nevertheless, the Arbitration Law recognises some of the most fundamental principles of arbitration, such as party autonomy, the limited role of the State courts, the arbitrability of disputes, separability of the arbitration agreement, powers of arbitrators, confidentiality of arbitral proceedings, finality of awards and court assistance in the enforcement of awards. These are discussed below.

Party autonomy

Under art 31 of the 1999 Law, the parties are free to choose the procedural law applicable to their arbitration, provided that it does not conflict with the provisions of the Law. If no arbitration rules are designated, the Law shall apply. As such, parties are entitled to conduct *ad hoc* arbitration without the involvement of any arbitral institution to administer the proceedings under its rules.

Despite the foregoing, the common method for conducting arbitration in Indonesia is by way of institutional arbitration. Due to lack of public awareness and education about *ad hoc* arbitration, there has been a common misapprehension that arbitration must be conducted by an arbitral institution. In this connection, the Indonesian National Arbitration Board/*Badan Arbitrase Nasional Indonesia* (BANI), which was established in 1977, has long been mistakenly perceived as a government-initiated arbitral institution, particularly because its name contains the word 'National'.

More pertinently, many complaints have been made that BANI's arbitration procedure is both too costly and time-consuming. It is also a common complaint that BANI-appointed arbitrators may not demonstrate the level of expertise and integrity that should be expected when performing their duties. Owing to a lack of information on the professional qualifications of arbitrators, it is usually difficult for parties to select competent arbitrators who can demonstrate a required level of experience and understanding of arbitration procedure. Moreover, under the current BANI Arbitration Rules 2021, parties may only challenge the appointment of an arbitrator by the chairman of BANI if they have reason to doubt his or her competence or that he or she has a conflict of interest.

Because of parties' dissatisfaction with the quality of BANI awards, many such awards are, in practice, brought to the courts for scrutiny on the grounds that an arbitrator may have misapplied the law or misunderstood the facts in reaching an erroneous decision. A number of BANI awards, such as that

in *v PT Pura Barutama Perum Percetakan Uang RI* (*PERURI*),[2] have been annulled by the Indonesian courts on the grounds that decisive documents were deliberately concealed by the claimant during the arbitration proceedings and that the chair of the arbitral tribunal (who was also the chairman of BANI), had a relationship with the claimant and so had not been independent.

> "… [T]he Arbitration Law recognises some of the most fundamental principles of arbitration, such as party autonomy, the limited role of the State courts, the arbitrability of a dispute, separability of the arbitration agreement, powers of arbitrators, confidentiality of arbitral proceedings, finality of awards and court assistance in the enforcement of awards."

Pursuant to art 22 of the 1999 Law, any party may challenge the appointment of an arbitrator if there are sufficient reasons and authentic evidence for doubting whether he or she will perform his or her tasks honestly and make impartial decisions. An appointment may also be challenged if a party can prove that the arbitrator has a family, financial or work relationship with one of the parties or their attorneys.

With the aim of enabling parties in dispute to have easier access to justice and developing Indonesian arbitration, several concerned authorities and business associations have taken the initiative in establishing new and more specialised arbitral bodies, such as BASYARNAS (*Badan Arbitrase Syariah Nasional*) to settle disputes in accordance with *Shari'ah* principles, BAPMI (*Badan Arbitrase Pasar Modal Indonesia*) to settle disputes in capital markets, and BAKTI (*Badan Arbitrase Perdagangan Berjangka Komoditi*) to settle disputes in commodities and futures exchanges. In the past two decades, more than 10 new arbitral bodies have been established in Indonesia and the numbers continue to grow. It may be said that their establishment was mainly motivated by the desire of local communities to have their own people, with experience and specialisation in specific sectors, sit as arbitrators.

In view of the co-existence of so many arbitral bodies in the financial sector, on 22 September 2020 the Indonesian Financial Services Authority/*Otoritas Jasa Keuangan* (OJK) decided to establish a single *Lembaga Alternatif Penyelesaian Sengketa - OJK* (LAPS-OJK) to assist the public in settling all kinds of dispute in the financial sector through arbitration and ADR. This initiative combined all of the pre-existing arbitration and ADR bodies in the financial sector[3] into one body.

> "Due to lack of public awareness and education about *ad hoc* arbitration, there has been a common misapprehension in Indonesia that arbitration must be conducted by an arbitral institution."

In light of the proliferation of arbitral bodies, Indonesian disputants are now more sceptical about institutional arbitration and tend to gravitate towards *ad hoc* arbitration. Many of them have become concerned about rigid institutional procedures and policies as well as (given the arbitration costs payable by parties) the quality of support facilities and staff provided by institutions.

> “It is also a common complaint that BANI-appointed arbitrators may not have demonstrated the level of expertise and integrity that should be expected when performing their duties. … Because of parties’ dissatisfaction with the quality of BANI awards, many such awards are, in practice, brought to the courts for scrutiny …”

To promote and facilitate both *ad hoc* arbitration and mediation practice in Indonesia, the Indonesian Academy of Independent Mediators and Arbitrators/*Akademi Mediator dan Arbiter Independen Indonesia* (MedArbId) was established by a group of Indonesian independent mediators and arbitrators on 17 August 2015. MedArbId offers support to the public in conducting arbitration and mediation under either institutional or ‘self-administered’ (*ad hoc*) procedures and rules. To carry out its mission, MedArbId has established two affordable, accessible and convenient facilities in Jakarta and Denpasar (Bali) through which to provide venues and accommodation for arbitration and mediation participants.

Limited role of the State courts

The power of Indonesian courts to intervene in arbitral proceedings under the 1999 Law is expressly limited to specific circumstances.[4] These relate to the annulment and enforcement of awards and the appointment of arbitrators in cases where no other appointing authority has been designated by the parties or in the rules chosen by them.

Although the 1999 Law does not expressly recognise the *Kompetenz-Kompetenz* principle, it deems parties to have

waived their right to resolve disputes through litigation in a national court where they have agreed to arbitrate.[5] The Law also expressly provides that the courts have no jurisdiction over a dispute that is subject to an arbitration agreement.[6]

Arbitrability of disputes

Article 5 of the 1999 Law provides that all disputes that are commercial in nature (whether contractual or not) and concern rights which, under prevailing laws and regulations, fall within the full legal authority of and can be disposed of by way of an amicable settlement by the disputing parties, may be settled through arbitration. While the Law provides clear rules as to whether a particular type of a dispute can or cannot be settled by arbitration, much is open to interpretation.

> “Many [disputants] … have become concerned about rigid institutional procedures and policies as well as (given the arbitration costs payable by parties) the quality of support facilities and staff provided by institutions.”

In practice, certain disputes may involve such sensitive public policy issues that they are left exclusively to the jurisdiction of domestic courts applying domestic law. For example, in *ED & F Man (Sugar) Ltd v Yani Haryanto*,[7] the Supreme Court considered that the dispute determined by an LCIA award was not arbitrable under Indonesian law. This was because the subject-matter of the dispute was an agreement for provision of sugar that was subject to the approval of a local authority, the Indonesia Logistics Bureau/*Badan Urusan Logistik* (BULOG).

> "Although the 1999 Law does not expressly recognise the *Kompetenz-Kompetenz* principle, it deems parties to have waived their right to resolve disputes through litigation in a national court where they have agreed to arbitrate."

Separability of the arbitration agreement

The 1999 Law defines an 'arbitration agreement' as a written agreement in the form of an arbitration clause entered into before a dispute arises, or a separate written agreement (a submission agreement) made after a dispute has arisen.[8] For a submission agreement to be recognised and enforced in Indonesia, it must be signed by all parties to the dispute and contain certain information (including the full names of the arbitrators and their secretary, as well as the period in which the dispute shall be resolved through the arbitration).

The 1999 Law recognises the principle of separability or autonomy of the arbitration clause. Under the Law, an arbitration clause which forms part of a contract will be treated as an agreement independent of the other terms of the contract. Article 10 of the Law expressly states that an arbitration agreement will not become void because of the occurrence of circumstances pertaining to the underlying agreement or the contracting parties, including termination of the underlying agreement.

Powers of arbitrators

Pursuant to art 31 of the 1999 Law, the parties are free to choose either institutional or *ad hoc* arbitration or to vary chosen rules, provided that this does not conflict with the provisions of the Law. Furthermore, the appointed arbitral tribunal may decide the timeframe and place of the arbitration where these issues have not been determined by the parties.

Under the 1999 Law, and at the request of one of the parties, the tribunal may issue a provisional, interim or other interlocutory award or decision to regulate how the dispute will be considered, including ordering a security attachment, deposit of goods with third parties or the sale of perishable goods. While in practice the court's assistance may be requested if the tribunal grants a provisional award or interim relief in the arbitration, the 1999 Law, unfortunately, makes no express provision allowing court intervention specifically in relation to interim measures. It only permits parties to seek judicial assistance for the appointment of arbitrators, determination of challenges to arbitrators and the enforcement of awards.

> "… [T]he 1999 Law … makes no express provision allowing court intervention specifically in relation to interim measures. It only permits parties to seek judicial assistance for the appointment of arbitrators, determination of challenges to arbitrators and the enforcement of awards."

The 1999 Law is also silent on whether a tribunal or a party to an arbitration agreement can compel a third party to join an arbitration. However, art 30 of the Law stipulates that a third party may voluntarily intervene and join the arbitration if:

(1) it has an interest in the dispute referred to arbitration;
(2) the parties agree that it may join the arbitration; and
(3) the tribunal agrees that it may join the arbitration.

Confidentiality of arbitral proceedings

Article 27 of the 1999 Law stipulates that all proceedings are closed to the public, a statutory elucidation explaining that this is to ensure the confidentiality of the arbitration process. It should be noted, however, that the Law makes no provision as to the confidentiality of arbitral awards.

> "Since the enactment of the 1999 Law, there has been growing public acceptance of arbitration in Indonesia. This has been based on the concept of finality of awards, the expected expertise and integrity of arbitrators and the flexibility of the arbitration process."

Finality of awards

Pursuant to art 60 of the 1999 Law, an award shall be final and binding upon both parties in the same way as a final and binding court judgment. These provisions attempt to address the main concerns of the general public in Indonesia about the effectiveness of awards.

Since the enactment of the 1999 Law, there has been growing public acceptance of arbitration in Indonesia. This has been based on the concept of finality of awards, the expected expertise and integrity of arbitrators and the flexibility of the arbitration process.

Registration of awards

The 1999 Law requires an arbitral award to be registered in a competent court if it is to be recognised and enforced in Indonesia. This applies whether the award is domestic or international and responsibility for registration with the court rests with the tribunal or their duly authorised representatives. Pursuant to art 59(4) of the Law, failure to register a "national" (ie, domestic) award within 30 days from the date it was rendered will render it unenforceable. There is no express provision in the Law regarding a time limit for registering international awards.

Thus far, Indonesian courts have not strictly applied the 30-day limit to registration of international awards, but have granted *exequatur* in cases where applications have been made outside of this timeframe. That said, a judicial review petition was submitted to the Constitutional Court by an Indonesian company, PT Indiratex Spindo, challenging such differential treatment under the 1999 Law, including the lack of a time limit for filing an application with the relevant District Court for annulment of an international award. The Constitutional Court rejected the petitioner's application on the ground that no breach of constitutional rights arose from the petitioner's complaint.[9]

Court assistance in the enforcement of awards

As previously explained, registration of both domestic and international arbitral awards in Indonesia is a necessary step for the purpose of enforcement of awards. The registration process is not, however, straightforward as it is subject to certain administrative procedures.

A party seeking registration must first determine whether an award is domestic/national or foreign/international. The 1999 Law does not define 'domestic/national award'. Article 1(9) does, however, define 'International Arbitration Awards' as "awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award [*sic*] by an arbitration institution or individual arbitrators which under the provisions of Indonesian law are deemed to be international arbitration awards."

The lack of a provision expanding the definition of 'international arbitration award' entails that only an award rendered outside of the jurisdiction of Indonesia may be considered such an award. Conversely, therefore, if an award is rendered in Indonesia, then it may be considered as a national or domestic award.

> "Pursuant to art 59(4) of the [1999] Law, failure to register a "national" (ie, domestic) award within 30 days from the date it was rendered will render it unenforceable. There is no express provision in the Law regarding a time limit for registering international awards."

> "The lack of a provision expanding the definition of 'international arbitration award' entails that only an award rendered outside of the jurisdiction of Indonesia may be considered such an award."

It is important to note, however, that such a distinction between 'national' and 'international' awards based on the venue or seat of the arbitration may not apply across the board. In *PT Lirik Petroleum v PT Pertamina*,[10] the Supreme Court held that an ICC award rendered in Jakarta was not a 'domestic arbitration award' because of the ICC's involvement as administrator of the arbitration. It considered that the ICC (with its headquarters in Paris) was an international arbitral institution, so that the ICC award concerned was an 'international arbitration award'. Furthermore, the court held that, as an 'international arbitration award' under the 1999 Law, its registration was not subject to the 30-day time limit pursuant to art 59(1) of the Law.

Under the 1999 Law, international awards may be registered at the District Court of Central Jakarta (DCCJ) only if they are supported by the following documents:

(1) a duly executed power of attorney from the arbitrator (where the award is registered by the arbitrator's proxy) and its official translation into *Bahasa Indonesia* (Indonesian);
(2) an original or an authenticated copy of the award and its official translation into Indonesian;
(3) an original or an authenticated copy of the agreement that is the basis of the foreign arbitral award and its official translation into Indonesian; and
(4) a statement by the Indonesian Embassy in the country where the arbitral award was rendered stating that

the country has a bilateral or multilateral treaty with Indonesia on the recognition and enforcement of foreign arbitral awards (eg, the New York Convention 1958).

After registration of the award has been completed, leave for enforcement (*exequatur*) may be sought from the competent court. Unless the government of the Republic of Indonesia is a party to the arbitrated dispute, art 66(d) of the 1999 Law vests jurisdiction in the Chief Judge of the DCCJ to issue an *exequatur* (where the government was a party, art 66(e) stipulates the Supreme Court). The Chief Judge shall issue an *exequatur* if the award:

(1) has been rendered by an arbitral tribunal in a country that is a contracting party under a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (art 66(a));
(2) falls within the scope of commercial law under Indonesian law (art 66(b)); and
(3) does not violate public policy (art 66(c)).

Legally, the *exequatur* issued by the Chief Judge of the DCCJ is final and binding. Article 68 of the 1999 Law provides that it is not reviewable, whether through appeal or cassation. An arbitral award that has received an *exequatur* is equivalent to a court judgment having a *res judicata* effect. It is the *exequatur* that makes an arbitral award enforceable. Once it has been issued, the award creditor must file an application with the Chief Judge of the DCCJ to obtain a writ of execution if it wishes the court to enforce the award judicially.

> “An arbitral award that has received an *exequatur* is equivalent to a court judgment having a *res judicata* effect. It is the *exequatur* that makes an arbitral award enforceable.”

Once the application has been granted, the DCCJ will summon and reprimand (*aanmaning*) the award debtor to comply with the award. If the debtor still fails to comply with it, judicial enforcement (by attachment and sale of the debtor's identified assets through public auction or private sale) will commence, with the assistance of relevant district courts based on the location(s) of specific assets.

Annulment of awards

Article 70 of the 1999 Law provides limited grounds for annulling awards. These are:

(1) that letters or documents submitted in the arbitration proceedings were discovered or deemed to have been false after the award was rendered;
(2) that a document that was material to the outcome of the case or decisive in nature was deliberately concealed by the opposing party and was found after the award was rendered; and
(3) that the award was rendered as a result of fraud committed by one of the parties.

In this connection, Constitutional Court decision No 15/PUU/XII/2014 is of particular significance. In this case, the Court set aside the elucidations to art 70 of the 1999 Law. It considered that the text of art 70 itself was already sufficiently clear regarding the requirements for fulfilling the three grounds set out therein. The elucidations led to confusion and uncertainty as to whether prior examination of the subject award by a court was a prerequisite to submission of an application to annul it. The Court made clear that valid

applications for annulment of awards in Indonesia did not require a prior court decision confirming the existence of the three circumstances set out in art 70.

Pursuant to art 71 of the Law, no annulment application can be made after 30 days from the date the award is registered at the competent court.

Pursuant to art 72(4) of the Law, no appeal is permissible against a court decision rejecting an annulment application.[111] In practice, however, this provision has often been ignored, not only by parties but also by district court clerk offices on the basis that the latter are in no position to reject appeal submissions. To address the growing concerns about the abuse of the judicial system by parties acting in bad faith, the Supreme Court issued *Circular Letter No 4 of 2016*, which provides an interpretation of art 72(4). In it, the Supreme Court reaffirms its position that there is no available legal avenue (by appeal or judicial review) for challenging a District Court decision rejecting an annulment application. It appears that the number of appeals filed against District Court rejections of annulment applications since 2016 have declined.

> "… [T]here is no available legal avenue (by appeal or judicial review) for challenging a District Court decision rejecting an annulment application."

Application of public policy

In *Pertamina v Karaha Bodas,*[12] the DCCJ controversially granted an application to annul an UNCITRAL award rendered in Geneva on public policy grounds. The DCCJ found (*inter alia*) that the Indonesian parties had no opportunity to participate in the appointment of the tribunal and that it may have misapplied a number of Indonesian mandatory laws that were the governing law of the parties' contract. Following much criticism, the Supreme Court later overturned the DCCJ's decision and so remedied the problem.

Since its decision in *Pertamina v Karaha Bodas*, the Supreme Court has steadily developed a fluent body of jurisprudence in this regard. It is therefore well settled and understood by Indonesian courts today that the competent court for the annulment of an international arbitral award is that of the seat of arbitration.

> "It is … well settled and understood by Indonesian courts today that the competent court for the annulment of an international arbitral award is that of the seat of arbitration."

That said, special caution needs to be applied by parties who arbitrate under applicable Indonesian substantive or procedural law. To date, Indonesia has had an inadequate law on 'public order' (to employ the term used in the 1999 Law). Award debtors have often taken advantage of the lack of a statutory definition of or guidelines on the interpretation of 'public policy' or 'public order' to challenge or avoid the enforcement of awards on public policy grounds.

There are a number of cases in which enforcement of an award has been refused on grounds of violation of public policy. A notable recent Indonesian court decision on the application of public policy is *Astro Nusantara International BV & Ors v PT Ayunda Prima Mitra & Ors.*[13] Astro's application for recognition and enforcement in Indonesia of an SIAC award in its favour was rejected by the DCCJ in September 2012 on public policy grounds. The DCCJ considered that the arbitral tribunal had unlawfully interfered in the sovereignty of the Indonesian judiciary pursuant to an arbitration clause

that limited the rights of the parties to bring the case to court. The DCCJ found that the parties had made an agreement to refer all disputes to arbitration under the SIAC Rules and not to litigate in any State court, including in Indonesia. The DCCJ also found that the award contained an instruction to Ayunda to cease and withdraw its Indonesian litigation proceedings against Astro and others.

In this case, the DCCJ held that the limitation of the parties' right to go to court as set out in their arbitration agreement breached the legal requirements for a valid agreement under the Indonesian Civil Code, particularly that of "permissible cause". The DCCJ further reasoned that the SIAC award violated the Indonesian court's sovereignty by ordering Ayunda to rescind its ongoing litigation case. On appeal, the Supreme Court upheld the DCCJ's decision.

It appears from this case that there is a risk factor in Indonesian courts refusing enforcement of an award on public policy grounds where they find that there is an ongoing case brought by an Indonesian party in the Indonesian courts on the same subject-matter prior to the application for enforcement of an award against that party. Further, Indonesian courts may be willing to apply the public policy ground if they find that an arbitral tribunal has violated an established Indonesian legal principle.

Other caveats

The process of execution of assets upon issuance of an *exequatur* can take a considerable length of time. This is because it depends heavily on the attitude of court officials in carrying out the relevant procedures, the creditor's ability to locate the debtor's assets to be attached and sold, and the co-operation of the debtor.

Given that challenging the filing of an application to the Indonesian courts for annulment of international awards is no longer effective and that issuance of an *exequatur* is not subject to appeal, award debtors try to find other ways of delaying or frustrating enforcement. One such is to file a formal opposition or challenge to the court as to the legality of the execution against assets. There is no specific provision in the 1999 Law prohibiting of such challenges.

> "The process of execution of assets upon issuance of an *exequatur* can take a considerable length of time."

There is also no provision in the 1999 Law that allows or prohibits the stay of enforcement proceedings by the enforcing court pending the outcome of the challenge proceedings. In practice, however, the court usually and at its discretion stays enforcement proceedings on a request by the party against which enforcement is sought. Although theoretically the filing of such opposition will not block enforcement of an international award that has been granted an *exequatur* by the competent court, in practice every submission opposing enforcement will effectively stay any enforcement process.

1 *Editorial note*: Available in unofficial English translation (but without statutory explanatory notes or 'Elucidations') at http://www.flevin.com/id/lgso/translations/.

2 Decision No 30/Pdt.P/2002/PN.KDS (District Court of Kudus, Central Java, 2 July 2003).

3 *Badan Arbitrase Pasar Modal Indonesia* (*BAPMI*), *Badan Mediasi dan Arbitrase Asuransi Indonesia* (*BMAI*) *Badan Mediasi Dana Pensiun* (*BMDP*), *Lembaga Alternatif Penyelesaian Sengketa Perbankan Indonesia* (*LAPSPI*), *Badan Mediasi Perusahaan Penjaminan Indonesia* (*BAMPPI*) and *Badan Mediasi Pembiayaan, Pegadaian, dan Venture Indonesia* (*BAMPPVI*).

4 Article 11(2) of the 1999 Law.

5 *Ibid*, art 11(1).

6 *Ibid*, art 11(3).

7 Judgment No 1205, K/Pdt/1990 (4 December 1991).

8 Article 1(3) of the 1999 Law.

9 Decision No 19/PUU-XIII/2015.

10 *PT Pertamina EP and PT Pertamina (Persero) v PT Lirik Petroleum*, Judgment No 904 K/Pdt.Sus/2009 (9 June 2010, Supreme Court).

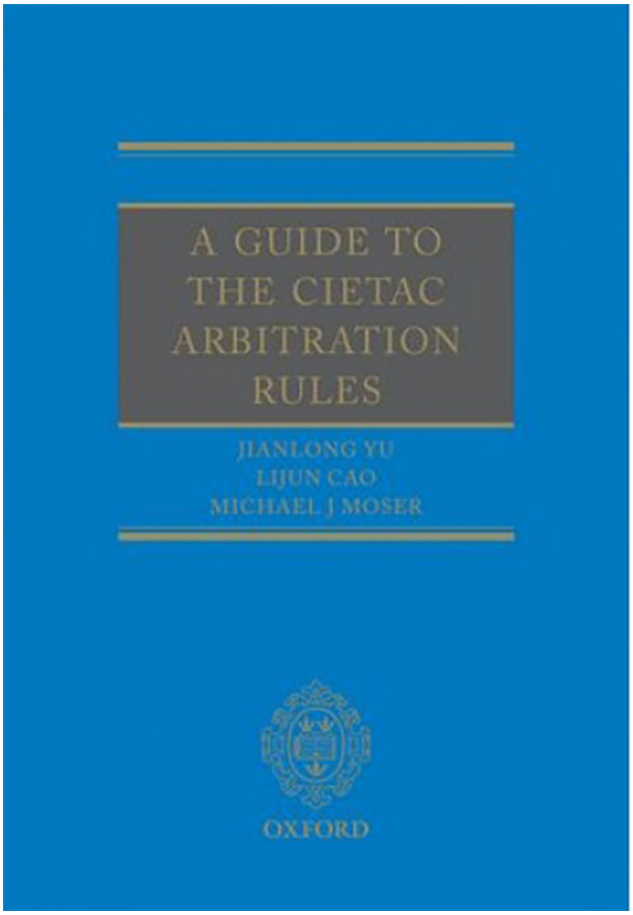
11 Nonetheless, under the 1999 Law, in cases in which a District Court decides to annul an award, the respondent to the petition may appeal to the Supreme Court.

12 *Perusahaan Pertambangan Minyan dan Gas Bumi Negara (Pertamina) v Karaha Bodas Co LLC & Anor*, Extraordinary Appeal No 444/Pk/Pdt/2007 (Supreme Court, 9 September 2008).

13 Judgment No 877 K/Pdt.Sus/2012 (Supreme Court, 26 March 2013). See also Extraordinary Appeal No 26 PK/Pdt.Sus-Arbt/2016 (Supreme Court, 18 May 2016).

A Guide to the CIETAC Arbitration Rules[1]

Reviewed by Jane Willems



The China International Economic and Trade Arbitration Commission (CIETAC), established in 1956 by the China Council for the Promotion of International Trade and headquartered in Beijing, China, is one of the oldest and most important arbitral institutions in the world. CIETAC has 11 sub-commissions throughout China, encouraging its increased use by parties. During the past decade, growth in its caseload has outpaced other well-known institutions, including the International Chamber of Commerce. Importantly, CIETAC's Arbitration Rules have been restated and reformed several times since 1995. The most recent version - the CIETAC Arbitration Rules 2015 - came into force on 1 January 2015 and has made CIETAC one of the most prominent contributors to the development of international arbitration practice in China.

The importance of the CIETAC Arbitration Rules in arbitration in China rightly deserves this first major work prepared by two experts on CIETAC arbitration, Jianlong Yu, a former Secretary General of CIETAC, and Lijun Cao, a leading lawyer in Beijing, who specialises in international arbitration. This book is the first of its kind to focus on CIETAC arbitration practice by providing a guide to and commentary on the 2015 Rules and explaining how CIETAC administers arbitration cases.

The *Guide* is divided into 15 chapters. It begins with a helpful introduction to the legal framework of Chinese arbitration law (Chapter 1). The authors also address at the outset relevant provisions of the PRC Civil Procedure Law 2017 and relevant Judicial Interpretations by the Supreme People's Court. There is also important discussion of the distinction between 'domestic' and 'foreign-related' arbitration. The remainder of this chapter explains clearly the main features of CIETAC arbitration, including the concepts of 'administered arbitration' and combinations of 'arbitration and conciliation'.

The history of CIETAC, including its structure and relations with its sub-commissions, is set out in 'The Arbitration Commission: Structure and Duties' (Chapter 2). This is a vital chapter, in that it explains the creation of CIETAC as an 'arbitration commission' under the PRC Arbitration Law 1994. Its current Articles of Association were introduced in 2015. Thus, while it is an official government body, it is required to act independently when dealing with arbitration cases.

The authors then follow the common approach of an article-by-article commentary on the 2015 Rules. However, they also make a welcome choice by organising the commentaries by topic, in a sequence that follows the procedural steps of an arbitration and the essential issues arising for practitioners. They are organised as follows: scope of application, including issues relating to consent (Chapter 3); issues related to jurisdiction, including the jurisdiction of local arbitration commissions (Chapter 4); arbitration agreements, including important discussion of

their binding effect on non-signatories, as recognised under Chinese law (Chapter 5); commencement of the arbitration and written submissions (Chapter 6); the formation and duties of arbitral tribunals, including the duty of disclosure (Chapter 7); conduct of the proceedings (Chapter 8); the principles applicable to the making of arbitral awards (Chapter 11); and arbitration fees and costs (Chapter 12).

With regard to hearings, Chapter 8 discusses the very specific choice left to parties by the 2015 Rules as to the adoption of an inquisitorial or adversarial approach, underlining the inquisitorial approach adopted in CIETAC arbitrations and the need for expression of party choice. With regard to 'Med-Arb' ('arbitration-conciliation' in the PRC), the authors examine the pros and cons of this process and explain step by step how it is administered and enforced by CIETAC.

Of particular interest is the discussion devoted to the arbitration agreement by Chapter 5. This is for two reasons: first, its analysis of the requirements under Chinese arbitration law for a valid arbitration agreement, supported by references to PRC court decisions, and second, for the practical guidance provided to practitioners on how to address jurisdictional objections under the 2015 Rules. The *Guide* provides explicit guidance on how and where to raise jurisdictional challenges in a legal framework in which both the arbitral institution and the local courts have concurrent jurisdiction to examine them. Furthermore, the chapter on complex arbitrations (Chapter 10) provides useful case illustrations as to the scope of the arbitration agreement in relation to the position adopted by CIETAC in the context of multi-contract and multi-party situations (Chapter 14).

Further chapters devoted to interim measures (Chapter 9) and summary proceedings (Chapter 12) provide insightful comments on how best practices in international arbitration are implemented under the current Chinese legal framework. The authors' reference to PRC judicial practice in arbitration is particularly useful here.

The *Guide* is completed by the provision of information on the special features of CIETAC domestic arbitration (Chapter 14) and of CIETAC Hong Kong arbitration (Chapter 15). The Guide makes clear that under art 74 of the 2015 Rules, the parties may agree to have CIETAC Hong Kong administer an arbitration, with the venue being Hong Kong, the law applicable to the arbitral proceedings being the arbitration law of Hong Kong and the arbitral award being a Hong Kong award.

The final part of the volume comprises several appendixes. Beyond the insertion of the texts of the 2015 Rules and the PRC Arbitration Law, the authors have also provided the CIETAC Code of Conduct for Arbitrators (1994) and the CIETAC Guidelines on Evidence (2015), as well as templates of CIETAC forms.

Throughout the *Guide*, the authors have embraced a welcome comparative perspective, employing references to other arbitration rules (including those of the ICC, HKIAC and SCIA) and to arbitration guides or handbooks of other arbitral institutions, thus allowing readers to identify the standard of international arbitration adopted by CIETAC. The *Guide* also provides an explanation of the CIETAC standard of scrutiny in its review process for draft awards.

This book is a guide to CIETAC administered arbitration that all practitioners would do well to utilise. It is comprehensive and extremely user friendly, with a text that is both thorough and concise at the same time.

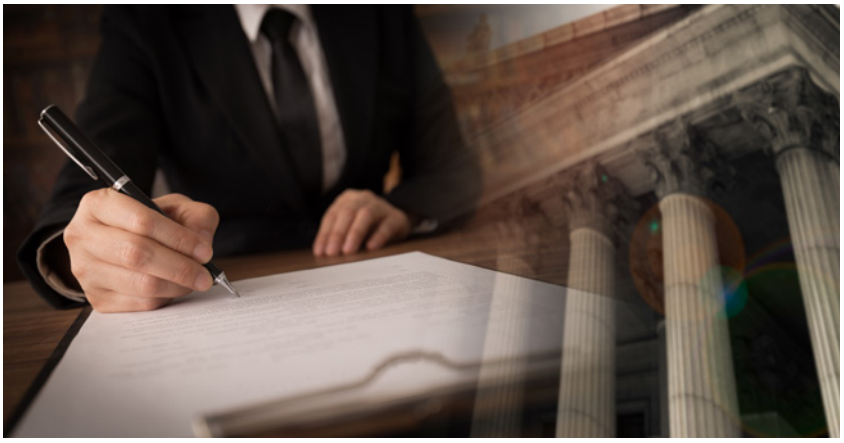
1 Jianlong Yu & Lijun Cao (2020, Oxford University Press), ISBN 978-0-19-967171-7, xliii+536 pp, casebound. Also available as an e-book. Hereinafter *the Guide*.

New and emerging dispute resolution legislation

Amendment of the PRC Arbitration Law

On 30 July 2021, the PRC Ministry of Justice published for consultation a Revised Draft of an amended PRC Arbitration Law 1994 (the Law) on which work had begun in 2018. The aim of the draft is to make China-seated foreign-related arbitration (or arbitration with 'foreign elements') more certain, consistent and transparent by aligning it with international best practice.[1] The consultation period ended on 29 August 2021. When enacted, this will be the third set of amendments to the Law since those of 2009 and 2017, which implemented some minor and cosmetic changes. The most significant changes now proposed include the following.

(1) The seat of arbitration will be distinct from the venue or place, enabling parties to make different provision in each case and empowering arbitral tribunals to determine the seat where the parties fail to do so. The seat will govern the nationality of awards.
(2) Party autonomy with regard to (i) choice of the law governing the arbitration agreement and (ii) of arbitral institutions (including foreign), or (iii) choice of *ad hoc* arbitration, will be recognised. Chinese courts will be empowered to assist in relation to procedural matters in *ad hoc* arbitrations.
(3) The parties' choice of arbitration rules will be expressly recognised, subject to mandatory provisions of the Law.
(4) Where the validity of an arbitration agreement is challenged, the tribunal (or, if one has not yet been appointed, an arbitral institution) may determine this. This represents the acceptance of *Kompetenz-Kompetenz* in Chinese law.



(5) A party will be deemed to have waived its rights to object to alleged non-compliance with the arbitration agreement if it continues to participate in proceedings without having made a written objection.
(6) Mediation may be accommodated in arbitration proceedings where the parties so agree, in particular with regard to Arb-Med-Arb.
(7) Guidelines will be provided on applications for interim measures. The powers of arbitral tribunals and emergency arbitrators to grant them (which is currently reserved to the courts) will be recognised.
(8) Express provision will be made as to partial awards and their enforceability.
(9) With regard to challenges to awards, (i) an award may be set aside if the respondent fails to receive notice of appointment of an arbitrator or of arbitration proceedings, and (ii) a Chinese court may partially set aside an award where it is possible to do so.
(10) With regard to the enforcement of awards, (i) enforcement may not be refused on account of relatively minor problems, and (ii) a court may offer the tribunal an opportunity to clarify any part of an award to enable its enforcement.
(11) Clearer provision will also be made on how enforcement proceedings should be commenced with regard to foreign arbitral awards.

Singapore: third party funding rules

By virtue of the Civil Law (Third-Party Funding) Regulations 2017 (Cap 43, No S68), TPF has hitherto been permitted in Singapore in respect only of (*inter alia*) international arbitration proceedings and related mediation and court proceedings. On 21 June 2021, the Singapore Ministry of Law announced that TPF would be extended to domestic arbitration proceedings and related mediation and court proceedings with effect from 28 June 2021, by virtue of the Civil Law (Third-Party Funding) (Amendment) Regulations 2021 (Cap 43, No S 384).[2] At the same time, the Ministry announced that local lawyers and regulated foreign lawyers under the Legal Profession Act (Cap 161) would be governed by the TPF rules in Part 5A of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161, No S 706) where they are involved in domestic arbitrations funded by TPF.[3]

New and emerging dispute resolution rules

(1) Asian International Arbitration Centre (AIAC)

Following extensive study and public consultation, the Malaysia-based AIAC launched its Arbitration Rules 2021,[4] which replaced the 2018 edition with effect from 1 August 2021. The 2021 Rules will apply to all arbitrations commenced after this date, unless the parties otherwise agree. The changes made seek to modernise the Rules in accordance with international best practice and so improve the efficiency, cost and time economy, and transparency of Malaysian arbitration. The key changes and provisions are as follows.

(1) The UNCITRAL Arbitration Rules 2013 and the previously stand-alone AIAC Fast Track Arbitration Rules 2018 are consolidated into a single set of rules.
(2) In line with such institutions as ACICA, HKIAC, LCIA and SIAC, the Rules provide for a summary determination procedure.
(3) In line with similar provisions in the LCIA and SIAC rules, the tribunal may dismiss a claim, counterclaim or defence that is manifestly (i) outside its jurisdiction, (ii) inadmissible or (iii) without merit.
(4) A new Fast Track Procedure will be applicable where (i) the parties so agree, (ii) the amount in dispute is less than RM2,085,700 (approx US$500,000) for an international arbitration or RM2,000,000 (approx US$477,600) for a domestic arbitration, or (iii) in a case of exceptional urgency. The key features of the Procedure are (a) determination by a sole arbitrator, unless the parties otherwise agree, (b) documents only procedure, with no hearing, unless the tribunal decides to convene a time-limited oral hearing, and (c) short timelines for arbitrations, in particular that an arbitration should be declared closed within 90 days of the tribunal's first procedural order.
(5) Multiple arbitrations may be consolidated pursuant to a single notice of arbitration of all claims, accompanied by a consolidation request.
(6) A streamlined default mode for appointing arbitrators in multi-party arbitrations has been introduced.
(7) Emergency arbitration provisions are clarified, so that (i) such arbitrations may be conducted virtually or on documents only; (ii) arbitrators may proceed in the absence of a party; (iii) arbitrators may rule on their own jurisdiction; and (iv) an arbitrator may make any order or award that can be made by the arbitral tribunal.
(8) The AIAC may publish the entirety, excerpts or summaries of redacted arbitral awards with the parties' consent.
(9) Parties are under a duty to obtain confidentiality undertakings from all participants in arbitration, including authorised representatives, fact and expert witnesses, and any service providers.

(2) Japan Commercial Arbitration Association (JCAA)

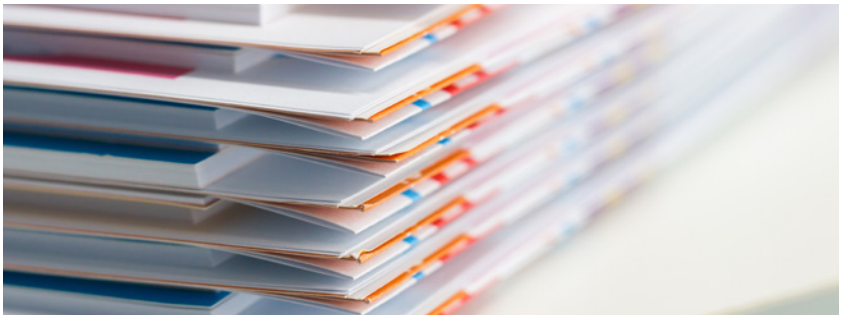
On 1 July 2021, a new set of JCAA Commercial Arbitration Rules came into force,[5] superseding the 2019 Rules. Applicable to arbitrations commenced on or after that date, the main body of the 2021 Rules is identical to the 2019 Rules, while the focus of the new provisions is on the JCAA's expedited arbitration procedures. The procedures now apply to amounts on dispute not exceeding ¥300 million (approximately US$2.73 million). Where amounts exceed ¥50 million (approximately US$450,000), the time limit for issuance of awards is raised from three months to six. Parties may opt out of the procedures or agree to apply them to higher-value disputes.

The JCAA has also published Appointing Authority Rules that are applicable to appointments of arbitrators to (i) *ad hoc* arbitrations, and (ii) arbitrations administered by other institutions in cases where the JCAA is named as appointing authority, effective from the same date.[6]

(3) Swiss Arbitration Centre (SAC)

The Swiss Chambers Arbitration Institution (SCAI) merged with the Swiss Arbitration Association (ASA) in September 2020 to create the Swiss Arbitration Centre (SAC). On 1 July 2021, the SAC issued revised Swiss Rules of International Arbitration 2021 (Swiss Rules).[7] The 2021 Rules apply to arbitrations commenced on or after that date and may, if the parties so agree, apply to arbitrations commenced before that date instead of the 2012 Rules. The key provisions of the 2021 Rules, some of which are influenced by other international rules, are as follows.

(1) In light of COVID-19 related changes to the conduct of arbitrations, provision is made as to electronic filings, obligations to address data protection and cybersecurity and remote hearings at the initial conference, and the right of the tribunal to order that "any hearings may be held in person or by videoconference or other appropriate means".



(2) Where claims are raised under more than one arbitration agreement, the SAC Arbitration Court (the Court) will review whether those agreements are "manifestly incompatible" while at the same time reserving the arbitral tribunal's right to rule as a jurisdictional question whether those claims may be heard in a single arbitration.

(3) Further provision is made as to joinder of arbitrations, with regard to claims against an additional party by an existing party (joinder) or vice versa (intervention).

(4) The Court will rule on consolidation of arbitrations pursuant to a request from a party.

(5) Arbitrators' continuing obligations to disclose matters raising justifiable doubts as to impartiality or independence are stated expressly. The tribunal may oppose the appointment of a new party representative that would jeopardise its impartiality or independence.

(6) A tribunal secretary may only be appointed with the parties' consent.

(7) Arbitration proceedings will be stayed should the parties decide at any time to attempt mediation. Where they agree that the tribunal should play a role in the mediation, they shall waive their right of challenge on the basis of its participation and of any knowledge acquired in pursuing settlement.

(8) Where the Expedited Procedure applies, the parties may agree at any time that they no longer wish it to apply.

(9) Deposits will be administered solely by the SAC instead of the tribunal.

(4) ICSID draft Mediation Rules

On 15 June 2021, ICSID published, as part of its Rules Amendment Project, *Working Paper No 5*, Vol 1, which contains the proposed text of new ICSID Mediation Rules.[8] Reference should also be made to two ICSID documents of July 2021, *Background Paper on Investment Mediation*[9] and *Overview of Investment Treaty Clauses on Mediation*.[10] The draft follows extensive stakeholder and public consultations. The ICSID Secretariat hopes to place the proposals before the member-States by the end of 2021 with a view to implementing them early in 2022. The proposed Rules are the first to be developed for mediation by ICSID, the institution having hitherto limited its involvement to assisting parties and providing administrative services. Non-mandated ISDS processes were hitherto limited to conciliation and fact finding (which will also continue to be offered).

Key proposed provisions of the Rules are as follows.

(1) Parties may file requests for mediation with the ICSID Secretariat either unilaterally or, by agreement, jointly.

(2) Parties who are unable to agree on the appointment of mediators may request the assistance of the ICSID Secretary-General.

(3) Mediators will be required to be impartial and independent. Parties may, however, agree that they should also possess specific qualifications and/or comply with standards and competency criteria, such as an understanding of investor-State disputes.

(4) Once the request for mediation has been transmitted to a mediator, each party shall then file with the Secretary-General an initial written statement, which shall include a brief description of the issues in dispute, the parties' views of the issues and proposed procedures for the mediation.

(5) The first session shall then be held within 15 days, at which the mediator and the parties shall determine the protocol for conducting the mediation (dealing with, for example, language, place, procedure, the next steps and who should participate). The protocol shall also deal with the treatment of information relating to and documents required in the mediation for the purpose of confidentiality.

(6) The first session shall also deal with (i) whether a meeting should be held in person or remotely, and (ii) who shall be authorised to negotiate and settle on behalf of each party the issues being mediated.

(7) A mediation will end where the parties jointly sign a settlement agreement or unilaterally agree to terminate it, or where the mediator determines that there is no likelihood of settlement and issues a notice of termination (i) briefly summarising the procedural steps taken and the basis for termination, and (ii) referring to any confidentiality agreement arrived at by the parties.

New and emerging dispute resolution practice guidance and standards

ICCA Standards of Practice in International Arbitration

On 3 June 2021, ICCA issued its *Guidelines on Standards of Practice in International Arbitration*.[11] The Guidelines, which reflect the many cultures and situations in which international arbitration is deployed, are a further means of encouraging fairness and legitimacy in the international arbitral process. They are not of mandatory application, but may be adopted by parties in their arbitration agreements and by arbitral institutions and tribunals.

The Guidelines set out guiding minimum standards of civility expected of all practitioners within the international arbitration community and of other participants in the arbitral process (specifically, party representatives, expert and fact witnesses, tribunal secretaries and personnel of arbitral institutions). The scope of the Guidelines embraces not only integrity, respect, courtesy and civility, but also honesty, privacy and confidentiality, impartiality, effectiveness, the giving of assistance to the tribunal and furtherance of the arbitration process. In an approach that is very similar to the IBA *Guidelines on Conflicts of Interest in International Arbitration*, the ICCA Guidelines booklet also contains explanatory notes of both general and specific application.

IBA Toolkit on Arbitration and Insolvency

In March 2021, the IBA Arbitration Committee published a *Toolkit on Insolvency and Arbitration*.[12] The Toolkit provides guidance to parties, counsel and arbitral tribunals where a party to an arbitration is subject to insolvency proceedings in one or more jurisdictions. It emphasises that different jurisdictions have their own approaches to the problem and makes no attempt to harmonise national approaches. The Toolkit comprises three parts:

(1) survey-based National Reports from 19 jurisdictions on how arbitration and insolvency proceedings intersect in each jurisdiction. Of greatest relevance to practitioners in Asia are the reports for Hong Kong, India and Singapore (along with that for England & Wales, as the common law jurisdiction from which those jurisdictions' laws derive) and the People's Republic of China;
(2) an Explanatory Report, which provides context and some general commentary on how arbitration and insolvency proceedings intersect in both domestic and international arbitrations and the legal issues that may arise as a result. The Report also sets out the standard survey questionnaire on which the National Reports are based;
(3) an Annex entitled Checklist on the Effects of Insolvency on Arbitration. This is intended to serve as an *aide memoire* and tool for parties, their counsel and arbitrators in identifying relevant issues arising where arbitration and insolvency proceedings intersect and to provide a framework for considering their resolution.

The IBA intends that the Toolkit should be subject to ongoing review in light of experience and invites the submission of further National Reports.

Remote arbitration and mediation: Green Pledges

Two interest groups have launched campaigns promoting the signature of 'green pledges' seeking to minimise the environmental impact of international dispute resolution processes, in particular with regard to, wherever possible, reducing air travel and the use of paper by promoting electronic correspondence and hearing bundles, videoconferencing and encouraging parties and witnesses to consider remote hearings. Separate pledges apply to arbitration and mediation, and may be signed by neutrals, practitioners and institutions. They are as follows.

(1) The Campaign for Greener Arbitration (CGA) *Green Pledge*.[13] This is supported by six *Green Protocols*: (i) *Arbitral Proceedings*; (ii) *Law Firms, Chambers and Legal Service Providers*; (iii) *Arbitrators*; (iv) *Arbitration Conferences*; (v) *Arbitration Hearing Venues*; and (vi) *Arbitral Institutions*.[14] The background to these documents is explained in the CGA document *Framework for Adoption of the Green Pledges*.[15]
(2) The World Mediators Alliance on Climate Change *Green Pledge*.[16] This is broadly based upon the CGA *Green Pledge*. There are, however, no CGA-type protocols.

Accessions to international dispute resolution instruments

New York Convention

It was reported in the April 2021 issue of *Asian Dispute Review* that Iraq had passed legislation ratifying the New York Convention on 4 March 2021.[17] Following the deposit of instruments of ratification with the United Nations, the Convention took effect in Iraq on 31 May 2021.

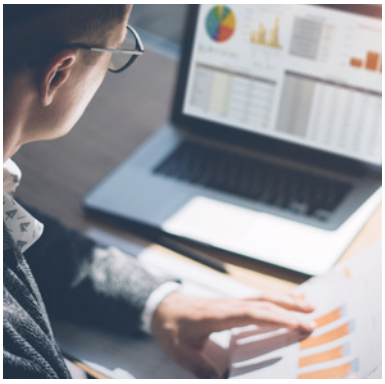
ICSID Convention

Following a ruling by the country's Constitutional Court, the President of Ecuador ratified the ICSID Convention without reference to the legislature on 16 July 2021 and deposited instruments of ratification with the World Bank on 4 August 2021. This enabled Ecuador to rejoin the ICSID Convention, from which it had previously withdrawn in 2009, on 3 September 2021.[18]

Mauritius Convention

Benin and Iraq both signed the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration 2014 in 2017. They have become the eighth and ninth State parties respectively to ratify the Convention, which will come into force in Benin on 19 January 2022 and in Iraq on 20 February 2022. They join Australia, Bolivia, Cameroon, Canada, Gambia, Mauritius and Switzerland as ratifying parties. Fourteen other States, including France, Germany, Sweden, the United Kingdom and the United States, have signed but not yet ratified the Convention.[19]

Reports and briefing papers



Length and costs of investor-State arbitration

On 3 June 2021, the British Institute of International and Comparative Law (BIICL) published an empirical study on *Costs, Damages and Duration in Investor-State Arbitration*.[20] The study is the result of collaborative research between its Investment Treaty Forum and international law firm Allen & Overy into over 400 ICSID and UNCITRAL arbitral awards and over 70 ICSID annulment decisions. Its key findings include the following.

(1) Investors have claimed and been awarded increasingly larger amounts, the percentage increase ranging from 29% to 36%.
(2) While parties' costs of arbitration have generally decreased over the past three years (by 3% for investors and 15% for States), investors' costs remain higher than those of States (mean costs for each being US$6.4 million and US$4.7 million respectively).
(3) Prospects for recovering costs have, however, improved with the wider adoption by ICSID tribunals of UNCITRAL's 'costs follow the event' rule. There was no significant difference in the levels of costs incurred or awarded by ICSID and UNCITRAL tribunals.
(4) There has been a steady increase in the duration of investor-State proceedings, with recent proceedings lasting approximately 18 months longer than those conducted before 2017.
(5) Parties' choice of arbitration rules has not significantly impacted upon the duration of proceedings, tribunal costs and the allocation of costs.

(3) A 'Post-COVID' world for dispute resolution

On 27 July 2021, international law firm Herbert Smith Freehills published a briefing paper entitled *Light in the tunnel? The post-Covid arbitration outlook*.[21] The paper discusses how far the rollout of vaccinations and the relaxation of restrictions on movement and association may advance progress toward the 'new normal' for dispute resolution, while cautioning that the speed and trajectory of recovery will differ between jurisdictions. While international arbitral institutions have experienced substantial increases in the number of filings, there is no conclusive proof that this is substantially attributable to the effects of the pandemic.

Comparisons are drawn between the COVID-19 pandemic and the Global Financial Crisis (GFC) of 2007-2009

in discussing (1) the effects, extent and duration of the disruption caused, (2) the types of trade and industry affected, (3) effects on civil dispute resolution and insolvency-related disputes, including how they will differ with each 'wave' of the pandemic and generate a long overall 'tail' of disputes over the next four to five years, and (4) the role of formal dispute resolution in allocating risk and responsibility in the future. The paper states that the future may see a move away from ADR and toward more adversarial options. In relation to arbitration, there is uncertainty as to the extent to which there will be a return to in-person arbitration hearings as standard, though 2021 may witness an increasing number of 'hybrid' hearings.

Surveys

(1) ICC Survey on ADR and Arbitration: Practice and Preference

On 8 July 2021, the ICC Commission on Arbitration and ADR launched an electronic Pilot Survey on ADR and Arbitration: Practice & Preference. The survey seeks to gauge how arbitration practitioners and users (including companies, States and State entities) choose and use ICC ADR services and to evaluate settlement practices within the arbitration process. The findings will be published in a report which will be published on the Commission's website. Although the survey closed on 13 September 2021, the contents of the questionnaire may, at the time of writing, still be viewed.[22]

(2) ICCA research project and survey on the right to a physical hearing in arbitration

On 4 September 2020, ICCA announced the launch of a research project entitled *Does a Right to a Physical Hearing Exist in International Arbitration?*[22] Between 17 December 2020 and 26 May 2021, the authors of the project uploaded national reports from some 86 New York Convention jurisdictions to the ICCA website to survey how jurisdictions handle legal questions posed by the increased use of remote arbitration hearings as a result of the COVID-19 pandemic, such as due process issues. A general report will be published in due course, setting out the authors' analysis of their findings from the survey, along with "a series of essays addressing the interplay between remote hearings and key conceptual issues in international arbitration". The report will be presented at the postponed XXVth ICCA Congress to be held in Edinburgh on 18-21 September 2022 and published in the ICCA Reports series.

1 See Pinsent Masons Out-Law briefing, *China's arbitration reforms will align it with international rules* (8 September 2021), available at https://www.pinsentmasons.com/out-law/analysis/china_s-arbitration-reforms-will-align-it-with-international-rules. The Ministry of Justice has published explanatory notes on the draft, in Chinese only, at http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432965.html.

2 Ministry of Law press release, *Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore* (21 June 2021), available at https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore.

3 *Ibid.*

4 Available at https://www.aiac.world/Arbitration-Arbitration.

5 Available at https://www.jcaa.or.jp/en/arbitration/rules.html.

6 *Ibid.*

7 Available at https://www.swissarbitration.org/centre/arbitration/arbitration-rules/.

8 Available at https://icsid.worldbank.org/services-arbitration-investor-state-mediation. The draft mediation provisions are set out at pp 202-221.

9 Available at https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation.

10 Available at https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation.

11 ICCA Task Force on Standards of Practice in International Arbitration, ICCA Reports No 9, available at https://www.arbitration-icca.org/icca-task-force-standards-practice-international-arbitration.

12 Available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/toolkit-arbitration-insolvency.

13 https://www.greenerarbitrations.com/greenpledge.

14 The Green Protocols are available at https://www.greenerarbitrations.com/green-protocols.

15 *Ibid.*

16 https://womacc.org. See also Pinsent Masons, Out-Law Analysis, *Further evolution of remote mediation expected post-pandemic* (24 May 2021), available at https://www.pinsentmasons.com/out-law/analysis/remote-mediation-post-pandemic.

17 [2021] Asian DR 97.

18 The ICSID List of Contracting States and Other Signatories of the Convention (ICSID/3) (as of 3 September 2021) may be accessed at https://icsid.worldbank.org/resources/lists/icsid-3.

19 See https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status for the list of signatories and parties to the Convention.

20 Available at https://www.biicl.org/projects/empirical-study-costs-damages-and-duration-in-investor-state-arbitration.

21 Available at https://www.herbertsmithfreehills.com/kr/business-services/latest-thinking/light-in-the-tunnel-the-post-covid-arbitration-outlook. This briefing discusses arbitration only. As to mediation, see note 16 above.

22 See http://web.iccwbo.org/iccwboorg-avxnt/pages/gt14ptmeeu6ywanornzng.html?PageId=3e78dd1accdfeb11bacb000d3ab35936.

23 See ICCA, *Does a Right to a Physical Hearing Exist in International Arbitration?* (4 September 2020), available at https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration.

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HKIAC

HKIAC ONLINE SERVICES

E-HEARINGS AND WEBINAR

HKIAC partners with leading legal technology specialists to offer users a comprehensive range of integrated virtual hearing services. These services include: HD video and audio conferencing, online document repositories (including bundles and electronic presentation of evidence), and transcription and interpretation services.

To ensure our users remain connected to developments at HKIAC and other arbitration-related matters wherever they are, we regularly hold 60-minute webinars on a variety of topics in multiple languages as part of the HKIAC Webinar Series.

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