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This issue of Asian Dispute Review commences with an article based on the 2019 Kaplan Lecture delivered in Hong Kong by the Rt Hon Beverley McLachlin, who provides a judicial perspective on the relationship between arbitration and the rule of law, and where it is headed. Teresa Cheng then discusses interim measures of protection in international arbitration and how cross-jurisdictional arrangements may serve as an ‘interim stopgap measure’ for less developed arbitral jurisdictions. Her article is based on the 2019 Hong Kong Vis East Moot Annual Lecture.

These are followed by an article in which Olga Boltenko, Howard Chan and Wong Zi Wei survey the regimes for setting aside jurisdictional findings and applying for the ad hoc admission of counsel in Hong Kong and Singapore. Anton Asoskov then examines the role of the Hong Kong International Arbitration Centre as a Permanent Arbitral Institution in Russia-related international arbitrations.

The ‘In-House Counsel Focus’ article by Karl Hennessee considers recent developments in settlement in arbitration, including the role of arbitrators in actively promoting settlement. In his ‘Jurisdiction Focus’ article, Konstantin Voropaev offers insights into arbitration law reforms enacted in Kazakhstan in 2019 and dispute resolution at the Astana International Financial Centre.


In other news, we would like to extend a warm welcome to Shaylla Shabir, who has joined the editorial team as an Editorial Assistant.

General Editors

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Interim Measures in Arbitration: 
Surprise Attack or Offensive Defence?

Teresa Cheng GBS, SC, JP

This article discusses the nature of interim measures of protection in international arbitration and, in particular, explores the idea of cross-jurisdictional arrangements as an ‘interim stopgap measure’ for less-developed arbitral jurisdictions, taking as its model the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (2019). The article is based on the Hong Kong Vis East Moot Annual Lecture delivered on 31 March 2019 at the Hong Kong Stock Exchange (HKEX).

Introduction

The element of ‘surprise attack’ in some interim measures can be easily appreciated. The phrase ‘offensive defence’ refers to the tactic that an offensive, in the form of making the first strike, is sometimes your best defence.

In arbitration, interim measures may be granted both by arbitral tribunals and by national courts. Many parties therefore have to face warfare on two fronts. Indeed, an international arbitration involving the interplay between the arbitral tribunal and courts in multiple jurisdictions may become multiple-front warfare. The intricacies arising from competing and overlapping jurisdictions increase the complexity of the warfare exponentially.

For parties to arbitration and their lawyers, the importance of knowing how to take advantage of interim measures strategically cannot be overstated. It is no exaggeration to say that, in some cases, a successful application for interim measures (or otherwise) may make or break the entire arbitration, even leading at times to early settlement or an abrupt end to the dispute.
Types of interim measure

Article 17 of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (the 2006 Model Law) sets out four different types of interim measure, namely those that require a party to:

(1) maintain or restore the status quo pending determination of the dispute;
(2) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(3) provide a means of preserving assets out of which a subsequent award may be satisfied; or
(4) preserve evidence that may be relevant and material to the resolution of the dispute.

In Hong Kong, art 17 is adopted by s 35 of the Arbitration Ordinance (Cap 609) (the Hong Kong Ordinance), which defines the scope of interim measures that may be granted by arbitral tribunals. In addition, s 45 of the Hong Kong Ordinance governs interim measures that the Hong Kong court may order in aid of domestic or international arbitration. That provision defines court-ordered “interim measures” by reference to art 17 of the 2006 Model Law.3

While the types of interim measure are the same, their targets may well be different. Article 17 refers to interim measures as orders directing “a party” to do (or not to do) something. In the context of arbitral tribunals, the term “party” means a party to the arbitration, whereas in the context of court proceedings, it refers to “a party brought before the court, against whom the interim measure is sought to be made” (who may be a third party to the arbitration).4 Thus, the binding effect on third parties can in some cases be a huge advantage of interim measures ordered by courts over those granted by tribunals.

Conditions for granting interim measures

Article 17A of the 2006 Model Law, which is adopted by s 36 of the Hong Kong Ordinance, sets out the conditions for granting an interim measure. The party requesting such measure shall satisfy the arbitral tribunal that:

(1) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(2) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

The two conditions in art 17A(1)(a) and (b) of the 2006 Model Law are mandatory for the grant of interim measures by tribunals, except that for the measure referred to in art 17(2)(d) of same (ie, preservation of evidence) the requirements apply only to the extent that the arbitral tribunal considers appropriate.

These two conditions resemble the two requirements for granting interlocutory injunctions in many common law jurisdictions, as laid down in the seminal House of Lords case of American Cyanamid Co v Ethicon Ltd,5 which are:

(1) that there is a serious question to be tried; and
(2) that the balance of convenience lies in favour of granting an injunction.

Preliminary (ex parte) orders

Article 17B of the 2006 Model Law, which is adopted by s 37 of the Hong Kong Ordinance, authorises a party to an arbitration to request a preliminary ex parte order (preliminary order) “directing a party not to frustrate the purpose” of a requested interim measure. A typical example of a preliminary order is an order to freeze liquid assets, such as bank accounts or vessels and aircraft, where there is a risk of dissipation if the respondent has notice of the application.6
The preliminary orders featured in the 2006 Model Law are nonetheless subject to certain safeguards or limitations, including the temporary nature of such orders, their being unenforceable in the courts, the default requirement on the requesting party to provide security, and the disclosure requirement in respect of “all circumstances that are likely to be relevant to the arbitral tribunal’s determination whether to grant or maintain the order”.

A typical example of a preliminary order is an order to freeze liquid assets, such as bank accounts or vessels and aircraft, where there is a risk of dissipation if the respondent has notice of the application.

Choice of court- or arbitral tribunal-ordered interim measures

There are occasions in which an application would have to be made to the courts and a decision has to be made as to whether an application should be made before a court or arbitral tribunal. The relevant considerations include:

(1) the lex arbitri and lex fori: whether the law of the seat of arbitration or the law of the forum where the interim measures are being sought can provide the particular interim measures;
(2) the power of the national court in aid of foreign arbitration: whether the arbitration in question is a ‘foreign arbitration’, in aid of which the national court is empowered to grant interim measures;
(3) compliance by third parties: whether the order for interim measures needs to be complied with by any third parties (eg, banks);
(4) enforcement by courts: whether the order for interim measures would require enforcement by a court and, as such, an order by the relevant court would be more effective; and
(5) enforcement of preliminary (ex parte) orders in arbitration: whether there is any need for enforcement of such orders (which are not enforceable by the courts under the 2006 Model Law).

Recognition and enforcement of interim measures granted by tribunals in foreign arbitrations

With regard to an international perspective of the enforcement of interim measures, it is useful to consider the following scenario, which may not be unusual for international arbitration.

Party A has commenced arbitration against its contractual counterparty B from another jurisdiction, pursuant to an arbitration clause in the contract for an arbitration seated in a third jurisdiction, X. Meanwhile, B has commenced parallel litigation proceedings against A before the court of its home jurisdiction. A has successfully obtained an anti-suit injunction from the tribunal to prohibit B from continuing the court proceedings. In addition, fearing that B would remove its assets from its home jurisdiction to another place that is a non-New York Convention jurisdiction to evade enforcement of the final award, A has successfully persuaded the tribunal to grant a freezing order in respect of B’s assets in its home jurisdiction.

In this scenario, the anti-suit injunction and the freezing order granted by the tribunal seated in jurisdiction X would be meaningless ‘paper judgments’ unless they are recognised and enforced by the court of B’s home jurisdiction. This highlights the prime importance of international enforcement of interim measures.

Enforcement under the 2006 Model Law and Hong Kong law

Articles 17H and 17I of the 2006 Model Law deal with the recognition and enforcement of interim measures by national courts. Article 17I sets out the grounds for refusal of recognition and enforcement of interim measures, such grounds being similar to those for refusing recognition and
enforcement of arbitral awards under art 36 of the 2006 Model Law (which does not apply in Hong Kong\textsuperscript{15}), which is in turn modelled on the well-known art V of the New York Convention 1958.

Articles 17H and 17I of the 2006 Model Law were not, however, adopted in the Hong Kong Ordinance\textsuperscript{12} because Hong Kong’s own liberal approach to recognising and enforcing interim measures (including those issued by arbitral tribunals seated outside Hong Kong) predated the 2006 amendments to the Model Law.

Since 2000, there has been an express provision in the Hong Kong Ordinance (initially with s 2GG of the now-repealed Arbitration Ordinance (Cap 341) (the repealed Ordinance)) empowering the Hong Kong court to enforce an “order or direction” (which would include an order for an interim measure) made by an arbitral tribunal, whether in or outside Hong Kong. This approach is largely retained by s 61 of the current Hong Kong Ordinance, which deals with the enforcement of orders and directions (whereas s 84 of that Ordinance deals with the enforcement of arbitral awards).

There are several differences between the current Hong Kong approach and that of the 2006 Model Law:

(1) section 61 of the Hong Kong Ordinance does not refer to the specific grounds for refusal under the Model Law (which are substantially the same as those for refusing enforcement of awards under the New York Convention); and

(2) by virtue of s 61(2), the Hong Kong court will only enforce interim measures granted by a foreign tribunal that are of a type that a Hong Kong arbitral tribunal may grant. For example, US-style orders for discovery and depositions may not be enforced.\textsuperscript{13}

**Court-ordered interim measures in aid of foreign arbitrations**

In addition to or as an alternative to enforcement of the interim measures granted by foreign arbitral tribunals, the national court of a particular jurisdiction may also assist parties to foreign arbitrations by way of issuing interim measures itself in aid of these arbitrations.

Two provisions relate to interim measures ordered by national courts: art 9 of the 2006 Model Law and (in substitution for art 17 of the Model Law) s 45 of the Hong Kong Ordinance.

Article 9 of the 2006 Model Law (which is adopted by s 21 of the Hong Kong Ordinance) is not itself an empowering provision. It is only permissive in nature, in order to ensure compatibility between an arbitration agreement and the granting of interim measures by the court. It reflects the dual principles that, first, a party does not waive its right to go to arbitration by seeking interim measures from the court and, second, the court may grant such measures despite the arbitration agreement.\textsuperscript{14}

Before the advent of an express statutory provision empowering the Hong Kong court to grant interim measures in aid of foreign arbitration (ie, s 45 of the Hong Kong Ordinance and its predecessor provision, s 2GC of the repealed Ordinance), the Hong Kong court relied on its inherent jurisdiction, and a stringent test for granting interim relief in aid of foreign arbitration was laid down by the Hong Kong Court of Appeal in the leading authority of the *Lady Muriel*.\textsuperscript{15}

By contrast with the previous restrictive approach which relied on the court’s inherent jurisdiction, s 45 of the Hong Kong Ordinance explicitly empowers the Hong Kong court to grant interim measures in aid of “arbitral proceedings which have been or are to be commenced in or outside Hong Kong”. Principles on how to apply s 45 in relation to foreign arbitrations were expounded in *Top Gains Minerals Macao Commercial Offshore Limited v TL Resources Pte Ltd*.\textsuperscript{16}

In that case, the plaintiff, before commencing arbitration proceedings in Singapore, applied to the Singapore court in June 2015 for a worldwide *Mareva* injunction to restrain the defendant from disposing of its assets. However, the court refused to grant the injunction because it was not
satisfied that there was a real risk that the defendant would dissipate its assets to evade its liabilities. Notwithstanding the Singapore court’s refusal, the plaintiff applied to the Hong Kong Court of First Instance in July 2015 for a Mareva injunction to restrain the defendant from disposing of some of its assets within Hong Kong.

The Court adopted a two-stage test for determining whether to grant interim relief:

1. whether the facts of the case would warrant the grant of interim relief if substantive proceedings were brought in Hong Kong, and
2. whether it was unjust or inconvenient for the court to grant the interim relief sought.

Hence, at the first stage, the relevant principles governing an application for the particular type of interim measure being sought in the context of local proceedings would apply equally to a request for such a measure in aid of a foreign arbitration. This seems to be in line with the spirit of art 17J of the 2006 Model Law (which does not have effect in Hong Kong) that a court has the “same power of issuing an interim measure in relation to arbitration proceedings … as it has in relation to proceedings in courts” and that such power shall be exercised “in accordance with its own procedure”.

At the second stage, the court would consider whether it is unjust or inconvenient for it to grant the interim relief. Factors to be taken into account may include:

1. “whether the making of the order will interfere with the management of the case in the primary court, eg where the order is inconsistent with an order in the primary court or overlaps with it”; and
2. “whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting[,] inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located.”

At this second stage, the court would consider (in accordance with s 45(5) of the Hong Kong Ordinance) whether the interim measure should be declined because it is currently the subject of arbitral proceedings and the court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal. This approach is also consistent with the requirement under art 17J of the 2006 Model Law that the national court should exercise its power “in consideration of the specific features of international arbitration”.

As such, therefore, while the Hong Kong Ordinance does not adopt art 17J of the 2006 Model Law in terms, the spirit of that provision is very much respected.

… [W]hile the Hong Kong Ordinance does not adopt art 17J of the 2006 Model Law in terms, the spirit of that provision is very much respected.

Interestingly, the judge in the Top Gains case observed that, while the Hong Kong court must respect the view and the approach of the foreign court that was seized of the substantive proceedings, and should be cautious and slow to take a different view, this was not to say that it could not take a different view. Hong Kong was bound to exercise its own independent discretion in deciding whether there was a real risk of dissipation of assets, as a matter of Hong Kong law.

On that basis, the Hong Kong Mareva injunction was granted despite the Singapore court’s refusal to grant the worldwide Mareva injunction.

Cross-jurisdictional arrangements for foreign parties to seek interim measures: an ‘interim stopgap measure’?

Introduction

The previous discussion shows the powerful and wide-ranging nature of interim measures in arbitration. In the
context of international arbitration, the powers and readiness of the court of a jurisdiction (particularly one in which a party’s assets are located) in assisting parties to foreign arbitrations - by way either of enforcement of tribunal-granted interim measures or itself issuing interim measures in aid of such arbitrations - are of pivotal importance to the protection of foreign parties’ interests as well as the smooth and effective conduct of those arbitrations. In this regard, the Hong Kong court has been fully empowered under Hong Kong law and has consistently shown and reaffirmed its willingness to be an arbitration-friendly jurisdiction so far as parties to foreign arbitrations are concerned.

These features are not, however, yet universally embraced by all jurisdictions, particularly those which have not yet adopted the Model Law (either in its 1985 or 2006 version). In some jurisdictions, arbitral tribunals do not have the power to grant interim measures and any such applications have to be brought before national courts. For example, in Mainland China, application must be made to the court through the arbitral institution administering the arbitration. Under art 16(3) of the Arbitration Law of the People’s Republic of China (1994) (the Arbitration Law), parties must in their arbitration agreements designate one of the ‘arbitration commissions’ established within Mainland China. Under art 28 of the Arbitration Law:

“A party may apply for property preservation if it may become impossible or difficult for the party to implement the award due to an act of the other party or other causes.

If a party applies for property preservation, the arbitration commission shall submit the party’s application to the people’s court in accordance with the relevant provisions of the Civil Procedure Law.”

An ideal solution in the long run for (in particular) non-Model Law jurisdictions may be to reform their national arbitration laws gradually by adopting Model Law standards and practice. Before that ideal position can be achieved, however, could interim stopgap measures be devised? For example, it may be possible to explore the conclusion of cross-jurisdictional arrangements to assist and facilitate parties to arbitrations to seek interim measures from the national courts concerned. Would such ‘interim stopgap measures’ in respect of interim measures in arbitration be a viable option? Would this not be a way for the jurisdictions concerned to become accustomed gradually to international practice laid down by the Model Law regime, thereby creating a more inclusive and harmonised arbitration infrastructure for the international arbitration community as a whole?

A game-changing ‘interim stopgap measure’: the PRC-Hong Kong Arrangement on mutual assistance in court-ordered interim measures

On 2 April 2019, the Supreme People’s Court of the People’s Republic of China and the Department of Justice of the Hong Kong Special Administrative Region entered into the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings (the 2019 Arrangement). This game-changing and ground-breaking instrument could serve as a unique model for the cross-jurisdictional ‘interim stopgap measures’ discussed above.

Prior to the 2019 Arrangement, it had long been the case that a party to an arbitration seated outside Mainland China could neither seek enforcement there of an interim measure issued by the arbitral tribunal nor apply to the Mainland courts for any interim measure in aid of its arbitral proceedings.

Furthermore, as previously discussed, Mainland-seated arbitral tribunals do not themselves have the power to order interim measures, and Mainland China does not recognise ad hoc arbitrations seated there (save in certain circumstances in specific free trade zones).

By capitalising on the national policy of China as set out in its Outline of the 13th Five-Year Plan for National Economic and Social Development (2016) and recognising the differences between the ‘two systems’ in the legal and arbitration contexts, the 2019 Arrangement addresses, as between the Mainland and Hong Kong, the interim measures phenomena.
discussed above. It does so by making Hong Kong the first and only jurisdiction outside the Mainland in which, as a seat of arbitration, parties to arbitral proceedings administered by eligible arbitral institutions are able to apply to the Mainland courts for interim measures, whether before the commencement of the arbitration or during the arbitral process, and irrespective of the nationality, domicile or place of business of the parties involved.

The scope of the interim measures that can be applied for under the 2019 Arrangement is comprehensive and includes the preservation of property, preservation of evidence and prohibitive or mandatory orders directed to the conduct of parties, with the latter being of particular relevance to intellectual property-related disputes.

Since the entry into force of the 2019 Arrangement on 1 October 2019, a number of applications for interim measures have been dealt with by the eligible arbitral institutions. In particular, the first successful application was filed by a party to an arbitration administered by Hong Kong International Arbitration Centre and granted by the Shanghai Maritime Court on 8 October 2019 to seize and freeze the respondent’s bank accounts and assets located in Mainland China.

Conclusion

The 2019 Arrangement has proven to be a major breakthrough not only for Hong Kong but also for the international business community. With the potential of both the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area having been unleashed, the Arrangement could benefit parties from all over the world. It will be conducive to the effectiveness of Hong Kong as an international dispute resolution centre by opening up an effective and accessible route for seeking interim measures from the Mainland courts to ensure that a successful party will not be deprived of the fruits of Hong Kong-seated contentious proceedings.

The 2019 Arrangement will also be worthy of close study by other jurisdictions as a model for ‘interim stopgap measures’ in international arbitration.

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3 See s 45(9) of the Arbitration Ordinance (Cap. 609).
4 Company A and Ors v Company D and Ors [2018] HKCFI 2240, at [33]-[34], per Mimmie Chan J.
5 American Cyanamid Co v Ethicon Ltd [1975] AC 396.
7 Article 17C(4) of the 2006 Model Law.
8 Ibid, art 17C(5).
9 Ibid, art 17E(2).
10 Ibid, art 17F(2).
11 Editorial note: See s 83 of the Hong Kong Ordinance.
12 Editorial note: See ss 43 and 44 respectively of the Hong Kong Ordinance.
16 Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd [2016] 3 HKC 44.
17 See art 17J(1).
18 Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd (note 16 above), at [23], per Mimmie Chan J.
19 Ibid, at [27].
20 Ibid, at [30].
21 Ibid, at [42].
22 Ibid.
23 Article 10 of the Arbitration Law.
25 The 2019 Arrangement is premised upon the ‘one country, two systems’ policy, with the legal basis provided under art 95 of the Basic Law (PRC-Hong Kong SAR jurisdictional relations).
26 As of February 2020, the six eligible arbitral and dispute resolution institutions and permanent offices under the Arrangement are Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong Arbitration Center of CIETAC, the International Court of Arbitration of the International Chamber of Commerce (ICC) - Asia Office, the Hong Kong Maritime Arbitration Group (HKMAG), South China International Arbitration Centre (HK) (SCIAC) and the eBRAM International Online Dispute Resolution Centre.
A Judicial Perspective on Arbitration: Where Are We Headed? The Kaplan Lecture 2019

The Rt Hon Beverley McLachlin PC, CC, CSJ

In this article, the author discusses the relationship between arbitration and the rule of law. She concludes that arbitration has always been an integral part of the rule of law, having regard in particular to requirements that decision-makers be impartial and independent, that they be accessible to parties and that their decisions be enforceable. The article is an edited version of the Kaplan Lecture delivered at the Hong Kong Club on 27 November 2019.

Introduction
Tonight, I would like to offer some thoughts on a debate that preoccupies the legal community: the relationship of arbitration to the rule of law, as administered by the courts.

I am aware that in 2015, David Neuberger addressed a Hong Kong audience on the same subject. Yet, four years have passed - four years in which we have seen challenges to the rule of law in many parts of the world, as independent and impartial courts are undermined or politicised. In this context, it is worth taking a fresh look at the role of arbitration in maintaining and growing the rule of law throughout the world.

Like David Neuberger, I believe that arbitration is not an outlaw, beyond the remit of the rule of law, but an integral part of the rule of law. I will argue that arbitration has always been part of the law and that this is so in the 21st century more than ever in the past. I will further argue that arbitration works to advance the rule of law in a number of
ways, offering an alternative to the formalism of the rule of law and introducing legal norms in places that might lack them. Finally, I will suggest ways in which we can assure that arbitration continues to play its vital role as part of the rule of law throughout the world.

“… Arbitration is not an outlaw, beyond the remit of the rule of law, but an integral part of the rule of law.”

Arbitration in history
We sometimes think of arbitration as outside the law - an outlaw - or as a late-come addition to the law. Nothing could be further from the truth. I will come in a moment to the question of whether arbitration, in modern conception, is part of the rule of law. At this juncture, I simply want to point out the eminent pedigree of arbitration in resolving legal disputes and securing justice.

Arbitration has long worked to help people and organisations find justice - justice according to the law. This is particularly the case in commercial matters. Court decisions have historically been important in the commercial arena, but so has arbitration.

We are all familiar with how the court system developed through the centuries to produce the common law and the civil law administered in the courts. We may, however, be less familiar with the long lineage of arbitration. Manchu Emperor Kangzi, who ruled China from 1654 to 1722, wrote approvingly of settling disputes by arbitration instead of the law courts, stating “as for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice due to them.”2 The Prophet Mohammed served as an arbitrator, which was a fixture of Islamic Law in the 8th century.3 These are but two examples; throughout history and throughout the world, people have used arbitration to resolve legal disputes.

Arbitration, trade and commerce have always gone hand in hand. However, as courts developed, a question arose: who should decide commercial disputes - the courts or private arbitrators?

France offers an interesting example. In France, King Francis II (r 1559-1560) permitted arbitration and trade with the Germans, Swiss and Italians under the Edict on Arbitrators of August 1560.4 However, French Parlements later stifled arbitration. After the French Revolution of 1789, the pendulum swung back in favour of arbitration under the Constitutions of 1793 and 1795.5 The pendulum swung again with the Napoleonic Code of 1804, which abolished contract clauses that provided for extra-judicial dispute resolution.6 In 1843, the Cour de Cassation effectively outlawed arbitration,7 but in 1923 the pendulum swung back to arbitration with a resounding clang when the ICC founded the International Court of Arbitration in Paris, which became a centre for international arbitration, a position it occupies to this day.

The same happened in England & Wales and its colonies. Lord Coke in Vynor’s Case (1609)8 limited arbitration, but statutes of 16979 and 169810 supported it. The Court of King’s Bench in Kill v Hollister (1746)11 ousted arbitral jurisdiction, and the House of Lords did not overturn this case until 1856 in Scott v Avery,12 Lord Campbell stating that the ban on arbitration “probably originated in the contests of the courts of ancient times for extension of jurisdiction.” Still, up to and including the 20th century, courts in England & Wales, Canada and elsewhere regarded arbitration with a
suspect eye. The Supreme Court of Canada in Seidel v Telus Communications Inc\textsuperscript{13} stated (per LeBel and Deschamps JJ, dissenting but not on this point):

“[T]he courts originally displayed overt hostility to arbitration, effectively treating it as a second-class method of dispute resolution .... “Until the 1990’s, commercial arbitration in Canada was not regarded as a real substitute for the courts and the provinces were slow to recognize any distinction between domestic arbitration and international arbitration.” ”

A similar story of tension between courts and arbitration played out in the United States. The Dutch settlers in New Amsterdam favoured commercial arbitration\textsuperscript{14} and George Washington’s will directed that any disputes be arbitrated.\textsuperscript{15} A long period of judicial dominance followed.\textsuperscript{16} The pendulum swung back to arbitration under the Federal Arbitration Act 1925, aimed at countering long delays in congested courts, the expense of litigation and the failure to reach just decisions through litigation. “Businessmen,” the drafters proclaimed, “needed solutions that were simpler, faster, and cheaper”.\textsuperscript{17} Even with the blessing of the federal government, however, commercial arbitration remained relatively obscure in the United States until a series of US Supreme Court decisions in the 1980s and 1990s.\textsuperscript{18} Yet, opposition to arbitration continues in the US: Kompetenz-Kompetenz is not the default for arbitrability.\textsuperscript{19}

This history suggests that the star of arbitration is firmly fixed in the legal constellation. It is as old as the idea of justice itself, and despite recurrent attempts to suppress it in favour of dispute resolution only by the courts, it has persisted, indeed triumphed.

My conclusion is that we should accept that arbitration is here to stay and that it plays a vital role in legal dispute resolution. The old debate about whether disputes should be resolved in the courts or by arbitration poses a false ‘either/or’ alternative. It is sterile and leads nowhere. We need the courts to resolve legal disputes in all areas of public and private law, and we need arbitration to resolve legal disputes in a number of private contexts, first and foremost commercial disputes.

“[Arbitration] is as old as the idea of justice itself, and despite recurrent attempts to suppress it in favour of dispute resolution only by the courts, it has persisted, indeed triumphed.”

\textbf{Arbitration and the rule of law: current perspectives}

Against this background, I come to the question at the heart of this lecture: what role does arbitration play in maintaining and promoting the rule of law?

First, we must consider what we mean by the term ‘rule of law’. While the phrase rolls off the tongue with ease, it is worth considering what we understand by it. As Oliver Wendell Holmes counselled:

“[A judge] must not stop at consecrated phrases, which in their day were a revelation, but which in time from their very felicity, tend to stop the endless necessary process of further analysis and advance.”\textsuperscript{20}

\textbf{Principles underlying the rule of law}

So let us turn to further analysis of what we mean by the ‘rule of law’. British jurist and constitutional scholar A V Dicey stated that the rule of law is based on three principles:

(1) that legal duties and liability to punishment are determined by regular law and not by arbitrary official fiat, government decree or broad discretionary powers;
(2) that everyone is equal before the law; and
(3) that judicial review exists to ensure that all State powers are exercised in accordance with the law.
In 2007, the late Tom Bingham elaborated eight principles:

(1) the law must be accessible, clear and predictable;
(2) issues should be resolved by law, not discretion;
(3) laws must apply equally to all;
(4) the law must protect fundamental human rights;
(5) disputes must be resolved economically and fast;
(6) public powers must be exercised reasonably, *bona fide*, and appropriately;
(7) State adjudicative procedures must be fair; and
(8) the State must comply with its international law obligations.\(^{21}\)

While formulations vary, a fundamental theme runs through definitions of the rule of law: at its most basic, it is the doctrine of supremacy of the law. All power must be exercised within the law. People are governed, not by the ruler or parties or representatives, but by the law, validly created and promulgated. No person is above the law: monarchs and rulers and their representatives are themselves governed by law.

**Requirements of the rule of law**
The requirements of the rule of law can be divided into two categories.

(1) **Requirements related to the nature of law**
This category contains requirements related to the nature of law itself. It must be legitimate, or properly made; it must be clear and predictable, it must protect certain fundamental rights; and it must apply equally to everyone.

(2) **Requirements relating to the machinery of the rule of law**
This category relates to how the laws that meet these characteristics are actually maintained on a day-to-day basis - impartial and independent dispute resolution and enforcement of orders. This is the machinery that makes the rule of law a reality in the lives of people. It is not merely a fancy set of rules on paper; it is the reality in the lives of people, the social matrix and the economy.

Both categories of requirement of the rule of law are essential. A country can have a beautiful suite of laws on the books, but unless they actually operate on the ground, there is no rule of law. This second category above is where arbitration contributes to the rule of law.

**Fundamental procedural requirements of the rule of law**
What are the requirements of this second category? How do we ensure supremacy of the law on a real day-to-day basis? How do we ensure that State power and citizen-to-citizen relations are exercised in accordance with the law?

The answer can be stated simply. To ensure the rule of law is maintained, citizens need access to independent impartial decision-makers who are committed to applying the law and whose decisions will be enforced.

This sentence reveals three fundamental procedural requirements for maintaining the rule of law:

(1) there must be *independent and impartial decision-makers*;
(2) users must be able to *access* the decision-makers; and
(3) the orders of the decision-makers must be *enforceable*.

Unless all three conditions are met, the rule of law, however pretty it looks on the books, will not exist in practice. Arbitration meets all three requirements and thus helps further the rule of law.
Arbitration meets all three [of the fundamental procedural] requirements and thus helps further the rule of law.

(1) Independent and impartial decision-makers

When we think of this procedural requirement - independent and impartial decision-makers - we usually think of State-appointed judges. The judiciary decides matters of public and private law. Judges of inherent jurisdiction have broad powers to maintain the rule of law, whenever it is threatened. Judges are not, however, the only decision-makers essential to upholding the rule of law. Every advanced State has tribunals and administrative decision-makers who decide issues under particular legal regimes. Arbitrators - our subject tonight - decide issues of law in private disputes, from family law to weighty commercial matters. They may be appointed privately and the legal system they apply may be chosen by the parties. This does not, however, detract from the fact that, like judges and administrative decision-makers, arbitrators are independent and impartial decision-makers.

(2) Access to decision-makers

This requirement means that individuals or organisations seeking to enforce the law must be able to access the decision-makers and resolve their disputes economically and fast. Access to courts is a problem in many countries, including England & Wales, Canada and the United States. Litigation may be expensive, denying justice to people of ordinary means. Delays may be significant and court formalities may get in the way of speedy and effective resolution. Resolving disputes through the courts economically and fast often remains an ideal rather than a reality.

Another problem litigants may face on the access front is that disputes can be complex and require decision-makers with a degree of knowledge or specialisation. Educating a judge with no commercial background, for example, can prolong hearings, make them more expensive and sometimes affect the quality of the justice that is eventually meted out.

Many countries, including my own, are working to improve access to justice through the courts. Sometimes, however, the court system does not offer the access to justice parties want or require. At this point, they may look to alternative ways to resolve their legal disputes and enforce their legal rights. They therefore appoint private judges - arbitrators - to get the access to justice they need.

(3) Decisions must be enforceable

This requirement for maintaining the rule of law - in fact and not just in appearance - means that the decisions of independent and impartial decision-makers must be enforceable. Stephen Breyer, a Justice of the Supreme Court of the United States, in his book *Making Our Democracy Work*, discusses the fact that judicial decisions in democracies are accepted and enforced even when they are unpopular. This is vital to maintaining the rule of law in day-to-day life. Decisions that are not enforced are not worth the paper they are written on.

Judicial decisions have long been enforced by the State. The police take an offender into custody or sheriffs seize and sell property to satisfy a debt. The State makes sure the order of the judge is enforced. Likewise, judicial decisions are recognised as having *res judicata* or issue estoppel effects.
Arbitration has found ways to harness State apparatus to enforce its awards and, on the international front, to improve enforcement. The New York Convention,23 of course, has allowed for the rapid increase in international commercial arbitration, making it easy to have awards recognised and enforced across the world. Recognition and enforcement of foreign judgments can, by contrast, be difficult, often involving issues of comity and local law.24 In nearly 50 years, the Hague Convention on Foreign Judgments in Civil and Commercial Matters25 has only attracted three signatories and five parties, while the Brussels Regulation regime is limited to European Union and European Free Trade Association members.26 This leaves arbitration as the way to have binding decisions between international parties.

**The relationship between arbitration and the rule of law**

Against this background, let me return to arbitration and the rule of law. Arbitration is not in the business of making laws and ensuring they apply equally and meet a certain quality. These aspects of the rule of law do not directly pertain to it. Arbitration is, however, definitely in the business of maintaining the rule of law on the ground, so that it is not just a pretty suite of laws but a reality in people’s lives and organisations’ activities.

As stated earlier, arbitration, in the private sphere, meets all the requirements of the procedural elements of the rule of law. It provides impartial and independent decision-makers who apply the law; it provides access to justice - for some situations, superior to the access the court system provides. Finally, it has found means to make its decisions enforceable.

In this way, arbitration enriches the justice system and enhances the rule of law. Within justice systems with a rich conception of the rule of law, consensual justice, devised by the parties, supplements imposed justice, devised by States. Arbitration fits naturally with the resolution of contractual disputes, which are formed by consent. This consensual activity, however, takes place under the umbrella of the rule of law. Contracts are created and construed in accordance with the rules of law. The result is a justice system in which courts and arbitrators work as separate but compatible dispute resolution mechanisms.

Arbitration also advances the rule of law in countries that may not fully embrace all its tenets. In countries with reductionist versions of the rule of law, arbitration promotes values that underlie the rule of law - decision-making on the basis of principle rather than arbitrary fiat; fair process; certainty and predictability; access to justice; flexibility and informality; and decisions rendered efficiently and flexibly - to mention only a few. Countries lacking effective independent courts may benefit from the arbitral model as applied to commercial disputes and go on to apply rule of law values in other areas of public and private law.

Peru provides an example of how arbitration works in a State lacking the full range of rule of law protections, discussed by Jan Paulsson in *The Idea of Arbitration*.27 Following the toppling of President Alberto Fujimori in 2000, Peru’s lawyers worked diligently to bring about transformative change in their justice system. Despite hard work, the courts remained in the stranglehold of suffocating formalism that hampered progress moving through the system. Arbitration has assuaged the situation and Peru has passed favourable arbitration legislation recognising arbitral wards.

This said, without the support of a strong legal culture, maintaining integrity in arbitration can be difficult. On 7 November 2019, we read that a Peruvian judge had ordered
the pre-trial detention of 14 arbitrators for 18 months while they were being investigated for allegedly taking bribes to favour a scandal-hit Brazilian construction company, Odebrecht, in a series of disputes that cost the State more than US $250 million. Odebrecht, of course, is embroiled in Brazil’s own massive and ongoing corruption case. There are similar allegations against the company in Peru involving several of that country’s former presidents. A number of practitioners in Peru have spoken out against the detentions. The cases of three respected arbitrators, for example, rest on allegations that they charged excessive arbitration fees. These fees have been alleged to constitute bribes.28

I conclude at this point that arbitration, far from being an outlaw, is part of a good legal system - indeed, a fundamental pillar in maintaining the rule of law. At its best, it works within legal systems built on a broad conception of the rule of law, in the full sense A V Dicey and (even more fulsomely) Tom Bingham described. Further, it may contribute to the rule of law even where this is not present.

Against this background, I shall now look at what we have already done and what must be done in the future to ensure that arbitration effectively enhances the rule of law.

Contracts are created and construed in accordance with rules of law. The result is a justice system in which courts and arbitrators work as separate but compatible dispute resolution mechanisms.

Arbitration and the rule of law: challenges for the future

Arbitration has succeeded by adopting the principles of independent effective decision-making developed by courts operating under the rule of law and applying them in the private sphere in a flexible, informal way that meets the needs of private litigants. If arbitration is to continue as a strong activity fostering justice and development, it should maintain this approach into the future. The best way forward is to combine the advantages that arbitration offers with the fundamental principles underlying the rule of law. Easy as this may sound, it is not without its challenges. The following are some of the challenges I see ahead.

(1) Maintaining the independence and impartiality of arbitrators

The great success of arbitration has been combining the rule of law value of independent, impartial decision-making with procedures that meet the particular needs of clients - needs like speed, efficiency and confidentiality.

Arbitrators must not only be independent and impartial: they must also be perceived to be independent and impartial. This requirement is reflected in the conventions and model laws that govern arbitration, as well as legislation governing arbitrations in various jurisdictions. In 1958, the New York Convention laid the foundation for independence and impartiality. The result was a new acceptance of the international utility of arbitration. With the formal accession of the Maldives on 17 September 2019, there are now 161 signatories to the New York Convention. The Convention enshrines certain procedural rights. Recognition and enforcement can be denied if parties lack capacity or do not receive notice or an opportunity to be heard. The Convention also protects against tribunals that exceed their jurisdiction or fail to comply with the arbitration agreement. Along with these natural justice protections, the ability of local courts to deny recognition or enforcement of an award because it violates public policy helps protect against awards obtained by fraud or corruption.

The New York Convention’s requirement of impartiality, both actual and perceived, was taken up in the Washington Convention of 1966, the UNCITRAL Arbitration Rules
and the UNCITRAL Model Law. Like the New York Convention, the Washington Convention has enjoyed similar success, with 154 countries ratifying it, allowing never before seen levels of foreign investment across the globe. The Model Law has also helped to standardise arbitration legislation, since currently 111 jurisdictions (including 80 States) have adopted it, either in the 1985 or the current 2006 version. All of these instruments affirm and support independent and impartial decision-making.

“Arbitration has succeeded by adopting the principles of independent effective decision-making developed by courts operating under the rule of law and applying them in the private sphere in a flexible, informal way …”

The need for perceived and actual impartiality has generated sophisticated sets of rules and guidelines. These come not only from institutions like the HKIAC, but also from the ‘soft law’ that has come from the International Bar Association and the Chartered Institute of Arbitrators, among others. Since their introduction in 2004, the IBA’s red, orange and green lists for conflicts of interest have become ubiquitous. Motions to unseat an arbitrator on the ground of perceived lack of independence due to conflicts of interest and professional and personal relationships are not uncommon. Many situations are clear, but others may depend on a complicated set of circumstances. Those adjudicating such motions may be forced to draw fine lines between maintaining high standards of independence and avoiding the removal of arbitrators that a party might prefer not to have for other reasons. In England & Wales, absent other factors, a barrister arbitrator and one party’s counsel may be members of the same set of chambers. In France, an award has been overturned where one of the parties retained the arbitrator’s multi-jurisdictional law firm on unrelated business. The LCIA has come to a similar conclusion. An English court, however, will not remove an arbitrator if the conflicts audit system at his or her firm does not show that one of the parties has acquired a client of the firm. A Canadian court did not find a conflict of interest where a party had been - unbeknown to the arbitrator - a client of the arbitrator’s former law firm. Yet, a Canadian court also held that a reasonable apprehension of bias exists where two arbitrators are partners of a small law firm and are hearing related matters.

Of course, the notion of impartiality must not be abused. After-the-fact attacks based on accusations of lack of independence and of corruption are also sometimes mounted in an attempt to undercut the legitimacy of arbitral awards. I earlier mentioned the allegations that respected Peruvian arbitrators took bribes by charging high fees. Without prejudging that case, it is easy to see how frivolous accusations of lack of independence can damage the image of arbitration. Because they are privately appointed, arbitrators do not come with the Good Housekeeping Seal of Approval that State-appointed judges do.

In sum, arbitration has over the last 70 years developed and maintained high standards of independence and impartiality, in accordance with the highest values of the rule of law. However, the challenges of maintaining continued confidence are considerable. Meeting them will be critical to arbitration’s success within the rubric of the rule of law.

(2) Maintaining efficient and fast decision-making

One of Tom Bingham’s criteria for the rule of law is efficient and fast decision-making. Arbitration has done an excellent job of adhering to this value. Indeed, efficient and fast decision-making is one reason why parties may prefer private adjudication by arbitration to judge-based adjudication.
The list of innovations arbitration has introduced is long and impressive. Expedited discovery limited to what is really in issue. Bundling of documents, sometimes aided by hyperlinking, so that all those involved can deal with the critical documents rapidly and efficiently. Procedures to make expert witness testimony more efficient, like interactive processes such as ‘hot-tubbing’. Scott schedules, which detail the parties’ positions and evidence on particular sub-issues in advance of the hearing. These are but some of the ways in which arbitration has made dispute resolution faster and more efficient. Courts are paying arbitration the supreme compliment by integrating some of these techniques into their own processes. In all these ways, arbitration has advanced the rule of law.

Still, maintaining arbitral efficiency and speed as we move to the future presents challenges. Complaints that arbitration may be becoming too formal and inflexible are heard from time to time. Some worry that the same complaints made of the courts - that their processes are too rigid, formal and inflexible to allow optimum adjudication of particular disputes - will increasingly be made of arbitration, particularly in large commercial arbitrations. Arbitration is in a difficult spot. A generation ago, billion-dollar cases hardly existed and those that did were unlikely to go to arbitration. Cost, length and expense may be an unavoidable consequence of the complexity of the dispute itself. Arbitration is not the problem; often it is the complexity, magnitude and importance of the dispute.

For better or worse, the phrase ‘due process paranoia’ has become a rallying cry. The introduction of the Prague Rules in December 2018 was a response to the influence of common law traditions - especially discovery - on international cases. Whether the Prague Rules shorten arbitration remains to be seen.

(3) Advancing the law so that it remains clear and predictable

One of the central pillars of the rule of law is that the law be clear, coherent and provide legal guidance to individuals and organisations as they make decisions. Courts have done this for centuries by a system of public judgments backed up by the doctrine of precedent. The decisions themselves became the law. They were open and accessible.

Arbitral awards are private - indeed, this is one of the primary attractions of arbitration for many parties. Arbitrators do not publish their awards. While they may be obliged to give reasons - awards can usually be set aside for lack of reasons - their reasons do not add to the lexicon of the law. Yet, more and more, it is arbitral tribunals rather than the courts that are dealing with cutting-edge issues of commercial law. This raises the danger that the guidance for the future that the law should provide will be undercut by arbitration. It also raises concerns that arbitrators may not have the benefit of
knowing what other arbitrators on cases similar to theirs have ruled. Both these concerns are relevant to maintaining the rule of law.

“There is a danger] that the guidance for the future that the law should provide will be undercut by arbitration … [and] concerns that arbitrators may not have the benefit of knowing what other arbitrators on cases similar to theirs have ruled. Both these concerns are relevant to maintaining the rule of law.

Maintaining clarity, consistency and predictability in the law on emerging issues in a context where courts are more and more shut out is one of the principal challenges arbitration faces in the 21st century. Some arbitration centres are grappling with the problem of meeting this challenge without losing the confidentiality essential to the arbitral process. One idea is to publish decisions on important legal issues as the law reports would, but with the identities of parties and other critical facts excised.50 Certainly, ICSID has had success publishing non-binding51 decisions.

Some would argue that publication of awards is antithetical to arbitration, which focuses on confidentiality and privacy, and that attempts to publish arbitral decisions, even with redaction, are futile and misconceived. To the extent this may be so, we may wish to explore other opportunities for advancing clear and practicable jurisprudence in the worlds of commerce and construction law, which are more and more dominated by arbitration. One idea is to establish courts - not to oust arbitration, but to supply arbitral procedures and insights within a judicial framework that allows for appeals and published decisions to which parties can, if they wish, resort. The Singapore International Commercial Court (SICC) is such a body. Another idea is to take inspiration from the civil law, which develops the law not on the basis of reported cases and precedent but upon principles and academic commentary.

Conclusion

Arbitration has always been part of the legal firmament and today plays a fundamental role in maintaining and enhancing the rule of law, both domestically and on the international plane. Arbitration is not an outlaw; on the contrary, it is firmly planted within the edifice of the rule of law. Much of the success of arbitration in the past 70 years can be attributed to the fact that it adheres to and builds on the pillars of the rule of law.

The future success of arbitration depends on its continued adherence to the fundamental tenets of the rule of law.

I have suggested three challenges arbitration faces in this task - (1) maintaining actual and perceived independence and impartiality without illegitimately undermining arbitral awards, (2) maintaining flexible, fast and efficient decision-making appropriate to the issue at hand, and (3) developing the law of the future in a way that is clear and accessible. I believe arbitration can meet these challenges and, in doing so, continue to enhance the rule of law throughout the world. m

5 Constitution of 1793, art 86 (“The right of the citizens to have their disputes settled by arbitrators of their choice shall not be violated in any way whatsoever.”); Constitution of 1795, art 210 (“The right to choose arbitrators in any dispute shall not be violated in any way whatsoever.”); Law of 16-24 August 1790, art 1 (“As arbitration is the most reasonable means of terminating disputes between citizens, the legislators shall not make any provision that would diminish either the favour or efficiency of an arbitration agreement.”).
Article 2059 of the Code (which made pre-dispute arbitration agreements unenforceable); see also art 1056 of the Code of Civil Procedure 1806.

Compagnie (Alliance v Prunier, Cass Civ 10 July 1843, S 1843:1, p 561.

Vynor’s Case (1609) 8 Co Rep 81b, (1609) 4 ER 302.


Arbitration Act, 9 William III, c 15 (1698).

Kill v Hollister (1746) 1 Wilson 129, 95 ER 532 (KB).

Scott v Avery (1854) 5 HL Cas 811.


Born (note 4 above).


See, for example, Tobey v County of Bristol, 3 Story 800, Fed Cas No 14 (CCD Mass, 1845) (“But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they [courts] necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.”); Home Insurance Co v Morse, 87 US 445 (1874) (“They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”); Doyle v Continental Insurance Co, 94 US 535 (1877); United States Asphalt Refining Co v Trinidad Lake Petroleum Co, 222 F 1006 (SDNY, 1915); Paul L Sayre, Development of Commercial Arbitration Law, 37(5) Yale LJ 595 at 610 (1928).


Henry Schein Inc v Archer & White Sales Inc, 586 US __ (2019); 139 S Ct 524, Editorial note: This case is not yet reported in the United States Reports series.


See, for example Dart v Dart, 224 Mich App 146, 568 NW 2d 353 (1997) (Michigan Court of Appeals, reversing the lower court which had refused to recognise or enforce an English divorce decision), aff’d 459 Mich 573, 597 NW 2d 82 (1999).


Brussels I Regulation (recast) 2015.


New York Convention, art V.1(a).

ibid, art V.1(b).

ibid, art V.1(c).

ibid, art V.1(d).

ibid, art V.2(b).

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966 (the Washington Convention).


ibid.

To name but a few, the IBA Guidelines on Conflicts of Interest in International Arbitration (2014, updated 2015), the IBA Rules on the Taking of Evidence in International Arbitration (2010), and the IBA Guidelines for Drafting International Arbitration Clauses (2010).

The CIArb provides excellent free resources covering all aspects of arbitration.

IBA Guidelines on Conflicts of Interest in International Arbitration (note 39 above).


Jacob Securities Inc v Typhoon Capital BV, 2016 ONSC 604.


Sundaresh Menon SC, Keynote Address to the ICCA 2012 Congress in Singapore, The Coming of a New Age for Asia (and Elsewhere) at para 25 (“Today, arbitration is a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts. The lack of an avenue of appeal and minimal curial intervention were meant to simplify things. Instead, these factors have given rise to the realisation that there is little room for error in arbitration.”). Editorial note: Available at https://www.arbitration-icca.org/AV_Library/AV_Library_textformat/ICCA_2012_Singapore_ Keynote_Menon.html.


El Paso Energy International Co v Argentine Republic, ICSID Case ARB/03/15, Decision on Jurisdiction, 27 April 2006, para 39 (“ICSID arbitral tribunals are established ad hoc, … and the present Tribunal knows of no provision … establishing an obligation of stare decisis. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.”).
Setting Aside Jurisdictional Findings by Tribunals and the *Ad Hoc* Admission of Counsel in Singapore and Hong Kong

Olga Boltenko, Howard Chan & Wong Zi Wei

This article discusses, in the particular context of Belt and Road Initiative disputes, the significance of (1) the applicable regimes for setting aside preliminary jurisdictional findings of arbitral tribunals seated in Singapore and Hong Kong, and (2) *ad hoc* admission of overseas counsel to conduct such challenges in those jurisdictions.

“Me? I am a man of flair, elan, distinction, and intellect.”

**Introduction**

Singapore and Hong Kong are prominent venues for international arbitration, both in Asia and worldwide. Their respective arbitral institutions - the SIAC and the HKIAC - deal with comparable caseloads and operate under comparable institutional rules. Their judiciaries are highly experienced in arbitration matters and are equally regarded as among the most sophisticated in Asia. Their legal communities are also equally professional, dynamic, highly respected and sometimes overlapping.

There are, however, striking differences in each jurisdiction’s legal frameworks for arbitration. These differences are often glossed over by their respective proponents in conference and seminar addresses delivered around the world. Understanding these differences should inform party choice of the most appropriate arbitral seat for different types of dispute referred to international arbitration in Asia.

This is not to say that Hong Kong is more suitable than Singapore for international arbitration, or the other way around. It also does not mean that the convenience of the venues, the grandeur of the hotels and the glossy hearing
rooms at Maxwell Chambers and Exchange Square have no impact on the parties’ choice of seat. Most fundamentally, Hong Kong and Singapore have different arbitration regimes that - depending on the type of transaction or dispute - would mean in particular cases that one jurisdiction may be better suited than the other to respond to the needs of the disputing parties. Highlighting these differences is of assistance to parties in the context of their choice of arbitral seat with particular regard to Belt and Road Initiative (BRI) disputes. It is these differences and the availability of both regimes that make Asian arbitration overall so appealing to disputing parties.

“Most fundamentally, Hong Kong and Singapore have different arbitration regimes that - depending on the type of transaction or dispute - would mean in particular cases that one jurisdiction may be better suited than the other to respond to the needs of the disputing parties.”

Statutory frameworks for setting aside arbitral tribunals’ preliminary jurisdictional findings

(1) Hong Kong
The Hong Kong Arbitration Ordinance (Cap 609) (the Hong Kong Ordinance) has adopted verbatim art 16 of the UNCITRAL Model Law (the Model Law) on the competence of arbitral tribunals to rule on their own jurisdiction. This provision is the pinnacle of one of the main concepts of arbitration law, the Kompetenz-Kompetenz doctrine.

Article 16(3) of the Model Law (s 34(3) of the Hong Kong Ordinance) allows a party to challenge a positive finding of jurisdiction by an arbitral tribunal in the Hong Kong Court of First Instance. The Court’s decision on a tribunal’s jurisdictional finding is not subject to appeal. Article 16(3) provides:

“If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the … [Court of First Instance] to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

This would appear to be a rather striking limitation on the parties’ ability to bring important points of law concerning jurisdictional issues in arbitration to the attention of Hong Kong’s highest court. The drafting committee explains this position by citing the need for finality of tribunals’ findings, and by the desire to limit procedural avenues to those parties who wish to disrupt or delay the arbitral proceedings.

Section 34(3) of the Hong Kong Ordinance needs, however, to be read in conjunction with s 81(4) of that provision (adopting art 34 of the Model Law), which allows appeals, with leave of the Court of First Instance, from the outcome of applications to it to set aside arbitral awards:

“The leave of the Court is required for any appeal from a decision of the Court under article 34 of the UNCITRAL Model Law, given effect to by subsection (1).”

The Court of Appeal, or even the Court of Final Appeal, would therefore have an opportunity to review the lower court’s decisions on matters relating to a tribunal’s positive jurisdictional findings in the context of setting aside of a final award, if the tribunal determines such matters in non-bifurcated proceedings while making that award.
This, in turn, should inform one of the parties’ strategic decisions in the arbitration in a manner akin to Shakespeare’s “to be or not to be” - to bifurcate or not to bifurcate. If the arbitral proceedings are bifurcated into jurisdictional and other phases, the tribunal’s positive findings on jurisdiction may be challenged early on, but the court’s decision on such challenge may not be appealed. Sections 34(4) and 34(5) together of the Hong Kong Ordinance make clear that a negative ruling on jurisdiction is not subject to appeal to the court, so that, if it has jurisdiction, the court must decide the dispute.

On the other hand, if the proceedings are not bifurcated, the tribunal’s jurisdictional findings - either positive or negative - may be challenged before the Court of First Instance, and later, with leave of the court, before the Court of Appeal.

Hong Kong’s legal framework for setting aside jurisdictional findings has a number of implications for the types of dispute that are best suited to Hong Kong-seated arbitration. For example, a foreign investor in a treaty arbitration would be exposed to an early challenge by the host State to the tribunal’s preliminary positive jurisdictional findings in the Hong Kong Court of First Instance, which may - or may not - cause the arbitration to be suspended pending resolution of the challenge. This alone potentially makes Hong Kong a more desirable seat for respondent States, rather than for foreign investors, in treaty arbitration.

This has wide-reaching implications for BRI disputes and for their legal seats - such disputes inherently being those between Chinese investors and BRI host States. In essence, Hong Kong would arguably better serve the procedural interests of host States in terms of their ability to challenge preliminary positive jurisdictional findings early on, which - taken together with the inability of foreign investors to challenge negative jurisdictional findings - may make Hong Kong a more preferable seat to Singapore. This would, however, have to be balanced against a number of other relevant seat-related considerations.

(2) Singapore

Singapore’s International Arbitration Act (Cap 143A) (the Singapore Act) has adopted a different approach. Article 16 of the Model Law is not part of the country’s legal framework for setting aside jurisdictional decisions. Instead, Singapore has adopted its own procedure.

Section 10(3) of the Singapore Act allows challenges to either positive or negative jurisdictional findings by arbitral tribunals, if such findings are made as a preliminary matter in an arbitration, and s 10(4) allows appeals against decisions of the High Court of Singapore on such challenges to the Singapore Court of Appeal:

“(3) If the arbitral tribunal rules (a) on a plea as a preliminary question that it has jurisdiction, or (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.

(4) An appeal from the decision of the High Court made under Article 16(3) of the Model Law or this section shall lie to the Court of Appeal only with the leave of the High Court.”

This is a departure from art 16(3) of the Model Law, which provides only for the review of positive jurisdictional rulings.
by tribunals. In amending the Singapore legislation, the Singapore Ministry of Law considered that both positive and negative jurisdictional rulings should be subject to judicial review because disallowing this for negative jurisdictional rulings would undermine the essence of what the parties had agreed to avoid (ie litigation in national courts). Further, it would be inconsistent to deny only the judicial review of negative jurisdictional rulings while allowing review of positive rulings, because injustice could just as easily arise where a tribunal makes an erroneous negative jurisdictional ruling. Finally, being a seat where negative jurisdictional rulings are subject to review may make Singapore a more attractive seat.

Respondent States may, however, find it burdensome and costly to submit tribunals’ preliminary jurisdictional findings to the entire judicial system of Singapore early on in an arbitration, thus extending the time and cost associated with such findings. Again, these seat considerations would have to be balanced against other important aspects of the underlying dispute.

**Ad hoc admission of overseas counsel**

Parties to a Singapore- or Hong Kong-seated international arbitration may prefer their overseas arbitration counsel also to represent them in related proceedings before the national courts. Both Singapore and Hong Kong have restrictions on *ad hoc* admission of overseas counsel. Once certain mandatory requirements are met, whether to admit overseas counsel is usually a matter of discretion for their local courts. Recent case law suggests that in exercising this discretion, Singapore courts tend to consider whether the issues are “within the competence of local counsel.” Hong Kong courts, on the other hand, adopt a more flexible approach, particularly where counsel seeking admission was counsel in the arbitration.

Ultimately, whether or not a party can instruct its preferred counsel before the national courts is but one of many factors to be considered in deciding what is the most appropriate seat for the dispute or transaction in question.

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(1) **Singapore**

In *Re Gearing, Matthew Peter QC* the High Court of Singapore refused to admit an English Queen’s Counsel for the purpose of representing a claimant before the Singapore courts in an application by the respondent to set aside the tribunal’s positive jurisdiction ruling. This was the same leading counsel who had represented the claimant before the tribunal. In so deciding, the Court reviewed the issues raised in the jurisdictional challenge, including such issues such as treaty interpretation. The Court noted that the Singapore Court of Appeal had considered similar issues before (such as in *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic*) and concluded that local senior counsel were clearly capable of arguing those issues and that there was “no reason why they would be left floundering”.

(2) **Hong Kong**

Hong Kong, on the other hand, adopts a more flexible approach in determining whether to admit overseas counsel, and considers such factors as the public interest in the case, the level of court in which the advocate intends to appear, the importance of the legal issues to Hong Kong’s jurisprudence and the complexity of the case.

In particular, Hong Kong courts consider that the ‘arbitration factor’ - that is, court proceedings that arise from arbitration proceedings in which the relevant counsel has appeared in the substantive hearing or has had substantive involvement
is a powerful factor in favour of admission. The usual obligation on solicitors to provide details of local counsel who have been approached and their availability is also reduced where the arbitration factor is in play. This is because where the arbitration factor exists, other leading counsel would not have represented the party in the underlying arbitration proceedings and therefore would not have had the arbitration counsel’s advantages. However, there are limits on the arbitration factor. For example, it only applies to leading counsel because counsel must be of sufficiently high quality and standing (such as a Queen’s Counsel or equivalent) to be admitted, and the matter must be a substantial one (e.g., ad hoc admission for a directions hearing is unlikely to be granted).

Additionally, the burden of showing that the case is one of unusual difficulty and complexity is not a high one. In *Re Alistair John McGregor QC*, the Court of Appeal had “no doubt that many Senior Counsel in Hong Kong will be able, competently and skilfully, to conduct the case”, but still allowed the admission of overseas counsel because (inter alia) it appreciated that the action required specialist and experienced counsel and that the counsel seeking admission had been consulted at a relatively early stage.

The usual practice in Hong Kong is for overseas leading counsel to appear alongside local barristers. In *Re Mark Taylor Simpson QC*, the Court of First Instance rejected a proposal for overseas leading counsel to appear alongside local solicitor advocates instead of a local barrister. The Court reasoned that solicitor advocates played a less significant role in enhancing access to justice (by comparison with the local Bar), and that the public interest in having a strong and independent local Bar outweighed the public interest in the development and growth of a body of solicitor advocates.

**Conclusion**

The supervisory court’s power over jurisdictional findings by tribunals should be at least one of the determining considerations for parties in deciding where to seat their BRI arbitrations, together with the ability to instruct leading counsel of their choice, particularly for complex international disputes.

While there may be a traditional reticence on the part of Belt and Road host States to seat in Hong Kong their disputes with their Chinese investors, the main emphasis should not be on the myths and prejudices but rather on the particulars of Hong Kong’s arbitration legislation and its set aside regime. Likewise, when considering Singapore, Chinese investors and host States alike should focus on the costs and duration of potential early jurisdictional challenges and their impact on the ongoing arbitration - among other important substantive considerations - rather than on the “flair, elan, [and] distinction” of the renovated Maxwell Chambers and its accompanying hotels.
The Advantages of Arbitrating Russia-Related Disputes at HKIAC as a Permanent Arbitral Institution under Russian Law

Anton Asoskov

This article discusses the role of Hong Kong International Arbitration Centre in Russia-related international arbitration following its designation as a Permanent Arbitral Institution pursuant to Russia’s Arbitration Reform of 2016 and highlights a number of advantages to disputing parties flowing from that designation.

HKIAC’s status as a Permanent Arbitral Institution under Russian law: why does it matter?

In April 2019, HKIAC became one of the first non-Russian arbitral institutions to obtain special legal status under Russian arbitration law - that of a Permanent Arbitral Institution (PAI). This status was introduced as a result of the 2016 Arbitration Reform (the 2016 Reform, which came into effect on 1 September 2016) in response to the rise of ‘pocket’ arbitral institutions, which had become widespread in Russia prior to this. Such arbitral institutions had been created by many large Russian corporations and banks (eg, arbitration centres at (inter alia) Gazprom, Rosatom, Lukoil and Sberbank), which then required their counter-parties to refer all disputes to arbitration administered by these institutions. The Russian courts not having adopted a consistent approach to this issue, the Russian legislature addressed it in the 2016 Reform.
The 2016 Reform now requires Russian arbitral institutions to obtain special governmental authorisation and the status of PAI in order to continue their activities. Failing this, arbitrations administered by these institutions will be characterised as ad hoc arbitrations under Russian law and made subject to a number of restrictions discussed below. Foreign (non-Russian) arbitral institutions may also file a request to obtain PAI status if they wish to enjoy the advantages associated with that status. Such a request will be granted if the Council for Development of Arbitration at the Russian Ministry of Justice (MoJ) confirms that an applicant arbitral institution has a widely recognised international reputation, which is assessed pursuant to a set of criteria adopted by the MoJ.

To date, only five Russian and two non-Russian arbitral institutions have been granted PAI status. The two non-Russian PAIs are HKIAC and the Vienna International Arbitration Centre (VIAC). A number of other well-known non-Russian arbitral institutions (including the International Court of Arbitration at the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA)) do not currently have PAI status.

Advantages of PAI status
Under Russian law, PAI status brings with it a number of advantages. These are described in detail below.

Advantage No 1: Russian corporate disputes
Among the peculiar features of Russian arbitration legislation are limits in respect of the arbitrability of Russian corporate disputes. Such disputes include those arising out of share purchase agreements, pledge (charge) share agreements and shareholders’ agreements. Disputes concerning shares and participation interests in Russian legal entities are only arbitrable provided that the relevant arbitration is administered by a PAI. Russian commentators use the expression ‘conditionally arbitrable disputes’ to refer to these.

If this kind of corporate dispute is referred to an arbitral institution without PAI status or to an ad hoc arbitration, a number of negative consequences would arise. Russian courts would
(1) consider such an arbitration agreement invalid or unenforceable and so not refer the parties to arbitration, even if one of them objects to the jurisdiction of the Russian court;
(2) set aside an arbitral award if the place of arbitration is in Russia; and
(3) refuse to recognise and enforce an arbitral award, regardless of whether the place of arbitration was located in Russia or abroad.

Thus, if the arbitration agreement relates to a dispute as to the disposition of shares in a Russian company or the management thereof, that agreement would be valid and an arbitral award enforceable in Russia only if an arbitral institution with PAI status has been selected. At the time of writing, HKIAC is the only available option among Asian arbitral institutions.

Advantage No 2: Russian procurement disputes
Russian law distinguishes between two types of procurement contract:
(1) contracts entered into directly by the Russian State or Russian State authorities (Federal Law No 44): disputes arising out of such contracts remain non-arbitrable until a special federal law on this issue, which is currently still under preparation, is enacted; and
(2) contracts entered into by Russian commercial companies controlled by the Russian State, including Gazprom, Rosneft, Rosatom and other Russian State-controlled companies (Federal Law No 223): disputes arising out of such contracts with the place of arbitration in Russia are arbitrable provided that a dispute is administered by the PAI (in other words, it is ‘conditionally arbitrable’).

Although there are no formal restrictions for the latter category of disputes where the place of arbitration is outside
Russia, in practice Russian State-controlled companies are unwilling to agree to arbitrate abroad and prefer to include arbitration clauses with a Russian seat in tender documents. In such situations, HKIAC would be a natural choice of neutral arbitral institution.

**Advantage No 3: Assistance by the Russian courts in the taking of evidence**

A party may request assistance from the Russian courts in the taking of evidence for the purposes of ongoing arbitral proceedings. However, this option is available only if the dispute is administered by a PAI and the place of arbitration is in Russia. Evidentiary measures may include the production of documents (including by third parties who do not participate in the arbitration), taking witness testimony under oath and the preservation of evidence to prevent its destruction or removal.

The Plenary Session of the Russian Supreme Court has specifically stressed that a request for assistance in the taking of evidence may be filed in support of arbitrations administered not only by Russian PAIs but also by non-Russian arbitral institutions with PAI status (such as HKIAC). This important option will therefore be available in HKIAC proceedings with the place of arbitration in Russia.

**Advantage No 4: Waiver of various forms of supervision exercised by Russian courts**

If the place of arbitration is in Russia, Russian courts will be competent to exercise limited forms of supervision over arbitral proceedings. These include:

1. setting aside an arbitral award, pursuant to a party’s request submitted within three months;
2. setting aside an interim award on the tribunal’s jurisdiction, pursuant to a party’s request submitted within one month; and
3. pursuant to a party’s request, reconsidering a challenge to an arbitrator if that challenge was rejected by the arbitral tribunal or a competent body of the arbitral institution rendered in accordance with the procedure laid down by applicable arbitration rules.

At the same time, parties are permitted to exclude these forms of judicial supervision by means of express wording in the arbitration agreement. However, such exclusions would be valid only if the dispute is administered by an arbitral institution with PAI status. These types of clause are popular among Russian end-users, who prefer to reduce interference by State courts to a minimum. The PAI status of HKIAC accords this important option to all parties to HKIAC arbitrations as well.

**Advantage No 5: Assistance for conducting ad hoc arbitrations in Russia**

After the 2016 Reform had been enacted, several Russian institutions that had been denied PAI status tried to evade the mandatory provisions of the Russian legislation by arguing that they did not administer arbitrations but only ‘assisted’ in conducting ad hoc arbitrations. In reality, such ‘ad hoc’ arbitrations were no different from administered arbitration.

In response to these practices, the Russian legislature introduced a rule according to which functions relating to assistance in conducting ad hoc arbitrations where the place of arbitration was Russia (eg, the appointment of arbitrators, decisions on challenges to arbitrators and the termination of
their mandates, holding deposits of advances of arbitration fees and expenses, and the provision of hearing facilities) may be exercised by PAIs only. If these functions are exercised by an institution not having PAI status, the arbitral procedure would be deemed to have been violated, which is a self-sufficient ground for setting aside an arbitral award or refusing to recognise and enforce it.

“… [P]arties are permitted to exclude … judicial supervision by means of express wording in the arbitration agreement. … [S]uch exclusions will be valid only if the dispute is administered by an arbitral institution with PAI status.”

There is also a separate requirement for Russia-seated *ad hoc* arbitrations to the effect that the arbitral award, together with the entire case file, must be handed over to an arbitral institution with PAI status or a Russian State court for storage for a period of five years after the termination of arbitral proceedings. As the Russian State courts are not familiar with this new requirement and no established procedure for this in place, storage at an arbitral institution with PAI status is the most suitable option in practice.

Thus, if end-users select *ad hoc* arbitration with the place of arbitration in Russia, they should choose an arbitral institution with PAI status to perform functions of the appointing authority and/or other functions related to assisting the conduct of such arbitration. Given its PAI status, HKIAC may be a convenient option in this situation.

Other considerations to be taken into account when arbitrating Russia-related disputes

A variety of international sanctions implemented by the United States, European Union States and a number of other countries against certain Russian persons, territories and sectors of the economy are another critical consideration that must be taken into account when drafting dispute resolution clauses for Russia-related contracts. The existence of these sanctions can influence arbitral proceedings in a number of different ways and at different stages of an arbitration:

1. if the head office of an arbitral institution is located in the territory of a State that has adopted sanctions, such institution may be obliged to obtain a special authorisation (licence) from a regulator in order to proceed with administering the arbitration. Such arbitral institutions are obliged to implement a complicated compliance procedure at the institutional level in order to reveal all entities that are owned or under the control of a designated person (ie, a person in the sanctions list). As a result, the initial phase of an arbitration may be significantly delayed as a result of detailed enquiries from an arbitral institution in respect of the parties’ controlling persons, beneficial owners and other affiliated persons;
2. arbitrators having their nationality or place of residence in States that have adopted sanctions may experience the same problems when accepting appointments in such cases;
3. parties and arbitral institutions may experience problems with making and receiving payments (eg, advances of fees and expenses) because of the compliance procedures and policies of the respective banks; and
4. when resolving the case on the merits and determining the applicable law, arbitrators may adopt a variety of approaches to sanctions provisions (as a type of overriding mandatory provision), depending on the place of arbitration, the law chosen by the parties and other factors.

Hong Kong has not adopted any Russia-related sanctions. This would make HKIAC a ‘safe harbour’ for potential disputes with Russian parties that are currently or potentially subject to international sanctions.
Finally, it is important to stress the difference between international and domestic arbitration under Russian law. HKIAC’s licence does not extend to domestic arbitration. An arbitration is characterised as ‘international’ if one of the following criteria is met: (1) the place of business of at least one of the parties is located outside Russia; (2) any place where a substantial part of the obligations is to be performed is located outside Russia; (3) the place with which the subject-matter of the dispute is most closely connected is located outside Russia; (4) the dispute has arisen in connection with foreign investments made in the territory of Russia or Russian investments abroad; or (5) the dispute is between residents of the special administrative region at the islands of Russky or Oktyabrsky (‘Russian offshore zones’) or relate to activities conducted in the territories of such regions.24

Conclusion

In summary, given its status as a PAI under Russian law, the choice of HKIAC for arbitrating Russia-related disputes has a number of essential advantages by comparison with other non-Russian arbitral institutions (VIAC excepted). As commentators have observed, for certain categories of Russia-related transactions, “careful thought should be given before choosing a non-PAI institution, in particular where disputes are likely to need to be enforced inside Russia”.26 End-users should therefore make informed and conscious choices when negotiating and drafting contracts with Russian counterparties.

2 In Russia, two main laws govern arbitration: (1) the Law on International Commercial Arbitration No 5338-1 dated 7 July 1993, which is based mainly on the UNCITRAL Model Law as amended in 2006, and (2) the Federal Law on Arbitration in the Russian Federation No 382-FZ dated 29 December 2015, which applies to domestic arbitration. However, Chapter 9 of the 2015 Federal Law, which contains the rules on PAI status, is equally applicable to international arbitration.
4 The Council for Development of Arbitration at the MoJ consists of leading Russian arbitration specialists and includes law firm partners, in-house lawyers, academics and representatives of Russian authorities.
5 The set of applicable criteria is available (in Russian) at https://minjust.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/rekomendaciya-soveta-po-sovershenstvovaniyu.
6 The five Russian PAIs include the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC), the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (RAC), the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs and the National Centre for Sports Arbitration at the Sports Arbitration Chamber.
7 Article 45(7) and (10) of the Federal Law On Arbitration in the Russian Federation 2015 (note 2 above); art 225.1 of the Arbitrazh (Commercial) Procedure Code of the Russian Federation, No 95-FZ dated 24 July 2002. Other conditions for certain types of Russian corporate dispute may apply. For example, for disputes arising out of shareholders’ agreements, the place (seat) of arbitration must be in the territory of Russia. Special rules for arbitrating corporate disputes must be adopted and applied by the arbitral institution with regard to challenges to decisions of corporate bodies or claims for damages against directors alleged to have breached their fiduciary duties vis-à-vis a legal entity.


15 Article 27 of the Law On International Commercial Arbitration 1993 (note 2 above); art 74.1 of the Arbitrazh (Commercial) Procedure Code (note 7 above).

16 Section 37 of the Resolution of the Russian Supreme Court Plenary Session No 53 (note 9 above).

17 Article 34(1) and (3) of the Law On International Commercial Arbitration 1993 (note 2 above).

18 Ibid, art 16(3).

19 Ibid, art 13(3).


22 In order to administer domestic arbitral proceedings, a non-Russian institution must open a branch in the territory of Russia. At the time of writing, HKIAC does not have a Russian branch and so cannot request the extension of its licence to domestic arbitration. The same limitation applies to the VIAC (the second non-Russian arbitral institution granted PAI status).


25 Section 8 of the Resolution of the Russian Supreme Court Plenary Session No. 53 (note 9 above).

Arbitrating for Settlement: Eyes on the Prize

Karl Hennessee

This article considers recent developments in settlement in arbitration, with particular regard to the role of arbitrators in actively promoting settlement and the right time for entering into settlement discussions during an ongoing arbitration. It is based on an address delivered at Hong Kong Arbitration Week on 22 October 2019.1

Introduction
Statistics on the growth of arbitration as a dispute resolution mechanism speak to the continuous appreciation of its potential to address the true purpose of dispute resolution.2 According to the ICC, a total of 842 cases were administered by the ICC Court in 2018, the second highest number of cases registered with the ICC. Further, 2018 set a new record for draft awards approved by the ICC, with a total number of 599.3 It is also not unusual, however, for parties to find a mutually agreeable solution while the arbitration is still pending and end the reference with a settlement - which may actually be more indicative of arbitration’s true potential purpose.

Experience has shown that, absent distortions, rational parties are not primarily focused on whether they win or lose a case but, rather, a fair and just result.4 This finding may also explain the even more remarkable drive toward settlement.5 A settlement negotiated by the parties satisfies needs that no award can, and will often be collectively easier for internal stakeholders to accept. Also, if an amicable solution brings the desired fair and just result, it is understandable why parties would prefer this option over investing more time, money and internal resources in an ongoing arbitration that may also endanger the parties’ business relationship.6
It is ... not unusual ... for parties to find a mutually agreeable solution while the arbitration is still pending and end the reference with a settlement - which may actually be more indicative of arbitration's true potential purpose.

At first sight, assisting the parties to conclude an arbitration with a settlement might seem to conflict with the tribunal's mandate to complete the arbitration and render an award within a reasonable time. However, recent practice shows simultaneous and equally important functions being exercised by arbitral actors, including the tribunal, in adjudicating the dispute on the one hand and, on the other, encouraging settlement of the dispute.

Recent developments in terms of settlement in arbitration

To a user, it is surprising how little attention is paid by arbitration practitioners to statistics on cases settled before an award is rendered, as well as how that number has changed over time.7

If users do indeed desire a focus of arbitration on settlement, then the outlook is positive. The Queen Mary University of London/White & Case (QMUL/White & Case) 2008 International Arbitration Survey showed that approximately 25% of arbitration cases were settled before an award was rendered.8 Some years later, the official ICC Secretariat’s commentary on the 2012 ICC Rules indicated that around 47% of cases were eventually withdrawn and that this would likely happen when the parties were able to reach a settlement.9 At least one study has identified a trend toward a growing appetite for settlement.10

According to the QMUL/White & Case 2008 International Arbitration Survey, there were several reasons why parties settled cases. Some 27% of parties said that cases were settled in order to preserve a good business relationship.11 This is particularly true in cases where a long-lasting business relationship or interdependencies existed between the parties - for example, because the market did not offer a wide range of alternative suppliers.12 The other main reasons given were savings in costs, a weak case or the desired avoidance of excessive delays.13

Another interesting result shown by one of the studies was that almost half of the cases were settled before the first hearing and almost three quarters before the first hearing on the merits.14 Another study showed that, once an arbitration had proceeded to a hearing, only 20% of all cases were settled between the hearing and an award.15

Worryingly, the opinions of some arbitrators still do not reflect this trend, as studies also show that the majority of them are not themselves concerned with a settlement.16 However, those arbitrators who do engage in fostering a settlement are aware of the influence they might have by conducting the arbitration in a specific way, such as how they formulate their summary disposition or manage pre-hearing processes.17

The tribunal’s role in promoting successful settlement negotiations

Assuming a tribunal perceives the users’ desire to settle, the question arises as to how and when it would be best to do so.

An arbitrator can aid settlement in a number of ways without too actively engaging in the discussions themselves. For example, a sensible procedural timeframe can go a long way in encouraging settlement. Party presentation of key arguments and documents at an early stage allows early focus on the merits and thus the early weighing of settlement options. Disclosure is not always - or even usually - useful, but when it does feature, an early disclosure calendar may also allow
a balancing of settlement options. Critically, a timeframe with enough space for meaningful settlement negotiations as the evidentiary picture emerges can also aid in finding an amicable solution. So too, can early tribunal engagement on the merits, which must walk the line between tribunal emphasis on decisive points and showing a closed mind to further factual and legal argument.

An essential point the tribunal must keep in mind is that eventually it will always be the parties - and not their external counsel - who decide whether a dispute will be settled. Thus, the way the tribunal conducts the proceedings and addresses arguments should, while acknowledging the role of counsel, really focus on the parties themselves. To this end, the tribunal should encourage party awareness and involvement. This applies in particular to situations where the tribunal can encourage direct contact with the parties by encouraging attendance of their principals at the case management conference or the hearing on the merits.

Limits on the tribunal’s role in fostering settlement will necessarily derive from the fact that, if negotiations fail, the tribunal must proceed to its primary role as impartial judge. Doubts (actual or perceived) as to the impartiality of a tribunal that actively drives settlement, is a classic dilemma. Experience has shown that parties might hesitate to engage in settlement discussions out of concern that the tribunal may learn of them and revise its view accordingly.

A comparison of how different arbitration rules and guidelines address this is instructive.

Paragraph 47 of the UNCITRAL Notes on Organising Arbitral Proceedings 2012 acknowledged that “[a]ttitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement.” Its successor, para 72 of the 2016 Notes, states:

“In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations.”

Paragraph 72 of the 2016 Notes goes on to say that “certain sets of arbitration rules provide for facilitation of a settlement...”
by the arbitral tribunal.” Some institutional rules expressly empower arbitrators at least to discuss a potential settlement with the parties. For example, art 26 of the Rules of the German Arbitration Institute (DIS) 2018 provides:

“Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”

This provision thereby clearly requires an active engagement by the tribunal.21 However, the majority of the most frequently used institutional rules tend to be more conservative.

By contrast, the ICC Rules of Arbitration 2017 do not contain a comparable provision but leave this to an appendix. The relevant part in Appendix IV to the ICC Rules, ‘Case Management Techniques’, reads much more cautiously and states that:

“The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. …

i. informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;

ii. where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.”

In practice, art 24.4 of the ICC Rules gives the tribunal the power to request the attendance of the parties in person or through an internal representative at the case management conference.22 This provision could be viewed as a positive effort to favour a forum for fruitful discussions and a possible amicable settlement.

The most recent LCIA Arbitration Rules (2014) do not contain any explicit provision on the tribunal’s role in this regard but seem also to prefer a conservative approach, stating that:

“No arbitrator shall advise any party on the parties’ dispute or the outcome of the arbitration.”23

A roadmap for arbitrators’ involvement in the settlement process is provided by the current edition of the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 4(d) of which states:

“An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such a process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.”24

It remains to be seen whether other institutions apart from the German Arbitration Institute will adjust their rules to encourage an active tribunal role so directly in specifically encouraging settlement.

The parties’ point of view

It is very common in commercial arbitration that the parties are business partners and that their dispute arises out of
recurring or long-term relationships. Consequently, in most cases both of them are neither willing nor able to put their entire business relationship at risk. A long-lasting business relationship - particularly one between large companies or companies and their suppliers - may often result in interdependencies that cannot easily be brought to an end. While not obvious within the context of the specific matter in arbitration, it is often more important for the parties to a dispute to preserve their business relationship than to receive a favourable decision.

Commercial issues external to the dispute will often play a decisive role when parties need to decide how to proceed with a dispute and whether to aim for a settlement or for a final award. Of course, the terms on which a party may be willing to settle change - even considerably - during the course of the arbitration. The process itself has considerable influence on how early these positions may stabilise and what costs each party perceives through the course of the proceeding. Even parties who feel robust about a position are acutely aware that an award in their favour could bring lengthy and costly enforcement proceedings with an uncertain outcome, as well as possible further damage to a relationship.

Obviously, trying to settle the dispute at the earliest time possible might have the greatest advantages in terms of saving costs and resources. Use of so-called ‘escalation’ or ‘multi-tier’ dispute resolution clauses used in many contracts may be understood as expressing party intentions to prefer settlement and the preservation of relationships. The fact is, however, that these clauses cause significant problems in practice by imposing an artificial sequence and timing on settlement mechanisms. At a minimum, parties might face several hurdles when trying to settle a case before an arbitration is initiated. The process of arbitration, once commenced, can still embrace the will of the parties to settle and define procedure to narrow the gap between their expectations and willingness to make mutual concessions.

In addition to overstepping the bounds or perceptions of neutrality, a tribunal seeking to encourage settlement and a process too focused on settlement opportunities run the further risk of raising doubts as to its willingness to complete its mandate to render an award within a reasonable time.

More generally, a tribunal must always be attentive to the balance of perceived power between the parties. In other words, opportunity for settlement is low at procedural points where one party or the other seems at a net ‘advantage’ in terms of having made unanswered submissions or disclosure. To seek to force settlement at such a point might endanger the impression of impartiality of the tribunal and see the ‘disadvantaged’ party avoid further negotiations.

On the other hand, if a tribunal starts promoting a settlement at a very late stage of the proceedings, the parties may feel that they have already invested too much time and money in the proceedings, so that they may as well bring them to an end. The argument of costs avoided is a powerful one. This could lead to the parties being only willing to settle on what they perceive as very favourable terms. This may account for the statistics cited earlier of low percentages of settlement post-hearing and should certainly encourage all players to seek an early engagement on the merits.

“The right timing for attempting settlement during an arbitration

Questions of timing are also important, both as to the likelihood of success for finding a mutually agreeable solution and to the parties’ acceptance of the settlement.
Conclusion

Recent trends in arbitration, in particular growing support for a proactive role of arbitral tribunals, have highlighted, at least in part, the potential benefit of all players seeking a process that actively facilitates settlement. The structure of the arbitration proceeding itself may foster an amicable solution by simply giving the parties a more realistic picture of their position at points when they can mutually act to take advantage of the convergence of their positions. From the perspective of inter-party business relationships, there is no doubt that an amicable settlement by the parties is the ideal outcome of any arbitration, even if at first it seems to contradict the mandate of the tribunal to render an award in as short a time as possible. An amicable solution of the dispute avoids the tribunal forcing an award upon the parties, and with acceptance of the outcome more likely. An award often gives the parties the feeling of 'win-lose', whereas a settlement may be able to create a 'win-win' situation.

If a settlement is successfully reached, the parties can - under the majority of arbitration rules - incorporate it into an award on agreed terms that will have the same binding force as an award on the merits and can be enforced in the same ways. Further, the use of additional means of dispute resolution (such as mediation) during arbitral proceedings is steadily on the increase, so provision must be made in modern arbitration law and practice to accommodate such methods and to further their goal of amicable resolution of disputes. Let us collectively resolve to use the flexibility of the process to drive what users truly want: outcomes that foster and do not harm long-term relationships, ideally settlements. ☞

1 Grateful thanks are given to Hannah Eckhoff for her assistance in preparing this article.


6 The regular International Arbitration Surveys conducted by the Queen Mary University of London and White & Case have shown that the high costs of arbitration are widely criticised by parties: 2010 International Arbitration Survey, Choices in International Arbitration, 2018 International Arbitration Survey: The Evolution of International Arbitration, p 3.


9 Fry et al (note 5 above), para 3-1163.


11 QMUL/White & Case (note 8 above), p 7.

12 Ibid.

13 Ibid.

14 Ibid. 43% of all settlements were reached before the first hearing in the proceeding. See also Thomas J Stipanowich, A Recent Survey of Experienced US Arbitrators Highlights Areas for Further International Study and Discussion, Kluwer Arbitration Blog (6 February 2015), available at http://arbitrationblog.kluwer arbitration.com/2015/02/06/a-recent-survey-of-experienced-us-arbitrators-highlights-areas-for-further-international-study-and-discussion/.


16 Stipanowich & Ulrich (note 10 above), p 459.

17 Ibid, p 461.


21 This is in line with German law on litigation proceedings, which also obliges a judge to discuss a potential amicable settlement with the parties: see the German Code of Civil Procedure (ZPO), section 278(1). A similar provision exists under the Austrian Code of Civil Procedure (ZPO), section 204(1).


23 LCIA Arbitration Rules (2014), art 5.3.


26 Stipanowich & Ulrich (note 7 above), p 9.
Arbitration Law Reform in Kazakhstan: One Year On

Konstantin Voropaev

This article discusses critically several amendments made in 2019 to Kazakhstan’s Law on Arbitration 2016 and the establishment and functions of the Astana International Financial Centre’s Court and International Arbitration Centre, and comments on the new institution’s prospects as a regional dispute resolution venue.

Introduction: the arbitration law reform of 2019
In January 2019, the Parliament of the Republic of Kazakhstan (the Republic) passed a statute making significant legislative changes. In particular, it amended several provisions of the Law of the Republic of Kazakhstan ‘On Arbitration’ No 488-V (8 April 2016) (the Law on Arbitration). While the 2019 amendments are aimed at refining and further developing legal rules, a number of issues of practical relevance have since arisen as a result of gaps and inconsistencies, and require close attention.

Amending the definition of ‘usual and customary business practices’
The Law on Arbitration as enacted in 2016 unduly narrowed the definition of the term ‘usual and customary business practices’ that may be applied by arbitral tribunals with regard to the conclusion of civil agreements (contracts). However, this term also applies to any area of business. The 2019 amendments now define it to mean established and widely applied rules of conduct in the field of civil law relations that are not inconsistent with the applicable law, regardless of whether they are recorded in any document.

Under art 3.4 of the Civil Code of the Republic of Kazakhstan (adopted by the Supreme Court on 27 December 1994) (the Civil Code), civil relations may be governed by custom, including usual and customary business practices, if they do not conflict with current legislation of the Republic governing civil law.
Usual and customary business practices’ must meet several criteria. Firstly, they should be well-established and sufficiently defined as to their content. Secondly, they must be widely used by participants in civil transactions and not provided for by legislation. Finally, they must be widely applied in any area of business.

While the 2019 amendments are aimed at refining and further developing legal rules, a number of issues of practical relevance have since arisen as a result of gaps and inconsistencies, and require close attention.

Usual and customary business practices may therefore be applied by an arbitral tribunal in resolving disputes. Disputing parties and tribunals should verify that the business practices rules applicable in their cases meet all of the criteria discussed above. In practical terms, this is a valuable approach given the prevalence of usual and customary business practices in arbitration and their importance both to participants and to arbitration in achieving proper outcomes.

**Essential conditions of arbitration agreements**
The arbitration agreement constitutes an ordinary contract, so that relevant rules of the civil law apply to it. Thus, a contract is not to be regarded as concluded unless its subject-matter is clearly defined by the parties. The 2016 version of the Law on Arbitration stipulated four essential terms of the arbitration agreement: (1) an unambiguous intention of the parties to settle a dispute by arbitration; (2) determination of a specific arbitral institution; (3) a robust indication of matters that could be considered by the arbitral institution; and (4) the consent of the government authorised organisation.

The legislation of many countries in the Commonwealth of Independent States (CIS), by contrast, does not set out so many requirements for arbitration agreements. The Belarusian legislation, for example, stipulates that an arbitration agreement represents the parties’ agreement to empower an international arbitration court to resolve disputes arising out of their legal relations. Agreement may take the form either of an arbitration clause in a contract or a separate agreement.

The legal community has no unified approach as to fundamental terms of the arbitration agreement. While one school of thought asserts that there are two essential terms (intention of the parties and arbitrability of the subject-matter), another asserts that the parties need only agree as to the place of arbitration. Nevertheless, it was obvious that the 2016 version of Kazakhstan’s Arbitration Law imposed an unfeasibly extensive list of essential terms of the arbitration agreement.

The 2019 amendments, by contrast, impose only one essential requirement: the arbitration agreement must contain the consent of the government or local State body where a dispute involves State authorities or legal entities in which 50% or more of voting shares are directly or indirectly owned by the State body. The parties are free to agree additional terms. Thus, in practical terms, parties are freed from additional obstacles to concluding arbitration agreements.

**Applicable substantive law**
As a general rule, the substantive law to be applied by Astana International Finance Centre judges is the law that has been agreed upon by the disputing parties in the arbitration agreement (art 29(1)(b) of the Regulations) or, failing party choice, such law (which may include Kazakh domestic law) as appears to the Court to be the most appropriate in the circumstances of the particular case (art 29(1)(c)) (ie, having the closest and most real connection). The Court will not, however, uphold the parties’ choice of applicable law if it considers this to be contrary to the public order or public policy of Kazakhstan (art 29(1)(b)).
The 2019 amendments substantially revise art 44 of the Law on Arbitration 2016, so that the mandatory application of Kazakh law now extends only to arbitrations between individuals and/or legal entities of the Republic.

The 2016 version required the mandatory application of Kazakh law by arbitral tribunals to all cases in which one of the parties to the dispute was a State body, a State enterprise or a legal entity in which 50% or more of the voting shares directly or indirectly belonged to the State. A State body and a non-resident counterparty to a foreign economic agreement were therefore barred from choosing a foreign law as the applicable substantive law, unless otherwise stipulated by an international treaty. This provision was contrary to arts 1084 and 1112 of the Civil Code.

The 2019 provisions may be attractive to foreign investors, who are now free to choose the applicable law governing legal relations with a Kazakh counterparty. Usual business practice demonstrates that this is not Kazakh law.

Grounds for setting aside arbitral awards

The 2019 reforms significantly revised the bases for setting aside arbitral awards. One ground has been abolished, namely failure to execute a demand for written form and signature of an award.

Further, the 2016 version of the Law on Arbitration provided that an award could be set aside where the composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement of the parties. The 2019 amendments make similar provision, but subject to a proviso that an award may be set aside unless the agreement contravenes mandatory provisions of the Law on Arbitration.

The Law on Arbitration now prohibits de novo reconsideration of an award by a State court. The Court, in considering applications to set aside or to issue or refuse to issue a writ of execution, therefore has no right to reconsider an award on its merits. This is a positive change because it will leave no room for the unjustified exercise of discretion by State courts that would allow them to revise an award without any legal grounds.

Both the European Convention on International Commercial Arbitration 1961 (1961 Convention) and the UNCITRAL Model Law (the Model Law) were taken into account in revising of the Law on Arbitration. The changes discussed above align the national legislation with art IX of the 1961 Convention and art 34 of the Model Law.

Competency of the Arbitration Chamber of Kazakhstan

The 2019 amendments provide that the Arbitration Chamber of Kazakhstan (ACK) no longer has legal powers to retain the case files of arbitral institutions. Their purpose is to observe confidentiality and prevent interference with arbitrations. The previous ACK powers were inconsistent with these purposes as it was open to unauthorised persons to access and reveal confidential information as to the merits of cases.

The ACK has, however, been given authority to approve rules for the retention of case files by arbitral institutions. Henceforth, such institutions must retain case files themselves but in compliance with the ACK rules. Two separate bodies are therefore tasked with regard to the file retention function. This is an evident contradiction that may handicap the effectiveness of the ACK.

Further, the 2016 version of the Law on Arbitration provided that an award could be set aside where the composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement of the parties. The 2019 amendments also vest powers in the ACK to present an expert opinion in arbitrations regarding the law of Kazakhstan. An ACK opinion has the nature of a legal recommendation and is a significant step toward developing
unified practice in arbitrating legal issues. These amendments are aimed at enhancing the ACK’s effectiveness.

“The Court, in considering applications to set aside or to issue or refuse to issue a writ of execution, has no right to reconsider an award on its merits.”

Legal issues relating to the Astana International Finance Centre

The 2019 amendments to the Law on Arbitration relate significantly to the Astana International Financial Center (AIFC), which had commenced operations on 5 July 2018.

Addressing an acute need for independent justice

The collapse of the Soviet Union in 1991, followed by the independence of the former Soviet republics and the creation of the CIS on 8 December of that year, led to significant efforts by each State to pursue sovereign rights and to develop democratic institutions. While some aims were achieved but others were not, the CIS countries favoured economic freedom and westernisation, a key element of which was undoubtedly an independent judicial system. The CIS republics faced many obstacles on the way to achieving this.

As a result, the issue of post-Soviet justice is still being settled and there are no guarantees that the situation will be resolved or even improved in the short- to medium-term. This is a stumbling block in pursuing economic prosperity and strengthening a country’s authority. The lack of independent and effective justice always leads to outflows of investment. Given the extreme volatility of the global economy and financial markets, inward investment remains an essential source of financing. States are keen to influence investors to make additional infusions of funds. The State must therefore offer suitable conditions for attracting foreign investors and partners. Examples of these include the creation of special zones or centres in which far greater rights and freedoms are conferred on foreign investors - including the right to independent justice. Kazakhstan is no exception in this regard.

Introduction to the AIFC

Since its establishment in 2018, the AIFC has become an important financial platform for the Asian region. Among the advantages of AIFC dispute resolution, parties from foreign jurisdictions may adjudicate their disputes in accordance with universal principles of litigation and arbitration before reputable judges and arbitrators at a convenient geographical location, the Kazakh capital Nur-Sultan (formerly Astana). The two most crucial elements are the AIFC Court (discussed below) and the International Arbitration Centre (IAC). While a large uptake of their services by investors (particularly those from common law jurisdictions) cannot immediately be expected, the AIFC is expected to gain a reputation as an effective international dispute resolution centre in due course.

Nevertheless, several Asian countries, such as China, have begun to recognise the advantages of AIFC dispute resolution and taken steps to establish long-term co-operation.

The Belt and Road Initiative and the AIFC

As an Asian financial and dispute resolution hub, the AIFC aspires to take up a prime position as the venue of choice for foreign entities and investors in resolving commercial disputes. It aims to be a lynchpin platform for financial and legal issues arising out of Belt and Road Initiative (BRI) disputes. The BRI represents a very important new chapter in China-Kazakhstan relations. Concrete examples of this include the opening of a China Development Bank office in the AIFC (the first Chinese business to do so) and, in 2019, the signing of several memoranda of understanding between the IAC and reputable arbitral institutions in Hong Kong and China.
As a result, co-operation between Asian arbitral institutions has become much closer, with mediators and arbitrators becoming better equipped to perform their functions and exchanging experience. One collective benefit of this may be the simple and quick execution of arbitral awards rendered by these institutions. Co-operation between key regional actors will assist in creating an integrated legal space, strengthening their position and making them more attractive to investors.

"The AIFC … aims to be a lynchpin platform for financial and legal issues arising out of Belt and Road Initiative (BRI) disputes."

Outstanding questions
Nothing is perfect and it may be surmised that some gaps exist in the legal regulation of the AIFC, consequentially raising questions on such matters as jurisdiction, applicable AIFC law and the overall status of that law within the Kazakh legal system, and the status of AIFC judges.

(1) Jurisdictional issues
The AIFC Court (the Court) was created to resolve commercial and civil disputes between parties. Criminal matters are excluded from its jurisdiction. On the one hand, this is understandable as such matters should normally remain within the exclusive prerogative of the State; whereas, on the other hand, realities in Kazakhstan have not been taken into account, in that civil legal issues can often morph into criminal ones. By way of examples, (1) an accounting error might be interpreted as fraud and treated as a criminal offence, while (2) a minor violation of environmental legislation during the extraction of natural resources might be regarded as a serious crime.

Pursuant to art 26 of the AIFC Court Regulations 2017 (the Regulations), the Court has exclusive jurisdiction in respect of:
(1) any disputes arising between ‘AIFC Participants’ (as defined in art 1(5)), AIFC Bodies (ibid) and/or their foreign employees;
(2) any disputes relating to any transaction carried out within the AIFC and subject to AIFC law;
(3) any disputes referred to the Court by agreement of the parties; and
(4) interpretation of the Regulations.

Moreover, the reference in art 26 to “disputes” between the parties applies to civil or commercial disputes arising out of transactions, contracts, agreements or other incidents of commerce.

It may therefore be surmised that the Court will give its own interpretations in line with increases in the volume of cases decided under the Regulations and that commercial matters will therefore not fall within the jurisdiction of State courts.

(2) The ‘Acting Law’ of the AIFC and the overall position of that law within the Kazakh legal system
In addition to the applicable substantive law (as discussed above), it is vital to parties to AIFC proceedings to have certainty as what constitutes the ‘Acting Law’ (viz the applicable law) of the AIFC itself and the rules of its dispute resolution bodies and their proceedings. There is, however, no clear understanding as to the scope of AIFC law and precisely which legal acts should apply to the Court.

The legal framework of the AIFC is stipulated by art 4.1 of the Constitutional Statute (the Statute). The main sources of AIFC law are the Statute itself and ‘AIFC Acts’ (ie, written documents governing relationships with and between art 1(5) persons – see above) that are not inconsistent with the Statute. These Acts may be based on the principles, norms and precedents of the law of England & Wales and the standards of the world’s leading financial centres, as adopted
by the authorities of the AIFC within the powers conferred by the Statute.

“There is ... however, no clear understanding as to the scope of AIFC law and precisely which legal acts should apply to the [AIFC] Court.

The final source of AIFC law is the Acting Law of the Republic of Kazakhstan (viz the current national law), which applies to matters arising from AIFC activities only to the extent that they are not governed by the Statute and AIFC Acts.

Article 29(1) of the Regulations also provide that the Court shall apply (and the parties will therefore be bound by) the AIFC Acting Law in relation to regulatory issues (per arts 4 and 13.6 of the Statute).

The way in which the mixture of sources of law is dealt with in AIFC instruments does not, however, clearly state the hierarchy and scope of applicable laws. This may be a reason for discrepancies and legal uncertainties experienced by participants in AIFC Court proceedings. The Statute and the Regulations, in particular, should be made to reflect these matters in a clearer and more logical way.

(3) The status of AIFC judges

The legal status of judges in Kazakhstan is generally defined by the Constitutional Law 132-II ‘On the judicial system and the status of judges of the Republic of Kazakhstan’ of 25 December 2000 (Constitutional Law 132-II). As the AIFC is not a part of the Kazakh national judicial system, however (art 13.2 of the AIFC Statute), this Law does not govern the status and position of its judges; these matters fall exclusively within the purview of the Statute.

The Statute does not, however, contain specific requirements relating to AIFC judges. Articles 12 and 14 respectively of the Regulations state that the Chief Justice and other judges of the Court may be appointed and removed by the President of Kazakhstan on the recommendation of the Governor of the AIFC. Further, the 2017 Resolution of the Management Council of the Court (which is chaired by the President of the Republic) makes no provision as to the composition of the Court, the processes for assigning and removing court servants, essential requirements for judges and court servants and any other issues that are germane to the activities of the Court. All that the Statute does, therefore, is to set out a blanket rule concerning requirements for judges, the key source of which is the Resolution of the Management Council.

General legal provision with regard to the status of judges in Kazakhstan is made by Constitutional Law 132-II. Judges assigned by the Republic to international courts are granted the right to occupy this position without competition and working time spent in an international court is included in calculating the duration of judicial work done and taken into account on retirement. Where rights and obligations of international judges are not governed by applicable treaties, such judges are subject to all material and social guarantees under the Constitutional Law. Arguably, these provisions should also apply by analogy to the status of AIFC judges, meaning that they should be given treatment equivalent to that generally accorded to the Kazakhstan judiciary where AIFC laws are silent.

“The way in which the mixture of sources of law is dealt with in AIFC instruments does not ... clearly state the hierarchy and scope of applicable laws. ... The Statute and the Regulations ... should be made to reflect these matters in a clearer and more logical way.”
Further, the immunity from prosecution and administrative penalties enjoyed by the Kazakh judiciary under the Constitutional Law should also apply by analogy to AIFC judges. Whether it does conceivably depends on the citizenship of a particular judge. There is no doubt that immunity would apply in full to a citizen of the Republic of Kazakhstan and this should arguably also be the case for citizens of, for example, Canada, Australia or the United Kingdom in AIFC judicial service. Applying principles of equity and legal analogy, AIFC judges should enjoy rights that are similar in scope.

Conclusion: outcomes

Notwithstanding a number of drawbacks and juristic gaps that inevitably tend to arise under new forms of legal regulation, the initiative to establish the AIFC as an independent body for dispute resolution - and as a ‘law district within a law district’ along lines broadly similar to the Dubai International Financial Centre (DIFC) - has been an inspired one. This initiative is a keynote guarantee that both foreign and local investors’ assets and financial investments in Kazakhstan can be protected by impartial and independent judges or arbitrators, and marks out the Republic as an exception in the context of ongoing high profile legal conflicts between foreign investors and State authorities in the majority of Central Asian countries.

Some evidence of interim success is provided by a World Bank report, Doing Business in Kazakhstan 2019, which clearly indicates that all locations benchmarked in Doing Business in Kazakhstan 2017 had elevated their economic profiles, with the capital Nur-Sultan advancing the most. In many respects, this can be explained by the location and activities of the AIFC in resolving legal disputes without fear or favour.

All of this has taken time. It is hoped that in the near future the AIFC will become a peer competitor to the DIFC or the Qatar Financial Centre and that the AIFC Court and the IAC will be recognised as dispute resolution fora with a high reputation.

“...[T]he initiative to establish the AIFC as an independent body for dispute resolution - and as a ‘law district within a law district’ along lines broadly similar to the Dubai International Financial Centre (DIFC) - has been an inspired one.”
Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act

Reviewed by Robert Morgan

Malaysia’s Arbitration Act 2005 (the 2005 Act) replaced the long-outdated and English-based Arbitration Act 1952 with effect from 15 March 2006. It adopted the original 1985 version of the UNCITRAL Model Law and applied it to both domestic and international arbitration, while at the same time (in common with other jurisdictions, such as Hong Kong and Singapore) enacting supplementary provisions. The 2005 Act was amended in 2011 and twice in 2018 - the later of the 2018 amendments adopting the 2006 version of the Model Law with effect from 8 May 2018. As part of contemporaneous moves aimed at raising Malaysia’s profile as an international arbitration seat in Asia, the former Kuala Lumpur Regional Centre for Arbitration was rebranded as the Asian International Arbitration Centre (AIAC).

Treatises commenting on primary legislation, rules of court, practice directions, model laws and international treaties and conventions lend themselves particularly well to the annotation methodology. Such commentaries give their readers (and indeed their authors, who include this reviewer) unique opportunities to concentrate closely on those provisions of the instruments analysed having the most direct relevance and significance. Points both major and minor fall to be broken down and analysed. What may seem to be a major point at the outset may turn out to be a minor one and vice versa in the light of practice, case law and further learned debate.

The art of a commentary author therefore lies in guiding readers clearly, cogently and concisely in the right direction while contributing to the sum of specialised knowledge. A commentary must also be up to date. Thaya Baskaran’s authoritative work on the 2005 Act as amended ticks all these boxes.

The commentaries on each provision of the 2005 Act observe widely accepted protocols. They begin with the text of each provision, followed by (i) general discussion comprising an introduction to and explanation of the provision’s general scheme and underlying principles; (ii) definitions and explanations of words and phrases used; and (iii) legal issues and practice points arising out the provision. In all instances, the commentaries make extensive reference both to relevant case law (primarily Malaysian) and other sources (such as UNCITRAL’s 1985 Analytical Commentary on the Model Law). Commentaries on all provisions of the Act, both Model Law-based and supplementary, are extensively cross-referenced throughout. There is some comparative discussion of the supplementary provisions where they closely reflect overseas legislation (eg, those relating to confidentiality and to arbitral immunity, which derive from, respectively, the English and Hong Kong legislation).

Given Malaysia’s status as a Model Law jurisdiction, the commentary is also a very useful contribution to cross-jurisdictional and comparative study of the application of the Model Law in practice. The same comment applies to its treatment of the recognition and enforcement of awards under the New York Convention. In these respects, extensive reference is also made to such leading international commentators as Dr Peter Binder and Albert Jan van den Berg.

Only two minor criticisms occur to this reviewer. Firstly, it would have been useful to include a table of cases. Secondly (a matter for the publisher) printing the verbatim text of each provision in light italic font did not make for ease of reading. Perhaps these matters could be addressed in the next edition.

This book is both a valuable addition to the existing corpus of leading works on arbitration law and practice in Malaysia and an essential reference tool for arbitrators and practitioners alike.

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2 The Arbitration (Amendment) (No 2) Act 2018. It may be noted, however, that at the time of writing (March 2020), UNCITRAL’s otherwise authoritative Status list (https://unctad.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status) omits any reference to Malaysia having adopted the 2006 amendments.
New dispute resolution rules

**Australia and New Zealand**

The Resolution Institute¹ (the Institute) launched its revised Arbitration Rules 2020² (the Rules) on 20 November 2019. The Rules, which took effect on 1 January 2020, are based on the current UNCITRAL Arbitration Rules but include modifications intended to encourage innovations in arbitral practice and procedure. They are accompanied by a set of Explanatory Notes.³

The Rules may be adopted for arbitrations seated in Australia and New Zealand. They are drafted to be consistent with Australia’s International Arbitration Act (Cth) 1974 as amended and its State- and Territory-level Commercial Arbitration Acts, with New Zealand’s unitary Arbitration Act 1996 as amended and with the common law. The Rules may also be applied to arbitrations seated in Papua New Guinea, where the Model Law does not apply.

The numerous changes made by the Rules affect (inter alia):

1. sole arbitrator appointments;
2. flexibility of hearing procedures;
3. joinder of post-commencement disputes;
4. appointment of experts without party consent;
5. immunity of arbitrators; and
6. limits on fees recoverable by a successful party.

**International: business and human rights arbitration**

On 12 December 2019, the Hague Rules on Business and Human Rights Arbitration (2020)⁴ (the Hague Rules) were launched by the Drafting Team of the Business and Human Rights Arbitration Working Group (Working Group) at the Peace Palace in The Hague. The Working Group is a private group of practising lawyers and academics established to create a neutral private dispute resolution system - business and human rights (BHR) arbitration - for disputes between individuals and business parties involving human rights issues.⁵ The Hague Rules aim to provide recourse to BHR arbitration in countries where national courts are dysfunctional, corrupt, politically influenced or unqualified. They derive from the UNCITRAL Arbitration Rules and the suite of Hague Arbitration Rules that apply to public international law-related disputes and derive in turn from the UNCITRAL Rules.

The provisions of the Rules are explained in detail in the project leader’s Report: The Hague Rules on Business and Human Rights Arbitration,⁶ which also explains the principles underlying BHR arbitration under the Rules. They apply not only to disputes arising from direct relationships between ‘victim’ parties and businesses (V2B) but may also involve business to business (B2B)...
news

Disputes (eg, regarding supply chains) and those involving other stakeholders (eg, labour unions, State entities and civil society organisations).

In addition to incorporating recently developed provisions that are standard to international commercial and investor-State arbitration, such as emergency arbitration, transparency and third party funding, the Rules make special provision geared to BHR disputes. This includes:

(1) the appointment of appropriately qualified and experienced arbitrators, who must comply with a Code of Conduct forming part of the Rules;
(2) multiple claimants;
(3) arbitrators creating special accessions to international dispute resolution instruments confidentiality mechanisms in gathering evidence and for the protection of parties, their representatives and witnesses; and
(4) a duty on arbitrators to satisfy themselves that proceedings and awards are compatible with the United Nations’ Guiding Principles on Business and Human Rights (2011).7

Accessions to international dispute resolution instruments

New York Convention

The Seychelles became the 162nd State party to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 after depositing its instrument of ratification on 3 February 2020 (effective from 3 May 2020). It has declared that the Convention’s reciprocity and commercial reservations will apply.

Singapore Convention

Singapore and Fiji became the first two State parties to accede to the Singapore Convention on International Settlement Agreements Resulting from Mediation 2019 after depositing instruments of ratification on 25 February 2020. Qatar having become the third State to deposit its instrument, on 12 March 2020, the Convention will enter into force on 12 September 2020.8

Reports

International arbitration in construction

The Queen Mary University of London/Pinsent Masons 2019 International Arbitration Survey: Driving Efficiency in International Construction Disputes,9 was published on 22 November 2019. The Survey was conducted globally. It considers arbitration to be, despite several criticisms, the best process for resolving construction disputes, while also concluding that there is real scope for improved efficiency at all stages. Key points include the following.

(1) The process itself was a barrier to the fair resolution of disputes of less than US$10 million, while technical complexity and the large amount of evidence required were criticised across the board.
(2) The most important attributes of arbitrators included the ability to make difficult procedural decisions, the possession of technical knowledge and of case and counsel management skills, and the ability to issue awards within a reasonable time.
(3) The effective use of interim and provisional orders was favoured as a means of promoting settlement.
(4) Some arbitrators were afraid of using all remedies available to them for fear of challenges to awards for lack of due process, viz there was ‘due process paranoia’.
(5) There was widespread failure by parties to comply voluntarily with the outcome of pre-arbitral ADR processes.
(6) Third party funding in international construction was in its infancy, 64% of respondents to the Survey not having experienced it.
(7) The most commonly used seats were London (46%), Paris (35%), Dubai (26%) and Singapore (22%). The most frequently used arbitral institutions were the ICC (71%) and LCIA (32%), while ad hoc arbitration was used in nearly one-third of cases.
Arbitration of climate change-related disputes

On 28 November 2019, the ICC Commission on Arbitration and ADR published Resolving Climate Change Related Disputes Through Arbitration and ADR, a report by its Task Force on Arbitration in Climate Change Related Disputes appointed in 2017. The Task Force identifies three broad categories of dispute that may arise out of investor-State and international commercial arbitration, in addition to those arising out of the Paris Agreement (2015) and the United Nations Framework Convention on Climate Change (1992):

1. Specific transition, adaptation or mitigation contracts, such as those relating to construction and delivery of renewable energy plant;
2. Contracts not specifically having climate-related purposes or subject-matter but involving climate or environmental issues, such as construction and manufacturing projects; and
3. Submission agreements (compromises) where arbitration is used for existing disputes absent other available or adequacy fora, such as disputes relating to populations affected by investments or activities that affect climate or the environment.

The report states that “climate change related disputes will increase exponentially”. It therefore identifies a number of specialised requirements for arbitration and ADR in such cases. These include the appointment of arbitrators or experts with relevant technical expertise, an understanding of international climate change commitments and law, and appropriate case management skills; measures for expediting early resolution of disputes; the use of urgent interim or conservatory relief; a high level of transparency; the ability of third parties (such as non-governmental organisations) to participate; and a flexible approach to the allocation and payment of costs, both to parties and other participants.

1 The Institute was created in Australia in 2014 by a merger of LEADR and the Institute of Arbitrators and Mediators Australia (IAMA). Although the Institute operates in New Zealand, both LEADR NZ (which merged with LEADR in 2013) and the Arbitrators and Mediators Institute of New Zealand (AMINZ) continue to exist as separate institutions.

Contributor to this issue’s News section:

Robert Morgan
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