

# News & Views

HK45 | HKIAC Newsletter

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## FOREWORD

Dear Readers,

In this edition, we report on the many interesting arbitration-related judgments recently issued by the Hong Kong courts, including the case of *Dana Shipping*, dealing with the intriguing question of whether the Hong Kong courts will enforce a foreign arbitral award that has been set aside by the court of the seat of the arbitration.

On the arbitral institution front, with increasing competition between institutions, pioneering reforms are being introduced to deal with such issues as transparency and efficiency, for example, the ICC has introduced fee penalties to be imposed on arbitrators and the ICC itself for delay in submitting draft awards for scrutiny and in the scrutiny process itself.

The HKIAC has also newly published a Practice Note on Consolidation of Arbitrations (to clarify the matters to be included when applying for consolidation), effective on 1 January 2016, and recently updated two Practice Notes on Costs of Arbitration, effective on 1 June 2016.

Away from Hong Kong, new forums for international commercial dispute resolution are discussed in terms of the Singapore International Commercial Court and the Abu Dhabi Global Market.

In terms of firsts, we report on ICCA Mauritius 2016, the first time in ICCA's 50-year history to host its biennial Congress in Africa. With growing investment (and arbitration) in Africa, particularly from China, it was fitting that the ICCA Congress was held in Mauritius.

In closing, the HKIAC warmly welcomes its new Secretary General, Ms. Sarah Grimmer, and hopes readers find it interesting to learn more about her and her visions for the HKIAC from the interview article.

On a final note, an update on changes to the editorial team. Mr. Andrew Chin and Mr. Matthew Townsend will be joining the editorial team as co-editors starting from the next edition. They replace Mr. Desmond Ang, who will be departing from the editorial team.

On behalf of the HKIAC & HK45, we would like to express our appreciation to Desmond for his leadership and hard work in our newsletter through what has now been a fruitful 8 editions.

In the meantime, we hope you enjoy this edition.

Best,

*The HKIAC & HK45 Newsletter Editorial Team*

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## CASE REVIEW

### **China Property Development (Holdings) Ltd v Mandecly Ltd (24 May 2016) CACV 92/2015 – Setting Aside of Arbitral Award**

*Reported by Wilson Leung, Temple Chambers*

#### Introduction

This is a relatively rare case of the Hong Kong Courts of First Instance and Appeal setting aside an arbitral award on the ground that a party had been prevented from presenting its case and that the award dealt with a dispute not falling within the terms of the submission to arbitration.

#### Facts

In August 2004, China Property Development (Holdings) Ltd (“**CPDH**”) entered into an agreement (the “**Agreement**”) to purchase the entire shareholding of BPP (a company which developed real estate in the PRC) from Mandecly and Tsoi (the “**Vendors**”).

At the time, BPP was suing a company called Huazhengshi to recover certain deposits, which BPP had paid to Huazhengshi. Huazhengshi had apparently transferred those deposits to a third party called Jiangtai.

In view of this ongoing litigation, the Agreement contained an adjustment mechanism: (i) if, by March 2005, BPP had not recovered RMB10 million from Huazhengshi, CPDH would be entitled to deduct that amount from the consideration payable by CPDH to the Vendors (the “**Deduction Clause**”) and (ii) if, by June 2008, BPP managed to recover RMB10 million from Huazhengshi, BPP would have to pay that money to the Vendors (the “**Recovered Funds Clause**”).

The Agreement contained a deeming clause setting certain situations in which BPP would be deemed to have recovered RMB10 million from Huazhengshi (the “**Deeming Clause**”). This included Jiangtai confirming in writing that it held RMB10 million for the benefit of BPP.

BPP eventually obtained judgment against Huazhengshi. However, Huazhengshi failed to pay the judgment debt to BPP.

A dispute arose between CPDH and the Vendors over the consideration payable under the Agreement. The dispute was referred to arbitration in Hong Kong.

CPDH claimed that it was entitled to deduct RMB10 million from the consideration pursuant to the Deduction Clause.

The Vendors countered that: (i) CPDH was not entitled to make the deduction because CPDH was in breach of an implied condition to exercise due diligence in recovering RMB10 million from Huazhengshi; (ii) further, the Vendors were entitled to be paid RMB10 million pursuant to the Recovered Funds Clause and the Deeming Clause because Jiangtai had issued a written confirmation in March 2008 that it held RMB10 million for the benefit of BPP.

In its Award, the Tribunal decided that, in light of Jiangtai’s written confirmation dated March 2008, the Deeming Clause and the Recovered Funds Clause were applicable. Consequently, the Tribunal ordered CPDH to pay RMB10 million to the Vendors.

However, the Vendors’ pleadings and written submissions had never actually argued that CPDH was obliged to pay RMB10 million pursuant to the Recovered Funds Clause. The Vendors had only argued that: (i) CPDH was liable to pay RMB 20 million to the Vendors pursuant to various other provisions of the Agreement; and (ii) BPP was liable to pay RMB10 million to the Vendors pursuant to the Recovered Funds Clause.

CPDH applied to the Hong Kong court to set aside the Award. CPDH relied upon Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration (the “**Model Law**”) (which was applicable at the time by virtue of s. 34C of the former Arbitration Ordinance (Cap. 341) and is now given effect by s. 81 of the Arbitration Ordinance (Cap. 609)). Art. 34(2)(a)(ii) and (iii) stipulates respectively that an award may be set aside if “*the party making the application...was otherwise unable to present his case*” or “*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on*

*matters beyond the scope of the submission to arbitration”.*

### Decision

The Court of First Instance acceded to CPDH’s application and set aside that part of the Award ordering CPDH to pay RMB10 million to the Vendors. This was upheld by the Court of Appeal (the “**Court**”).

Cheung JA held that this was a clear case of irregularity. In their pleadings and written submissions, the Vendors had never argued that CPDH was liable to pay RMB10 million to the Vendors pursuant to the Recovered Funds Clause. Indeed, in both their oral and written submissions, the Vendors had stated that liability under the Recovered Funds Clause rested on BPP and not CPDH. In short, the Tribunal had taken upon itself to make a finding against CPDH, which was contrary to the Vendors’ own stance.

In the circumstances, the Award was liable to be set aside because CPDH had been prevented from presenting its case (Art. 34(2)(a)(ii) of the Model Law) and/or because the Award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contained decisions on matters beyond the scope of the submission to arbitration (Art. 34(2)(a)(iii) of the Model Law).

Cheung JA recognised that the Court had a residual discretion not to set aside an award even where irregularity has been established. In exercising the discretion, the Court should consider the seriousness of the irregularity. If there was a fundamental irregularity, which severely damaged the structural integrity of the arbitration proceedings, the Court would have no hesitation in setting aside the award. Cheung JA considered that the case before him was close to the serious end of the spectrum.

Cheung JA rejected the Vendors’ argument (based on *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd’s Rep 1) that CPDH’s application was really a criticism of the adequacy of the Tribunal’s reasons rather than an assertion of irregularity.

### Comments

This is a relatively rare instance of the Court setting aside an arbitral award on the ground that a party had

been prevented from presenting its case and that the award dealt with a dispute not falling within the terms of the submission to arbitration.

It is well established (and was reiterated by Cheung JA in his decision) that the setting aside remedy under Art. 34 of the Model Law is not an appeal. The Court does not address itself to the substantive merits of the dispute, or the correctness or otherwise of the award. Article 34 can only be used to set aside an award where a party has been denied due process *and* the conduct complained of has been serious or even egregious. Even where due process has been denied, the Court has discretion not to set aside the award if it is satisfied that the outcome could not have been any different.

That being so, it is not uncommon for the courts to refuse to set aside an award, either on the ground that the party applying to set aside had not been denied due process, or on the basis that the result would have been the same even if the tribunal had not made the error in question (see, for example, cases cited in para. 7.4 of the decision).

Nonetheless, as shown by the Court’s decision in this case, the courts will set aside an arbitral award on the basis of Art. 34 where there is good reason to do so. This decision therefore serves as a useful reminder to arbitrators to pay close attention to the arguments actually advanced by the parties in their pleadings and submissions – and to avoid deciding a case based on a ground which was not put forth by either of the parties.

## **Enforcing a Foreign Arbitration Award that has been Set Aside: Can it be Done?**

*Reported by Jose Maurellet SC and Tom Ng, Des Voeux Chambers*

### Introduction and procedural history

Will Hong Kong courts enforce a foreign arbitral award that has been set aside by the court of the seat of the arbitration? This intriguing legal issue was addressed by M Chan J in the “*rather unusual and unfortunate*” case of *Dana Shipping and Trading SA v*

*Sino Channel Asia Ltd* (HCCT 47/2015, 28 July 2016, at para. [1]).

The applicant Dana Shipping and Trading SA (“**Dana Shipping**”) obtained a London arbitral award against the defendant, Sino Channel Asia Ltd (“**Sino Channel**”) for a principal sum of US\$1.68 million (plus interest and costs). Dana Shipping later obtained an *ex parte* order to enforce the award in Hong Kong, subject to Sino Channel’s right to apply to set aside the enforcement order within 14 days after service of the enforcement order.

Sino Channel did so within time, on the ground that Sino had not been given proper notice of the appointment of the arbitrator or of the arbitral proceedings. It also applied in England to set aside the award.

Meanwhile, Sino Channel was ordered by the Court of First Instance (the “**Hong Kong Court**”) to give security, failing which its application to set aside the enforcement order would be dismissed. It failed to do so within time, and as a result its application to set aside the Hong Kong enforcement order was dismissed.

However, the English court later accepted Sino Channel’s challenge and set aside the award, on the basis that the arbitral tribunal was not properly constituted and the award was made without jurisdiction, as the notice of arbitration had not been served on anyone with the authority to receive the notice on behalf of Sino Channel.

Sino Channel therefore applied to set aside the Hong Kong enforcement order once again. Dana Shipping, on the other hand, argued that (i) Sino Channel’s application had already been dismissed for want of security; and (ii) in any event, the Hong Kong Court retained a discretion to enforce the award despite the English court’s order to set aside the award.

### Discretion to enforce award that had been set aside

Let us first consider Dana Shipping’s second argument. Most importantly, M Chan J agreed that the fact that the award had been set aside by the court of the seat of the arbitration does not automatically entitle a party to resist enforcement of the award in Hong Kong (at [13]).

This is because s. 89 of the Arbitration Ordinance (Cap. 609) provides that the Hong Kong Court “*may*” refuse enforcement when the award had been set aside. The word “*may*” indicates that the Hong Kong Court still retains a discretion to enforce the award.

To this end, the English High Court judgment of *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] 2 CLC 162 indicated that the key question is whether the foreign decision setting aside the award should be recognised in accordance with ordinary conflict of laws principles applied to the recognition of foreign judgments. On the facts, M Chan J observed that the English decision to set aside the award was properly obtained. Accordingly, M Chan J recognised the validity of the English decision.

M Chan J’s decision is noteworthy for two reasons. First, the decision recognises the mere fact that an award has been set aside at the seat of arbitration does not automatically preclude it from being enforced in Hong Kong. In particular, M Chan J noted that the Hong Kong Court has previously enforced annulled awards on the basis that the defendant failed to act in accordance with its obligation of good faith (see *China Nanhai Oil Joined Service Corporation Shenzhen Brunch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 and *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).

Second and on the other hand, it appears that the Hong Kong Court would respect the decision of the court at the seat of arbitration, as long as the decision

can be given effect in accordance with Hong Kong conflict of laws rules (in particular, the rules on recognition of foreign judgments). This may be a factor that affects the choice of the seat of the arbitration.

### Two bites of the cherry?

Returning to Dana Shipping’s first argument, it was suggested that Sino Channel could not challenge the enforcement order once again after its application was dismissed due to its failure to provide security. Dana Shipping argued that the previous dismissal gave rise to *res judicata* estoppel in its favour.

This argument was rightly rejected by M Chan J. As M Chan J observed, the dismissal on procedural grounds was not a final determination of the merits of

Sino Channel's case. In any event, the English decision setting aside the award constituted a material change of circumstances.

In addition to the authorities relied upon by M Chan J, readers are also referred to the recent decision of Chung J in *Cheung Ting Kau, Vincent v Koo Siu Ying* (HCAP 4/2011, 13 May 2016). In that judgment, Chung J explained that, in determining whether the doctrine of issue estoppel applies, one must consider the actual grounds of the previous decision said to give rise to the estoppel. Applying this principle, M Chan J's decision is eminently sensible.

### Conclusion

M Chan J accordingly accepted Sino Channel's application and refused to enforce the award.

A number of observations can be made. First of all, parties should be careful in choosing the seat of arbitration, and pay particular attention to the competence and integrity of the court of that jurisdiction. As we have seen, when the court of the seat of arbitration sets aside (or upholds) an award, and when a party relies on that decision to resist

enforcement of (or to uphold) the award in Hong Kong, an important question is whether the foreign judgment would be recognised according to the conflict of laws rules in Hong Kong.

Secondly, even if a party successfully sets aside an award in the seat of arbitration, this does not necessarily mean that it can resist enforcement in Hong Kong. In particular, if it has failed to act in good faith, the Hong Kong Court may nevertheless enforce the award despite the annulment of the award in the seat of arbitration.

## **Winding-up based on Local Arbitral Awards: Is Leave to Enforce Required?**

*Reported by Jose Maurellet SC and Tom Ng, Des Voeux Chambers*

### Introduction

It is well-established that a local arbitral award is enforceable in the same manner as a judgment of the court that has the same effect, but only with the leave of the court: s. 84(1), Arbitration Ordinance (Cap.

609). This procedural requirement of obtaining leave is generally to be observed.

However, can a winning party "enforce" (in the non-technical sense) a local arbitral award by issuing a statutory demand and a winding-up petition against the losing party based on the awarded sum. Would leave to enforce under s. 84 still be required?

### The decision of Lucky Resources

Harris J answered the question in the negative in *Re Lucky Resources (HK) Limited* (HCCW 89/2016, 11 July 2016). In that case, the petitioning creditor obtained a Hong Kong arbitral award in its favour in the sum of US\$1,444,499.61 plus interest, and issued a statutory demand and a winding-up petition against the Respondent Company. No leave to enforce the Hong Kong award had been obtained. The Respondent Company argued that the petition was therefore defective.

This argument was rejected by Harris J. Most importantly, Harris J re-iterated the well-established proposition that the presentation of a winding-up petition does not constitute enforcement of a judgment or an arbitral award. In contrast, winding-up based on a company's inability to pay its debt has always been regarded as a "class remedy". This is because winding-up is for the benefit of the creditors as a whole. This is also reflected by the fact that, upon the making of the winding-up the order, the petitioner would not have its debt immediately paid.

In so holding, Harris J applied the decisions of *In Re International Tin Council* [1989] Ch 309; *In Re International Tin Council* [1987] Ch 419, and *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] SGHC 173, as well as *Re Ghelani Impex Ltd* [1975] EA 197. These cases demonstrate that winding-up proceedings do not equate to enforcement of a judgment or Hong Kong arbitral award.

### Conclusion and observation

The decision of *Re Lucky Resources (HK) Limited* clarified this specific point of law and is to be welcomed.

It must be emphasised that *Re Lucky Resources (HK) Limited* deals with local awards. The position may not be the same when it comes to foreign or mainland awards because of s. 87(3) and s. 92(3) of the

Arbitration Ordinance, which provide that “enforcement” of a foreign or mainland award is to be construed as including reliance on such an award. In light of Harris J’s decision, the winding-up process should not be regarded as “enforcement” of a judgment or Hong Kong arbitral award. This has significant procedural implications. As explained by *Re Lucky Resources (HK) Limited*, no leave to “enforce” a local award is required. In addition, the “non-enforcement” nature of the winding-up process also affects other applications, such as an application to serve out of jurisdiction (see *In Re Grand China Logistics Holding (Group) Co., Ltd*) and an application for a stay of execution pending appeal (since the stay may not affect the commencement of the winding-up process). It also affects the operation of an arbitration clause: specifically, due to the special nature of liquidation, an arbitration clause does not preclude a party from presenting a winding-up petition. Practitioners should therefore bear the “class remedy” nature of the winding-up process in mind.

## **WHAT’S NEW IN ARBITRATION**

### **A Step Forward with Greater Transparency and Certainty – An Update on Latest Practice Notes on Consolidation and Costs of Arbitration**

Reported by Eric Woo, ONC Lawyers

#### **Introduction**

In view of the increasing number of complex international disputes that involve multiple parties, and to enhance transparency and certainty of costs in arbitration, the Hong Kong International Arbitration Center (“**HKIAC**”) has newly published a Practice Note on Consolidation of Arbitrations (the “**Consolidation Practice Note**”), effective on 1 January 2016, and recently updated two Practice Notes on Costs of Arbitration (the “**Updated Costs Practice Notes**”; collectively with the Consolidation Practice Note, the “**Practice Notes**”), effective on 1 June 2016. These Practice Notes are welcomed as they clarify the matters to be included when applying for consolidation, as well as the details of fees involved in arbitration.

#### **Background**

To introduce some of the benefits of court litigation, in 2013, HKIAC introduced consolidation and joinder mechanisms into its Administered Arbitration Rules (the “**Rules**”) to facilitate the handling of complex multi-party, multi-contract disputes.

The introduction of a mechanism for consolidating arbitration was seen as an important move in promoting arbitration as it gave rise to several benefits, such as avoiding duplication of proceedings and lowering the risk of contradictory results. This mechanism is useful when dealing with disputes involving multiple parties.

Further, it is now unnecessary to draft consolidation provisions for arbitration agreements, so long as the parties to an arbitration agreement had expressly agreed to be bound by the Rules or to have the arbitration administered by the HKIAC.

#### **Key points in the Consolidation Practice Note**

The Consolidation Practice Note supplements the consolidation provision (Art. 28) of the Rules and applies to all Requests for Consolidation (“**Request**”) submitted on or after 1 January 2016. Matters to be included in a Request are provided for in the Consolidation Practice Note. A flowchart demonstrating the procedures involved in consolidation is also available on the HKIAC website.

The particulars to be included in a Request are largely the same as those required for a request for joinder, which are set out in the Rules themselves. In brief, to apply to consolidate two or more arbitrations, the applicant should include copies of all arbitration agreements, contracts or other legal instruments which are relevant to the arbitrations that are to be consolidated. If there is any provision about consolidation in the arbitration agreements, the applicant is required to include the same in the Request. The nature of the claims and remedy sought in each arbitration, such as the amounts of the claims, should also be described. Further, the facts and law supporting the Request and supporting consolidation should be included. The applicant should also provide comments concerning the appointment of the arbitral tribunal after consolidation, including whether they would like to preserve the appointment of any confirmed arbitrators.

After submission of the Request, the other parties or arbitrators may be required to reply and comment on the Request.

### Key points in the Updated Costs Practice Notes

The HKIAC has shown its unremitting effort in enhancing transparency and certainty of costs incurred in arbitration by publishing the two Updated Costs Practice Notes, one dealing with the case where the fees of the arbitral tribunal are based on hourly rates (supplementing Schedule 2 to the Rules) and the other based on the sum in dispute (supplementing Schedule 3 to the Rules). The earlier editions of the costs practice notes had been published in November 2013 (the “**Original Costs Practice Notes**”).

### Comparison between the Original and Updated Costs Practice Notes

The main changes between the Original Costs Practice Notes and the Updated Costs Practice Notes concern deposits for costs and HKIAC administrative fees. Pursuant to para. 7.1 of the Updated Costs Practice Notes, parties are jointly and severally liable for the HKIAC’s administrative fees. In the case of withdrawal or termination of arbitration, the percentage of administrative fees payable varies at different stages. For instance, parties will need to pay up to 50% of the administrative fees if they withdraw or terminate arbitration after submitting the Notice of Arbitration and before the due date of filing the Answer to the Notice of Arbitration. On the other hand, if the withdrawal or termination of arbitration occurs after the due date for filing the Answer to the Notice of Arbitration and before the transmission of the case file to the arbitral tribunal, the parties will need to pay 50% to 80% of the administrative fees. Where the parties only manage to withdraw or terminate the arbitration thereafter, they will need to bear 80% to 100% of the administrative fees (para. 7.2). That said, such percentages are indicative only and other circumstances, such as the amount of work undertaken by the HKIAC, will also be considered when calculating the administrative fees payable upon withdrawal or termination (para. 7.3).

If a party has paid deposits for costs on behalf of the other party, the party is now allowed to seek reimbursement for the same from the other party by seeking a separate award from the arbitral tribunal (para. 8.7 of the Updated Costs Practice Notes). In the case of joinder, further deposits may now be

requested from each party including the additional party by the HKIAC (para. 8.4). The same provision also applies to consolidation and was already provided for in the case of the Original Practice Notes. The wording “*If the circumstances of the case so justify, HKIAC may amend the time limits [for requesting deposits for costs]*” (para. 7.6 of the Original Practice Notes) has been deleted. Finally, it is expressly stated that the deposits for the arbitral tribunal’s fees and HKIAC’s administrative fees shall now be held in two separate accounts of HKIAC as mentioned on its website (para. 8.8).

### A great stride to promote cost-effective and practical arbitration

As aforementioned, consolidation can improve efficiency in handling multi-parties arbitrations. The introduction of the Practice Notes is no doubt another great stride to promote cost-effective and practical arbitration as they clarify the procedure of consolidation and the costs consequences of arbitration. Without these practical guidelines, parties may hesitate to opt for arbitration as there would be more uncertainty on costs for those involved in arbitrations. With these Practice Notes, parties could now gain a better understanding on the process of arbitration, consolidation and costs calculation.

The Consolidation Practice Note has also streamlined multi-party arbitration because, firstly, it overcomes the difficulties faced by parties when applying for consolidation of arbitrations by laying down a set of particulars required in the Request. Time will be saved for parties to contemplate what particulars should be included in the Request. Parties are therefore more likely to submit all the required documents within a shorter period of time.

Secondly, it addresses the problem of delay caused by parties’ misunderstanding of the procedures and failure to file all the required documents as parties could now check whether they have filed all the information as required in the Request according to the Consolidation Practice Note. Time spent on preparing irrelevant documents will also be reduced.

However, arbitration may not be a more appealing dispute resolution forum than litigation since parties new to arbitration might not be familiar with details of the fees and expenses payable to HKIAC and arbitrators. In light of these concerns, the Updated Costs Practice Notes have outlined details of fees and expenses payable and, most importantly, the

administrative fees. Items of costs, percentage of fees payable and the amount payable are also dealt with in the Updated Costs Practice Notes so as to enhance the transparency and certainty on costs to be incurred in arbitration. In view of such details and clarity, it is less likely for parties to dispute liability to pay fees and expenses incurred in arbitration. Parties may also estimate the costs of arbitration in a more detailed and certain way, thereby making a more informed decision on the costs involved in arbitral proceedings.

### Conclusion

Implementing the Consolidation Practice Note is a crucial step in rendering consolidation a more cost-effective regime with simplified procedure, whereas implementing the Updated Costs Practice Notes is a step towards greater transparency and certainty on costs. The Consolidation Practice Note shows that the HKIAC has taken pragmatic and practical steps to adopt mechanisms from litigation. For the parties who agreed to resolve their disputes through arbitration in the HKIAC, they are likely to benefit from both practice notes. They also encourage the use of arbitration, attract more parties to arbitrate in the HKIAC and enable the HKIAC to promote itself as one of the top arbitration centres in Asia. It is reassuring that the HKIAC continues to adopt practices that enable it to stay on the cutting edge of international arbitration practices and standards.

## Upping the Ante: ICC Reforms for more Transparency and Accountability in International Arbitration

*Reported by Andrew Chin, Baker & McKenzie*

The competition between various Asia Pacific arbitral institutes has spawned interesting innovations to benefit the arbitration community. The HKIAC won the GAR Innovation Award 2015 for its tribunal secretary service and its revised model arbitration clause. The SIAC has released the 2016 edition of its rules (a mere 3 years after its previous 2013 edition) with innovations such as an early dismissal procedure for unmeritorious claims or defences.

In the wake of aggressive competition, the ICC Court of Arbitration (“ICC”) has implemented numerous reforms to boost transparency and accountability in

ICC arbitrations ever since Mr. Alexis Mourre became the President of the ICC on 1 July 2015.

### Fee penalties for delay in rendering the award

Delays and inefficiencies in the arbitral process have been a constant gripe of all users and have diminished the standing of international arbitration as a preferred mode of dispute resolution. Lawyers who drag matters out by making voluminous filings and parties wanting to have their day before the tribunal have taken the brunt of these complaints.

Various case management techniques have been implemented to control excesses from lawyers and parties, but little has been done to address delays caused by arbitrators and/or the arbitral institute.

In a pioneering reform, the ICC announced on 5 January 2016 a system of fee penalties for arbitrators who delay in submitting their draft awards to the ICC for scrutiny. In ICC arbitration, all awards must be scrutinised by the ICC before they are rendered to the parties. Scrutiny involves the award being subjected to review as to form and possibly substance as well, so long as the arbitrators' flexibility to decide the case is unaffected. The scrutiny process is a hallmark feature of ICC arbitrations to maximise the enforceability of ICC awards before state courts and ensure that each ICC award is of the highest quality.

Starting from the last day of the substantive hearing or written submissions (excluding costs submissions), whichever is later, a three-member tribunal or sole arbitrator will have three months and two months respectively to submit their draft awards to the ICC for scrutiny. Unless the ICC finds that any delay was beyond the arbitrators' control or caused by exceptional circumstances, the following fee penalties will apply.

Period of Delay	Amount of Reduction in Fees
≤ 7 months	5–10%
7–10 months	10–20%
≥ 10 months	≥ 20%

In determining the amount of reduction, the ICC will consider any delay by the arbitrators in submitting prior partial awards. As a sweetener, the ICC has stated that arbitrators' fees may be increased if the arbitration was expeditiously conducted. However,

there are no guidelines on the amount of the increase or how it may be applied.

In a parallel reform, the ICC announced on 14 July 2016 that it would reduce its administrative fees by up to 20% depending on the length of delay in the scrutiny process that are not due to exceptional circumstances beyond the ICC's control. However, there are no guidelines on the length of time which constitutes delay and how the amount of fee penalty is calculated.

### Comments

These reforms are the most stringent measures thus far of any arbitral institute to push its arbitrators and itself to minimise delay. It is a welcome use of the ICC's market power in the arbitral community to enforce discipline amongst its arbitrators. These reforms certainly address one of the most frequent queries (and complaints) by parties on when they may expect to receive the award. Prior to such reforms, lawyers could only provide informed estimates and chase the ICC, while their clients' impression of arbitration diminished by the day. Lawyers will be relieved that such instances should now be far and few between for ICC arbitrations.

However, to gain more widespread acceptance, it is suggested that the ICC provide a mechanism where arbitrators can ask for more time from the ICC, if justified. International arbitrations vary in complexity, so a rigid two to three month deadline may not be realistic for more complex cases. While justice delayed is justice denied, it is also true that justice hurried is justice buried. The difficulty is finding the right balance between fairness and expedition, and this cannot be overcome with rigid deadlines.

Criteria can be laid down on what factors would justify an extension of time. It is unhelpful to merely provide that extensions are permitted in "exceptional circumstances" without further elaboration. The parties should also be heard since they know the case best. Moreover, such input should be anonymous to minimise the fear (perceived or otherwise) of retribution if either party wishes to object to the arbitrators' request for more time. The arbitrators should be urged to make such applications early. As long as there is a reasonable deadline by which parties can expect the award to be rendered, they will not feel that the arbitration has fallen into a black hole after final submissions or the hearing.

### Guidance note on conflict disclosures

On 23 January 2016, the ICC published a guidance note on the making of conflict disclosures by the arbitrators. The scope of conflict disclosures is based on the fundamental principle that parties have a legitimate interest to be fully informed about all relevant facts affecting the independence and impartiality of the arbitrator. Any doubt whether to disclose should be resolved in favour of disclosure.

The ICC has emphasised that a disclosure does not mean that there is a conflict, but a failure to disclose is a factor in determining whether a bias challenge should be upheld. There is an ongoing duty of disclosure for all arbitrators and an advance waiver of conflicts is not possible. Arbitrators should view themselves as being at one with their law firm when considering what disclosures to make.

The ICC has also laid down a non-exhaustive list of circumstances where arbitrators should consider giving disclosures, which include:

- a. the arbitrator has previously advised one of the parties or its affiliates or had a business relationship with one of the parties;
- b. the arbitrator has a professional or close personal relationship with the law firm of one of the parties;
- c. the arbitrator has previously served as arbitrator in a case involving one of the parties or its affiliates; and
- d. the arbitrator has previously been appointed as arbitrator by one of the parties or its affiliates or by counsel or the law firm representing one of the parties.

Arbitrators who are members of the same barristers' chambers as a party's counsel are also encouraged to make such a disclosure.

### Comments

An arbitrator is already subject to professional conduct rules on disclosure of conflicts. Moreover, the IBA Guidelines on Conflicts of Interest (2014) have already set out a sophisticated system on what and how much disclosure should be made in a wide variety of circumstances that includes the circumstances set out in the guidance note.

Given that the IBA Guidelines represent the gold standard in international arbitration on conflict disclosures, it is unclear how much the guidance note

will add to established jurisprudence. Moreover, some of the circumstances, such as “*the arbitrator or prospective arbitrator has a professional or close personal relationship with counsel for one of the parties or its law firm*”, are so widely drafted that it could generate a swathe of irrelevant disclosures, which parties and their lawyers have to comb through. For renowned arbitrators, making such disclosures could be difficult since they would have close professional and personal contacts with many of the lawyers proposing their appointment. The difficulties are further exacerbated in close-knit arbitration communities like Hong Kong and Singapore. The breadth of the wording of the guidance is also a recipe for delaying tactics by recalcitrant parties making repeated requests for more information from the prospective arbitrator until he/she declines appointment due to the intrusion of privacy.

### Publication of arbitrators who act in ICC arbitrations since January 2016

On 5 January 2016, the ICC announced that it would publish the names of arbitrators sitting in ICC cases on their website. The publication would involve all cases received by the ICC from 1 January 2016 onwards and would include details such as:

- a. the name of the arbitrator;
- b. the entity which appointed the arbitrator (namely, the ICC, co-arbitrators or party appointed);
- c. whether the arbitrator is the presiding arbitrator;
- d. the nationality of the arbitrator;
- e. whether the case he/she is sitting is still ongoing; and
- f. an anonymous Case ID number (not the same as the ICC case reference number) representing the case in which the arbitrator is sitting.

The information will remain on the website even though a case has been terminated. However, parties can opt out of this limited disclosure. The *raison d'être* for this reform is to “*demonstrate the high quality of ICC tribunals while promoting regional, generational and gender diversity in the appointment of arbitrators.*”

### Comments

Again, this is a welcome development for the arbitration community. Very often, arbitrators are nominated by parties based on prior professional

experience with that arbitrator or word of mouth recommendations from fellow arbitration practitioners. Now, parties can reach out to other arbitrators who have sat on the same case as a potential arbitrator for a confidential reference, so that a more informed decision on the appointment can be made. This will encourage co-arbitrators in three-member tribunals to be more proactive in the deliberation process.

With time, parties can also identify who are the popular arbitrators for ICC arbitrations, which will lead to more transparency in the market for such arbitrators.

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The ICC has since consolidated the guidance notes above into a jumbo guidance note entitled “*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*” (the “**Note**”), which was published on 13 July 2016 following the first ICC Court plenary session held in Hong Kong on 28 June 2016.

The Note also addresses various topics that parties and arbitrators may encounter in the course of an ICC arbitration. Apart from the matters discussed above, the 19 page Note also provides practical guidance on, among other things, how to submit a Request for Arbitration, how to calculate arbitrators' fees and expenses, and how to appoint, utilise and remunerate administrative secretaries to the tribunal.

The Note is certainly mandatory reading for all users of ICC arbitration and an inspiration for flagship arbitral institutes that want to get ahead of the pack.

## FROM ACROSS THE GLOBE

### **Abu Dhabi Global Market: an Impressive New Face in International Arbitration**

*Reported by Suraj Sajjani, King & Wood Mallesons*

#### What is the Abu Dhabi global market?

Established in 2013, the Abu Dhabi Global Market (“**ADGM**”) is a financial free zone situated on Al Maryah Island within Abu Dhabi, the United Arab Emirates. It was formed as a result of the passing of federal law, Abu Dhabi law and Cabinet resolution. Legally, the ADGM is an independent jurisdiction that

practises its own laws, self-legislates and has its own court system. It also has its own financial regulator, the Financial Services Regulatory Authority, and registration authority, the Global Market's Registration Bureau. The ADGM aims to become a global financial centre, and has employed numerous incentives to do so, including zero tax on income and repatriation on profits, permitting 100% foreign ownership of companies and exemption from custom duties on goods imported and exported to and from the zone.

Of interest to readers of this publication will be the ADGM's legal system and arbitration framework. This article addresses these two topics, and compares the ADGM arbitration framework with that of the Dubai International Financial Centre ("DIFC").

### Legal system of the ADGM

The ADGM is able to self-legislate. English common law is directly applicable to the zone. This is different from its Dubai counterpart, the DIFC, where English law is used to fill gaps when DIFC law is applicable but silent. In the short time since it has been formed, the ADGM has enacted its own arbitration legislation – Arbitration Regulations 2015 (the "Regulations") – and extensive commercial laws, including its own companies laws, insolvency laws, employment laws, takeover laws and property laws.

The ADGM courts are modelled on the English judiciary. They consist of a Court of First Instance and a Court of Appeal with three judges. The courts' jurisdiction is currently limited to civil / commercial cases and disputes involving the ADGM, its authorities or establishments, suits arising out of contracts and transactions conducted in the ADGM, and appeals against decisions of ADGM authorities. While the ADGM courts can also hear requests which they have jurisdiction to consider under ADGM regulations, their scope is noticeably narrower than that of DIFC courts. In contrast, DIFC courts are able to hear and determine any civil or commercial disputes involving parties that have elected DIFC courts to hear their disputes, even in the absence of any connection to the DIFC.

### Arbitration in the ADGM

The ADGM's primary arbitration legislation is the Regulations. The Regulations are based on the

UNCITRAL Model Law on International Commercial Arbitration (as updated in 2006). The Regulations include provisions on the conduct and enforcement of arbitral awards. The rules on conduct of arbitration (Part 3) apply in cases where the ADGM is chosen as the seat of arbitration, or in situations where parties expressly choose to apply the Regulations.

The Regulations were designed with the goals of maximising party autonomy and control over the arbitral process, and to reflect modern standards of arbitration laws. The Regulations thus include provisions on:

### Consolidation and joinder

Provided parties confer such powers on the tribunal, the tribunal can consolidate parallel arbitration proceedings or order hearings to be held consecutively (Art. 35 of the Regulations). Parties may be able to confer such powers either by agreement in an arbitration clause, or alternatively at the time that a dispute arises. Under Art. 36 of the Regulations, the arbitral institute administering the arbitration (or if the arbitration is ad hoc, the Court of First Instance) can join one or more third parties to an arbitration (i) if they are party to the arbitration agreement, or (ii) if the third party consents to being joined upon request by any of the parties to the arbitration. The institute's (or Court's) discretion in this regard is very wide and can be exercised if it is in the interest of justice to do so. Joinder can also be ordered after the confirmation or appointment of an arbitrator if all parties (including the additional party) agree to it. These requirements are similar to those set out in the 2014 LCIA arbitration rules. (The LCIA has an arbitration centre in the DIFC and can be chosen as the arbitral institute to administer an arbitration seated in the ADGM as discussed below). In contrast, the DIFC arbitration law does not provide for any mechanisms by which joinder or consolidation can take place (however, a revision of those rules is currently underway and expected to be launched in the second half of 2016).

### Option to limit recourse against arbitral award

Under the Regulations, the Court's power to set aside an arbitral award is limited to grounds similar to those found in the New York Convention. Additionally, parties are permitted to take the limitation of recourse even further by waiving fully the right to bring an

action for setting aside, or limiting any actions to set aside to one or several of the grounds listed in the Regulations. This stance makes it clear that the setting aside provisions are not part of the mandatory law of the ADGM. An express waiver provision such as this one does not exist under the DIFC arbitration law.

### Confidentiality

As is now common in modern arbitration legislation, the Regulations contain provisions prohibiting publication, disclosure or communication of any information relating to the arbitration proceedings or the resulting award unless it is otherwise agreed and with limited exceptions. All arbitration related proceedings in the ADGM courts will be held in a closed court.

### Comparing the ADGM and DIFC

Boasting attractive free zone features, the ADGM provides an alternative to the DIFC when arbitrating disputes in the UAE.

The ADGM does not currently have an arbitration institution: parties can select ADGM as the seat – either on an institutional basis with the arbitration administered by a chosen institution, such as the LCIA, or the proceedings will be ad hoc. On the other hand, the DIFC-LCIA Arbitration Centre has been operating since 2008 and had as of the end of 2015 a current case load of 28 cases (<http://kluwerarbitrationblog.com/2015/11/20/the-difc-lcia-arbitration-centre-re-launches-in-new-location-bound-for-a-brighter-future/>).

Any qualms regarding enforcement of ADGM court judgments and arbitral awards were also quelled by the signing of two memoranda of understanding in April and May 2016 with the Abu Dhabi Judicial Department and Ministry of Justice respectively. These memoranda sought to ensure that that recognition and enforcement of ADGM court judgments and ADGM arbitral awards will be carried out without uncertainty, and without re-examination of the merits of the substantive dispute.

### Conclusion

The emergence of the ADGM and its legal framework clearly reflects the continued importance to

commercial parties of a comprehensive legal system which is designed to be favourable to global commerce. The ADGM's dispute resolution system illustrates the attractiveness of an arbitration system which is underpinned by impartiality, party autonomy and enforceability across jurisdictions: these are the same features that make Hong Kong an attractive location for international commercial arbitration.

Much remains to be seen as ADGM takes its first steps into the competitive realm of arbitration seats. Its outlook appears to be rather positive, particularly in light of its cutting-edge Arbitration Regulations which permit the streamlining of proceedings and add strength to arbitration's virtues. For the future, both DIFC and ADGM are spots to watch and their parallel development remains interesting for all arbitration practitioners both in and outside the region.

## EVENTS

### **The Singapore International Commercial Court – A Threat to International Arbitration?**

(Evening seminar organised by the Chartered Institute of Arbitrators, East Asia Branch and held at the HKIAC on 30 June 2016)

*Reported by Felicia Cheng, Squire Patton Boggs*

Two partners from Pinsent Masons in Singapore, Mr. Mohan Pillay and Mr. Toh Chen Han, gave a very informative presentation regarding various aspects of proceedings at the Singapore International Commercial Court (“SICC”) and compared the same to international arbitration. They devised a scoring system to rank the SICC and international arbitration. In their view, the SICC narrowly came out on top (see table below).

	SICC	Arbitration
<b>Joinder</b>		
<b>Document Disclosure</b>		
<b>Costs</b>		
<b>Appeal</b>		
<b>Choice of decision making panel</b>		
<b>Confidentiality</b>		

<b>Enforcement</b>		1
<b>Total score</b>	4	3

In the writer's view, however, the main strength of international arbitration over the SICC is enforceability based on the New York Convention and despite the many strengths of the SICC, this must be the overriding concern of parties in their choice of dispute resolution forum.

### Introduction

The SICC was launched in January 2015 and is part of the Singapore High Court. As its name suggests, it is a forum dedicated to handling international commercial disputes and it has no domestic remit.

### Jurisdiction

For the SICC to have jurisdiction, three conditions must be met:

- the claim must be international and commercial;
- the claim must not involve prerogative orders; and
- the claim must be within the original civil jurisdiction of the Singapore High Court.

A claim will be within the jurisdiction of the Singapore High Court if the defendant has submitted to its jurisdiction and the main way in which the defendant will have done so, as applicable to the SICC, is a written agreement between the parties to submit their dispute to the SICC. "Written" is broadly defined to include a record in any form and the jurisdiction agreement need not provide for exclusive jurisdiction. In appropriate circumstances, the Singapore High Court may also transfer cases to the SICC. Indeed, the first case heard by the SICC was transferred from the High Court.

The meaning of "international" turns on the parties' place(s) of business. This jurisdictional condition is met if (i) the parties have their places of business in different states; (ii) no party has their place of business in Singapore or (iii) at least one party has its place of business in a state other than where contractual obligations are to be substantially performed or the subject matter of the dispute is most closely connected.

On an interesting note, the speakers discussed the fact that the test for international and commercial is applied when the claim is first filed and thus, it would

not be applied when an additional party is joined, albeit they expect that the SICC, when exercising its discretion whether to join the additional party, would consider whether the claim involving the additional party is international and commercial in nature.

Prerogative orders are orders for judicial review of decisions by public bodies. The policy reason they have been excluded from the jurisdiction of the SICC is political so that foreign states do not have to be concerned that their public bodies may be subject to review by the SICC and hopefully will support and enforce SICC judgments.

The speakers saw jurisdiction as a neutral factor because in both SICC and international arbitration cases, it will be or at least will most commonly be derived from the agreement of the parties.

### Joinder

The SICC may join an additional party without the existing parties or the additional party's consent. This is certainly an advantage over arbitration, which requires such consent for joinder. One limitation to note is that a state or sovereign may only be joined if they submit under a written jurisdiction agreement.

The test for joinder under the SICC regime is one that is commonly applied, namely, the disputes in question involve common questions of law or fact and relief sought relates to the same series of transactions.

Such provision for joinder means disputes arising out of the same transaction may be resolved together to avoid multiple proceedings and inconsistent decisions. This would likely result in time and costs savings.

The speakers saw the SICC as having a definite advantage over arbitration in terms of joinder.

### Decision making panel

Parties may choose the number of members of the decision making panel in SICC proceedings, namely, a single judge or three judges. The Chief Justice retains ultimate discretion in this regard, but it is not expected that he would intervene lightly. On the

other hand, the parties may not choose the identity of the actual judge(s).

The speakers acknowledged that this was an advantage of international arbitration, namely, the fact of having a say in the identity of the tribunal members. That said, the speakers saw the quality of judges in the SICC as an assurance in this regard.

### Legal representation

Registered foreign counsel are permitted for offshore cases in the SICC, namely, cases with no substantial connection to Singapore (i.e. where the dispute in question is not governed by Singapore law or if the only connection is a choice of Singapore governing law and the parties' submission to the SICC).

Foreign counsel may be registered if they are qualified in their own jurisdiction and have at least five years' advocacy experience.

Foreign counsel may make legal submissions on foreign law directly and there is no need to prove foreign law through expert evidence as in court proceedings usually.

The speakers saw this as a neutral factor given in both SICC and arbitration proceedings, parties may be represented by foreign counsel and they may make submissions on foreign law. The registration requirement for foreign counsel to appear in the SICC is not overly restrictive.

### Confidentiality

Given the public nature of court proceedings, SICC trials are open to the public. However, to allay concerns relating to confidentiality, there is provision for confidentiality orders to be made in the form of closed hearings and judgments published with particulars identifying parties redacted.

Confidentiality orders will more likely be made if the case is an offshore one (what makes a case an offshore case is discussed above) and parties agree. One novel provision is that a party may seek pre-action certification of confidentiality, which if granted means the certificate is attached to the papers if and when the action is actually commenced, and the SICC is then treated as having made the relevant confidentiality order.

The speakers saw arbitration as having a slight advantage in terms of confidentiality, but novel provisions have been introduced by the SICC to allay some of the concerns.

### Document disclosure

The SICC approach to document disclosure is based primarily on the International Bar Association Rules on the Taking of Evidence (“**IBA Evidence Rules**”), namely, parties must disclose documents on which they wish to rely and may request production with the grounds for objection to production being similar to those in the IBA Evidence Rules. On the other hand, features taken from court procedures include the ability of the SICC to order and compel production, and to do so pre-action and/or from non-parties. In terms of non-parties, they are given more time to respond to a request to produce and may seek to recover their costs in complying with a request.

The speakers saw the ability to seek disclosure pre-action and from non-parties as a distinct advantage over arbitration.

### Evidence

By default, Singapore law on evidence applies to SICC proceedings. On the other hand, parties may contract out excluding specific rules or the rules as a whole, and alternative rules may be adopted. Alternative rules that may be adopted include rules of foreign jurisdictions, international standards such as the IBA Evidence Rules or bespoke rules. However, the SICC retains ultimate discretion as to what rules are to be applied. It remains to be seen how the SICC will exercise such discretion, but it is expected that it will only use such discretion sparingly such as when the rules adopted by the parties are not workable.

The speakers acknowledged that one advantage of international arbitration is the freedom to avoid technical rules of evidence. Whilst Singapore law on evidence is technical, the parties have the choice to contract out. This was again considered a neutral factor.

### Costs

Similar to international arbitration, deposits are required by the SICC and proceedings may be suspended for non-payment.

However, the speakers saw this factor as an advantage over arbitration because of the lower costs involved.

Claims of >S\$1m (US\$750,000)	SICC Single Judge	SICC 3 Judges
5-day trial	S\$17,500 (US\$13,000)	S\$52,500 (US\$39,500)
10-day trial	S\$35,000 (US\$26,000)	S\$105,000 (US\$78,500)

### Appeal

SICC decisions are generally appealable to the Singapore Court of Appeal. Whilst this is not a special or specific SICC appeal court, it is expected that the Court of Appeal would be constituted from the High Court’s international judges (albeit a different panel from the first instance SICC proceedings) and the advantages of SICC proceedings will be carried over to appeals such as the right to be represented by registered foreign counsel (discussed above). However, parties have the freedom to exclude or limit the right to appeal. Model clauses in this regard can be found on the SICC website.

In international arbitration, there is generally no right to appeal the merits of a decision.

The speakers saw the option of a right to appeal as an advantage over international arbitration, as the right to appeal would provide for a mechanism for error correction. On the other hand, there is another view that no appeal on the merits is an advantage of international arbitration, as it provides for finality.

### Enforcement

SICC judgments may be enforced by way of the Hague Convention on Choice of Court Agreements (the “**Hague Convention**”) or reciprocal arrangements between Singapore and other states.

This means currently, they may be enforced in 39 states (28 by way of the Hague Convention and 11 by way of reciprocal arrangements). The Hague Convention has been signed by all member states of the European Union except Denmark and Mexico. Singapore has reciprocal arrangements with 11 states including the United Kingdom and Australia and other mainly Commonwealth countries. Key countries in which SICC judgments would not be

enforceable include China, Russia, the United States and countries in Africa.

The speakers acknowledged that in contrast, arbitration awards are enforceable in over 150 states pursuant to the New York Convention.

### Conclusion

It is clear that the SICC benefits from having the advantages of a court, such as its jurisdiction over third parties as evidenced by its joinder and document disclosure powers, and the option for a right to appeal on the merits. It has also introduced some flexibility derived from international arbitration in terms of how it deals with confidentiality and rules of evidence.

However, the main weakness of the SICC as compared to arbitration is enforceability. It seems to the writer that the main purpose of dispute resolution is to obtain an enforceable decision; without enforceability, this factor would weigh heavily on a party’s choice despite many of the SICC’s undeniable strengths.

## **Report on ICCA Mauritius 2016: International Arbitration and its Contribution to and Conformity with the Rule of Law – 8 to 11 May 2016**

*Reported by Hu Ke, Jingtian & Gongcheng*

### Introduction

From 8 to 11 May 2016, the International Council for Commercial Arbitration (“**ICCA**”) held its 23<sup>rd</sup> Congress in Mauritius. Widely regarded as the most influential organisation in the arbitration world, ICCA has tremendous impact on the shaping and development of international arbitration.

ICCA Mauritius 2016 is the first time in ICCA’s 50-year history to host its biennial Congress in Africa. In addition to shining the spotlight on Africa, the Congress addressed the relationship – in theory and in practice – between international arbitration and the development of the rule of law. Without exception, the 2016 Congress also featured a large group of stellar international arbitration practitioners, academics and senior statesmen.

### Day 1 – Opening

The opening reception took place at L’Aventure du Sucre, formerly a sugar factory and now a museum of Mauritius history and culture.

Several heavyweights delivered welcome and keynote speeches, including Mr. Salim Moollan QC, past President of UNCITRAL and Chairman of ICCA 2016 Host Committee; Mr. Donald Donovan, incumbent President of ICCA and Co-head of the International Disputes Group of Debevoise & Plimpton, and Dr. Mohamed ElBaradei, Nobel Peace Prize Laureate and former Director-General of the International Atomic Energy Agency. The insights from the speakers’ diverse and different angles delineated the major issues to be discussed in the Congress, with a focus on the interaction between international arbitration and the rule of law, on institutional reforms and good governance, and on the rise of Africa as a seat for international arbitration. Dr. Mohamed ElBaradei raised his proposal for the further development of international arbitration through developing coherent case law on the one hand and taking arbitration as a judicial process on the other hand.

The after-party which followed mourned the passing away of Mr. Robert von Mehren of Debevoise & Plimpton, the lead counsel for the claimant in the history-making investment arbitration case of *Texaco v Libya*, the mentor of IBA President Mr. David Rivkin and ICCA President Mr. Donald Donovan, and a pioneer in international arbitration.

### Day 2 – International arbitration and its contribution to the rule of law

The plenary session in the morning of Day 2 underscored international arbitration and its contribution to the rule of law.

Judge Abdulqawi A. Yusuf of the International Court of Justice, in his keynote speech, called for a “relocalisation” of arbitration in Africa and having more Africans appointed as arbitrators in disputes with African elements. Admitting that instability, corruption, and arbitrary governance is hindering arbitration and the rule of law in many jurisdictions, he stressed that some institutions and states are well positioned and prepared to entertain international dispute resolution.

Against the backdrop that international arbitration is a system separate from, and in addition to, national court systems, a panel of economists, political scientists and jurists debated on how the international arbitration system affects and contributes to the rule of law, human rights and economic development.

ICCA Mauritius 2016 marked the first time that an incumbent Secretary-General of the United Nations delivered a keynote speech in its Congress. Mr. Ban Ki-moon described ICCA as “a good partner of the United Nations” and emphasised ICCA’s “important role to play in our efforts to build a better world for all”. Mr. Ban reviewed the work and status of the Convention on Transparency in Treaty-based Investor-State Arbitration (the “**Mauritius Convention**”), and hoped it could bring greater efficiency and coherence to the investment arbitration system. In closing, he forcefully asked the arbitration community “to use the great power of arbitration to help the world overcome conflict and hatred and build a future of dignity for all on a healthy planet”.

The panel discussions in the afternoon switched to relatively more practical issues, such as due process concerns in the constitution and challenge of the arbitral tribunal, the interface between domestic courts and arbitral tribunals, interim measures issued by arbitral tribunals and domestic courts, and trends of investment arbitration in Africa and beyond.

Judge Liu Jingdong of the 4<sup>th</sup> Civil Division of the Supreme People’s Court of the PRC (the “**SPC**”) delivered a speech on fresh developments in arbitration law and practice in China, introducing the infrastructure of, and highlighting, recent cases before Chinese courts, which reassured the commitment of Chinese courts to the enforcement of the New York Convention and to a pro-arbitration judicial policy.

In another panel discussion, Ms. Teresa Cheng SC, Chairwoman of the HKIAC, shared the Hong Kong and HKIAC experience and insights in interim measures issued by arbitral tribunals and domestic courts.

### Day 3 – International arbitration and its conformity with the rule of law

Day 3 focused on international arbitration and its conformity with the rule of law. This topic is derived from the notion that international arbitral tribunals must respect and enforce the rights of parties while

also being seen to do justice, often with only limited supervision by arbitral institutions and national courts. With Mr. Doug Jones, an independent arbitrator from Australia, being the moderator, Chief Justice James Allsop of the Federal Court of Australia delivered a keynote speech on the application of the rule of law in international arbitration, in which he argued the notion of taking arbitration as a judicial process and criticised the “industrialisation” of arbitration.

In a panel discussion on “The Corruption Defense: Burden, Standard, and Types of Proof”, the panelists shared their experiences on handling issues related to corruption, with Ms. Domitille Baizeau of Lalive delivering an impressive and persuasive presentation on how to address corruption allegations in arbitration. In a panel discussion on how to prepare a persuasive case, Professor Brigitte Stern of Sorbonne University observed that cross-examination is overused or even abused in international arbitration practice and submissions are too often overly lengthy, leading to escalating costs in terms of time and money for arbitration users. Mr. Toby Landau QC of Essex Court Chambers criticised the “*lack of courage*” of counsel in selecting and otherwise dropping some of the less strong causes of action and evidence, and on the lack of sufficient preparation of some arbitrators. The two exchanged fire on several issues, but reached agreement that over-industrialised practices in arbitration should be revolutionised, taking measures such as limiting pleadings to no more than 50 or 100 pages. The suggestion inspired many follow-up questions from the audience, with several suggesting tribunals and institutions, instead of counsel, take the initiative due to practical concerns.

In another panel discussion on post-award remedies, Ms. Sae Youn Kim of Yulchon South Korea, invoking the example of the Supreme People’s Court’s Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987), which mandated Chinese courts to refuse recognition and enforcement when a ground under Art. V of the New York Convention is present (thus leaving no residual discretion), called for the amendment of the New York Convention for the purpose of unification.

The gala dinner took place in the evening at the historic Château Labourdonnais, featuring a musical recital by renowned American opera singer Mr. Michael Fabiano.

### Day 4 – Closing

On Day 4, a group of leading African and international arbitration practitioners discussed their experiences in African seats and arbitral centers.

At the closing ceremony, Mr. Salim Moollan SC thanked the delegates and spoke about Mauritius’s vision to be established as a preferred seat of arbitration in Africa. Mr. Donald Donovan called the Mauritius Congress a “*phenomenal success by any measure*”. The closing remarks of Lord Hoffmann, who is “*by birth and background an African*” in his own words, included his notion of taking arbitrator’s role as a judicial one, by performing the function of interpreting language in its context with regard to the purpose for which it was used, and awarding remedies: honestly, fairly and efficiently, and warned arbitrators to “*observe the limits of our role*”, since “*arbitrators are not politicians*”.

### Comments

The 23<sup>rd</sup> ICCA Congress Mauritius confirmed the commitment of the arbitration world to uphold and contribute to the rule of law beyond the context of arbitration, in addition to fair and effective resolution of commercial disputes, and conducted a careful review and heated debate over the challenges facing the community. African states, widely regarded as underrepresented in international arbitration (particularly in arbitral tribunals), also voiced their vision, which might lead to a change of landscape in arbitration across the continent and beyond.

The next Congress is to be held in Sydney in 2018.

## ONE-ON-ONE WITH...



### **An Interview with Sarah Grimmer, the Newly Appointed Secretary-General of HKIAC**

*Reported by Desmond Ang, Sidley Austin and Felicia Cheng, Squire Patton Boggs*

With effect from September 2016, Ms. Sarah Grimmer succeeds Ms. Chiann Bao as the new

Secretary-General of the Hong Kong International Arbitration Centre (“HKIAC”).

Sarah obtained her LLB and BA from Victoria University of Wellington, and her LLM from Cambridge University. She began her legal career as a human rights lawyer specialising in refugee law in New Zealand before finding her way into international arbitration and eventually assuming positions at three major arbitral institutions.

With over 14 years of experience in international arbitration, Sarah has witnessed the dramatic development of international arbitration. When she first joined the Permanent Court of Arbitration (“PCA”) in The Hague in 2006, a mere 19 cases were being heard. Ten years later, the PCA currently administers over 115 cases.

Sarah’s wealth of experience in international arbitration in continental Europe will bring a welcome change to Hong Kong, and will no doubt further enhance Hong Kong’s position as an international arbitration centre.

### 1. What brought you to arbitration?

My introduction to international arbitration was in commercial arbitration. I was first employed with Shearman & Sterling’s International Arbitration Group on a one-year contract in 2001. At the end of my contract, I joined the ICC International Court of Arbitration as Assistant Counsel working on commercial cases from common law jurisdictions for three years. In 2006, I joined the PCA as Legal Counsel and was promoted to Senior Legal Counsel in 2012. After spending almost 10 years at the PCA, I was approached about the position at HKIAC. There were a number of things that appealed to me strongly about the role, such as the high standing of the institution in the international arbitration community, the quality of its leadership, the active arbitration community in Hong Kong and the support and engagement they provide. I was also drawn by the vibrancy of the city and the great food on offer. This is an area of the world in which I have never lived in before and it is exciting to be able to explore it.

### 2. How has your role at the PCA evolved over the last 10 years?

The PCA was originally established for inter-state disputes, but has over its lifetime been called upon by parties and tribunals to administer cases involving

States, State-entities, intergovernmental organisations, private parties and a combination of those kinds of entities. In recent years, it has administered a burgeoning number of investor-State arbitrations. The PCA has also dealt with 11 of the 12 arbitrations commenced under the United Nations Convention on the Law of the Sea (“UNCLOS”). The PCA primarily administers arbitrations under its own or the UNCITRAL Arbitration Rules. At the PCA, I was legal counsel providing support as registrar or tribunal secretary in arbitrations and other proceedings. I also advised the PCA Secretary-General on appointing authority matters such as the appointments of arbitrators, challenges to arbitrators and fees issues. As Senior Legal Counsel, I also had a promotional function and educational role in terms of speaking to visiting delegations of students, judges, and lawyers on the work of the PCA, as well as guest lecturing in different masters programs.

### 3. What are some of the highlights of your career at the PCA, such as the more high profile cases you have been involved in?

Before I left, I was registrar to the *Arctic Sunrise Arbitration* between the Netherlands and Russia. This arbitration arose out of events that arose in September 2013. A Greenpeace vessel (under a Dutch flag) sailed to the Arctic to protest against oil exploration in the region. Some protestors attempted to attach themselves to the fixed platform, the *Prirazlomnaya*, meeting resistance from workers on the platform, as well as armed security personnel, who scuffled with the protestors at the base of the platform. Some time after the confrontation, Russian security personnel arrived on board the Greenpeace vessel by helicopter and arrested the crew and the vessel. The *Arctic Sunrise* vessel was impounded and the crew imprisoned in Russia for several months. The protestors were charged with piracy and later hooliganism. The Netherlands filed a claim under the Law of the Sea Convention, but Russia did not accept jurisdiction and thus did not participate fully in the arbitration.

Last year, the Tribunal found that Russia had breached the Law of the Sea Convention. This case, which is public, is now in its compensation phase.

The *Arctic Sunrise Arbitration* is an interesting case because it involves a State that has decided to not fully participate. This has significant procedural implications such as the Tribunal's duty to ensure due process, questions relating to the burden of proof, and to the Tribunal's duty to establish its jurisdiction. In this case, following receipt of the Netherlands' submissions, the Tribunal would assess whether it wished to pose further questions to the Netherlands and seek further evidence. If so, the Tribunal would issue questions to which the Netherlands would respond. The Russian Federation would be given a period of time in which to indicate whether it wished to respond and if so, further time to respond. This procedural set-up would not have been in place if both parties had participated in the proceedings.

#### 4. In the course of your work at the PCA, I understand that you had some interaction with the HKIAC, perhaps you can elaborate on that?

In 2010, the PCA and the HKIAC concluded a cooperation agreement on the 25<sup>th</sup> anniversary of the HKIAC. Under the agreement, the organisations agree to collaborate and in the event a hearing or meeting is to take place at either venue, the respective organisations will provide secretarial support for each other. I travelled to Hong Kong to hand over the signed cooperation agreement to then Chairman of HKIAC, Dr. Michael Moser. There was a feeling of *déjà vu* when I came to Hong Kong again in June this year and shook Michael's hand.

#### 5. What motivated you to move to Hong Kong?

For me, on a personal level, I was ready to take the next step in my career. I had enjoyed working at the PCA for many years. The PCA attracts amazing cases and I cannot overstate how much I enjoyed my time there. But one must think about what is next and how to keep growing and evolving. When I was asked about the Secretary General role at HKIAC, I knew immediately that this was a serious contender for my next step. It is a new challenge in a new part of the world and yet it allows me to draw on my past experience. Over the next few years, I will have the pleasure of exploring this part of the world and contributing to international arbitration in Asia. I am excited to think that in five or 10 years' time, I will have learned so much about this part of the world.

The fact that compared to Europe, Hong Kong is halfway home to New Zealand, also makes me happy.

#### 6. What challenges do you anticipate facing in this new role?

HKIAC has gone from strength to strength over the last six years under Chiann. This is reflected in the innovations made and the awards granted. My challenge is to build on that work and take HKIAC forward in new ways. It is important that HKIAC

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*“... When I was asked about the Secretary General role at HKIAC, I knew immediately that this was a serious contender for my next step ...”*

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continues to lead in international dispute settlement.

#### 7. What ideas do you have in mind to take the HKIAC forward?

I am looking to expand HKIAC's tribunal secretarial support service and the accreditation program associated with it. I have seen first-hand, from my experience as a tribunal secretary at the PCA, the benefits of this extra level of administrative support in terms of efficiency and cost reduction. I also think it is an exciting way to have younger practitioners develop their skills under the guidance and instruction of tribunals. HKIAC has traditionally adopted a “light touch” approach to the administration of cases. Enhanced tribunal secretary support is in line with this. Also, HKIAC has a large number of domain name disputes and this is an area in which qualified younger decision-makers can be brought on to resolve a relatively narrow legal dispute. I want to explore the provision of further mediation services by HKIAC, including whether HKIAC staff can provide administrative support in addition to the appointment service. I also want to explore whether the Mediation Rules require an update, as well as whether the pool of mediators and mediation training needs to be developed. This would enhance the position of the HKIAC as one-stop shop.

## 8. Will your to-do-list involve changes made to the HKIAC Administered Arbitration Rules?

The current Rules are very good. While some small improvements could be made, it is yet to be seen whether these will justify another iteration. There is a danger of changing rules too often, as it can lead to confusion over which set applies. When parties incorporate an HKIAC arbitration clause into their contract, they do so based on their knowledge of the rules in force as of that date. While rules do change, there is something to be said for predictability.

## 9. What is your vision for HKIAC?

Though the HKIAC is already a one-stop shop, I would like to see it fully formed and ready to assist in different types of disputes including those it has not traditionally seen such as investor-State arbitration. The One Belt One Road initiative might lead to more such cases for which Hong Kong and HKIAC are perfectly positioned. In the short term, my vision is that HKIAC's services shall be provided at the highest level of excellence, so that every user will enjoy a consistently impressive and positive experience.

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