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Asia Pacific Regional Arbitration Group

STRONGER TIES
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THE REVISED CIETAC ARBITRATION RULES UNVEILED —NEW CIETAC ARBITRATION RULES EFFECTIVE ON 1 JANUARY 2015

/The Secretariat of CIETAC

The current Arbitration Rules of China International Economic and Trade Arbitration Commission (CIETAC), effective on 1 May 2012, has been in use for more than two years. In an effort to adapt to the newest development in international arbitration practice and to better accommodate the needs of the parties, CIETAC has revised its 2012 Arbitration Rules. The new Arbitration Rules, passed by the Chairmen's meeting in September 26, 2014 and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on November 4, 2014, will come into effect as of January 1, 2015

The revision of the Arbitration Rules covered a range of issues.

SET UP AN ARBITRATION COURT TO ADMINISTRATE ARBITRATION CASES

As part of its internal reforms, CIETAC has set up an arbitration court to replace the Secretariat to perform case administration functions under the Arbitration Rules. The Secretariat will instead focus on the promotion of arbitration and other public services. It should be noted that the set-up of the Arbitration Court only represents a change in division of responsibilities of CIETAC's internal departments and the name of CIETAC remains unchanged.

INTRODUCE PROVISIONS ON MULTIPLE CONTRACTS AND ADDITIONAL PARTIES

In response to the diversification business modes and in order to quickly and fairly solve disputes arising from multiple parties and contracts due to serial transactions, multi-party transactions and/or project series transactions, CIETAC, on the basis of summarizing its own experience, has added two provisions on "Joinder of Additional Parties" and "Multiple Contracts"and revised the provisions on "Consolidation of Arbitrations", which will increase arbitration efficiency and reduce arbitration cost of the parties at issue.

INCREASE THE DISPUTE AMOUNT OF SUMMARY PROCEDURE

In order to reduce procedural complexity and improve efficiency, and in view of the rapid growth of China's economy and the growing value of cases accepted by CIETAC, the new Arbitration Rules increases the amount in dispute to which the Summary Procedure shall apply from RMB 2 million to RMB 5 million, that is, unless otherwise agreed by the parties, the Summary Procedure shall apply to cases where the amount in dispute is

below RMB 5 million.

ADD A SPECIAL CHAPTER FOR HONG KONG ARBITRATION

This revision adds a chapter of "Special Provisions for Hong Kong Arbitration" to highlight the international feature of CIETAC. CIETAC plays an active role in promoting the development of international commercial arbitration and in September 2012, CIETAC set up the CIETAC Hong Kong Arbitration Centre at the invitation of Hong Kong SAR. As the Centre was not yet established when the Arbitration Rules took effect in 2012, the 2012 Arbitration Rules did not include the Hong Kong Arbitration Centre and was not revised accordingly either. By adding the chapter on "Special Provisions for Hong Kong Arbitration", the new CIETAC Arbitration Rules fully shows the openness and internationalisation of CIETAC Arbitration Rules.

The "Special Provisions for Hong Kong Arbitration" in the new Arbitration Rules includes a number of new international arbitration practices, with express provisions that "For an arbitration administered by the CIETAC Hong Kong Arbitration Centre, the place of arbitration shall be Hong Kong, the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, and the arbitral award shall be a Hong Kong award", "The parties may nominate arbitrators from outside the CIETAC's Panel of Arbitrators", and "Administrative fee and arbitrator's fee shall be charged separately". The revision reflects an even more open attitude of CIETAC and its commitment to embracing international arbitration practices in Hong Kong and providing parties at issue with more professional, efficient and international arbitration services.

INTRODUCE THE EMERGENCY ARBITRATOR PROCEDURES

The emergency arbitrator procedure is a new mechanism of international arbitration, representing the direction of development of international arbitration rules. It reflects the importance of emergency relief before the formation of the arbitral tribunal and helps to guarantee the fulfilment of lawful rights of parties.

The introduction of emergency arbitrator procedures under CIETAC Arbitration Rules meet the need of the practice of CIETAC Hong Kong Arbitration Centre, where pursuant to the Hong Kong Arbitration Ordinance, any emergency relief granted by an emergency arbitrator is enforceable in the same manner as an order of the court. Also, it adds the possibility of enforcement of the decision of the emergency arbitrator in the enforcing state or region. If the law at the enforcing place grants legal validity to the decision of the emergency arbitrator, the parties may apply for enforcement in accordance with the decision of the emergency arbitrator.

Further, the new procedure can serve as a necessary supplement to interim measures ordered by the court. Emergency relief granted by the emergency arbitrator may be interim measures that cannot be ordered by the court and therefore can serve as a necessary supplement to interim measures and help to protect the lawful rights and interests of the parties in a timely manner and reduce losses, with great significance in practice.

OTHER REVISIONS

Other revisions include the way of service of documents, increases of the power of the presiding arbitrator, engagement of stenographer, etc.

Through the revision of its Arbitration Rules, CIETAC endeavours to further refine its procedural design and improve arbitration efficiency. CIETAC will continue to provide high-quality international arbitration services through constant refinement and innovation.

THE ARBITRATOR AS WITNESS

/Daniel Arthur Laprès
and
Yang Qin

1. INTRODUCTION

This article concerns the conditions in which courts may receive testimony and evidence from arbitrators with respect to their roles in international commercial arbitration proceedings.

A survey of the legislation and regulations of several major countries, of the rules of the leading arbitration institutions, and of model arbitration laws proposed by international arbitration organizations reveals that the question is left largely untreated.

Even the major countries' case-law on the subject is quite discreet.

In particular, Chinese legislation, case-law and arbitration institution rules of arbitration contain no provisions specifically treating the question of admissibility in judicial proceedings of arbitrator testimony and evidence.

The body of national legislative provisions and of judicial precedents around the world reveal that the approaches to the problem vary among legal systems.

As a result, before national courts the admissibility of evidence and testimony from arbitrators involved in international proceedings may give rise to conflicts of jurisdiction and of the applicable laws. Thus, while some national laws treat the question as procedural, such that the governing law would be that of the forum, other national legal systems treat the question as substantive. [1]

From a policy viewpoint, arbitrators' independence and the certainty of their awards plead in favour of a general limitation on arbitrators' testimony in judicial proceedings. Thus, it may be argued that arbitrators should be protected from involvement in legal actions lest they be exposed to intimidation by disgruntled parties, for instance, by the threat to impose upon them the necessity to incur costs to defend themselves in court. Also, the opportunity to implicate arbitrators in legal actions arising in connection with their proceedings could engender dilatory measures to delay the implementation of their awards. On the other hand, the prevention of criminal conduct, corruption, civil fraud, partiality, willful misconduct and gross negligence may be invoked to justify exceptions intended to guarantee the integrity of arbitral process, which conditions the parties' willingness to have recourse to arbitration in the first place.

In terms of legal analysis and concepts, the case-law and scholarly discussion have focused on the immunities afforded to arbitrators in connection

1 Tom Ginsburg and Richard M. Mosk Evidentiary Privileges in International Arbitration, International and Comparative Law Quarterly, Vol. 50, April 2001, p. 345, at p. 367-9.

with their participation in arbitral proceedings and the privileges that can be invoked before courts to restrain their testimony.

2. RECALL OF THE APPLICABLE LEGAL CONCEPTS

To the extent that arbitrators are immune from legal actions brought against them for their conduct in connection with the proceedings they conduct, the number of situations in which they might give testimony or provide evidence before the courts is reduced.

In national legal systems, the immunities of arbitrators are often theorized by analogizing them with those of judges.

While they have in common their roles as deciders of disputes between parties, judges are appointed by states and their conduct may entail state responsibility. For this reason, the parties to a judicial miscarriage may not direct claims against the judges themselves in order to obtain reparation, but instead pursue the liability of the state on behalf of which they acted.

On the other hand, arbitrators assume their functions as a result of mutual consent between all the parties and themselves, and their misconduct would not normally entail any state liability. Consequently, if the parties to an arbitration proceeding are led to seek reparation for the misconduct of arbitrators, the latter are their only potential targets.

Furthermore, the standards by which courts measure the impartiality of judges are more stringent than those applied to arbitrators. The latter derive their effectiveness from being "men of affairs, not apart from but of the marketplace", and therefore they should not be "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial". [2]

Accordingly, the scope of protection from liability afforded to arbitrators might reasonably be narrower than that afforded to judges.

In the end, the breadth of the immunities recognized for arbitrators varies among countries.

For instance in the People's Republic of China (PRC), the Arbitration Law provides that arbitrators' may incur liability when "they meet privately with a party or agent or accept an invitation to entertainment of gifts from a party or agent"[3] or where they have committed "embezzlement, accepted bribes or malpractice for personal benefits or perverted the law in the arbitration of the case".[4] Considering that expressio unius est exclusio alterius, one might infer that arbitrators are immune from legal actions brought on any other basis.

Furthermore, the existence of immunity from civil actions for arbitrators still leaves open the question whether they might voluntarily provide testimony and evidence in judicial proceedings in which they choose to defend themselves.

Moreover, arbitrators' testimony and evidence might well be sought in judicial proceedings in which they are not parties, most obviously in those intended to void, recognize or enforce their

2 Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), at p. 340 (Concurring opinion of Justice White).

3 Articles 35(4) and 38 of the Arbitration Law, adopted at the ninth meeting of the Standing Committee of the eighth National People's Congress (NPC) on August 31, 1994 and promulgated by Order No.31 of the President of the PRC on August 31, 1994.

4 Articles 58(6) and 38 of the Arbitration Law, adopted at the ninth meeting of the Standing Committee of the eighth NPC on August 31, 1994 and promulgated by Order No.31 of the President of the PRC on August 31, 1994.

awards. In such proceedings, their immunities do not necessarily shield them from court orders to depose or to submit evidence.

In cases where arbitrators were to voluntarily submit testimony and evidence before a court, might other parties contest its admissibility and, if so, on what basis?

The concept called evidentiary and testimonial privilege in the common law countries and present in most legal systems with or without such a label provides the requisite more general framework. Common examples of such privileges outside the realm of international commercial arbitration arise in connection attorney-client relationships and spousal relationships.

Privileges allow the beneficiary to refuse to testify and to withhold evidence. In the common law, they are classified as "absolute" when they can be invoked in any circumstances or as "qualified" when they can be ignored in certain circumstances. Actually, the use of the epithet "absolute" in the literature is a misnomer in so far as even a so-called absolute privilege cannot be invoked to occult a criminal act.

Under the PRC's Arbitration Law, arbitration proceedings are held "in camera".[5] This requirement is reiterated in the Rules of Arbitration of the China International Economic and Trade Arbitration Commission (CIETAC).[6] But, such a requirement does not expressly or necessarily impose upon the parties to an arbitration proceeding or on their arbitral panel a duty of confidentiality or a right to refuse to disclose information obtained in connection with the performance of their arbitral duties.

5 Article 40 of the Arbitration Law, adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress (NPC) on August 31, 1994 and promulgated by Order No.31 of the President of the PRC on August 31, 1994.

6 Article 36, http://www.cietac.org/index.cms.

3. ARBITRATOR TESTIMONY AND EVIDENCE IN CRIMINAL PROCEEDINGS

A distinction may be drawn between criminal proceedings involving, on the one hand, acts of the parties committed before the commencement of the arbitral proceedings, such as a corrupt payment to induce the conclusion of the contract subsequently giving rise to arbitration, and those, on the other hand, that are committed once the proceedings have begun and that are intended to influence their outcome, such as a corrupt payment to an arbitrator.

In practice, the arbitrators would not generally be called upon in relation with the former situations, because they would not have been involved in the incriminated conduct and would therefore have nothing to contribute to the judicial proceeding.

But their contributions as to the second type of situations could be decisive for the result in the courts.

A further distinction concerns acts committed by the arbitrators themselves from those acts committed by others, which give rise to criminal proceedings.

Where the criminal proceedings involve potentially criminal conduct by an arbitrator, the latter would be called upon to testify not simply as a witness to the events, but rather as a defendant.

In the French affair involving the businessman Bernard Tapie and the Crédit Lyonnais resolution body, the CDR, the Cour de Justice de la République (the court specially invested with jurisdiction over criminal conduct by government officials in the context of the implementation of their duties), one of three arbitrators and several persons associated with the parties were indicted for criminal fraud on accusations that the award had been rigged in favour of Mr. Tapie. For our

purposes what bears noting is that the Court as well as the police took testimony from the two other arbitrators. Their testimony bore on the conduct of the proceedings as well as the collegiality of the arbitrator's deliberations.[7]

In another French case, involving a domestic arbitration proceeding, the Cour de Cassation seemed to allow that an arbitrator might be called upon to testify in a criminal proceeding concerning allegations of fraudulent rigging of an award, while ruling that in the case at hand there was no such necessity.[8]

In French law, where an arbitrator were to be called upon to testify in a proceeding in which he/she was not a defendant, a conflict would arise between the general obligation on witnesses to testify when called upon to do so,[9] and the obligation of those made aware of confidential information by virtue of their functions not to reveal such information.[10]

Where an arbitrator were to be accused of misconduct in criminal proceedings, for example for corruption, the courts in most developed legal systems would not be entitled to compel his/her testimony, since such an imposition would violate the defendant's privilege, right to remain silent, guaranteed for example under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the due process clause in the Fifth Amendment of the American Bill of Rights.[11]

On the other hand, those provisions would normally allow arbitrator defendants to waive their right to remain silent and to testify with respect to matters not otherwise protected from disclosure. Even if the arbitrator were held to confidentiality by the agreement to arbitrate or by the applicable rules of arbitration, it seems unlikely that a party to an arbitration could intervene in such a criminal proceeding to object to the arbitrator defendant's disclosures, for example to defend the integrity of the award rendered in its favour.

If the criminal proceeding targeted not the arbitrator(s) but a party to the proceeding for criminal conduct in that connection, for example an attempt to corrupt the arbitral panel, there might arise circumstances in which the defendant party would want to call the arbitrator(s) to adduce evidence to disprove the allegations, whereas the other party(ies) might prefer that no such evidence be introduced before the court. The intentions of the arbitrators in such circumstances might be very complex, varying from a desire to testify to defend their own reputations to refusal to testify lest their disclosures be used against them in subsequent proceedings.

There could also arise circumstances in which the arbitrator's testimony would concern points not covered by any immunity or privilege. For example, in many legal systems, arbitrators may be called to testify in court with respect to the unfolding of the arbitral proceeding, to the exclusion of any evidence regarding their deliberations or other aspects of their reflection culminating in their award. Where a party challenged the validity of an award involving a contract alleged to have been vitiated by fraud, and the challenge were to be based on the arbitrators' omission to render a decision on the party's allegation of fraud, the court might choose to hear the arbitrators if it were unclear on the evidence before it whether the corruption was actually pleaded.

In the PRC, under article 399a of the Criminal Law:

7 Daniel Arthur Laprès, Webliography on the Crédit Lyonnais and Bernard Tapie Arbitration, http://www.lapres.net/tapie-cdr.html.

8 Cour de Cassation, Criminal Chamber, May 16, 2012, n° 11-84480.

9 Article 109 of the Code of Criminal Procedure.

10 Article 226-13 of the French Code of Criminal Procedure.

11 In Canada, the protection is consecrated in section 11(c) of the Canadian Charter of Rights and Freedoms.

where a person, who is charged by law with the duty of arbitration, intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration, if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; and if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

In the context of such pursuits, arbitrators might be called upon to provide testimony or other evidence.[12]

While article 50 of the Criminal Procedure Law strictly forbids that judges, procurators and investigators "extort confessions by torture . . . and collect evidence by threat, enticement, deceit or other unlawful means", to compel an accused to admit his/her guilt by other means seems not to be excluded. Nor does such a provision amount to the recognition of a right for an accused, including an arbitrator accused of criminal conduct, to remain silent whether it be to avoid self-incrimination or otherwise.

Furthermore, were the arbitrator's testimony or evidence not to be ordered in a proceeding in which the arbitrator were the accused defendant, there does not exist in Chinese law a privilege which the arbitrator might invoke to refuse to reveal information gleaned in the course of the arbitral proceeding, such as the privileges that do exist for lawyer-client[13] and doctor-patient communications.[14]

4. ARBITRATOR TESTIMONY AND EVIDENCE IN CIVIL PROCEEDINGS

A review of national legal systems reveals a wide variety of solutions to the problems arising in connection with the production of arbitrators' testimony and evidence before courts in civil proceedings typically initiated to challenge awards or to seek their recognition or enforcement. For convenience, the review of national solutions is organized according to a dichotomy between civil law systems (4.1.) and common law systems (4.2.), and Chinese law is considered as sui generis (4.3.). But, as will be showed below, there is no clear-cut alignment of all the countries in one system with a particular solution.

4.1 CIVIL LAW COUNTRIES

In French law, despite the recognition of a general rule of arbitrators' immunity, their liability can be pursued before the courts in the event of grave professional fault, corruption or fraud.[15]

In principle, arbitrators may not be called as witnesses before French courts seized of claims involving the voiding, recognition or enforcement of the awards they rendered, but exceptions have arisen.

In 1992, in the context of an action to void an

12 In a judgment rendered by the Intermediate People's Court of Taizhou (Zhejiang) on May 6, 2013, based on facts that had arisen before the entry into effect of article 399a, an arbitrator in a labour arbitration proceeding, who admitted his guilt, was convicted under the first paragraph of article 399 of the Criminal Law.

13 Article 46 of the Criminal Procedure Law, adopted at the Second Session of the fifth NPC on July 1, 1979, promulgated by Order No.6 of the Chairman of the Standing Committee of the NPC on July 7, 1979 and effective as of January 1, 1980; amended in accordance with the Decision on Revising the Criminal Procedure Law of the PRC adopted at the Forth Session of the eighth NPC on March 17, 1996 and again modified by the adopted at the fifth session of the Eleventh NPC on March 14, 2012, come into force on January 1, 2013.

14 Article 62 of the Tort Law, which was adopted at the 12th session of the Standing Committee of the eleventh NPC on December 26, 2009, and which was promulgated and came into force on July 1, 2010.

15 Florange v. Brissart Corgié, TGI Reims, 27 September 1978, Bompart v. Cuts Carcassonne TGI Paris, 13 June 1990.

arbitral award, the Court of Appeal of Paris ruled that:

According to the rules of public policy to which are subject actions seeking the voiding of an arbitral award, the proceedings can only target the award, and not the arbitrator, who is not a party to the debate, and only his/her liability might be pursued, where relevant, but in a separate proceeding, subject to other rules.[16]

That same year, the same Court ruled that:

Testimony of the arbitrator in appeal proceedings with respect to an award is not an admissible measure of instruction . . . an arbitrator, even after he/she has been divested as a result of the effect of award, is not a third party in relation with the dispute which he/she has judged; having been invested with the role of deciding the dispute, he/she immediately upon accepting the mission is cloaked with the status of a judge by virtue of the contract of seizure; therefore, he/she enjoys the same rights and must respect the same duties as a judge, who cannot legally be heard in a proceeding in which he/she is not a party.[17]

Two years later, the Court ruled that an arbitrator may not intervene before the court to challenge a judgment that voided his award based on his misconduct.[18]

Still, the High Court of Paris has heard testimony from arbitrators in a proceeding seeking their recusation before the commencement of the arbitral proceedings.[19]

And situations may arise where the testimony of arbitrators would be the best, maybe even the only way, to verify their compliance with legal requirements.

For instance, a French court has recognized a presumption that arbitrators have had the opportunity to debate with their colleagues about the award.[20] But how could a party challenging an award for violation of the requirement rebut the presumption before a court without relying on the testimony of the arbitrators? Lack of such proof led the Cour de Cassation to reject one such challenge.[21]

Where the liability of an arbitrator is pursued based on allegations of attempted fraud to fix the award, the testimony of the other arbitrators on the panel may be admitted.[22] This exception could be theorized as justified because the issue in debate is distinct from the one before the arbitral panel.

Another country assimilated with the civil law tradition, Switzerland, adopts an approach different from that of France. A federal tribunal must communicate any recourse to the preceding authority as well as to the other parties or participants in the procedure where relevant or to the authorities which have standing to exercise a recourse; in so doing, it shall stipulate a deadline with which to make their determinations.[23]

The word “authority” includes the arbitral tribunal that rendered the award challenged in court.[24]

16 Consorts Rouny v. SA Holding, Cour d’Appel de Paris, 29 may 1992.

17 Consorts Rouny v. SA Holding, Cour d’Appel de Paris, 29 may 1992.

18 V. v. Société Raould Duval et autres, Court of Appeal of Paris, December 6, 1994, Revue de l’arbitrage 1996, p. 416; JCP 1995, 1, 207 observations I. Cadet.

19 SA CSF v SART Lamotte Distribution et X., High Court of Paris, March 2, 2012, RG N° 12/51029.

20 Société Papillon Group Corp. V Arab Republic of Syria et autres, Cour de Cassation, First Civil Chamber, June 29 2011, n° 09-17346; Revue de l’Arbitrage 2011, 958, note V. Chantebout

21 Sté La Marocaine de Loisirs v France Quick SAS, Cour de Cassation, First Civil Chamber, July 8, 2009, n° 08-17661, Cahiers de l’Arbitrage 2010, 863, obs. L. C. Delanoy; Revue de l’arbitrage 2009, p. 658; Dalloz 2009, 2959, observations T. Clay; RJ Commercial 2010/1, observations B. Moreau.

22 Tribunal de Grande Instance de Paris, June 29, 2011.

23 Article 102 of the Federal Law with respect to the Federal Tribunal.

24 G. Kaufman-Kohler, A. Rigozzi, Arbitrage International,

Since the procedure is optional, arbitrators generally decline to make submissions to the courts except where an award contains imprecisions or omits to discuss relevant points and the arbitrators' observations might show, despite the lacunae, that the recourse is groundless. Where the arbitrators abstain to detail their award in such a situation, they properly impute to the defendant the risk arising in connection with such lacunae.[25]

In a recent proceeding to have voided an award rendered by the ICC Court of International Arbitration based on the panel's omission to answer one of the losing party's arguments, the Federal Court received evidence from the arbitrators and in the end voided the award.[26]

The Spanish courts have on two occasions heard testimony from arbitrators with respect to their awards. In an application to have an award voided, arbitrator testimony was ruled admissible to determine whether they had acted independently.[27] In a second case, the award was voided because the arbitrators had not deliberated in a collegial manner, a decision that could probably not have been justified in the absence of testimony by the arbitrators.[28]

In Norway as well, all three arbitrators on a panel were allowed to testify before a court seized of an application to have its award voided.[29] The

arbitration agreement provided that the arbitral panel should interpret a reinsurance contract "from a practical viewpoint and from the viewpoint of equity rather than in a strictly legal manner". The applicant in the voiding proceedings argued that the arbitrators had failed to take account of that provision and had thus violated its fundamental right to a fair hearing. To prove that this provision had been asserted before the arbitral tribunal, the applicant sought the court's permission to call the three arbitrators as witnesses and to file summaries prepared for the hearing. The Supreme Court of Norway, in affirming the judgments of courts of first instance and of appeal, ruled that while arbitrators may not in principle be called as witnesses before the courts, nevertheless there are exceptions. Thus, while arbitrators may not be called upon to discuss their personal views of the case nor to clarify or supplement their awards, their testimony may serve to prove what actually happened in the arbitral proceedings.[30]

On the other hand, in Sweden, where the civil

Droit et pratique à la lumière de la LDIP, Weblaw, 2nd ed. 2010, n° 782b and 7782c.

25 G. Kaufman-Kohler, A. Rigozzi, Arbitrage International, Droit et pratique à la lumière de la LDIP, Weblaw, 2ème ed. 2010, n° 782b and 7782c.

26 Y. v. X, Federal Tribunal, First Chamber of civil Law, December 10, 2013, n° 4F-8/2013.

27 Skoda Power, AS v. Aberner Energia El Sauz, SA de CV, Audiencia Provincial de Madrid, May 5, 2008, n° 221/2008, La Ley 2008, 59444; the application was rejected.

28 Puma AG Rudol Dassler Sport v. Estudio 2000, SA, Audiencia Provincial de Madrid, June10, 2011, n° 200/2011, La Ley 109407; Arbitraje, 2012, p. 257, observations G. Jene.

29 Trygg-Hansa Försäkringsaktiebolag and If Skaderförsäkring AB, Supreme Court of Norway, March 14, 2008.

30 The case is commented by Eduard Bertrand, L'arbitre témoin/The witnessing arbitrator, December 10,2008, http://www.blogavocat.fr/space/edouard.bertrand/content/40-08-l%E2%80%99arbitre-temoin-the-witnessing-arbitrator_2fb537c8-ee67-488e-8d88-b1019fea2dd2.

procedure law provided for the testimony of arbitrators before courts, a court of appeal stated that it would abstain from punishing an arbitrator who refused to do so.[31] The case involved challenges to the validity of an award based on the lack of collegiality of the arbitrators' deliberations as well their failure to apply the law chosen by the parties. In the end, all three arbitrators did testify.

In the Canadian Province of Quebec, where the civil law is derived originally from French law, a district court in Montreal voided an award while relying on the testimony of the sole arbitrator who had been sued by one of the parties to the arbitral proceeding.[32] In the case before the court, the arbitrator did not challenge the admissibility of the action based on his immunities and he testified and submitted to cross-examination. The case involved a dispute about a construction contract and the challenge was based on a complaint that the arbitrator had violated the Civil Procedure Law by rendering an award on matters not submitted to arbitration.

4.2 COMMON LAW COUNTRIES

Among countries belonging to the common law tradition, the positions are varied.

Whereas in the United States arbitrators benefit from immunities similar to those recognized in France, in the United Kingdom the law provides more opportunities to involve arbitrators in judicial proceedings relating to their awards.

Even prior to the adoption of the Arbitration Act in 1996, courts in England recognized immunities for arbitrators in connection the course of their functions. Arbitrators' immunities were grounded in the arbitration contracts with the parties but were inoperative in cases of their commission of fraud.[33]

Section 29 of the Arbitration Act shielded arbitrators for acts or omissions related to the discharge of the functions of arbitrator unless the act or omission were to have been in "bad faith" or where an arbitrator's withdrawal were to be judged "unreasonable" by a court.

American courts manifest a visceral reluctance to admit suits against arbitrators and even when their acts have been tainted with fraud and conspiracy, some courts have held them liable only within the limit of their arbitration fees.[34] Some State legislatures in the United States have even adopted laws granting arbitrators absolute civil immunity.[35]

As early as 1871, in the case of Duke of Buccleuch v Metropolitan Board of Works, the House of Lords ruled that

1. That the umpire was a competent witness, like any other person, to prove matters material to the issues [i.e. of determining the arbitrator's jurisdiction].

2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.

3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.[36]

31 CME Czech Republic v. The Czech Republic, Court of Appeal of Svea, March 15, 2003, World Trade and Arbitration Materials, 2003-5, p. 171-277.

32 Maçonnerie Demers Inc. c. Lanthier, 21 mai 2002, CanLII 24364 (QC CS).

33 Arenson v. Arenson, House of Lords AC 405, 1977.

34 Graphic Arts Int'l Union, Local 508 v. Standard Register Co., 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979), case involving labour arbitation.

35 California Civil Code, section 1297.119 (1994), Florida Statutes, Section 684.35 (1998).

36 Buccleuch (1871–72) L.R. 5 H.L. 418 at 432–433.

This precedent was applied in several cases decided by lower courts.

In re Valley Railway Co., Vice-Chancellor Giffard wrote that:

Of course no award, where there is anything like fraud, can stand for a moment, nor could one possibly shut out evidence on fraud; but we have nothing whatever to do with that subject in the present case. I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is mistake in point of subject-matter — that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded — these are subjects on which he ought to be examined . . . a written statement by the arbitrator of his reasons admissible in considering whether the arbitrator had proceeded upon an erroneous view of his duties or not.[37]

In Bourgeois v Weddell, [38] Lord Hewart confirmed at a more general level that:

[C]ertainly there are many cases in the books which show that in some circumstances and for some purposes an arbitrator may be called to give evidence about matters relating to the arbitration, and one knows from one's own experience that sometimes an arbitrator is called to give evidence upon matters relating to the issue in controversy between the parties. I am not aware of any rule of law which prevents this arbitrator from being called to give evidence.

Some ten years later, in the case of Leisarch v Schalit, the High court held that the testimony of arbitrators could be admitted in exceptional circumstances to determine what the Court "is unable to ascertain from a perusal of the affidavits on one side and the other - namely, what are the essential facts of the case".[39]

In Ward v Shell Mex and BP Ltd.,[40] Streatfeild J. confirmed the reasoning in Buccleuch:

although an arbitrator may be called on to give evidence as to what took place in the hearing before him, what issues were raised, and so on, it is not competent, nor is it relevant, for him to explain, and still less vary, the award which he gave and which must stand upon its own footing.

In 2002, the approach was reaffirmed by a ruling of the House of Lords in a Scottish case, Cooperative Wholesale Society Ltd v Ravenseft Properties Ltd (No.2), that "in proceedings where the award itself was not in issue, it was not incompetent to call the arbiter as witness". [41] Lord Hope of Craighead wrote that an arbitrator may be examined as a witness for certain purposes, particularly as to his actings in the course of the submission where it is suggested that some irregularity has occurred. It has also been held to be competent to examine him as to what matters he took into account in arriving at his award when it was alleged that he had proceeded ultra fines compromissi in a way which was not apparent from the face of the award. An arbiter should be allowed the opportunity to protect himself against an allegation of misconduct, such as that he failed to determine a matter which was properly before him, by giving evidence as to what he did decide.

In summary as regards the English tradition, testimony and affidavits of arbitrators are inadmissible as evidence to interpret or delay the implementation of their awards.[42]

37 Re Dare Valley Railway Co., L.R. 6 Equity 429.
38 Bourgeois v Weddelin, 1 K.B. 239, 1924.
39 Leisarch v Schalit [1934] 2 K.B. 353.
40 Ward [1952] 1 K.B. 280 at 284.
41 Cooperative Wholesale Society Ltd. V. Ravenseft Properties Ltd. (N° 2), S.C.I.R. 644, 2002.
42 Gordon Blanke, Whether Arbitrators Can be Called

In the United States, several State legislatures have adopted provisions governing the conditions in which arbitrators may testify before courts.

The California Evidence Code in its Section 703.5 provides that

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could
(a) give rise to civil or criminal contempt,
(b) constitute a crime,
(c) be the subject of investigation by the State Bar or Commission on Judicial Performance.

New York[43] and New Jersey[44] adopted similar provisions.

The National Conference of Commissioners on Uniform State Laws drew its inspiration from these provisions to propose a model rule formulated as follows in the Revised Uniform Arbitration Act:

In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and may not be required to produce records as to a statement, conduct, a decision, or a ruling occurring during the arbitration proceeding to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply to

(1) the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or
(2) a hearing on an application to vacate an award . . . if the applicant establishes prima facie that a ground for vacating the award exists.

This provision has been incorporated in the laws of several States, for instance in the Code of the District of Columbia (Section 16–4414) and in the Alaskan Code of Civil Procedure (AS 09.43.410).

In the absence of legislative disposition of the question of arbitrators' testimony in subsequent judicial proceedings, the principles of the common law would be applicable.

In 1851, a New York court had ruled that arbitrators could to be forced to testify in proceedings to void their awards.[45]

But in 1855, the Supreme Court held that arbitrators are "judges chosen by the parties to settle the disputes submitted to them".[46] A series of earlier English cases cited by American courts had consecrated the immunities of judges from claims based on their conduct in connection with their judicial activities.[47]

More recently, the principle of arbitral immunity has been reaffirmed as follows:

The integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision makers who have no obligation to defend themselves in a reviewing court.[48]

Thus, the immunities of arbitrators are linked to the integrity of the arbitral process as a whole, which must be protected from "collateral

as Witnesses: the Position under English Law, (2008) 74 Arbitration 2; Admissibility of Affidavit or Testimony of Arbitrators to Impeach or Explain Awards, 80 A.L.R.3d 155, 1977.

43 N.Y. Ct. R. § 28.12.

44 N.J.R. Super. Ct. R. 4.

45 Doke v. James, 4 NY 568, 1851.

46 Burshell v. Marsh, 58 U.S. Supreme Court 344, 1855.

47 Bradley v. Fisher, 80 U.S. Supreme Court 13 Wall. 335, 1871, and Stump v. Sparkman, 435 U.S. Supreme Court 349, 1978, which judgments followed still earlier English precedents, Floyd v. Barker, Eng. Rep. 1305 Star Chamber, 1607 and The Marchalsea, Eng. Rep. 1027, 1607.

48 Fong v. American Airlines, 626 F2d 759, 762, 9th Circuit, 1980.

attacks".[49] Arbitral immunities cover all the acts undertaken by arbitrators in carrying out their functions,[50] from the process of their selection to their management of the proceedings.[51]

Through a long series of cases, the American courts have protected arbitrators from being forced to testify about the proceedings in which they have participated.

In 1957, a Federal District Court was called upon to set aside an arbitral panel's award because, inter alia, the arbitral panel had in arriving at their award violated the instructions of the court under the authority of which it had been mandated. To prove its point, the applicant tendered affidavits of two of the arbitrators on the panel and applied for an order requiring all the arbitrators to appear in court and submit to examination and cross-examination regarding the method of arriving at their award.[52]

In ruling this mode of attacking the award to be "improper", the court cited a long line of American cases.[53] The Judge analogized the deliberations of an arbitration board with those of a jury in a judicial process and concluded that they should be as zealously protected. As a matter of public policy, arbitrators, like jurors, must be able to have "private, frank and free" discussions.

The Court cited approvingly a jurisprudential source that summarized the principle as follows:

As in proceedings for enforcement of awards, the award is admissible and is the best evidence of matters purportedly determined by it; it cannot be altered by parol, nor is parol evidence admissible to prove an understanding or meaning of the arbitrators, different from that warranted by the terms of the award. Therefore, the general rule is that the testimony of an arbitrator is not admissible to impeach his own findings, and where the arbitrators recite in the award itself that they have disposed of the matters submitted to them for arbitration as was proper under the provisions of the agreement for submission, the parol testimony of one, or more, or all, of the arbitrators will not be received to impeach their award and its recitals.[54]

Again, citing a long line of cases,[55] the Court concluded that:

it would be most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a "fishing expedition" in an attempt to set aside the award. To do this would neutralize and negate the strong judicial admonitions that a party who has accepted this form of adjudication must be content with the results.

Arbitrators' testimony, even voluntary, in courts seized of applications to void their awards should

49 Austen v. Chicago Boulevard Options Exchange Inc., U.S. Court of Appeal, 2nd Circuit, 1990.

50 Olson v. National Assoc. Of Securities Dealers, 85 F.3d 381, 383, 8th Circuit, 1996.

51 Austin Mun. Securities v. Nat. Assoc. of Securities Dealers, 575 F.2d 676, 689-91, 5th Circuit, 1985.

52 Gramling v. Food Machinery & Chemical Corp., 151 F. Supp. 853, W.D.S.X., 1957.

53 Patriotic Order, Sons of America Hall Ass'n v. Hartford Fire Ins. Co., supra, 305 Pa. 107, 157 A. 259, 78 A.L.R. 899; Evans v. Edenfield, 1909, 7 Ga.App. 175, 66 S.E. 491; Eberhardt v. Federal Ins. Co., 1913, 14 Ga.App. 340, 80 S.E. 856; Alexander v. Fletcher, 1943, 206 Ark. 906, 175 S.W.2d 196; Sydnor Pump & Well Co. v. County School Board, 1943, 182 Va. 156, 28 S.E.2d 33; Johns v. Security Ins. Co., 1934, 49 Ga.App. 125, 174 S.E. 215; Wechsler v. Gidwitz, 1928, 250 Ill.App. 136; Giannopulos v. Pappas, 1932, 80 Utah 442, 15 P.2d 353; Koepke v. E. Liethen Grain Co., 1931, 205 Wis. 75, 236 N.W. 544; Putterman v. Schmidt, 1932, 209 Wis. 442, 245 N.W. 78; Stone v. Baldwin, 1907, 226 Ill. 338, 80 N.E. 890; City of Eau Claire v. Eau Claire Water Co., 1909, 137 Wis. 517, 119 N.W. 555.

54 3 Amer.Jur., Arbitration and Award, § 178.

55 Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc., supra, 4 Cir., 74 F.2d 533, 104 A.L.R. 556, certiorari denied 295 U.S. 748, 55 S.Ct. 826, 79 L.Ed. 1692; American Almond Products Co. v. Consolidated Pecan Sales Co., 2 Cir., 144 F.2d 448, 154 A.L.R. 1205, with annotation 1210-1215: Mutual Benefit Health & Accident Ass'n v. United Casualty Co., 1 Cir., 142 F.2d 390, certiorari denied 323 U.S. 729, 65 S.Ct. 65, 89 L.Ed. 585.

be deplored as unhealthy and because they would make no contribution to the search for the truth.[56]

In 1989, the U.S. Court of Appeals for the Fourth Circuit reaffirmed that only when a party makes a "clear showing" of the arbitrator's "fraud, misconduct, or bias" might a court properly grant a request to depose an arbitrator.[57] The Court supported its conclusions as follows:

We believe that to permit this kind of searching inquiry into the arbitral decision-making process would work an erosion of the integrity of that process as well as inject an impermissible degree of judicial supervision into arbitration proceedings. Indeed, it would defeat the whole purpose of arbitration as a faster and cheaper forum for dispute resolution if the courts were forced to step in and order the depositions of arbitrators whenever a party is displeased with a decision.

Such a discovery process would negate the concept of arbitration as a relatively quick means of dispute resolution, and would only protract and delay the termination of the arbitration proceeding. Thus, the arbitration, instead of serving as an efficient and expeditious means of dispute resolution, an essential ingredient of the parties' agreement to forego the judicial process, would, if discovery and an evidentiary hearing were ordered, mean inordinate delay.

In American law, in the absence of immoral conduct, arbitrators may not be called upon to testify in the context of discovery proceedings.[58]

In a 1962 case decided according to the law of the State of Colorado,[59] the court allowed lengthy cross-examination of one of the arbitrators to determine whether the arbitrators had improperly delegated their responsibilities by blindly relying on the opinion of an engineer hired by the panel to conduct much of the work in connection with the arbitration. The losing arbitrating party had argued that the arbitrators had thus improperly delegated their responsibilities. It relied on the engineer's bills that had been sent to both litigants in the arbitration.

In 1971, the Federal District Court of the Eastern District of Louisiana was seized of an application by one of the parties to have the three arbitrators of a panel summoned to give testimony. The applicant conceded that it could not inquire about their "reasoning" but argued that it could inquire into their "motives".

In its judgment, the Court referred to a jurisprudential source according to which:

It is the general rule that an arbitrator may not by affidavit or testimony impeach his own award or show fraud or misconduct on the part of the arbitrators. However, a dissenting arbitrator, the award not being his, may testify as to bias, partiality, or other misconduct of the arbitrators who render the award, the same as any other witness.[60]

But the Court did not apply that rule as in the case before it the arbitrators had rendered a unanimous award and furthermore the applicant had not presented any objective evidence justifying the depositions of the arbitrators.

56 Fukaya Trading a S.A. v. Eastern Marine Corp., 322 F. Supp. 278, 1971.

57 In Re National Risk Underwriters, Inc. 884 F.2d 1389, 1989, WL 100649, 4th Circuit, 1989; Doctor's Associates, Inc. V. Qasim, 2000 U.S. App. Lexis 22197 6-7, 2d Circuit, 2000; Gearhardt v. Cadillac Plastics Group, Inc., 140 F.R.D. 349, S.D. Ohio, 1992; United Food & Commercial Workers International Union, AFL-CIO v. SIPCO, Inc., 1990, U.S. Dist. Lexis 20210, S.D. Iowa, 1990.

58 Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 2d Circuit, 1978; Nationwide Mut. Ins. Co. v. Home Ins. Co., 90 F. Supp. 2d 893, 899, S.D.Ohio, 2000.

59 Continental Materials Corp. v. Gaddis Mining Co., 306 F.2d 952 (10th Cir. 1962).

60 5 Am.Jur.2d, Arbitration and Award, § 187.

The applicant had cited a jurisprudential source to argue that:

In some jurisdictions testimony of arbitrators is admissible to show the matters considered by them and the conclusions reached thereon, and to prove mistake as a result of which their award is made to operate in a way they did not intend.[61]

The court dismissed the source as inapplicable, without deciding whether the principle invoked was valid, because the applicant had failed to demonstrate the beginnings of such a mistake.

In 1978, the Court of Appeals for the Second Circuit (New York) was seized of an application to void an award rendered by three arbitrators,[62] and the applicant petitioned to summon all three to testify in court and sought documents from one of them in relation with his business and social connections with the other party. The trial judge had advised the parties that if the papers revealed "a legitimate disputed factual issue" concerning the adequacy of disclosure, the arbitrator in question would be called to testify in court under the judge's "direct supervision and control and briefly and quickly . . . ." Based on the lack of facts to support the allegation of partiality, the court of first instance refused to order the arbitrator to testify. On appeal, the Court affirmed while commenting that:

But in the special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards, we agree with the district court that any questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented.

The revised Hong Kong Arbitration Ordinance [63] is inspired largely by the UNCITRAL Model Law on International Commercial Arbitration[64] and, like that model, contains no provision governing the testimony of arbitrators in subsequent civil proceedings. However, arbitrators may be held liable for their acts or omissions done "dishonestly",[65] and one might infer that they could be called upon to testify on that point.

In Singapore's Arbitration Act of 1994, also largely inspired by the UNCITRAL Model Law, the legislator granted immunity to arbitrators for negligent acts in their capacity as arbitrators as well as for any mistakes in law, fact or procedure and in the making of the award, this implicitly leaving open the possibility of pursuing arbitrators for their gross negligence and intentional misconduct and of receiving their evidence on such points.[66]

4.3 PRC LAW

Considering that the Arbitration Law provides a range of grounds on which enforcement of awards may be refused, the question arises whether the full debate on any of such grounds might require that arbitrators might be called upon to testify or provide documentary evidence in such judicial proceedings.

As regards awards rendered in the PRC under the aegis of Chinese arbitration institutions in foreign related matters as referred to in Article 257 of the Civil Procedure Law,[67] articles 70 and

61 5 Am.Jur.2d, Arbitration and Award, § 187.

62 Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 2d Circuit, 1978.

63 http://www.legco.gov.hk/yr10-11/english/ord/ord017-10-e.pdf.

64 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

65 Arbitration Ordinance, Section 104.

66 Section 25, http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=03c3e576-97f0-4c1a-8063-127231bed753;page=0;query=DocId%3A%22fdb4f13d-0fdb-4083-806a-0c16554efd0b%22%20Status%3Apublished%20Depth%3A0;rec=0#pr3-he-..

67 Such matters are defined as those "arising from the foreign economic, trade, transport or maritime activities of China".

71 of the Arbitration Law[68] cover respectively the conditions in which they may be set aside or their execution refused. In each case, the provisions of Article 260 of the Civil Procedure Law[69] are incorporated by reference.

Based on the judicial precedents in other countries as detailed above, the following situations listed in Article 260 might reasonably be expected on occasion to give rise to debates that might best be clarified by having recourse to arbitrator testimony or evidence:

- "the party against whom the application for enforcement . . . was unable to present its case due to causes for which it is not responsible", [70]
- "the procedure for arbitration was not in conformity with the rules of arbitration",[71]
- "the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate",[72]
- "the enforcement of the award goes against the social and public interest of the country",[73] for instance in cases of allegations of fraud including corrupt of the arbitral process.

As regards awards rendered abroad either in ad hoc proceedings or under the aegis of foreign arbitration institutions, and considering that the PRC has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958 (the New York Convention),[74] it bears noting that Article V thereof identifies the following situations in which the enforcement of awards rendered abroad might be refused, and in which we suggest that debates might arise the clarification of which might benefit from arbitral panel testimony or evidence:

- "the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case",[75]
- "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration",[76]
- "the arbitral procedure was not in accordance with the agreement of the parties",[77]
- "the recognition or enforcement of the award would be contrary to the public policy of that country".[78]

In summary, under Chinese law, there exist numerous provisions under which arbitrators might eventually be called before local courts in proceedings to recognize or enforce their awards for the purpose of testifying or giving evidence on certain aspects of the arbitral process.

While there do not appear to be precedents

68 The Arbitration Law was adopted at the Ninth Meeting of the Standing Committee of the Eighth NPC on August 31, 1994 and promulgated by Order No.31 of the President of the PRC on August 31, 1994.

69 The Law was adopted at the Fourth Session of the Seventh NPC and promulgated by Order No. 44 of the President of the PRC on April 9, 1991.

70 Sub-paragraph 2.

71 Sub-paragraph 3.

72 Sub-paragraph 4.

73 Paragraph 2.

74 The Convention entered into effect as regards the PRC, on April 22, 1987. According to article 267 of the CPL, in deciding whether to recognize and enforce foreign arbitration awards, the Chinese courts should take account of the provisions of international agreements binding upon the PRC and respect the principle of reciprocity. In accordance with the CPL's article 236, in the event of conflicts between the PRC's domestic law and the requirements of international treaties after taking account of any reservations made by the PRC, the conventional provisions take precedence.

75 Article V 1(b).

76 Article V 1(c).

77 Article V 1(d).

78 Article V 2.

of such interventions, there does not appear to be a privilege in PRC law that arbitrators might invoke to protect the confidentiality of the arbitral process. If PRC courts were to align their practice with foreign precedents, then arbitrators' testimony or evidence might be limited to issues of fact relating to the arbitral process where the clarification of such points were to be impossible or impractical on the basis of the evidence otherwise available, to the exclusion of testimony or evidence concerning their deliberations or reasoning on the substance of the case, as well to testimony or evidence about serious allegations of fraud in the arbitration proceedings, for example based on corruption of the arbitrators by the parties.[79]

5. CONCLUSION

Outside of criminal investigations or proceedings in which arbitrators are suspects or defendants, the admission of their testimony should be severely limited to protect the integrity of the arbitral process. Even in such contexts, their right not to incriminate themselves should be respected.

As regards civil proceedings, the ideal would be for legislators to adopt rules, such as has been done in several American States.

But in fact, in most countries the legislator has not intervened. Therefore, the responsibility for determining the admissibility of arbitrator testimony and evidence will fall upon courts.

It may be concluded that neither of the two usually invoked theoretical approaches provides an adequate guide for determining the admissibility of arbitrator testimony. Arbitrators cannot be fully analogized with judges nor therefore can they be exempt from testimony according to the same principles as judges. Also, it would be impractical and unrealistic to expect the parties to an arbitration agreement to include in such agreement a provision with respect to the admissibility of arbitrator testimony in subsequent judicial proceedings.

Where arbitrators' civil liability is in debate, which situations are limited by their immunities, they should be entitled to defend themselves including by giving testimony and providing other evidence.

In proceedings concerning the validity of their awards, arbitrators might reasonably be called upon to testify and provide evidence with respect to the unfolding of the arbitral proceedings where the court is unable on the basis of the available documents to ascertain the facts it needs to render a judgment as well as where there are serious allegations of fraud vitiating the arbitral proceedings.

In the last scenario, remaining questions include whether arbitrators might charge for their costs and fees for their efforts and how to impute them among the parties.

79 In the interest of being complete, and considering that awards rendered in the PRC by domestic arbitration institutions and not involving foreign-related matters might concern Chinese subsidiaries of foreign enterprises as parties and thus might be considered to fall within a wide interpretation of the scope of our topic, we note that debates over the enforcement of such awards might benefit from arbitrator testimony or evidence include:

- the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- the arbitration procedure was not in conformity with the statutory procedure;
- the evidence on which the award is based was forged;
- the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or
- the arbitration award violates the public interest.

See article 58 of the Arbitration Law,

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THOUGHT ON DEVELOPING CONVENTION ON ENFORCEABILITY OF SETTLEMENT AGREEMENTS REACHED THROUGH CONCILIATION

/Audry Hong Li

The UN Commission on International Trade Law ("UNCITRAL") held its 47th session in New York on 7-18 July 2014 and the Author had the privilege of attending the conference at invitation of Mr. Yu Jianlong, President of the Asia Pacific Regional Arbitration Group ("APRAG"). During the conference, the U.S. Government submitted a proposal suggesting Working Group II (Arbitration and Conciliation) of UNCITRAL ("Working Group II") to develop a multilateral convention with respect of the enforceability of international commercial settlement agreements reached through conciliation ("Enforceability Convention") for the purpose of encouraging the use of conciliation in resolving international commercial disputes.

This Article proposes to share the Author's understanding on the subject including the necessity of having the Enforceability Convention and current legislations of countries including China on the enforceability of settlement agreements reached through conciliation ("Settlement Agreements") as well as concerns and thoughts on how to build up the Enforceability Convention.

I.NECESSITY OF DEVELOPING THE ENFORCEABILITY CONVENTION

In the recent years, conciliation has become an increasingly popular means of resolving international commercial disputes and attracted worldwide attention and discussions from the international community due to its advantages of being time-and cost-efficient, highly successful and effective in maintaining business and the win-win situation as compared with arbitration and litigation. The major international arbitration institutions such as the International Chamber of Commerce Court of International Arbitration, American Arbitration Association, Hong Kong International Arbitration Center, and Arbitration Institute of Stockholm Chamber of Commerce have all published rules on conciliation in resolving disputes. Other arbitration institutions such as Korean Commercial Arbitration Bureau and China International Economic and Trade Arbitration Commission ("CIETAC") have included in their arbitration rules the independent provisions on conciliation procedure and legal effect of Settlement Agreement; and CIETAC has been expressly using the approach that "combines arbitration with conciliation" in dealing with arbitration cases. At the same time, more and more international conciliation

institutions and organizations are emerging such as the International Mediation Institute, Singapore Mediation Center, China Council for the Promotion of International Trade / China Chamber of International Commerce Mediation Center (CCPIT/CCOIC Mediation Center), Hong Kong Mediation Center, and Financial Dispute Resolution Center in Hong Kong.

It is a significant progress that conciliation has received the recognition of UNCITRAL. The Guide to the Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002) states that, "Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. In addition, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes"[1] In order to promote the use of conciliation, UNCITRAL issued its Conciliation Rules in 1980 and the Model Law on International Commercial Conciliation in 2002.

However, one major long-existed obstacle to the greater use of conciliation is that Settlement Agreements up to date still are difficult to be enforced by law in the event that a party refuses to perform. This is because at the current stage, domestic legislations of most countries in the world only recognize and enforce Settlement Agreements as contracts; and under the circumstance where one party fails to honor the Settlement Agreement, the other party is unable to file to court to directly enforce it and instead has to proceed to file an arbitration or lawsuit.

1 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), para 8.

Just as the U.S. Government pointed out in its proposal, if two parties spent time and efforts in reaching a Settlement Agreement over their dispute but found that such Settlement Agreement was as difficult to enforce as the contract from which the dispute arises, then conciliation will be much less attractive than arbitration and litigation to the parties. In order to clear up this obstacle, the U.S. government thinks necessary to take measures to assure parties that Settlement Agreements reached between them could be effectively enforced and such enforcement would not cost a lot.

It is exactly for this reason, the U.S. Government proposed to develop the Enforceability Convention to give direct enforceability to Settlement Agreements, "with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration" [2]The Author supports the U.S. Government's proposal and thinks that it is necessary to develop an internationally recognized mechanism on the enforceability of the Settlement Agreement in order to foster the use and growth of conciliation.

II.DOMESTIC LEGISLATIONS ON THE ENFORCEABILITY OF SETTLEMENT AGREEMENTS

Although currently domestic legislations of most countries around the world still only give enforceability to Settlement Agreements the same as contracts, a number of other countries have progressed to formulate special provisions to facilitate conciliation and the enforcement of Settlement Agreements in their domestic legal system. To sum up, these special provisions mainly adopt two approaches to ensure enforceability: (1) treating Settlement Agreements reached in arbitral proceedings as arbitral awards

2 Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822.

or making arbitral awards based on Settlement Agreements; and (2) directly treating Settlement Agreements as arbitral awards despite that the arbitral proceedings are not initiated. Below is a summary of the details:

1. APPROACH I: TREATING SETTLEMENT AGREEMENTS AS ARBITRAL AWARDS OR MAKING ARBITRAL AWARDS BASED ON SETTLEMENT AGREEMENTS

The UNICITRAL provides in Article 30 of its 1985 UNCITRAL Model Law on International Commercial Arbitration that, if the parties settle the dispute during arbitral proceedings, the arbitral tribunal shall, if requested by the parties and not objected to by it, record the settlement in the form of an arbitral award on agreed terms; such arbitral award has the same status and effect as any other awards on the merits of the case.

Germany and Hungary have similar provisions. The Germany Code of Civil Procedure[3] and the Hungary Act LXXI[4] both provide that, during arbitral proceedings, if the parties settle the dispute, the arbitral tribunal shall terminate the proceedings, and upon request of the parties, record the settlement in the form of an arbitral award, unless the settlement violates public order or the law; such arbitral award shall have the same effect as any other awards on the merits of the case.

2.APPROACH II: TREATING SETTLEMENT AGREEMENTS DIRECTLY AS ARBITRAL AWARDS

California and Texas of the U.S., India, Bermuda, and Hong Kong of China have adopted a more aggressive approach to enforce the Settlement Agreements.

The California Code of Civil Procedure[5] and the Texas Civil Practice and Remedies Code[6] both provide that, if conciliation succeeds in settling the dispute, and the result of conciliation is in writing and signed by the conciliator(s) and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal and have the same force and effect as a final award in arbitration.

The Arbitration and Conciliation Ordinance of India[7] provides that, the settlement agreement drew up either by the parties or the conciliator, when signed by the parties, shall be final and binding on the parties and persons claiming under them respectively, and shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

Bermuda 1986 Arbitration Act[8] and Hong Kong Arbitration Ordinance[9] both provide that, if the parties to an arbitration agreement reach agreement in settlement of their differences and sign an agreement containing the terms of settlement, the settlement agreement shall, be treated as an award on an arbitration agreement; and may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the agreement.

3 Germany, Zivilprozeßordnung, tenth book, sect. 1053.
4 Hungary, Act LXXI, sect.39.

5 California Code of Civil Procedure, Section 1297.401.
6 Texas Civil Practice and Remedies Code, Section 172.211.
7 India Arbitration and Conciliation Act (1996), Article 73 and 74.
8 Bermuda 1986 Arbitration Act, Part II Conciliation, Appointment of Conciliator 3(4).
9 Hong Kong Arbitration Ordinance (effective as of 27 June 1997), Chapter 341, Section 2C.

III.PRC LEGISLATIONS ON THE ENFORCEABILITY OF SETTLEMENT AGREEMENTS

Due to the culture and history of China, conciliation has always been encouraged in dispute resolution in China. In terms of enforceability of Settlement Agreement, China is quite advanced to certain extent in its legislation. Under the current legal framework of China, conciliation is classified into three categories: conciliation conducted by court, conciliation conducted by arbitration institutions, and conciliation conducted by People's Mediation Committees or other mediation organizations ("Third-Party Mediation Organizations"). Chinese law has recognized the enforceability of the conciliation statements ("Conciliation Statements") or Settlement Agreements made through these three types of conciliation.

1.CONCILIATION STATEMENTS MADE BY COURTS

Pursuant to the C*ivil Procedure Law of the People's Republic of China*[10] ("*PRC Civil Procedure Law*"), the people's court may conduct conciliation based on the principles of voluntariness and legitimacy after a law suit is initiated or before the judgment is rendered with consent of the parties. If the parties reach settlement, the court may make a Conciliation Statement based on the terms agreed by the parties. Meanwhile, according to the *Provisions of the Supreme People's Court on Several Issues Concerning Civil Mediation by the People's Court*[11], the parties may conciliate the case by themselves during the litigation process; If a settlement agreement is reached, they may request the court to confirm and make a Conciliation Settlement based on the settlement agreement. The Conciliation Agreement is enforceable by law in China.

In order to build up a mechanism for conducting mediation in China, in 2009 the Supreme People's Court of China issued the *Several Opinions on Establishment and Improvement of Conflict & Dispute Resolution Mechanism Combining Litigation and Non-Litigation Approaches*[12] ("*Supreme Court's Opinions on Developing Conciliation Mechanism*") to encourage mediation before and after a case is officially filed. The relevant provisions are as follows:

(1)The court of proper jurisdiction of a case may, after receiving the complaint (written/oral) and before the case is officially filed, entrust by itself or upon request of parties, Third-Party Mediation Organizations such as administrative authorities, People's Mediation Committees, commercial mediation institutions, industry mediation organizations or other organizations with mediation function to mediate the cases with the parties. The Conciliation Agreement reached

10 Civil Procedure Law of the People's Republic of China, revised by the Standing Committee of the National People's Congress on 31 August 2012 and effective as of 1 January 2013.

11 Provisions of the Supreme People's Court on Several Issues Concerning Civil Mediation by the People's Court, issued by the Supreme People's Court on 16 December 2008 and effective as of 16 December 2008.

12 Several Opinions on Establishment and Improvement of Conflict & Dispute Resolution Mechanism Combining Litigation and Non-Litigation Approaches, issued by the Supreme People's Court on and effective as of 24 July 2009.

through conciliation by any of these organizations and that is signed and affixed the chops by the parties will have the effect of a contract. If the Settlement Agreement is signed by the conciliator and affixed the chop of the mediation organization, the parties may apply to the court of proper jurisdiction to confirm its legal effect. Whereas one party fails to perform the Settlement Agreement confirmed by the court, the other party may directly apply to the court to enforce it.

(2)Upon consent of the parties or where the court thinks necessary, the court may, after the case is officially filed, entrust the above mediation institutions to mediate the case. If a Settlement Agreement is reached, the parties may apply to the court to withdraw the case or to confirm the Settlement Agreement, or to make a Conciliation Statement based on the Settlement Agreement.

(3)For a civil case that has been officially filed, the people's court may invite qualified organizations or individuals to conduct conciliation jointly. If a Settlement Agreement is reached, the people's court may allow the parties to withdraw the case, or make a Conciliation Statement based on the Settlement Agreement.

Pursuant to Article 236 of the PRC Civil Procedure Law, Conciliation Statements made by people's courts enjoy the same force and effect as effective court judgments. Parties shall perform the Conciliation Statement; otherwise, the other party may directly apply to the people's court to enforce the Conciliation Statement.

2.CONCILIATION STATEMENTS MADE BY ARBITRATION INSTITUTIONS

According to the *Arbitration Law of the People's Republic of China*[13] ("*PRC Arbitration Law*") after arbitration is filed, the parties may reach a settlement over the dispute by themselves and request the arbitral tribunal to make an arbitral award based on the agreed terms; Or the parties may, before the arbitral award is rendered, reach a Settlement Agreement through conciliation by the arbitral tribunal and the arbitral tribunal may make a Conciliation Statement or make an arbitral award based on the Settlement Agreement. According to Article 51 of the PRC Arbitration Law and Article 2(3) of the *Provisions of Supreme People's Court on Several Issues Concerning Judicial Enforcement by People's Courts (for Trial Implementation)*[14], Conciliation Statements signed by the parties shall enjoy the same enforceability as arbitral awards; should one party fail to perform the Conciliation Statement or the arbitral award, the other party may apply to the people's court for enforcement directly.

CIETAC *Arbitration Rules (2012 version)*[15] follow the PRC Arbitration Law in terms of conciliation. According to the CIETAC Rules, parties may settle their dispute by themselves or reach a Settlement Agreement through conciliation before or during the arbitration process, and may request the arbitral tribunal to make an arbitral award based on the Settlement Agreement (specially, in the event that a Settlement Agreement is reached through conciliation by the arbitral tribunal during the arbitration process, a Conciliation Statement will be rendered by the arbitral tribunal).

Kindly note that, the Supreme Court's Opinions on Developing Conciliation Mechanism mentioned above has a special provision that allows the parties to apply to an arbitration institution to conciliate their disputes even if they do not have an arbitration agreement; the arbitration institution

13 Arbitration Law of the People's Republic of China, issued by the Standing Committee of the National People's Congress on 31 August 1994 and effective as of 1 September 1995.

14 Provisions of Supreme People's Court on Several Issues Concerning Judicial Enforcement by People's Courts (for Trial Implementation), issued by the Supreme People's Court on and effective as of 8 July 1998.

15 Arbitration Rules of China International Economic and Trade Arbitration Commission (2012 version), revised by the China Council for the Promotion of International Trade/ China Chamber of International Commerce on 3 February 2012 and effective as of 1 May 2012.

may set up a mediation tribunal to conduct the conciliation on basis of the fair and neutral principles. However, the Settlement Agreements that are reached and signed by the parties through such conciliation shall only have the force of a contract; in order to gain enforceability under law, the parties shall need to apply to the court to confirm the Settlement Agreement.

3.SETTLEMENT AGREEMENTS MADE BY THIRD-PARTY MEDIATION ORGANIZATIONS

According to the *Civil Mediation Law of the People's Republic of China*[16] ("*PRC Civil Mediation Law*") and the PRC Civil Procedure Law, if the parties choose to settle their disputes through conciliation by Third-Party Mediation Organizations such as People's Mediation Committees or other mediation organizations, they may request the mediation organization to make a Settlement Agreement, which will take effect after being signed by the parties and the conciliators as well as chopped by the mediation organization. However, in contrast with the Conciliation Statements made by courts and arbitration institutions, Settlement Agreements made by Third-Party Mediation Organizations are not enforceable. According to Article 33 of the PRC Civil Mediation Law and Article 194 of the PRC Civil Procedure Law, in order to make such Settlement Agreements enforceable by law, the parties will have to, within 30 days after the agreement takes effect, jointly apply to the basic-level people's court of the place where the mediation organization is located for the judicial confirmation. Should one party refuse to perform the Settlement Agreement confirmed by the people's court, the other party may apply to the people's court for enforcement.

CCPIT/CCOIC Mediation Center is a reputable and popular mediation center in China formed in 1987; its *Mediation Rules* (2012)[17] are in compliance with the *PRC Civil Procedure Law* with regard to the enforceability of Settlement Agreements. In order to facilitate the enforcement of the Settlement Agreements reached through the center, the Rules allow the parties to provide an arbitration clause in the settlement agreement to refer to CIETAC for arbitration in case of non-performance under a sole arbitrator who shall make an arbitral award based on the Settlement Agreement.

To streamline the procedure for parties to apply for judicial confirmation of Settlement Agreements reached through conciliation by the People's Mediation Committees, the Supreme People's Court further issued the *Several Provisions on Procedures for Judicial Confirmation of People's Mediation Agreements*[18] on 23 March 2011, which reiterate the principle of proximity for application of judicial confirmation, i.e., parties may apply for judicial confirmation with the basic-level people's court in the place where the People's Mediation Committee is located. Generally the people's court shall make a decision on whether to accept the request for judicial confirmation within 3 days after receiving the application, and shall, within 15 days after accepting the application, make a decision on whether to confirm the Settlement Agreement. Furthermore, to speed up the process, the court may at presences of the parties makes an immediate decision on whether to accept or confirm their Settlement Agreement. Lastly, the people's court will not charge any fees for the confirmation of Settlement Agreements reached through conciliation by the People's Mediation Committees.

16 Civil Mediation Law of the People's Republic of China, issued by the Standing Committee of the National People's Congress on 28 August 2010 and effective as of 1 January 2011.

17 Meditation Rule of Mediation Center (2012), passed by the seventh session third meeting of China Council for the Promotion of International Trade / China Chamber of International Commerce.

18 Several Provisions on Procedures for Judicial Confirmation of People's Mediation Agreements, issued by the Supreme People's Court on and effective as of 30 March 2011.

Apart from the above, the Supreme Court's Opinions on Developing Conciliation Mechanism offer two special approaches for Settlement Agreements involving payment obligations to obtain enforceability:

(1)For Settlement Agreements over civil disputes involving payment obligations and reached through conciliation conducted by Third-Party Mediation Organizations such as administrative authorities, People's Mediation Committees, commercial mediation institutions, industry mediation organizations or other organizations with mediation function, parties may apply to a notary public for making an enforceable notarized document based on the Settlement Agreements according to the *Notarization Law of the People's Republic of China*[19] Where the debtor fails to perform or improperly performs the notarized document, the creditor may apply to the competent people's court for enforcement.

(2)For Settlement Agreements effective as contracts and involving payment obligations, creditors may apply to the competent basic-level people's court for a payment order. If the debtor fails to raise an objection to or perform the payment order within the term prescribed in the payment order, the creditor may then apply to the people's court for enforcement.

IV.OPINION AND SUGGESTION

During the Author's legal practice, the Author has successfully assisted clients in resolving quite a few commercial disputes through conciliation; instead of going to arbitration or litigation, the clients were able to find alternative solutions to their problems and maintain further business relationship which is obviously win-win. In today's world economy which is still in recovery and when arbitration is being complained for being more and more like litigation and no longer cost efficient, the Author believes that conciliation will be increasingly preferred to international companies to resolving commercial disputes due to its advantage of being more time and cost efficient and effective to maintain business relationship.

If a multilateral convention or mechanism can be built up by UNCITRAL to address the key enforceability issue of settlement agreements reached by means of conciliation, it will undoubtedly increase the certainty and reliability of the result of conciliation for the parties involved and thus highly encourage greater use of conciliation in dispute resolution. The Enforceability Convention the U.S. Government proposed to develop not only reflects today's trend of using conciliation to solve international commercial disputes, but also will contribute to effective and efficient settlement of disputes which in return will enable the development and growth of international business and transactions.

Before putting into place such an international convention, in the Author's opinion, there are still important issues to be considered and solved.

1.DOMESTIC LEGISLATIONS CONCERNING THE ENFORCEABILITY OF SETTLEMENT AGREEMENTS

As stated above, currently there are still many jurisdictions that have not granted Settlement Agreements the same enforceability as arbitral awards or court's judgments in their domestic legislations. Considering this, one of the issues or goals of the Enforceability Convention should be to urge contracting parties to do so through their domestic legal systems or procedural laws. This in turn will form the foundation for the Enforceability Convention to promote the use of conciliation worldwide.

On the other hand, due to the discrepancies among domestic legal systems of different

19 Notarization Law of the People's Republic of China, issued by the Standing Committee of the National People's Congress on 28 August 2005 and effective as of 1 March 2006.

countries, it could be quite difficult for the Enforceability Convention to provide a uniform procedure for the enforceability of Settlement Agreements. Therefore, as the U.S. Government pointed out in its proposal, the Enforceability Convention may consider to follow the New York Convention by only setting forth "the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for reaching that goal"[20]

2.QUALIFICATIONS OF MEDIATION INSTITUTIONS

Another key issue is the qualities of the mediation institutions. It is advisable for the Enforceability Convention to set certain criteria or restrictions on the qualifications of the mediation institutions by which Settlement Agreements with direct enforceability are made, including on the appointment of conciliators, formulation of mediation rules and procedures, etc.

To set up criteria or thresholds for the qualification of the mediation institutions will be able to prevent the abuse of the judicial resources of countries. Arbitral awards and court judgments, which have been granted enforceability by local laws or the international conventions (the 1958 New York Convention), are made all by professional and authoritative legal institutions. If the Enforceability Convention confers enforceability to Settlement Agreements without screening the mediation institutions that make such Settlement Agreements, a possible consequence would be that any Settlement Agreements, despite the quality, made by any mediation institutions may be submitted to courts for enforcement. This will be likely to greatly reduce the quality, professionalism and reputation of conciliation, harm the solemnity of judicial enforcement, and ultimately hinder the sound development of conciliation in the future.

20 Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822.

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Audry Li is a partner of Zhong Lun Law Firm and co-heads the firm's M&A practice group. She has 20 years' experience in foreign investment, corporate advisory, M&A, joint venture and international commercial dispute resolution. Her clients are mainly multi-national companies.

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ARBITRATION IN THE UAE: RECENT DEVELOPMENTS REVISITED*

/By Dr. Gordon Blanke

1. INTRODUCTION

The past year of arbitration in the United Arab Emirates (UAE)[1] has witnessed a number of interesting developments. This will be of little surprise to arbitration specialists familiar with the practice of arbitration in the UAE given that in specialist circles it is well known that there has been a comparatively elevated activity level in UAE arbitration since the early 2000s.[2] Albeit not its sole cause, this is in part thanks to the steady increase in foreign investment in the UAE, which in turn has spawned the resolution of disputes by reference to arbitration. A further reason for the steady pace of development in the field of arbitration more specifically is the establishment in 2004 of the Dubai International Financial Centre[3] as an autonomous common law jurisdiction with its own stand-alone courts and laws, including most importantly the DIFC Arbitration Law[4.5] The DIFC, as it is commonly known in shorthand, has been developing its own institutional arbitration capacity, providing a home to the DIFC-LCIA, a sister organization of the London Court of International Arbitration (LCIA), and promoting itself as a place of arbitration in its own right.

This paper tracks recent developments in UAE arbitration by reference to the following areas:

- Legislative developments, including in particular in relation to the use of arbitration in the DIFC;
- institutional developments, including in particular the establishment of new arbitration bodies and the revision and interpretation of existing institutional arbitration rules; and
- developments in relation to the recognition and enforcement of arbitral awards in both mainland UAE and the offshore DIFC.

* This article is based on a paper originally circulated at the Eighth Dublin Forum on International Commercial Dispute Resolution of 11 July 2014 under the title "The Year of UAE Arbitration in Review" and on file with the author.

1 For present purposes, we take "the past year" to mean around August 2013 to around October 2014 in order to ensure coverage of all relevant developments over the envisaged period and taking into account that further developments of some significance have taken place since original circulation of the paper in July 2014.

2 See the developments in G. Blanke, Annotated Guide to Arbitration in the UAE - Volume I: The UAE Arbitration Chapter (Thomson Reuters, 2014), which shows an increase in arbitration-relevant jurisprudence of the UAE Courts since 2000.

3 See Dubai Law No. (9) of 2004 Concerning the Dubai International Financial Centre as amended.

4 DIFC Law No. 1 of 2008.

5 See e.g. G. Blanke, "The DIFC: A Brave New World of Arbitration", 75(3) Arbitration (2009), pp. 422–424.

2. LEGISLATIVE DEVELOPMENTS

In late 2013 and early 2014, there have been a couple of legislative developments in relation to DIFC-seated arbitration. Initiatives by the DIFC, such as the DIFC Courts' draft Practice Direction reported below, are occasionally quite avantgarde and it remains to be seen whether they will successfully carry through into practice.

2.1. AMENDMENT OF DIFC ARBITRATION LAW [6]

A recent amendment to the DIFC Arbitration Law brings the DIFC into line with the New York Convention[7] DIFC Law No. 6 of 2013, the Arbitration Law Amendment Law (the "Amendment Law"), which implements the amendment, was adopted on 15 December 2013. In the terms of the DIFC Authority's own coverage, "[t]he amendments to the Arbitration Law 2008 have been made to ensure alignment of DIFC to the New York Convention, which require[s] a court of a member state to have the obligation to dismiss or stay an action, upon request of a party, in a matter which is the subject of a valid arbitration agreement."[8]

More specifically, the introduced amendments focus on Article 7 of the DIFC Arbitration Law and ensure that Article 13 of the DIFC Arbitration Law also applies "where the Seat of Arbitration is one other than the DIFC"[9] and "where no Seat has been designated or determined"[10]. Article 13 in turn provides in pertinent part that "[i]f an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first amendment on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperable or incapable of being performed."

By way of background, the previous setting of Article 13, which did not expressly provide for the application of this Article to arbitrations seated outside the DIFC, provoked a stand-off between Justice Williams QC[11] and Sir David Steel J[12] in the DIFC Court of First Instance in 2012.[13] To recap, at the time, Justice Williams QC and Sir David issued divergent rulings on the interpretation of the scope of application of Article 13 of the DIFC Arbitration Law: On Sir David's interpretation, which was based on a literal reading of Article 7 of the DIFC Law, the DIFC Courts did not have the power to stay its own proceedings in favor of arbitration proceedings seated outside the DIFC; Justice Williams QC, however, saved the day by finding that the DIFC

6 For further detail, see G. Blanke, "Amendment to DIFC Arbitration Law brings DIFC into line with the New York Convention", Kluwer Arbitration Blog, 12 January 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/01/12/amendment-to-difc-arbitration-law-brings-difc-into-line-with-the-new-york-convention/.

7 On the recognition and enforcement of foreign arbitral awards, done in New York on 10 June 1958.

8 See http://www.difc.ae/news/difc-authority-announces-enactment-difc-laws-amendment-law-2013.

9 See subparagraph (2) of Article 7 of the Amendment Law.

10 See subparagraph (3) of Article 7 of the Amendment Law.

11 See Claim No. CFI 004/2012 – International Electromechanical Services Co. LLC v. (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC, ruling of 14 October 2012.

12 See Claim No. CFI 019/2010 – Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co, ruling of 6 March 2012.

13 For contemporaneous commentary, see G. Blanke, "Dubai Court confirms jurisdiction to stay proceedings in favour of foreign arbitrations: Nothing more to fear … and further lessons to be learnt", Kluwer Arbitration Blog, 30 January 2013, electronically available at http://kluwerarbitrationblog.com/blog/2013/01/30/dubai-court-confirms-jurisdiction-to-stay-proceedings-in-favour-of-foreign-arbitrations-nothing-more-to-fear-and-further-lessons-to-be-learnt/.

Courts had an inherent jurisdiction to stay in favor of arbitration outside the DIFC irrespective of the seemingly restrictive wording of Article 7.

By way of explanation, Article II(3) of the New York Convention imposes upon Convention countries – including the UAE, which joined the Convention in 2006[14] – an obligation to recognize arbitration agreements and give to them precedence over pending litigation that has been brought in another Convention country in violation of an existing foreign arbitration clause, unless this latter is "null and void, inoperative or incapable of being performed". Even though Sir David and Justice Williams QC coincided in their view that the terms of Article 13 of the DIFC Arbitration Law, which – read together with Article 7 – confine a DIFC Court's obligation to stay in favor of domestic, i.e. arbitrations seated in the DIFC only, Justice Williams QC found – contrary to Sir David – that the DIFC Courts did retain a discretion to stay in the presence of foreign or non-DIFC arbitration proceedings on the basis of a surviving "inherent jurisdiction to stay". According to Justice Williams, this inherent jurisdiction had not been displaced by Article 7(2), which did not contain any express wording to that effect, nor by Article 10 of the same Law, according to which "in matters governed by this law, no Court shall intervene except to the extent so provided in this Law." As a result, the surviving inherent jurisdiction of the DIFC Courts could be invoked to stay in favor of non-DIFC arbitration and more specifically to comply with obligations to stay under international enforcement instruments, such as the New York Convention.

The present amendment to Article 7 has the remedial effect of turning into an express power of the DIFC Court what previously could only be derived by implication from the "inherent jurisdiction to stay" of the DIFC Court as a common law court with English law heritage. As a result, the somewhat uncomfortable stand-off between Sir David and Justice Williams QC witnessed over the interpretation of the proper scope of application of Article 13 of the DIFC Arbitration Law in 2012 is likely to fade into the annals of history of the DIFC Courts as no more than an unfortunate incident of judicial disagreement. To be sure, going forward, international investors may rest assured that the DIFC Courts will stay their proceedings in favor of arbitration seated outside the DIFC in compliance with Article II(3) of the New York Convention, there remaining little (if any) margin for interpretation.

2.2 THE DIFC DRAFT PRACTICE DIRECTION[15]

In a recent, worldwide yet unprecedented move, the DIFC Courts have circulated for public consultation a draft Practice Direction[16], which

14 See UAE Federal Decree No. 43 of 2006.

15 For contemporaneous commentary, see G. Blanke, "The DIFC and arbitration: Raising the stakes?", Kluwer Arbitration Blog, 20 July 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/07/20/the-difc-and-arbitration-raising-the-stakes-2/. Also see the author's contribution to the DIFC Courts' consultation exercise by letter of 19 August 2014 to Mrs Natasha Bakirci of the DIFC Courts, on file with the author.

16 See Practice Direction No. X of 2014 amending

essentially aims to provide for the conversion of a DIFC Court judgment into a DIFC-LCIA arbitration award in order to avoid potential difficulties of enforcement of a DIFC judgment in jurisdictions outside the UAE. This is achieved by creating a system of optional referral to DIFC-LCIA arbitration of "any dispute arising out of or in connection with the enforcement of any judgment given by the DIFC Courts, including any dispute as to the validity or enforcement of the said judgment."[17]

The proposed adoption of the draft Practice Direction has raised a number of concerns among the local arbitration community. To start, conversion of a judgment into an arbitral award for reasons of enforceability would only make sense if judgments of the DIFC Courts did, in actual fact, face difficulties of recognition and enforcement, either domestically or internationally or both. This, however, does not seem to be the case:[18]

DIFC judgments are readily recognized and enforced domestically, i.e. in offshore Dubai and the wider UAE, by reference to the Judicial Authority Law as amended[19]. The international enforceability of DIFC judgments has also more recently been promoted by the adoption of various protocols of co-operation between a number of leading foreign courts and the DIFC Courts[20], which in turn mark the willingness of those courts to recognize and enforce DIFC judgments in principle. Further, recent reporting about the DIFC Courts has confirmed that over the past ten years, i.e. since the foundation of the DIFC and the DIFC Courts, enforcement abroad of all DIFC judgments has been successful.[21] This track record would suggest that there is no need for inventing alternative methods of domestic or international recognition and enforcement of DIFC judgments.

Second, there are a number of technical concerns. In particular, it remains to be tested to what extent an award rendered within the meaning of the draft Practice Direction would qualify as an award in the proper terms of the individual enforcement instrument, including, first and foremost, the New York Convention. To say the least, to ensure its enforceability, an arbitral award is usually required to resolve a genuine dispute subject of the arbitration[22],

Practice Direction No. 2 of 2012 DIFC Courts' Jurisdiction, electronically accessible on the official website of the DIFC Courts at www.difccourts.ae.

17 Ibid.

18 For a slightly over-stated, more skeptical view, see J. K. Krishnan and P. Purohit, "A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution", forthcoming in The American Review of International Arbitration (2015).

19 DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011. See in particular Article 7 of the Judicial Authority Law as amended. To the best of our knowledge, there have also been a number of unpublished precedents confirming the ready enforceability of DIFC judgments in the Emirate of Dubai and the wider UAE.

20 See in particular Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales of 23rd January 2013; and Memorandum of Guidance between the DIFC Courts and the Supreme Court of New South Wales of 9 December 2013; and Memorandum of Understanding between the Ministry of Justice of The Hashemite Kingdom of Jordan and Dubai International Financial Centre Courts of 18 May 2010. To the best of our knowledge, there has also been some unpublished precedent confirming the ready enforceability of DIFC judgments abroad, e.g. enforcement action before the Kuwaiti courts in DIFC Case No. 002/2010 - Global Strategies Group (Middle East) FZE v. Aqeeq Aviation Holding Company LLC.

21 See "DIFC Courts' rulings carry weight abroad", MENA Week in Review, Westlaw Gulf, Thomson Reuters, 7 August 2014, with comments by Nassir Al Nasser, a judicial officer of the DIFC Courts.

22 See also G. Born, International Commercial Arbitration, Kluwer Law International, 2014, at pp. 2926 et seq., where he argues that an award is required "to resolve a substantive, not a procedural matter". Read in this context, the enforcement of a DIFC judgment would arguably qualify as a

both ratione materiae and ratione personae: It may be questionable in this context whether a foreign court's potential reluctance to enforce a DIFC judgment can qualify as a genuine dispute between the judgment creditor and the judgment debtor. A foreign court's reluctance to recognize and enforce a DIFC judgment would hardly give rise to a dispute with a judgment debtor, who will essentially benefit from the foreign court's decision to refuse enforcement. If any dispute arises at that stage at all, it will be between the judgment creditor, who is seeking to benefit from enforcement before the foreign court, and the foreign court to which an application for recognition and enforcement has been made. However, such a dispute (if a "dispute" then it can be called), remains presently unresolvable as it raises matters of sovereignty on part of the non-enforcing court: That court – bar the existence of any bilateral or multilateral conventions or otherwise binding instruments of co-operation with the DIFC Courts – remains free to decide on the acceptability of a DIFC judgment in its own jurisdiction; the judgment debtor ultimately contracted into the original jurisdiction of the DIFC Courts of its own free will at the risk of non-recognition and non-enforceability in a particular target jurisdiction. This simply shows that choice of forum is an important part of litigation strategy, which is exercised at a litigant's own risk and may result in difficulties or even the impossibility of enforcement if not exercised with a measure of foresight and prudence. Finally, the author is presently not aware of any significant international enforcement practice of DIFC-LCIA awards by reference to the New York Convention outside the UAE. So even if conversion of a DIFC judgment into a DIFC-LCIA award were made possible through adoption of the draft Practice Direction, there is no guarantee that that award would be enforceable without reservation internationally. To the contrary, before a court that is little familiar with the concept of the DIFC, a DIFC-LCIA award may, in fact, meet the same projected difficulties of recognition and enforcement as a DIFC judgment.

Third, there are a number of political concerns that flow directly from the technical concerns set out above and in particular from the discussions of the issue of sovereignty. There is a strong argument for saying that the enforcement of judgments – being a prerogative of the courts - should not be circumvented by recourse to arbitration. Attempts at circumvention may jeopardize a State court's trust in arbitration more generally. For sure, a foreign supervisory court will be tempted to look behind an arbitration award that embodies a DIFC judgment which it may not have recognized and enforced in a direct enforcement action of the DIFC judgment itself and will, on this basis alone, be likely to decline enforcement. In this context, it cannot be ruled out entirely that a foreign supervisory court would rely on the public policy exception built into the majority of international arbitral enforcement instruments, most prominently Article V(2)(b) of the New York Convention, in order to justify its refusal to enforce.

3. INSTITUTIONAL DEVELOPMENTS

The year has witnessed an impressive array of institutional developments, ranging from the establishment of new DIFC- and UAE-seated arbitration institutions (or the announcement thereof), the adoption of a revised and fully-modernized set of the ADCCAC Regulations, the arbitration rules administered by the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), and various case law of the Dubai Courts interpreting the costs and time extension provisions of the Dubai International Arbitration Centre (DIAC) Rules of Arbitration.

procedural matter.

3.1. DIFC INTRODUCES ARBITRATION INSTITUTE[23]

A recent amendment to Dubai Law No. (9) of 2004 Concerning the Dubai International Financial Centre[24], referred to as Dubai Law No. (7) of 2014[25] and issued by the Ruler of Dubai on 21st May 2014 ("Law No. (7) of 2014"), establishes the so-called Dispute Resolution Authority headed by Chief Justice Michael Hwang SC, the current president of the DIFC Courts. In the terms of Article 3 of Law No. (7) of 2014, the Dispute Resolution Authority operates in the DIFC and is essentially comprised of the DIFC Courts and a so-called Arbitration Institute[26].

Pursuant to Article 8 of Law No. (7) of 2014, the Arbitration Institute is vested with separate legal personality and may sue and be sued in this capacity[27]. It operates on an independent budget and exercises its functions independently from the DIFC Courts and other DIFC bodies[28]. The Head of the Dispute Resolution Authority will appoint the members of a Board of Trustees, which, in turn, will exercise all the powers and duties of the Arbitration Institute[29]. In essence, these will include:

"(a) the promotion of the Arbitration Institute as a hub for the settlement of domestic and international disputes, and of disputes arising out of treaties, by arbitration, mediation, and other forms of alternative dispute resolution mechanisms (ADR);

(b) the preparation and issuance of rules and procedures required for regulating the administration of arbitration, mediation, and other forms of ADR;

(c) the hosting of conferences, seminars, lectures, and other events relating to arbitration, mediation, and other forms of ADR;

(d) the publication of books, journals, articles, and papers on arbitration, mediation, and other forms of ADR;

(e) the provision of courses and accreditation for arbitrators, mediators, and other persons concerned with arbitration, mediation, and other forms of ADR; and

(f) entering into co-operation and joint venture agreements with any local, regional, or international center, society or organization specialized in arbitration and ADR."[30]

In light of the wording of Articles 8(5)(a) and (b) of Law No. (7) of 2014, it is not entirely clear to what extent the Arbitration Institute is meant to dispense arbitration services itself and will not be confined to the promotion of the profession and practice of arbitration within the DIFC only. Too little is presently known to allow any meaningful assessment of the true scope of duties and powers of the Arbitration Institute. This being said, the use of the Arbitration Institute for the dispensation of arbitration services in their own right will inevitably raise the question of how the establishment of the Institute will impact the role of the DIFC-LCIA, which – to date at least – has been widely recognized as the dedicated arbitration center of the DIFC.

23 For further detail, see G. Blanke, "DIFC introduces Arbitration Institute", Kluwer Arbitration Blog, 4 June 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/06/04/difc-introduces-arbitration-institute/.

24 As previously amended by Dubai Law No. (14) of 2011.

25 Amending Law No. (9) of 2004 Concerning the Dubai International Financial Centre (DIFC).

26 See Article 8 of Law No. (7) of 2014.

27 See Article 8(1) of Law No. (7) of 2014.

28 See Article 8(2) of Law No. (7) of 2014.

29 See Articles 8(4) and (5) of Law No. (7) of 2014.

30 See Article 8(5) of Law No. (7) of 2014.

3.2. DUBAI ANNOUNCES ESTABLISHMENT OF EMAC[31]

In an ambitious stride to become the leading maritime hub in the Middle East, the Emirate of Dubai is set to establish the Emirates Maritime Arbitration Centre, which in shorthand will be known as "EMAC". Plans for the anticipated establishment of the Centre have recently been announced by Sheikh Hamdan bin Rashid Al Maktoum, the Crown Prince of Dubai. The announcement, which was made on 15 September 2014, comes timely in light of Dubai's commitment to create an integrated legal framework for the maritime sector following the launch of the Dubai Maritime Sector Strategy (DMSS) by the Dubai Maritime City Authority (DMCA) in 2007. The establishment of the EMAC is anticipated to contribute specialist dispute resolution capabilities to the wider maritime industry and services offering currently available in the Emirate. This, in turn, is hoped to attract further investment in the local maritime sector and its industry-specialist off-shots, such as maritime insurance and maritime finance.

It is presently unknown what shape and format the EMAC will take. It also remains to be seen what institutional rules the EMAC Rules of Arbitration will ultimately be modeled on, but there can be little doubt that the founders of the Centre will look at other leading arbitration rules in the maritime dispute resolution industry for guidance and inspiration. It has also not yet been decided where the Centre is to be located, whether in mainland Dubai or the increasingly popular off-shore DIFC, which offers a common law alternative to the otherwise civil-law dominated UAE. For the avoidance of doubt, choice of the DIFC as the seat of EMAC arbitrations will trigger the application of the stand-alone DIFC Arbitration Law as the prevailing curial law and empower the DIFC Courts to exert their curial functions in support of the individual arbitration reference. What is certain, however, is that in order to secure EMAC's international success the EMAC Rules of Arbitration will need to compare favorably to the sets of rules that are presently on offer in other internationally leading maritime arbitration centers, including in particular London and New York. Provided this is the case, there is all reason to believe that the establishment of the EMAC will further assist in promoting Dubai to become a primus inter pares of the most coveted maritime dispute resolution centers in the world.

31 For contemporaneous commentary, see G. Blanke, "Dubai announces plans to establish Emirates Maritime Arbitration Centre: Do they hold water?", Kluwer Law Blog, 2 October 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/10/02/dubai-announces-plans-to-establish-emirates-maritime-arbitration-centre-do-they-hold-water/.

3.3. ADOPTION OF NEW ADCCAC ARBITRATION RULES[32]

The new ADCCAC Rules, also known as the ADCCAC Procedural Regulations of Arbitration, entered into effect on 1st September 2013. The new Rules read more like a modern set of international arbitration rules, giving proper consideration to now widely-adopted modern thinking on party representation, the sequence of procedural milestones in an arbitration, the notion of the severability of the arbitration agreement, the constitution of the tribunal and the independence and impartiality of its members, the tribunal's kompetenz-kompetenz and the tribunal's powers more generally, the modalities for the issuance and rectification of awards and the costs of the arbitration. Importantly, the new Rules also introduce a costs schedule for the calculation of arbitration costs, including in particular arbitrator fees.

32 For further detail, see G. Blanke, "The New ADCCAC Arbitration Rules: Evolution or Revolution?", Kluwer Arbitration Blog, 8 October 2013, electronically available at http://kluwerarbitrationblog.com/blog/2013/10/08/the-new-adccac-arbitration-rules-evolution-or-revolution/.

No doubt, taken together, these improvements amount to more than a mere evolution of the former ADCCAC Regulations and may arguably have revolutionary potential: Essentially, the old Regulations have been entirely re-written, the title of the new Regulations being the only reminiscence of their outdated predecessor.[33]

3.4. RECOVERABILITY OF COUNSEL FEES AND PARTY EXPENSES UNDER THE DIAC RULES

In a ruling of 3rd February 2013[34], the Dubai Court of Cassation found against the recoverability of Counsel fees in arbitrations under the 2007 DIAC Arbitration Rules (the "DIAC Rules"). In doing so, the Dubai Court gave a distinctly restrictive interpretation to the wording of the provisions on cost contained in the DIAC Rules. As a result, the Dubai Court of Cassation affirmed the enforcement of a DIAC arbitration award in part only, setting aside the award of Counsel fees in the minor amount of AED 110,000.

In the Dubai Court's view, the cost provisions of the DIAC Rules do not make express reference to the recovery of legal and/or Counsel fees, as a result of which these must be unrecoverable in arbitrations conducted under the Rules unless a specific power to award such costs has been granted to the arbitration tribunal either in the original arbitration agreement (which, is rarely the case) or a later submission agreement, such as terms of reference. In the Court's own words:

"… the costs, expenses and legal fees are imposed on either arbitrating party only by law, general rules or if provided for expressly and clearly in a submission agreement given that an arbitration award is a contractual decision in relation to which the arbitrator's jurisdiction is based on an arbitration clause contained in the agreement concluded between both parties …" (author's translation)

The Dubai Court then continues to explain that references to arbitration under the DIAC Rules make binding upon the parties and the arbitration tribunal the rules on cost contained in the DIAC Rules. From amongst these, the Dubai Court cites in pertinent part in particular Article 37.10 of the DIAC Rules, which requires the tribunal to determine and apportion by way of award or order "the Arbitration Costs [sic] and fees … in accordance with Appendix – Cost [sic] of Arbitration", and Article 2.1 of the Appendix on Costs of Arbitration annexed to the DIAC Rules, which provides verbatim as follows:

"The costs of the arbitration shall include the Centre's administrative Fees for the claim and any counterclaim and the fees and expenses of the Tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration, and shall include any expenses incurred by the Tribunal, as well as the fees and expenses of any experts appointed by the Tribunal." (author's translation)

On this basis, the Dubai Court of Cassation concludes in the following terms:

"All these provisions imply that in an arbitration conducted before the DIAC, the arbitration costs decided by the arbitration tribunal are in particular those related to the administrative fees of the claim and counterclaim and the fees and expenses of the tribunal as well as the fees and expenses of tribunal-appointed experts in accordance with the DIAC Costs Schedule. Such costs do not include the legal expenses paid by the parties to their attorneys representing them in the arbitration procedure or whoever prepares the claim or advises the parties before initiating

33 For a full discussion, see G. Blanke, "The New ADCCAC Arbitration Rules: The Game Is On … Is It?", 80(3) Arbitration (2014), pp. 37-47.

34 See Case No. 282/2012 – Real Estate Cassation, judgment of 3rd February 2013 of the Dubai Court of Cassation.

the arbitration procedure. … The DIAC Rules do not grant arbitrators the power to award Counsel fees."

As a result, in order to ensure proper recovery of party expenses in arbitration proceedings under the DIAC Rules, parties are well-advised to confer upon a tribunal an express power to award party costs over and above the plain "costs of arbitration" within the meaning of the DIAC Rules. Similar considerations are likely to apply to the corresponding provisions on costs of the new ADCCAC Rules.[35]

3.5. TIME EXTENSION PROVISIONS UNDER THE DIAC RULES[36]

In an encouraging ruling of early 2014[37], the Dubai Court of Appeal confirmed the time extension provisions for rendering final awards under the DIAC Rules in an attempt to rectify an earlier ruling of the Dubai Court of First Instance in the same case[38], which essentially disregarded the full scope of the powers given to the DIAC Executive Committee to extend the common time-limit of six months that prevails under UAE law. By doing so, the Dubai Court of Appeal lent full force to an arbitration award rendered in DIAC Case No. 151/2009, subject to a presently pending appeal before the Dubai Court of Cassation.

By way of background, in the terms of Article 210(1) of UAE Civil Procedures Code[39] (the "CPC"), which in turn forms part of the UAE Arbitration Chapter, "[i]f, in the arbitration agreement, the parties have not stipulated a time-limit for the award, the arbitrator must render the award within six months from the date of the first hearing in the arbitration." Article 210(2) CPC continues to provide that "[t]he parties may agree – expressly or impliedly – to extend the time-limit laid down in the agreement or by law."

In the present ruling, the Dubai Court of Appeal left no doubt that arbitration proceedings may be extended for subsequent periods of a maximum of at least six months at a time in reliance on Article 36.4 of the DIAC Rules and are not confined to a single, one-off extension of six months only. By way of explanation, pursuant to Article 36.3,"[t]he Tribunal may, on its own initiative, extend the time-limit [of the original six months] for up to an additional six months[.]"; and Article 36.4 empowers the Executive Committee to "extend this time-limit ***further*** pursuant to a reasoned request or on its own initiative if it decides that it is necessary to do so." (author's emphasis) The use of the word "further" is clearly intended to allow manifold (rather than just one single) extension(s), provided there is good cause.

For the avoidance of doubt, there can only be good cause if the extension is justified and operated properly and in a timely fashion, i.e. is contiguous with the date of expiry of the previous time-limit and made prior to it[40]. Further, it is arguable that each individual extension may only be for a maximum period of six months, taking account of the wording of Article 210(1)

35 On this analogy, see G. Blanke, supra n. 33, 80(3) Arbitration (2014), at p. 46.

36 For further detail, see G. Blanke, "Dubai Court of Appeal confirms time extension provisions under the DIAC Rules and other pro-arbitration dicta", Kluwer Arbitration Blog, 28 April 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/04/28/dubai-court-of-appeal-confirms-time-extension-provisions-under-the-diac-rules-and-other-pro-arbitration-dicta/.

37 See Case No. 249 of 2013-Middle East Foundations LLC v. Meydan Group LLC (formerly Meydan LLC), Commercial Appeal, ruling of the Dubai Court of Appeal of 15 January 2014.

38 See Case No. 934 of 2012-Middle East Foundations Group LLC v. (1) Meydan Group LLC (formerly Meydan LLC) and (2) Nael Bunni, Commercial Plenary, ruling of the Dubai Court of First Instance of 14 February 2013.

39 Federal Law No. (11) of 1992 issuing the Law of Civil Procedure as amended.

40 See commentary on the application of Article 210 CPC in G. Blanke, supra n. 2.

CPC and established DIAC practice. This would also seem to stand confirmed by the wording of Article 36.2, which reflects the six-month base time-limit contained in Article 210(1). However, recent experience of the author's would intimate otherwise: The DIAC Executive Committee has approved of an extension in excess of six months (bordering, in actual fact, on an entire year).

This, of course, does not mean that arbitrators under the DIAC Rules are discharged from general obligations of procedural expediency, but they will have reassurance that in complex disputes, extensions of time may be obtained with good measure.

4. RECOGNITION AND ENFORCEMENT

By way of reminder, the UAE and the DIFC Courts are bound by the terms of international enforcement instruments in the enforcement of foreign arbitral awards, including in particular the New York Convention.[41] The UAE joined the New York Convention in 2006[42] and has – at the latest since 2010 – build a pro-enforcement practice in strict compliance with the terms of the Convention.[43]

This past year has witnessed some encouraging developments in favor arbitrandi and others less so. This being said, the unanticipated setback the UAE's pro-enforcement practice suffered in the Canal de Jonglei case will hopefully remain of little significance in the Courts' future enforcement practice.

4.1. ATTACHMENT ORDERS IN SUPPORT OF ENFORCEMENT ACTIONS OF ARBITRATION AWARDS [44]

A ruling of the Abu Dhabi Court of Cassation[45] of late 2013 did well to surprise the local arbitration community: According to a recent ruling of the Abu Dhabi Court of Cassation, an award creditor is entitled to an order for attachment of an award debtor's assets pending the ratification of a domestic arbitral award. In reaching this finding, the Abu Dhabi Court of Cassation had to interpret the wording of the CPC that contains the Court's powers to grant attachments expansively to include arbitration awards.

By way of background, the applicant, a subcontractor, sought to secure an attachment over the assets of a contractor, the award debtor, pending the enforcement of a favorable arbitration award issued by a sole arbitrator in Case No. 11/2011 under the auspices of the ADCCAC. Both the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal are understood to have confirmed the availability of attachment orders in support of enforcement actions of arbitral awards, pending ratification. The Abu Dhabi Court of Cassation affirmed the lower courts' rulings without reservation. The Court started by quoting in full Article 227 CPC permitting in principle the adoption of provisional measures on the basis

41 See in particular Art. 238 CPC and Art. 42(1) of the DIFC Arbitration Law read together with Art. 24(2) of the DIFC Court Law.

42 See UAE Federal Decree No. 43 of 2006.

43 For discussions of key case law on the subject-matter, see variously G. Blanke and S. Corm-Bakhos, "Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure", 1(1) BCDR International Arbitration Review (2014), pp. 3-28. Gordon Blanke and Soraya Corm-Bakhos, "Enforcement of Foreign Awards in the UAE", The In-House Lawyer (Nov. 2011); and Gordon Blanke and Soraya Corm-Bakhos, "Enforcement of Foreign Awards: Are the UAE Courts Coming of Age?", 78(4) Arbitration (2012), pp. 359 et seq.

44 For further detail, see G. Blanke, "Attachment orders in support of enforcement actions of arbitration awards: An Abu Dhabi Court of Cassation invention", Kluwer Arbitration Blog, 5 January 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/01/05/attachment-orders-in-support-of-enforcement- actions-of- arbitration-awards-an-abu-dhabi-court-of-cassation-invention/.

45 See Appeal No. 519 of 2013, ruling of the Abu Dhabi Court of Cassation of 2nd October 2013.

of judgments that remain subject to appeal; then continued to excerpt Article 254 CPC in its pertinent subparagraph (2), which provides that "[t]he judge for summary proceedings must order an attachment if the judgment creditor holds a judgment, albeit not mandatorily enforceable, awarding a debt in a specified amount." (author's translation and emphasis); and concluded with a citation of Article 258 CPC, which replicates the wording of Article 254(2) CPC in pertinent part. Relying on these Articles, the Abu Dhabi Court of Cassation held as follows:

"This means that a creditor relying upon a court judgment in seeking a provisional attachment against the personal assets of his debtor in the hands of the debtor or a third party has a valid application, notwithstanding that the judgment is a primary judgment that is not enforceable provided the judgment is of a specified amount even if disputed by the debtor before the court that issued the judgment. This also applies to arbitral awards. While an arbitral award is not self-executory, it has precautionary power to enable the issuance of provisional measures, such as a provisional attachment against personal assets in the hands of the debtor or garnishment, without a need for the judge's permission for an attachment or an action to validate the attachment given that an arbitral award is not enforceable [subject to ratification]." (author's translation)

Read in context, the Abu Dhabi Court of Cassation's ruling imposes an obligation on the Court to grant an order for attachment where an arbitration award awards the award creditor a specified amount of money by way of debt and hence makes the issuance of an attachment order automatic in those circumstances. This is little surprising given the res iudicata effect of arbitration awards under UAE law, no appeal being possible on the merits and hence the finding of liability in the amount of a specified debt. The ruling follows some previous reports of several UAE Courts of First Instance having awarded attachments in similar circumstances, yet never to that date had a UAE Court of Cassation been reported as having granted an attachment in support of an arbitral enforcement action. The Abu Dhabi Court of Cassation's confirmation to this effect will – in accordance with prevailing court practice – bear significant evidentiary weight in similar proceedings before the lower courts, including those of the other Emirates, despite the absence of the principle of binding precedent from the UAE civil law system. Most recent reporting suggests that by analogy to the Abu Dhabi Court of Cassation, the Dubai Courts have now also – for the first time – endorsed the adoption of an attachment order in support of an application for enforcement of a foreign arbitral award under the New York Convention.[46]

4.2. ENFORCEMENT OF FOREIGN AWARDS UNDER THE NEW YORK CONVENTION [47]

In its ruling of 18 August 2013,[48] the Dubai Court of Cassation upheld the rulings of the Court of

46 For initial reporting, see S. Al Mobideen, "Shipping Arbitration in London and Enforcement in Dubai", Mena Week in Review, 20 October 2014 (Thomson Reuters, 2014).

47 For further detail, see G. Blanke, "Recent ruling of Dubai Court of Appeal affirms UAE Courts' practice to abide by the terms of the New York Convention", Kluwer Arbitration Blog, 27 October 2013, electronically available at http://kluwerarbitrationblog.com/blog/2013/10/27/recent-ruling-of-dubai-court-of-appeal-affirms-uae-courts-practice-to-abide-by-the-terms-of-the-new-york-convention/. In this context, also note a further recent ruling by the Dubai Court of Appeal enforcing an LMAA award issued in London under the New York Convention in Dubai. For reporting, see S. Al Mobideen, supra n. 48.

48 Case No. 156/2013. For further reporting, see G. Blanke, "Recent Ruling of the Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is …", Kluwer Arbitration Blog (21 Oct. 2013), http://kluwerarbitrationblog.com/blog/2013/10/21/recent-ruling-of-dubai-court-of-cassation-on-enforcement-of-foreign-arbitral-awards-back-to-square-one-it-is.

First Instance[49] and Court of Appeal[50], which rejected the application for enforcement of a trilogy of awards rendered under the International Chamber of Commerce (ICC) Rules of Arbitration (the "ICC Rules") in Paris, one preliminary award in relation to a discrete finding of fact, a final award on the merits and an award on costs. In the final award, the ICC tribunal awarded the Claimant, a French company, several million U.S. dollars for outstanding payments for works performed in the construction of the Canal de Jonglei in South Sudan.

The Court of First Instance rejected the application for enforcement of the award creditor on the grounds that the UAE Courts lacked jurisdiction "over cases brought against any foreigner having no domicile or place of residence within the UAE, unless such case does relate to an obligation that has been concluded, carried out or has to be carried out in the UAE or if a foreign company, located abroad, has a branch in the UAE and the dispute relates to such a branch …".[51]

In this ruling, the Court of First Instance completely disregarded the text of Article 238 CPC and Article 22 of the UAE Civil Transactions Code: Article 238 CPC exempts the application of the provisions governing the execution of foreign judgments and foreign arbitration awards under Articles 235 and 236 CPC from the enforcement of foreign judgments and arbitration awards that fall within the scope of application of international conventions. In a similar vein, Article 22 exempts the application of Article 21 of the UAE Civil Transactions Code from cases governed by international conventions binding on the UAE. Under the New York Convention, enforcement does not depend – contrary to the terms implied by the Dubai Court of First Instance – upon the award debtor having a geographical nexus (in the form of domicile or otherwise) with the country of enforcement. The jurisdiction of enforcement of a supervisory court in a Convention country is entirely independent from any jurisdictional criteria apart from authentication requirements (bar the location of assets of the award debtor in the enforcing jurisdiction). In other words, there is no requirement for subject-matter jurisdiction for a court to have jurisdiction of enforcement under the New York Convention, provided the court in question is an emanation of a Convention country.

In its ruling of 31st March 2013, the Dubai Court of Appeal endorsed the ruling of the Dubai Court of First Instance without further ado. Even though acknowledging the appellant's main pleading to the effect that the Dubai Court of First Instance had wrongly decided against having jurisdiction despite the binding terms of the New York Convention, the Court of Appeal did not further investigate the proper applicability of the Convention. Instead, it simply concluded in similar terms to those of the Dubai Court of First Instance that "[t]he papers of the case did not contain any provision stating that the respondent had a domicile in the State [i.e. the UAE] or that the agreement was concluded or executed in the State, therefore the Courts of Dubai lacked jurisdiction."[52] On this basis, the Court of Appeal upheld the ruling of the Dubai Court of First Instance.

The Dubai Court of Cassation affirmed that both lower courts were essentially correct in their refusal of enforcement. Although the Court of Cassation addressed the applicability of the New York Convention to the facts at hand, it confirmed

49 Case No. 489/2012. For further reporting, see G. Blanke, "Recent ruling of Dubai Court of First Instance on enforcement of foreign arbitral awards: Back to square one?", Kluwer Arbitration Blog (12 Mar. 2013), http://kluwerarbitrationblog.com/blog/2013/03/12/recent-ruling-of-dubai-court-of-first-instance-on-enforcement-of-foreign-arbitral-awards-back-to-square-one/.

50 Case No. 40/2013.

51 See UAE Civil Transactions Code, Art 21.

52 Author's translation.

that the international jurisdiction of the UAE Courts was a matter of public order and the UAE local Courts did not have jurisdiction over claims brought against foreigners who did not have a domicile or a place of residence in the UAE, unless the claims were related to agreements which had been concluded or were required to be performed in the UAE. In the terms of the Dubai Court of Cassation's ruling:

"Article 3 of [Federal Decree No. 46 of 2006] provides that "each contracting country must recognize arbitral awards as binding awards and must execute the same according to the procedural rules applicable in the territory in which enforcement of the award is being sought, according to conditions specified in the following articles, where no more severe conditions or higher fees or charges than those imposed upon recognition or execution of local arbitral awards may be specified or imposed upon recognition of arbitral awards subject to such agreement." … This indicates that foreign judgments and arbitral awards must be executed according to the procedural rules applicable in the country in which execution is being sought. Whereas the provision of Article 21 of the [UAE] Civil Transactions Law provides that "rules of competency and all procedural matters shall be subject to the law of country in which the case is initiated or procedures are followed." Article 19(1) of the [UAE] Civil Procedures Law provides that "provisions of this law shall apply to all civil, commercial and personal status cases initiated before courts of the country." Article 21 [of the same Law] provides that "courts shall be competent to examine cases against any foreigner who does not have a domicile or a place of residence in the country in the following cases: 1. if he has a selected residence in the country, … 3. if the case is related to a concluded or executed commitment or to a commitment subject to a condition to be executed in the country." [Sub]paragraph (d) of the second clause of Article 93 of the [UAE] Civil Transactions Law provides that "an artificial person shall have an independent domicile, where such domicile shall be the place in which its management center is located. Regarding artificial persons having their headquarters outside and having activities inside [the UAE], their management center according to the law of the country shall be in the place of local management."

Read together, the above provisions confirm - as established by this Court - that international competency of courts is a matter of public order, where courts of the country are not competent for examining cases initiated against foreigners who do not have a domicile or place of residence herein, unless the case is related to a commitment which has been concluded or executed or subject to a condition to be executed in the case, or unless the foreign artificial person has the main management center outside the country and has a branch in the country if the dispute is related to a matter connected to such a branch.

Whereas the above has been the case and whereas the judgment of the Court of First Instance supported by the appealed judgment has been based, when ruling with lack of competency of Dubai Courts to examine the case, upon what has been specified in its minutes that "it has been established by papers that the Ministry of Irrigation (appellee) in the Republic of Sudan does not have a domicile or place of residence in the UAE and that the commitment has been made and executed outside UAE", whereas those reasons are tangible and have origin in papers and are consistent with sound application of procedural rules applicable in the country and the New York Convention …, hence all reasons of appeal shall be deemed as baseless." (author's translation)

Essentially, the decision of the Court of Cassation restricts the scope of application of the New York Convention to situations in which the UAE Courts have subject-matter or personal jurisdiction in any event. It is to be hoped that this ruling has been politically motivated and that it will therefore

remain an isolated instance in the UAE Courts' more recent enforcement practice.[53]

A recent ruling of the Dubai Court of Appeal[54] gives new hope that despite the Dubai Court of Cassation's disappointing approach in Case No. 156/2013[55], the UAE Courts are, in principle, firmly committed to and will – bar very minor, politically-motivated exceptions – enforce foreign arbitral awards (at least provided they have been issued in another Convention country) in the terms of the New York Convention. In its ruling, the Dubai Court of Appeal showed itself unimpressed with a number of grounds of appeal adduced by the award debtor to thwart enforcement of an award rendered by a sole arbitrator under the auspices of the ICC Rules in Stuttgart, Germany[56].

Given the German origin of the award, the Court of Appeal had little doubt that enforcement had to be effected by reference to the terms of the New York Convention, Germany being a Convention country, in compliance with Article 238 CPC, which exempts the statutory regime of enforcement laid down in Articles 217 and 218 of that Code from application in the context of international conventions, including for present purposes the New York Convention. In the Court's own words:

"… it is established … under the provisions of Article 238 of the Civil Procedures Law that international agreements that have become applicable legislation in the UAE after ratification of the same shall be deemed as internal legislation enforceable in the country. The judge is required to apply its provisions to the disputes over the enforcement of … arbitral awards. It is also established by Federal Decree No. 43 of 2006 published in the Official Gazette on 08/06/2006 that the UAE acceded to the New York Convention 1958 on the recognition and enforcement of the foreign arbitral awards; therefore, the provisions [of the Convention] shall be applicable to the dispute at issue." (author's translation)

Following full citation of Articles 1 to 5 of UAE Federal Decree No. 43 of 2006, which correspond to Articles I to V of the New York Convention, and making express reference to the Dubai Court of Cassation's ruling in Maxtel[57], the Dubai Court of Cassation continued in the following self-explanatory terms:

"Whereas in light of the foregoing and whereas it is established that the arbitrator's award which requires the Court's recognition is a foreign award issued outside the UAE in Stuttgart, Germany, in accordance with New York Convention on the recognition and enforcement of foreign arbitral

53 According to Ali Alaidarous, this ruling is "regressive". See A. Alaidarous, "The Trend of UAE Courts' Decisions Concerning Arbitration", presentation at ICC's 2nd Annual Conference on International Arbitration in the Middle East and North Africa, Dubai (Mar. 2014).

54 See Case No. 1/2013 – Commercial Appeal, ruling of the Dubai Court of Appeal of 9 July 2013.

55 See Case No. 156/2013, ruling of the Dubai Court of Cassation of 18 August 2013, whereby the Dubai Court of Cassation – most probably out of political motivation - refused to enforce a New York Convention award against the Sudanese Government; for contemporaneous commentary, see G. Blanke, "Recent ruling of Dubai Court of Cassation on enforcement of foreign arbitral awards: Back to square one it is …", Kluwer Arbitration Blog, 21st October 2013, electronically available at http://kluwerarbitrationblog.com/blog/2013/10/21/recent-ruling-of-dubai-court-of-cassation-on-enforcement-of-foreign-arbitral-awards-back-to-square-one-it-is/.

56 See ICC Award No. 15977/JHN, dated 20 July 2011.

57 See Appeal for Cassation No. 132/2012 Commercial – Airmec Dubai, LLC v. Maxtel International, LLC, ruling of the Dubai Court of Cassation of 18 September 2012; see G. Blanke, "Dubai Court of Cassation confirms enforcement of foreign awards under New York Convention: The end of a beginning – Inshallah!", Kluwer Arbitration Blog, 21st November 2012, electronically available at http://kluwerarbitrationblog.com/blog/2012/11/21/dubai-court-of-cassation-confirms-enforcement-of-foreign-awards-under-new-york-convention-the-end-of-a-beginning-inshallah/. For the avoidance of doubt, the Maxtel line of case law confirms the early trend of pro-arbitration enforcement under the New York Convention.

awards, which the UAE has ratified as per the Federal Decree No. 43 of 2006 concerning the accession of the UAE to New York Convention on the recognition and enforcement of foreign arbitral awards. Whereas the Appellee [i.e. the award creditor] has submitted a copy of the arbitral award that is duly certified and ratified together with the original distribution agreement which contains the agreement on arbitration that was duly certified and attested, enclosed with the legal translation. Accordingly, the requirements of Article 4 of the said Law are met.

Whereas the judicial supervision of this Court over the arbitrator's foreign award when considering the request for the recognition and enforcement of foreign awards is limited to verifying the absence of any violation against the above-mentioned Federal Decree. The Court examines whether the request fulfills the formal and substantive elements required under Articles 4 and 5 thereof. Whereas the arbitral award subject matter of the case is duly certified and authenticated where this Court did not find that the dispute subject matter of the arbitral award is one of the matters that may not be conciliated. Further, the Court did not find any violation of the public order, especially since the Appellant did not submit to this court any evidence confirming the existence of one of the cases set out in Article 5 of the said Decree. The Appellant did not prove any case of lack of competence or that the agreement was invalid or that it was not duly notified about the appointment of arbitrator or the arbitration procedures or that it was unable to present its defense before the arbitrator or that the arbitrator's award contained a violation of the arbitration clause set out in the agreement made with the Appellee, or that the formation of the arbitration tribunal or its proceedings did not comply with the said agreement, or that the arbitrator's award did not become binding upon the two parties or that the award was reversed or suspended by the competent authorities in the Federal Republic of Germany, where the award was issued.

Whereas the arbitration award subject matter of this case has fulfilled the conditions set out in the above-mentioned [Federal] Decree, the Court shall, by virtue of the above-mentioned grounds that are consistent with the law, recognize the arbitral award issued on 20/07/2011 by the sole arbitrator in Stuttgart, Germany, in the arbitration case no. 15977 – JHN 15977 in accordance with the arbitration rules applicable at the International Chamber of Commerce and shall enforce the same in accordance with the rules of the New York Convention on the recognition and enforcement of foreign arbitral awards." (author's translation)

4.3. DIFC AS "HOST" JURISDICTION FOR RECOGNITION OF DOMESTIC AND FOREIGN AWARDS [58]

In two recent rulings[59], the DIFC Court of First Instance confirmed that it is competent to hear applications for the recognition of domestic and foreign arbitration awards within the DIFC without the need for a connection to the DIFC. This essentially means that the DIFC may serve as a host jurisdiction for the recognition of awards rendered (i) in mainland Dubai or elsewhere in the UAE (but outside the DIFC) (domestic awards) and (ii) anywhere outside the UAE (foreign awards). Importantly, the DIFC Court's rulings for the first time place the author's own discussions on the subject of the potential status of the DIFC as a "host" or "intermediate" jurisdiction for the enforcement of foreign awards under the New York Convention in mainland Dubai and the wider

58 For further detail, see G. Blanke, "DIFC Court of First Instance confirms its status as host jurisdiction for recognition of both domestic and foreign awards", Kluwer Arbitration Blog, 7 June 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/06/07/difc-court-of-first-instance-confirms-its-status-as-host-jurisdiction-for-recognition-of-both-domestic-and-foreign-awards/.

59 See Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2, ruling of the DIFC Court of First Instance, undated, 2014; and Case No. ARB 003/2013 – Banyan Tree Corporate PTE LTD v. Meydan Group LLC, ruling of the DIFC Court of First Instance of 27 May 2014.

UAE in a practical context[60].

By way of background, in Case No. ARB 002/2013, the Claimants, award creditors incorporated outside Dubai, sought orders recognizing and granting leave to enforce a foreign arbitral award obtained in their favour against award debtors incorporated outside the DIFC in mainland Dubai. In the second case, Case No. ARB 003/2013, Banyan Tree Corporate PTE LTD, an award creditor incorporated in Singapore, similarly sought from the DIFC Courts an order for recognition and enforcement of a domestic DIAC award against the UAE-based Meydan Group LLC, the award debtor. In both cases, the award debtors objected to the DIFC Courts' jurisdiction and competence to hear applications for recognition and leave to enforce of awards not rendered in the DIFC.

In dismissing the applications in both cases, the DIFC Court of First Instance relied upon a combination of a number of DIFC and other laws. More specifically, in finding that the DIFC Court was competent to hear an application for recognition of a foreign award for the purposes of enforcement in mainland Dubai (i.e. outside the DIFC), the location of the award debtor's assets, Deputy Chief Justice Sir John Chadwick placed exclusive reliance on Articles 42 and 43 of the DIFC Arbitration Law read together with Article 5(A)(1)(e) of the Judicial Authority Law[61], which confers exclusive jurisdiction on the DIFC Court of First Instance to hear and determine "[a]ny claim or action over which the [DIFC] Courts have jurisdiction in accordance with the DIFC Laws and the DIFC Regulations".

Both rulings have now become final, the ruling in Case No. ARB 002/2013 having remained unappealed and the ruling in Case No. ARB 003/2013 having most recently been confirmed on appeal[62].

The practical relevance of the DIFC Courts' rulings is that the DIFC Courts are likely to ratify and enforce domestic (onshore) Dubai and international awards in mainland Dubai through the offshore DIFC on the basis of Article 42(1) of the DIFC Arbitration Law (read together with Article III of the New York Convention) even absent any geographic nexus to the DIFC. In practical terms, this means that award creditors (irrespective of whether the provenance of the subject award is domestic or international) will be able to circumvent any residual uncertainties in the Dubai Courts' enforcement practice of both domestic and foreign awards by obtaining an order of recognition from the DIFC Courts, which in turn will have to be recognized and enforced by the Dubai execution judge without a review on the merits in compliance with Article 7(3) of the Judicial Authority Law as amended always provided that the award debtor has assets in mainland Dubai. The enforcement order obtained in Dubai will then be enforceable throughout the UAE by reference to Article 11 of UAE Federal Law No. 11 of 1973 on Judicial Relationships Amongst Emirates in the terms articulated in the author's previous writings on the subject matter.[63]

5. CONCLUSION

This past year of arbitration in the UAE has been unusually rich in unforeseen developments. The majority of these demonstrate the UAE's drive to promote arbitration both domestically

60 See G. Blanke, "Enforcement of New York Convention Awards in the UAE (Part II): THE DIFC as 'host' jurisdiction?", Kluwer Arbitration Blog, 4 September 2012, electronically available at http://kluwerarbitrationblog.com/blog/2012/09/04/ enforcement-of-new-york-convention-awards-in-the-uae-part-ii-the-difc-as-%e2%80%9chost%e2%80%9d-jurisdiction/.

61 See Dubai Law No. 12 of 2004 as amended by Dubai Law No. 16 of 2011.

62 See Case CA-005-2-14, ruling of the DIFC Court of Appeal of 3rd November 2014. For commentary, see G. Blanke, "DIFC Court of Appeal confirms the DIFC's status as host jurisdiction for recognition of domestic awards", Kluwer Arbitration Blog, 11 November 2014, electronically available at http://kluwerarbitrationblog.com/blog/2014/11/11/difc-court-of-appeal-confirms-the-difcs-status-as-host-jurisdiction-for-recognition-of-domestic-awards/.

63 See e.g. G. Blanke, supra n. 60.

and internationally and to contribute to the international discourse of arbitration more generally. The DIFC Courts' apparent drive for innovation has no parallel in history but also leaves open the question as to the extent to which innovative ideas can be put into practice or will be relegated to the annals of history before too long. This being said, some other developments are less encouraging and cause concern that the UAE Courts have not yet fully embraced their enforcement obligations under the New York Convention. Be that as it may, the UAE has come a far way in establishing a full-service arbitration environment, with both a civil and a common law option, and are expected to build on the present, overall arbitration-friendly acquis in years to come.

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PARTY AUTONOMY IN CIETAC RULES 2015

/Man Sing YEUNG

Party autonomy is an essential feature of international commercial arbitration. As opposed to rigid court rules, party autonomy in arbitrations gives parties flexibility to agree upon the core aspects in the dispute resolution process such as substantive laws, procedural laws, and the adjudicating tribunal.

In the past decade, arbitration has become a popular dispute resolution option in the PRC. In this article, I would attempt to explain the extent of party autonomy in PRC arbitrations, with reference to rules of the China International Economic and Trade Arbitration Commission ("CIETAC") and the PRC Arbitration Law. The current PRC Arbitration Law came into effect on 1 September 1995 while the PRC Civil Procedure Law was amended and effective on 31 August 2012. CIETAC is a leading arbitration commission in the PRC. Its current version of arbitration rules ("CIETAC Rules 2012") took effect on 1 May 2012 (At the time of publishing the article, CIETAC Rules 2015 may be already operative). The new version of the rules ("CIETAC Rules 2015") has been adopted on 4 November 2014 and will become operative on 1 January 2015.

ADMINISTRATION OF ARBITRATION

Article 16 of the PRC Arbitration Law requires an arbitration agreement to include three elements: (1) the expression of the parties' wish to submit to arbitration; (2) the matters to be arbitrated; and (3) the arbitration commission selected by the parties. Therefore, the PRC Arbitration Law mandates parties to specify an arbitration commission in the arbitration agreement.

It is in fact quite a rigid approach adopted by the PRC in relation to administration of arbitrations. Its rigidity can be seen from Article 4[1] of the Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China effective on 8 September 2006 ("the Interpretation"), which specifically states that there is deemed to be no stipulation of arbitration institution if the agreement only stipulates the arbitration rules applicable. Therefore, an arbitration agreement which only stipulates the adoption of the rules of an arbitration commission without expressly requiring administration by that commission may be invalid.

Although Article 4 of the Interpretation provides an opportunity for the parties to ratify word-saving provisions like the above by agreeing on an arbitration commission later on, it is certainly difficult for them to reach any kind of agreement after dispute arises.

As such, ad hoc arbitration without the administration by an arbitration commission is not possible in the PRC. Parties must agree to have arbitration administered by an arbitration commission. In an ad hoc arbitration, parties can enjoy flexibility in agreeing to their own set

1 Article 4 of the Interpretation states, "Where an agreement for arbitration only stipulates the arbitration rules applicable to the dispute, it shall be deemed that the arbitration institution is not stipulated, unless the parties concerned reach a supplementary agreement or may determine the arbitration institution according to the arbitration rules agreed upon between them."

of procedures. In contrast, in an administered arbitration, a tried-and-tested set of procedural rules will be followed to govern the arbitration, with the advantage of relatively less controversies on the arbitration procedural steps. Therefore, by disallowing ad hoc arbitration, the PRC Arbitration Law may in effect sacrifice party autonomy on procedural rules in return for efficiency and certainty in arbitration procedures.

CHOICE OF ARBITRATION COMMISSION

In a recent PRC case[2], the PRC courts were asked to adjudicate whether parties are allowed to refer an arbitration to a foreign arbitration commission[3]. The difficulty lied upon the provision in Article 10 of the PRC Arbitration Law[4] that requires an arbitration commission to be registered with the relevant judicial administrative department. The Intermediate People's Court of Anhui Province adopted the literal meaning of Article 10 and also considered the fact that the PRC Government did not open the arbitration service sector to foreign institutions, therefore ruled that parties are not allowed to submit an arbitration to an unregistered foreign commission.

In the appeal, the Higher People's Court of Anhui Province, by majority, reversed the lower court's decision. Its decision was submitted to the Supreme People's Court for further review.

2 Anhui Long Li De Packaging and Printing Co., Ltd. v BP Agnati S.R.L. (No. 13 [2013] of the Civil Division IV of the Supreme People's Court on 25 March 2013)

3 The arbitration clause in the case submits disputes to ICC but at the same time specifies the arbitral seat as Shanghai, China

4 Article 10 of the PRC Arbitration Law states, "The people's governments of the municipalities and cities specified in the above paragraph shall organize the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration commission shall be registered with the judicial administrative department of the relevant province, autonomous regions or municipalities directly under the Central Government."

In March 2013, the Supreme People's Court handed down its decision in favour of the majority view in the Higher People's Court. In particular, it emphasized that as the arbitration agreement had specified that "Place of jurisdiction shall be Shanghai, China", according to the Interpretation, the validity of the arbitration agreement should be adjudicated in accordance with the laws of the PRC[5]. Therefore, so long as an arbitration agreement satisfies the requirements in Article 16 of the PRC Arbitration Law, it should be deemed valid.

The decision therefore indirectly allowed parties to choose a foreign arbitration commission by agreement so long as the agreement satisfies Article 16.

ARBITRATION RULES

If parties agreed to arbitration by CIETAC, they are deemed to have agreed to arbitration in accordance with its rules[6]. CIETAC Rules 2012 further added the wordings -- "Where the parties have agreed on the application of other arbitration rules[7], CIETAC shall perform relevant administrative duties." These wordings are retained in CIETAC Rules 2015, indicating CIETAC's willingness to provide administrative supports to arbitrations that do not adopt its own rules.

5 Article 16 of the Interpretation states, "The examination of the effectiveness of an agreement for arbitration which involves foreign interests shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place of arbitration shall apply; if they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply."

6 Article 4(2) of CIETAC Rules 2012/2015

7 Article 4(3) of CIETAC Rules 2012/2015

CIETAC gives a fairly high degree of freedom to parties' choice of procedural rules so long as the rules are operative and do not conflict with the PRC Arbitration Law. In this respect, party autonomy is well respected.

SEAT OF ARBITRATION

Seat of arbitration plays an important role in procedures of arbitration and enforcement of awards. Thus, party autonomy on the seat of arbitration is a real concern to parties, especially those not domiciled in the PRC.

In this regard, CIETAC Rules 2012/2015 allow parties to agree on the seat of arbitration other than the PRC[8]. This provision was already added in 2012. It showed an increasingly liberal approach by CIETAC to party autonomy.

CONSOLIDATION OF ARBITRATIONS

In a CIETAC arbitration, any party may request to have two or more arbitrations consolidated into a single arbitration[9]. This procedure is not entirely common in other arbitration commissions in the region[10], and there was no such mechanism in previous versions of its rules prior to CIETAC Rules 2012. This could again be seen as a reform towards more party autonomy. If all parties consent to a consolidation of several disputes, in the absence of compelling reason not to, CIETAC may likely honour the parties' wishes in order to save time and cost.

Note that in CIETAC Rules 2012, CIETAC may consolidate arbitrations upon a party's request or on its own initiative, so long as all parties agree to the consolidation[11]. On the other hand, in CIETAC Rules 2015, CIETAC may consider consolidation only at the request of a party[12]. This seems to give more autonomy to the parties. However, care must be taken when reading CIETAC Rules 2015, that once CIETAC received request of consolidation from a party, it may consolidate arbitrations even without the consent of all parties[13].

Nevertheless, in deciding whether to consolidate, CIETAC is now expressly required to take into account the opinions of all parties[14]. In this sense,

8 Article 7(1) of CIETAC Rules 2012/2015

9 Article 17 of CIETAC Rules 2012 and Article 19 of CIETAC Rules 2015

10 For instance, there is no such similar provision in the KLRCA Arbitration Rules 2013 in that the tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings unless the parties agree to confer such power on the arbitral tribunal,.

11 Article 17(1) of CIETAC Rules 2012 states, "At the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration."

12 Article 19(1) of CIETAC Rules 2015 states, "At the request of a party, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration if:(a) all of the claims in the arbitrations are made under the same arbitration agreement;(b) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature;(c) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of a principle contract and its ancillary contract(s); or(d) all the parties to the arbitrations have agreed to consolidation."

13 This change is in line with provisions in other well-established rules, such as Article 10 of the ICC Rules 2012 and Article 22.1 (x) of LCIA Rules 2014, that consolidation can only be considered upon application of a party, but all parties' consent is not necessary.

14 Article 19(2)of CIETAC Rules 2015 states, "In deciding whether to consolidate the arbitrations in accordance with the preceding Paragraph 1, CIETAC shall take into account the opinions of all parties and other relevant factors such as the correlation between the arbitrations concerned, including the nomination and appointment of arbitrators in the separate arbitrations."

party autonomy in consolidation of arbitrations is well preserved.

MULTIPLE CONTRACTS

Apart from consolidating several arbitrations, a party may, as of CIETAC Rules 2015, initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts provided that there is sufficient proximity in the contracts, transactions in dispute and arbitration agreements[15].

With increased autonomy in launching claims, this new provision makes arbitration an attractive option over other means of dispute resolution in terms of cost and time.

JOINDER OF ADDITIONAL PARTIES

Another new provision in CIETAC Rules 2015 is to allow a party to an arbitration to join an additional party to the arbitration and commence claim against that party if the arbitration agreement invoked in the arbitration prima facie binds the additional party[16]. CIETAC Rules 2015 contains detailed provisions governing the procedures of joining a party and the subsequent actions each party has to take[17]. This provides a clear guidance to the tribunal and parties[18].

This should give parties higher autonomy in the arbitration. However, CIETAC has reserved a general discretion for it to decide not to join an additional party if circumstance exists that makes the joinder inappropriate[19].

ARBITRATION TRIBUNAL

An arbitration tribunal in the PRC may comprise three arbitrators or one arbitrator[20]. CIETAC establishes a panel of arbitrators which uniformly applies to itself and all its sub-commissions / center. Parties can each recommend candidates from the panel of arbitrators. For a three-arbitrator tribunal, CIETAC Rules 2012/2015 give [21]opportunity for each party to appoint one arbitrator while the third and presiding arbitrator is appointed jointly by consent, failing which he/she shall be appointed by the Chairman of CIETAC[22]. In this respect, party autonomy in the selection of arbitrators is in line with other international standards[23].

As a step forward, as of CIETAC Rules 2012, parties are further allowed to nominate arbitrators from outside the CIETAC panel so long as there is consent from all parties and confirmation of CIETAC. The outside arbitrator nominated should nevertheless fulfill qualifications stipulated in the PRC Arbitration Law[24]. Parties' flexibility in

15 Article 14 of CIETAC Rules 2015

16 Article 18(1) of CIETAC Rules 2015

17 Article 18(2) to (6) of CIETAC Rules 2015

18 Contrast it with Article 22.1(viii) of LCIA Rules 2014 which allows one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement.

19 Article 18(7) of CIETAC Rules 2015

20 Article 30 of the PRC Arbitration Law, Article 23(1) of CIETAC Rules 2012 and Article 25(1) CIETAC Rules 2015

21 Article 25(1) of CIETAC Rules 2012 and Article 27(1) of CIETAC Rules 2015

22 A similar method of appointing an arbitration tribunal is recommended in Article 11(3) of the UNCITRAL Model Law

23 Article 24(2) of CIETAC Rules 2012 and Article 26(2) of CIETAC Rules 2015

24 Article 13 of the PRC Arbitration Law states, "The arbitration commission shall appoint fair and honest person as its arbitrators. Arbitrators must fulfill one of the following conditions: 1. they have been engaged in arbitration work for at least eight years; 2. they have worked as a lawyer for at least eight years; 3. they have been a judge for at least eight years; 4. they are engaged in legal research or legal teaching and in senior positions; and 5. they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior

choosing arbitrators is significantly enhanced while the standard of the arbitrators is still monitored.

LANGUAGE

According to CIETAC Rules, parties' agreement on the language of arbitration should prevail. In the absence of such agreement, in the 2005 version of CIETAC Rules, it was stipulated that Chinese language shall be used[25]. In CIETAC Rules 2012/2015, CIETAC is given discretion to conduct proceedings in other language having regard to the circumstances of the case[26]. In this regard, parties' autonomy is preserved as much as possible while discretion is given to CIETAC in the absence of parties' agreement to provide more flexibility.

"ARB-MED" PROCEDURES

CIETAC encourages parties to reach settlement by mediation (or termed as conciliation in its context) during the process of arbitration[27]. This "Arb-Med" mechanism provides the parties an option to make final attempts to resolve their disputes in a non-adversarial forum. Parties can explore an amicable or innovative solution together in the mediation, which may not be possible in a pure arbitration. If they are able to reach settlement, they may discontinue the arbitration or request the arbitration tribunal to render an award in accordance with their settlement agreement[28]. In this way parties enjoy both the benefits of party autonomy in mediation and enforcement of an arbitral award.

Although Arb-Med is common in civil law jurisdictions, it is not very well received by common law jurisdictions[29]. This is probably due to the risk of bias by the arbitration tribunal who is wearing two different hats. Apparently in an attempt to cure this uncertainty and provide further flexibility to the parties, CIETAC Rules 2012/2015 specifically provide that CIETAC may facilitate the parties to have mediation other than that conducted by the arbitration tribunal if the parties both desire so[30]. Parties are thus allo[31]wed to attempt a mediation conducted by an independent mediator, putting CIETAC more in line with the common practice of other international institutions[32].

AWARDS

Lastly, the discussion on party autonomy in arbitration would not be complete without

positions or of the equivalent professional level."

25 This is a distinct feature of the CIETAC Rules that a "default language" is specified in the absence of agreement. Rules of other arbitration commissions, like ICC and KCAB, usually delegate the power to determine the language to the tribunal directly.

26 Article 71(1) of CIETAC Rules 2015 and Article 81(1) of CIETAC Rules 2015

27 Article 45 of CIETAC Rules 2012 and Article 47 of CIETAC Rules 2015

28 Article47(5) of CIETAC Rules 2015 states, "Where the parties have reached a settlement agreement through conciliation by the arbitral tribunal or by themselves, they may withdraw their claim or counterclaim, or request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement."

29 For example in the Hong Kong Case Gao Haiyan and another v. Keeneye Holdings and another CACV 79/2011, the High Court judge ruled there was a real risk of bias in the Arb-Med process, albeit the decision was overturned in the Court of Appeal.

30 Article 45(8) of CIETAC Rules 2012 and Article 47(8) of CIETAC Rules 2015 both state, "Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with consent of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate."

31 For instance, the Singapore International Arbitration Centre (SIAC) has collaborated with the recently established Singapore International Mediation Centre (SIMC) to offer an "Arb-Med-Arb Protocol" where the arbitrator(s) and mediator(s) are separately and independently appointed by SIAC and SIMC respectively.

32 The current UNCITRAL Model Law is its 1985 version with amendments as adopted in 2006

considering whether, and in what circumstances, awards made by an arbitration tribunal could be challenged in courts. Awards given out from arbitrations in the PRC are broadly divided into "domestic awards" and "foreign-related awards". Foreign-related awards refer to those rendered by PRC arbitration commissions in cases with "foreign elements" such as foreign parties, foreign subject matters, etc. Domestic awards are those in cases without foreign elements.

Under the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law")[33], a court should set aside an award only in limited circumstances concerning procedural irregularities in this context: the dispute falls outside the terms of the submission to arbitration; the arbitrators exceeded the scope of the submission to arbitration; or the arbitral procedure was not in accordance with the agreement of the parties[34].

The PRC Arbitration Law adopts different approaches for review of foreign-related awards and domestic awards. For foreign-related awards, the PRC Arbitration Law empowers the courts to set aside on grounds similar to those in the UNCITRAL Model Law mentioned above[35]. However, for domestic awards, among other things, PRC courts are allowed to set aside an award upon material evidence is found to have been concealed or evidence on which the award was based is found to be falsified[35]. Notably, in recent years, there is a reform on the PRC laws that to a certain extent restrained courts' power to refuse to honour domestic awards by non-procedural grounds[36].

33 Article 34(2) of the UNCITRAL Model Law

34 Article 71 of the PRC Arbitration Law and Article 274 of the PRC Civil Procedure Law

35 Article 58 of the PRC Arbitration Law and Article 237 of the PRC Civil Procedure Law state the People's court can rule to set aside/refuse to honour (domestic) award if (among others): "4. The evidence on which the award is based is falsified; 5. The other party has concealed evidence which is sufficient to affect the impartiality of the award."

SUMMARY

For the past decades, party autonomy in PRC arbitrations was relatively limited. Certain degree of restriction is perhaps not a total denial of party autonomy but instead, a regulation of the arbitration procedures. Nevertheless, it must be recognized that arbitration is a developing mechanism to dispute resolutions in the jurisdiction.

Recent decisions of the courts and the amendments to the CIETAC Rules bringing out the new version of CIETAC Rules 2015 clearly showed that the PRC is both keen and ready to allow more party autonomy in arbitration. The present CIETAC Rules are in line with international standards. It is foreseeable that the PRC will become an appealing alternative for both foreign and Chinese parties looking for arbitrations in the near future.

36 Article 213 of the 2007 version of the PRC Civil Procedure Law states for the People's court may refuse to honour an award if (among others): "4. There is insufficient evidence leading to facts found; 5. There was error in the applicable law"

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PRIMERA MARITIME (HELLAS) LIMITED V JIANGSU EASTERN HEAVY INDUSTRY CO LTD [2013 EWHC 3066 (COMM)

/Ian Gaunt

Shipbuilding contracts: alleged failure of tribunal to deal with an issue: challenge under s.68 appeal may not be used to challenge arbitrators' legitimate findings of fact.

This was an appeal under s.68 Arbitration Act 1996 against the award of a London arbitration tribunal in disputes under contracts for the construction of 2 Kamsarmax vessels at the respondents' shipyard in China. The contracts expressly precluded the possibility of an appeal under s.69.

The tribunal found that the 2 contracts had been affirmed by the appellant buyers after the respondent shipyard had allegedly renounced them by failing to deliver them by the contractual delivery dates. The buyers' conduct in purporting to cancel the contracts was thus a repudiatory breach of the contracts which had been accepted by the shipyard.

The buyers appealed to set aside the awards and remit the reference to the tribunal, arguing that the tribunal had been guilty of a "serious irregularity" in failing to consider all the issues before it. The appeal was rejected.

The Judge referred to the ambit of s.68 reiterating that the focus of the court's enquiry under the section was due process, not whether the tribunal's decision was correct. Thus:

"The section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. This point, that section 68 is about whether there has been due process, not whether the tribunal "got it right", is of particular importance in the present case, where, for the reasons set out below, the claimants' real complaint is that they consider that the tribunal reached the wrong result, not a matter in relation to which an arbitration Award is susceptible to challenge under section 68."

In cases under section 68(2)(d), there were four questions for the court: (i) whether the relevant point or argument was an "issue" within the

meaning of the sub-section; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice.

The Judge made the following points of principle:

i) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can deal with an issue by making clear that it does not arise in view of its decisions on the facts or their legal conclusions.

ii) By way of amplification of this point, a tribunal may deal with an issue by so deciding a logically anterior point that the issue does not arise. For example, a tribunal that rejects a claim on the basis that the respondent has no liability is not guilty of a serious irregularity if it does come to a conclusion on each issue (or any issue) about quantum: by their decision on liability, the tribunal disposes of (or "deals with") the quantum issues.

iii) A tribunal is not required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them.

iv) In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as on other questions) is to read it in a "reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it": Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd. [1985] 2 EGLR 14 at p.14F per Bingham J.

v) This approach may involve taking account of the parties' submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum.

The particular issue which it was alleged in this case the tribunal had failed to address was the argument that there had been continuing breaches by the shipyard after (as the tribunal found) the buyers had affirmed the contracts and that the tribunal had not addressed this as an issue separate from the issue of whether there had been repeated renunciation. The judge considered that the tribunal had addressed the issue and the separate “issues” of repetition of a renunciation and continuing renunciation were not as distinct as counsel for the buyers sought to argue:

“Although Mr Bright sought to draw a sharp distinction between two concepts: repetition of a renunciation on the one hand and continuing renunciation on the other, in order to seek to demonstrate that the tribunal had dealt with the former argument but not the latter, in my judgment, as Mr Bright's own written closing submissions before the tribunal demonstrate, there is not always a clear distinction. In a very real sense the supposed distinction between a repeated renunciation and a continuing renunciation through silence is a semantic one, since persisting in a previously expressed renunciation can be characterised as repetition”

The Judge was not impressed by what was described as a nit-picking analysis of the text of the award in an attempt to demonstrate that the tribunal had overlooked the issue of continuing renunciation:

“Mr Bright then effectively subjected each sentence of this paragraph to a minute textual analysis with a view to demonstrating that the tribunal had failed to deal with the question of continuing renunciation. That is the wrong approach. A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nit-picking and looking for inconsistencies and faults: see per Bingham J in Zermat Holdings SA

v Nu-Life Upholstery Repairs Ltd [1985] EGLR 14 cited with approval by Andrew Smith J in Petrochemical Industries Co v Dow Chemical. A similar point was made by Teare J in Pace Shipping v Churchgate Nigeria Ltd [2009] EWHC 1975 (Comm); specifically deprecating a minute textual analysis. Quite apart from the fact that this is the wrong approach, it did not assist the claimants' case. Instead it demonstrated that the tribunal had dealt with the argument about continuing renunciation."

The Judge further made the point (citing The Petro Ranger [2001] 2 Lloyd's Rep 348 and Petrochemical industries v Dow Chemical [2012] EWHC 2739) that in an appeal under s.68 it was wrong in principle to look at the quality of the reasoning if the tribunal had dealt with the relevant issue.

The appeal raised a further issue which it was suggested that the tribunal had failed to consider, namely the buyers' intention to "flip" the contracts thereby affecting the quantum of damages. The point was academic in the light of the court's finding that the tribunal's award could not be challenged on the liability-related issue. The Judge however dealt with the issue raised. He considered that the tribunal had in fact reached the correct conclusion on the facts, namely that there had been "no market activity" and that the buyers could not discharge the burden of proving that they would have on-sold the contracts at a profit. Even if the tribunal had reached the wrong conclusion or a different conclusion from that which the Judge might have reached, the claimants could not seriously begin to suggest that the tribunal had not dealt with the issue.

"What this part of the application really is, is a scarcely veiled attempt to challenge the findings of fact of the tribunal which the claimants do not like. Even if the tribunal had overlooked a particular piece of evidence in reaching its findings of fact, that is not susceptible to challenge under section 68 or otherwise: see per Colman J in World Trade Corporation v C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422.."

ABOUT THE AUTHOR

Ian Gaunt
MA (Cantab); FCIArb; DipICArb

Full Member, LMAA Committee, Supporting Members Liaison Committee

Cambridge University Law Degree 1972.
Called to the Bar Middle Temple 1973.
Harmsworth Major Exhibition Middle Temple 1971.
Astbury Scholarship 1974.
Assistant Parliamentary Counsel: 1976-1979.
Partner, Sinclair Roche & Temperley: 1981-1999.

Senior Vice President-International, Carnival Corporation and Carnival plc: 1999-2008, having overall responsibility for commercial and legal management of Carnival Group shipbuilding programme (35 cruise ships including Queen Mary 2).

Director, The United Kingdom Protection & Indemnity Association (Bermuda) Limited: 2004-2008.

Full time Arbitrator since 2008.

Honorary Secretary of the LMAA since 2010.

Member of The Baltic Exchange and Northern Europe Committee RINA.

Particular experience of commercial, technical and legal aspects of ship sale and purchase, shipbuilding and related financing agreements.

Arbitration experience includes references concerning shipbuilding, ship repair and conversion contracts, charterparties, sale and purchase agreements and contracts of affreightment. Party appointed arbitrator in LMAA and LCIA arbitrations, sole arbitrator and third arbitrator/chairman in LMAA arbitrations.

Fluent in German, French and Italian. Mandarin Chinese (intermediate reading and spoken).

NEWS AROUND THE REGION

HKIAC 香港國際仲裁中心 Hong Kong Internationa Arbitration Centre

HKIAC Domestic Arbitration Rules Revised

The Hong Kong International Arbitration Centre (HKIAC) is pleased to announce the publication of the revised HKIAC Domestic Arbitration Rules (2014) (“Revised Domestic Rules” or "Revised Rules"), which will come into force on 1 November 2014. The Revised Rules amend and replace the Domestic Arbitration Rules (2012) and (1993) and are for use by parties seeking a set of formal and convenient procedures for ad hoc arbitration in Hong Kong. Where the parties wish to have a more structured arbitration, parties are advised to refer to the HKIAC Administered Arbitration Rules (2013).

The purpose of the Revised Domestic Rules is to provide a framework for the resolution of the widest possible range of domestic disputes through a procedure which is as short and inexpensive as practicable. The Revised Rules should not be used where the parties wish the seat of arbitration to be outside of Hong Kong.

The amendments included in the Revised Rules draw on users’ feedback to further strengthen HKIAC’s services to parties and professionals and ensure the rules continue to reflect the very best of modern industry practice in Hong Kong. Like the 2012 HKIAC Domestic Arbitration Rules which came into effect on 2 April 2012, the changes made in the Revised Domestic Rules continue to mirror the structure of the Hong Kong Arbitration Ordinance and provide greater clarity for users.

klrcA

Signing Ceremony: Collaboration Agreement between the Kuala Lumpur Regional Centre for Arbitration (KLRCA) & Thailand Arbitration Centre (THAC)

The 4th of November 2014 proved to be a significant day in KLRCA’s calendar. Apart from having the privilege of witnessing the Prime Minister of Malaysia officially launch the Centre’s newest premises, BangunanSulaiman; the Centre also had the honour of signing a collaboration agreement with the region’s latest alternative dispute resolution centre, the Thailand Arbitration Centre (THAC).

Staying true to the promises made by KLRCA’s Director, Datuk Professor SundraRajoo, in his speech delivered earlier in the day – to continue synergizing with other regional institutions to collectively elevate the standards of Asia’s alternative dispute resolution standing, a signing

ceremony was held to formally commemorate the memorandum of understanding between the two Asian arbitration counterparts.

The collaborative venture will see the KLRCA and THAC jointly organising seminars, conferences, educational training and internship programmes on arbitration from time to time – with the main goal of enhancing each party's contribution to their respective nations and continent.

A large crowd comprising of honourable ambassadors, senior arbitrators and eminent members of the KLRCA's Advisory Board bore witness to the ceremony as KLRCA's Director Datuk Professor SundraRajoo and THAC's Managing Director MrPasitAswawattanaporn took centre stage to officially sign the collaborative agreement documents.

Representatives of both centres then exchanged gifts to signify the mutually beneficial agreement and as a show of good will.

Beijing Arbitration Commission

BAC Arbitration Rules 2015 Unveiled with Acknowledgment

On December 4, 2014, the Beijing Arbitration Commission (the "BAC") officially released its Arbitration Rules 2015 (the "New Rules"). The New Rules were adopted at the Fourth Meeting of the Sixth Session of the Beijing Arbitration Commission on July 9, 2014, and will become effective as of April 1, 2015.

Arbitration rules best reflect an arbitration institution's professionalism. Ever since its establishment, the BAC has endeavored to provide a set of arbitration rules that can highlight the features and advantages of commercial arbitration, stick to party autonomy, meet the parties' needs, and embrace the trend of international commercial arbitration. The revision of its existing arbitration rules has fully shown the BAC's fast growing experience in arbitration, as well as its close attention to the development tendency of the international arbitration practice.

Following the release of the New Rules, the BAC is to host a series of trainings and seminars. From December 8, 2014, the BAC will publish the official interpretation article by article both on its website and on its WeChat homepage for anyone interested and in need. As always, the BAC would like to work closely with its colleagues and friends, to build a more cost-effective and professional commercial dispute resolution mechanism, and to contribute to a beautiful tomorrow of commercial arbitration in China.

EVENTS CALENDAR
JANUARY-JUNE 2015

16 January 2015

* Developments in Singapore Arbitration Law

Orgainzer:
Singapore Institute of Arbitrators

Venue:
Intellioffices, Level 11, 146 Robinson Road, Singapore

4 February 2015

* Dubai: 3rd Annual International Arbitration Summit

Organizer:
Wolters Kluwer

Venue:
Park Hyatt, Dubai

20 & 21 March 2015

* A Century - Shaping the Future of Arbitration

Organizer:
Chartered Institute of Arbitrators (East Asia Branch)

Venue:
Marriot, Hong Kong.

18 – 26 April 2015.

* Diploma of International Commercial Arbitration Course

Organizer:
The Chartered Institute of Arbitrators (Australia) Limited

Venue:
Sydney, Australia