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CROSSING BORDERS

International Arbitration
Insights

Welcome to the ninth edition of Crossing Borders, a periodic review of developments in international arbitration across the world.

In this edition, we celebrate the upcoming International Council for Commercial Arbitration (ICCA) Congress in Sydney and its theme “Evolution and Adaption: The Future of International Arbitration”. Inspired by ICCA, we explore how international arbitration has adapted and will continue to adapt to global challenges and opportunities. We look at recent developments in China and how these developments may impact China’s role in the resolution of disputes involving Chinese parties, particularly those going out pursuant to the Belt and Road Initiative (BRI). We discuss the increasing trend of Chinese parties as claimants and the potential legal, practical and cultural impact on international arbitration and cross-border dispute resolution. We review recent decisions on costs and institutional approaches to transparency and anticipate trends in international commercial and investor-state arbitrations in 2018.

From a national perspective, we look at how courts in Spain have dealt with arbitrator misconduct and how countries such as Japan continue to evolve to promote international arbitration and mediation as alternative forums for resolving disputes. We also discuss BRI developments and provide practical insight for Chinese investors interested in understanding the importance of structuring their BRI investments to benefit from investment treaty and other protections.

Our Global International Arbitration Team continues to work together and achieve great results for our clients. We are pleased to share with you some of the recent successes of our teams in Australia, Europe, Hong Kong SAR, Japan, Mainland China and the Middle East.

If you would like to discuss any issues in particular regions, or delve deeper on topics covered in this issue, please do not hesitate to contact any one of our International Arbitration partners across our global network.

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China year in review – Where we have been and where we are going

By Meg Utterback (Shanghai/London), Guo Shining (Shenzhen), Holly Blackwell (Shanghai) and Nicholas Lee (Shanghai, on secondment from Hong Kong)

2017 was a big year for the rule of law in China. We saw many legal initiatives aimed at expanding and improving options for cross border dispute resolution. KWM covered many of these developments in periodical articles published through various media outlets, including our website,¹ WeChat and third party publications.² This article will bring you up to date on what you may have missed and provide a snapshot of the developments that we found to be noteworthy.

The courts

Here are some of the developments from China last year that affected or will affect the role of courts in hearing cross-border disputes.

Principle of reciprocity

In China, foreign court judgments are enforceable pursuant to international treaty or on the basis of reciprocity.³ In the absence of a binding treaty, litigants must rely on the principle of reciprocity to enforce foreign court judgments in China. Until recently, there was no report of a foreign court judgment being enforced in China on the basis of reciprocity. This changed with the recent enforcement of US and Singapore court judgments.

For the first time, the Wuhan Intermediate Court enforced a monetary judgment from the Los Angeles Superior Court in California in the case of *Liu Li v Tao Li and Tong Wu (Liu Li)*.⁴ In applying the principle of reciprocity, the Wuhan court cited the case of *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co Inc*,⁵ in which a federal court in California had enforced a Hubei High Court judgment. In Jiangsu Province, the Nanjing Intermediate People's Court also enforced a monetary judgment from the Singapore High Court in the case of *Kolmar Group AG*

v Jiangsu Textile Industry (Group) Import & Export Co Ltd ⁶ (*Kolmar*). As in *Liu Li*, the court relied on the principle of reciprocity by citing the case of *Giant Light Metal Technology (Kunshan) Co v Aksa Far East Pte Ltd*,⁷ in which the Singapore High Court had enforced a judgment from the Suzhou Intermediate Court in Jiangsu Province.

Whilst the recent *Liu Li* and *Kolmar* cases demonstrate the applicability of the principle of reciprocity in China, they also illustrate the potential limits on the use of such principle. For instance, a foreign party attempting to enforce a foreign judgment in China will need to establish de facto reciprocity between China and the foreign state by demonstrating that the foreign state has already enforced a Chinese court judgment. For countries like Australia, where the courts are yet to enforce Chinese judgments, this may be a barrier to judgments being enforced in China. We are optimistic that the next Chinese recognition and enforcement of a foreign judgment on the basis of reciprocity will be of an English judgment, in light of an English High Court's

¹ "CIETAC Investment Arbitration Rules", <https://www.chinalawinsight.com/2017/12/articles/global-network/cietac-investment-arbitration-rules/>; "China Signs the Hague Choice of Court Convention", https://www.chinalawinsight.com/2017/09/articles/global-network/china-signs-the-hague-choice-of-court-convention/#_ftn1.

² Recent Developments in the PRC: A Change in Tide for Arbitration?" <http://arbitrationblog.kluwerarbitration.com/2017/12/05/recent-developments-prc-change-tide-arbitration/>.

³ References to the enforcement of foreign court judgments are generally intended to include recognition and enforcement of those judgments, unless otherwise noted.

⁴ *Liu Li v Tao Li and Tong Wu*, (2015) E Wuhan Zhong Minshang Waichuzi No 26.

⁵ *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co Inc*, 2009 WL 2190187 (CD Cal 2009).

⁶ *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd*, (2016) Su 01 Xie Wai Ren No 3.

⁷ *Giant Light Metal Technology (Kunshan) Co v Aksa Far East Pte Ltd* (2014) SGHC 16.

recent recognition of a Chinese maritime court judgment. Proceedings to potentially recognize the first English court judgment in China are currently underway in Shanghai.

Though recognition and enforcement of an English judgment is yet to be seen, there is still a silver lining for matters where the foreign jurisdiction has yet to recognise and enforce a Chinese judgment. For Belt and Road Initiative (**BRI**) countries, under the Several Opinions of the *Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts* issued by the Supreme People's Court (**SPC**) in 2015, a Chinese court can assume de jure reciprocity and take the first step in establishing the reciprocal relationship with the foreign state.

The Hague Convention

Another significant recent development to the liberal approach to enforcement of foreign court judgments was China's signing of the Hague Convention on Choice of Court Agreements (**Hague Convention**). In brief, the Hague Convention provides that courts of member states must respect exclusive jurisdiction clauses in commercial agreements by staying proceedings in favour of the courts of other member states. Importantly, the Hague Convention also provides commercial certainty by mandating that member states must also recognise and enforce judgments of the courts of other member states. This in theory sounds promising, but the scope and use of the Hague Convention is limited.

China has only signed the Hague Convention and not yet ratified it. Ratification can take time. By way of example, the US signed the Hague Convention in 2009 but has yet to ratify it. Even when ratified, the Hague Convention has limited territorial reach. Unlike the New York Convention, which extends to more than 150 countries, at present the Hague Convention extends to only 30 countries.

The Hague Convention only applies to exclusive choice of court agreements, as defined in Article 3. It will only come into play where a Chinese party has agreed to submit to the exclusive jurisdiction of a foreign court or a foreign party acquiesced to the exclusive jurisdiction of a Chinese court.

The application of the Hague Convention is also subject to a number of exceptions. For example, judgments which are not covered or cannot be enforced include those concerning employment, capacity of a natural person, insolvency, transportation, maritime, antitrust, personal injury, tort, property rights and certain intellectual property matters. The Hague Convention also does not apply to arbitration or related proceedings or to interim relief.

International commercial courts

China has recently approved plans to establish a BRI-specific dispute resolution mechanism. Under the proposal, the SPC will establish three international commercial courts. These courts will sit in Xi'an, Shenzhen and Beijing. The Xi'an court will handle cases related to the Silk Road. The Shenzhen court will deal with cases related to Maritime Silk Road disputes. The Beijing court will be the headquarters. It appears the SPC is looking to model these international commercial courts on the existing Singapore

International Commercial Court (**SICC**) and the Dubai International Finance Centre Court (**DIFC**).

Unlike the SICC and DIFC, which have their own panels of foreign judges, China has only a limited number of local judges qualified to hear such disputes, and local laws may prohibit foreign judges from sitting in Chinese courts. Even in that limited pool of judges not all will be able to hear disputes in English. Moreover, the current Civil Procedure Law puts obstacles in the way of the international commercial courts hearing cases in English. The international commercial courts and their implementation will need further definition before they are a viable option for BRI contracting parties.

Arbitration

Here are some of the key recent developments in arbitration in China.

New CIETAC Investment Arbitration Rules and CIETAC Investment Dispute Resolution Centre

On 1 October 2017, the Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission (**Rules**) entered into force. The Rules and the newly established CIETAC Investment Dispute Resolution Centre in Beijing (**CIETAC IDRC**) seek to "fill the gap" in the area of Chinese international investment arbitration. In our earlier article, KWM lawyers provide a summary of the Rules and their features.⁸

The Rules are important as they mark China's first attempt to establish a domestic arbitral institution for international investment disputes. This, at the same time as the establishment of the international commercial courts, clearly indicates the increasing desire of Chinese parties to resolve disputes on their home ground. As Wang Chengjie, Secretary General of CIETAC has stated, "[t]here are cases in which the Chinese side was treated unfairly because of a lack of understanding in Chinese laws and practices. We hope China's Arbitration Rules can help reduce unnecessary losses on both sides".⁹

The creation of the Rules and the CIETAC IDRC offer an alternative to traditional choices for resolving investor-state disputes such as the World Bank's International Center for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) and the International Chamber of Commerce International Court of Arbitration (ICC). These traditional choices have been typically identified as the rules and institutions for proceedings between a foreign investor and a host State under many bilateral investment treaties. Whether foreign investors and States will move away from these well-established arbitral institutions in favour of CIETAC IDRC and how the Rules will be adopted is yet to be seen. Conceivably, they could be included in investment contracts between Chinese investors and host country

⁸ "CIETAC Investment Arbitration Rules", <https://www.chinalawinsight.com/2017/12/articles/global-network/cietac-investment-arbitration-rules/>.

⁹ "China launches first Investment Arbitration Rules to defend rights", The State Council of the People's Republic of China, available at: http://english.gov.cn/news/video/2017/09/20/content_281475871634494.htm.

governments. They could also be incorporated into China's investment treaty regime.

Shenzhen Court of International Arbitration

In December 2017, the Shenzhen government announced that the previous Shenzhen Court of International Arbitration and Shenzhen Arbitration Commission (**SAC**) will be combined into one arbitration center named the Shenzhen Court of International Arbitration (**SCIA**). The newly merged SCIA will have jurisdiction over disputes submitted to its predecessor institutions. The combination is likely intended to meet the needs of domestic and international companies driving Shenzhen's rapid economic growth, particularly in the technology sector, and to better serve BRI participants and the Greater Bay Area (comprising Guangdong, Hong Kong SAR and Macao SAR).

Both the previous Shenzhen Court of International Arbitration and SAC had their own rules. The SAC rules were more closely aligned with Chinese civil procedures; the Shenzhen Court of International Arbitration rules were largely based on the UNCITRAL Rules. The SCIA Council, which comprises members from both predecessor institutions, is still in the process of formulating and implementing a new set of arbitral rules (including certain supplementary and auxiliary rules and procedural directives) and a panel of arbitrators. Until that process is completed, the rules of the SAC and the previous Shenzhen Court of International Arbitration continue to apply to existing contractual arrangements, and each arbitral institution's panel of arbitrators remain intact.

SPC regulations on the enforcement of arbitration agreements and awards

Finally, in late December 2017, the SPC released two regulations addressing judicial review of arbitration cases, namely the Regulation on Reporting Judicial Review of Arbitration Cases and the Regulation on Hearing Judicial Review of Arbitration Cases (collectively **Regulations**). The Regulations became effective on 1 January 2018.

In 1995, the SPC established an internal reporting system for judicial review of foreign-related arbitration cases. The Regulations replace the previous internal reporting system with a reporting and review system that now applies to judicial review of foreign-related and domestic arbitration awards.

Under the Regulations, the reviewing court must report to its superior court when it decides to deny the validity of an arbitration clause or to set aside or not to enforce an arbitration award. If the superior court agrees with the lower court's decision, it must then report the decision to the SPC for further review and the SPC will then give the final decision. Elevated reporting to the SPC applies when a foreign-related arbitration clause or award is at issue, and when a domestic arbitration clause or award is at issue and parties from different provinces are involved or public interest has been cited as a basis to deny enforcement of the arbitration clause or award. If, however, the matter is purely domestic and does not involve considerations of public interest, the final decision will come from the high people's court in the place where the application is made, not the SPC.

The Regulations address only the procedure for higher court reporting. They do not address the substance or timeline for review. The Regulations may provide a limited opportunity for party participation if a higher court determines that the "relevant facts" are unclear. In such case, the higher court may direct questions to the parties, in which case a written reply from the parties may be appropriate, or may return the case to the lower court for further investigation.

The Regulations also contain provisions which clarify and adopt a pro-arbitration approach to determining the governing law of a foreign-related arbitration clause, and provide a mechanism for a foreign respondent involved in Chinese court or arbitral proceedings to recognize a foreign arbitral award in China where the lack of assets or a domicile would have previously barred it from doing so.

Concluding remarks

The last twelve months have seen many notable developments in the cross-border disputes sphere in China. These developments have cut across State policy, judicial decisions and arbitral institutions. They demonstrate China's interest in assuming a role in the resolution of disputes involving Chinese parties and in providing an increasingly transparent and predictable domestic forum for resolution of these disputes. They provide new options for parties considering doing business with China and for Chinese businesses going outbound. If you need further information or wish to read these articles in full, please go to www.kwm.com.





Belt and Road projects – Actions to success

A report and recommendations following the Hong Kong SAR Belt & Road Summit

By Paul Starr¹ (Hong Kong) and Monique Carroll (Melbourne)

Our previous edition of Crossing Borders highlighted the Belt and Road Initiative (BRI). So important and ongoing is this People's Republic of China (PRC) worldwide initiative, that the PRC has organised an annual Summit (Summit) in the Hong Kong Special Administrative Region (Hong Kong SAR) to report on progress and where to next. What follows is a report from the 2017 Summit (held in September) and KWM's recommendations for making your BRI projects successful.

From Vision to Action – It is really happening

The theme of the Summit was 'From Vision to Action' with PRC government representatives sharing that over 600 contracts have already been signed by PRC enterprises for projects in BRI countries.

Our own case load also indicates that the 'Action' phase has well and truly commenced. Our PRC offices are involved with 22 BRI projects. Our Hong Kong Projects and Infrastructure Team is paying frequent visits to Ghana, where we are advising a PRC client on expansion of its mining operations and its proposed development on a Build-Own-Transfer basis of rail infrastructure in that country. (Purists might scoff that Ghana is not officially on the BRI – but that just demonstrates how quickly the

concept is growing.)

Our Hong Kong Finance Team has assisted with: the formation of the China-UAE Investment Corporation Fund; the drafting of a term loan facility for a Laos project; advice on a USD 900 million syndicated acquisition financing in Brazil; a bank guarantee facility in Greece; and bridge financing in Europe. Our Mainland China offices are assisting on BRI ventures as far flung as Pakistan (nuclear, wind and solar power), Argentina (nuclear power), Ethiopia (power transmission and distribution), Laos and Thailand (railways), Russia (railway, cable export and hydropower), Kazakhstan (gas pipelines) and Myanmar (oil and gas).

A number of leading international companies are already involved in BRI projects both within and outside Australia. As more companies develop their understanding of how the BRI links to them, we expect to see these numbers grow.²

How to successfully implement 'Action'

Three major themes were consistently raised at the Summit as essential to successful transition from Vision to Action.

(1) Sustainable = success

Exposure to high levels of political, financial and legal risk is a ubiquitous feature of many BRI projects given that the projects are based in 'foreign' jurisdictions many of which are developing economies.



Summit speakers reiterated comments in a report from McKinsey & Company, proposing that BRI project participants adopt a comprehensive risk management mechanism to achieve project sustainability, at both macro and microeconomic levels.³ At the macro level, this will entail the PRC government establishing a risk management think tank and using independent and transparent risk modelling. At the micro level, it means a localised risk management system. Summit speakers also noted that financing requirements from multilaterals, banks and export credit agencies can play a key role in implementation of risk mitigation mechanisms.

This is consistent with KWM's experience. The most successful cross-border investments are those which are implemented in conjunction with a considered and tailored risk management plan. This plan puts project leaders in the best position to encounter any commercial difficulties that arise as well as any social and regulatory issues.

We have also seen PRC companies being strongly encouraged by the PRC government to adopt comprehensive risk management tools including corporate social responsibility practices. Most recently, this has been demonstrated by the Asian Infrastructure Investment Bank (AIIB) which provides regional financing and acts as an investment platform for infrastructure development in Asia. The AIIB now requires that the environmental and social risks of projects which it finances are identified and managed in accordance with its Environmental and Social Framework. The PRC's Ministry of Commerce (MOFCOM) has also released guidelines and regulations for PRC companies in respect of their responsibilities to support

sustainable development, environmental protection and anti-bribery in cross-border investments.⁴

Risk management policies and procedures based on these principles can therefore be expected to be the new 'normal' for BRI projects.

(2) Private sector involvement

As Victor Fung, Chairman of the Fung Group, summarised at the Summit: "China cannot do it alone. It has to be a public-private sector cooperation internationally".⁵ While much work to date has focused on securing inter-governmental cooperation – for example through bilateral cooperation agreements – the private sector is increasingly seen as a key partner to work with the PRC

¹ Paul Starr was a guest speaker at the Summit.

² KWM is a key sponsor and supporter of the Australia-China Belt & Road Initiative, a private sector led initiative formed to ensure that Australian companies are given the opportunity, and are in a position, to make informed decisions around participation in BRI projects.

³ Belt and Road Summit, 'Executive Summary from the 2nd Belt and Road Summit Hong Kong, 11 September 2017', available at: http://www.beltandroadsummit.hk/pdf/MckinseyExecutiveSummary/McKinsey_BeltandRoadSummit2017_EN.pdf.

⁴ See Guidelines on the Environmental Protection in Outbound Investment and Cooperation (《对外投资合作环境保护指南》) and Key Working Points on Regulating the Conduct of Enterprises Engaged in Overseas Business and Preventing Overseas Commercial Bribery (《2013年商务部规范企业境外经营行为，防治境外商业贿赂工作要点》). See also <http://www.kwm.com/en/cn/knowledge/insights/investing-in-myanmar-risks-and-strategies-for-chinese-entities-20130901>.

⁵ Above n 3, 31.

government to realise the BRI. This is in recognition of the need to leverage the industry, project management and risk management expertise of private enterprise to ensure successful projects. More significantly, while the PRC has already committed USD900 billion to the BRI, it is expected that private capital will be needed to fund up to 80% of the estimated USD5 billion total price tag of projects across the 69 BRI countries.

McKinsey & Company recommends that PRC companies adopt the highest standards of risk management during investment and implementation to safeguard sustainability as well as the following focus areas: (i) establishing a dynamic project sourcing team with good industry and project management skills; (ii) standardisation of the project screening process; (iii) establishing a public-private functional committee incorporating market-based governance systems to increase transparency, project flow and access to funding; and (iv) cost-efficient project and post-investment management. These are all areas in which the private sector can contribute.

It is also clear from the Summit that the 'private' contribution to the BRI is not exclusive to large enterprises. Young business leaders at the Summit also explained how the BRI offers a platform for small and medium-sized enterprises (SMEs), and especially those in digital technology and big data, to expand into lucrative regional or even global markets. While risk management is a particularly acute issue for SMEs trying to access BRI markets, these delegates noted that governments can again play a facilitative role by implementing trade agreements, special economic zones and incentive programs.

The growing involvement of private enterprise is also consistent with our experience as set out above under 'Vision to Action'.

(3) Regulatory harmonisation

Policymakers from various BRI countries speaking at the Summit consistently referred to the importance of regulatory harmonisation and harmonisation of dispute resolution infrastructure. Harmonisation of regulations and policy coordination between participating nations is essential to the success of the BRI, where projects often transcend political and jurisdictional boundaries. Consistency and predictability are key elements to providing a stable and encouraging investment environment.

The groundwork for this harmonisation has already been laid through the business and trade cooperation agreements and memoranda of understanding signed between the PRC and 70 countries and international organisations. At the Summit, the PRC government expressed its intention to continue to enter into free trade agreements containing investment promotion and protection provisions.

In addition to this, Summit speakers stressed the importance of having available a robust, internationally recognised dispute resolution regime, such as international arbitration based in Hong Kong SAR. In this context Hong Kong SAR was recognised as a leading dispute resolution hub in the Asia Pacific region able to produce arbitral awards enforceable in over 150 jurisdictions, including Mainland China.

KWM recommends that parties consider and obtain advice as to the proposed dispute resolution mechanism in their contracts, the governing law of the contracts and if there are any likely impediments to enforcement of the contract from a legal or practical perspective. Dispute resolution clauses that are legally unenforceable or unenforceable due to some other practical impediment significantly devalue and undermine your contractual rights. This review should also include consideration of political risk and sovereign immunity if the project involves government approvals, facilitation or participation.

Recommendations

To ensure you are in the best position to successfully action BRI projects, we recommend you contact your legal advisers to:

- conduct an independent review of your risk assessments and compliance framework to ensure it adequately deals with the commercial, social and environmental risks;
- advise on the enforceability and adequacy of the dispute resolution procedure under the proposed contracts;
- advise on management of political risk and sovereign immunity issues;
- develop culture and corporate governance guidelines; and
- draft contractual and project documentation.





A practical guide to Chinese investor protections along the Belt and Road

By Donovan Ferguson (Hong Kong), James McKenzie (Hong Kong) and Felicity Ng (Sydney, on secondment from Hong Kong)

Investors journeying along Belt and Road Initiative (**BRI**) countries will be wary of the operational, political and legal risks that come along on the route. To mitigate these risks, aside from the usual prudent contracting and investment structuring, investors should also be aware of their rights under the web of investment treaties which cover the route. However, knowing about the existence of investment treaties is only the first step.

Investors should familiarise themselves with the particular dimensions of substantive rights as expressed in the various Chinese Bilateral Investment Treaties (**BITs**) and Multilateral Investment Treaties (**MITs**). As at the time of writing, 61 BITs exist between China and BRI nations as well as several MITs. Of these BIT-contracting states, 49 are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**Washington Convention**), which provides for enforcement of arbitration awards.

While these treaties and the Washington Convention provide a robust source of potential investor protections, they must be understood and carefully planned for by BRI investors. There remain key differences between BITs with BRI countries. In this article, we detail some of these differences and some of the key considerations for making BRI investments.

Why do investment treaties matter?

BITs are international law instruments agreed between two states. MITs are treaties agreed between more than two states. BITs and MITs trace their history back to the post-Second World War era, originally created by developed

countries to protect their investments in developing countries. Modern BITs and MITs aim to create a stable legal environment that fosters direct foreign investment. This is achieved by the “host state” (i.e. the state in which the investment is made) agreeing to provide certain guarantees and standards of protection to the investments of private foreign investors (i.e. those with the nationality of, or where they are a corporation the place of incorporation in, the “home state”).

A major innovation was introduced into investment treaties in the mid-1960s: arbitration mechanisms which give investors an effective remedy against unlawful actions of the host state, known as Investor State Dispute Settlement (**ISDS**). With the inclusion of ISDS mechanisms in investment treaties, corporate and individual investors can bring claims against governments for breaches of the substantive investor rights set out in those treaties. The ISDS process is independent from domestic legal systems, which means that BIT and MIT protections are a crucial bulwark against political and legal risks that BRI investors are likely to face in some of the high risk jurisdictions amongst the BRI countries. Importantly, investor rights and remedies through ISDS are often in excess of those that a BRI investor will enjoy under their BRI contract.

Notably, the usual dispute resolution method under Chinese investment treaties, arbitration submitted to the International Centre for Settlement of Investment Disputes (**ICSID**), allows investors to rely on simplified enforcement mechanisms under the Washington Convention. Host states that are party to the Washington Convention are required to enforce arbitral awards made under that Convention, making enforcement of awards an obligation under international law. While voluntary compliance with the Washington Convention is the norm rather than the rule, concerns surrounding reputation and creditworthiness are

likely to continue to encourage government compliance with enforcement, particularly where the investments are made against a backdrop of a myriad of geo-political intricacies amongst BRI countries.

Investor protections covering the BRI route

Typically, the protections offered in BITs are similar to the protections offered in MITs, but the scope of guaranteed protection offered by each treaty will be set by its wording. Common forms of guaranteed protection include:

- compensation for expropriation or nationalisation of an investor's assets by a state;
- fair and equitable treatment, which creates an obligation to provide a stable and predictable investment environment, to act transparently, and to act consistently;
- full protection and security, which provides a positive obligation to protect investment by the exercise of reasonable care;
- protection against discriminatory measures, e.g. taxes, fines, penalties, licences, permits, visa restrictions; and
- "umbrella clauses". These clauses may incorporate contracts entered into between a host state and investors as BIT obligations.

Whilst China began its negotiation process for investment treaties in 1982, its treaty-making practice has varied over time and with its rise in economic power. While Chinese BITs generally contain all of the substantive protections outlined above, many of the earlier Chinese BITs entered into between the 1980s and the mid-1990s do not allow for umbrella clauses. Examples of BRI contracting states which have entered into such BITs are Indonesia, Laos, the Philippines, Saudi Arabia and Vietnam. Consistent with China's earlier conservative approach, a further obstacle is posed by the limited scope of ISDS provisions in these treaties, as they only permit disputes relating to the compensation amount for expropriation. These treaties were concluded at a time when China was mainly acting as the host state, i.e. the recipient of foreign investments.

By contrast, China's more recent BITs, especially those concluded post-2000s, have a different approach to investment protection and host state interests. BITs with BRI contracting states like Bosnia and Herzegovina, Iran, Myanmar, South Africa and Uzbekistan not only incorporate umbrella clauses but allow for ISDS in relation to any dispute relating to the investment. This shift in practice reflects China's interest in protecting its own investors abroad. Given the increase in Chinese outbound investments and developments along the BRI countries, China may in the future renegotiate its earlier generation BITs to incorporate more liberal standards and to align with its policy orientation as exemplified in its more recent BITs.

To minimise risk exposure, investors should therefore carefully check the BITs and MITs between China and the BRI country where an investment is being made and their specific provisions. Investors should also check whether there are any treaties that are still in force and verify the BRI country's history in dealing with ISDS claims.

How to make use of investment treaties?

The most important first hurdle for an investor seeking to make use of an investment treaty is to make sure that their investment falls within the definition of "investment" under a particular investment treaty. As of 2015, 32% of all ICSID arbitrations failed at the jurisdiction stage, as claimants did not qualify as an "investment" or being an "investor" under the relevant investment treaties.

The definition of investment has been subject to significant arbitral scrutiny. Notably, in *Salini v Morocco* (ICSID Case No Arb/00/04 (Decision on Jurisdiction, 23 July 2001)), the tribunal identified five criteria indicative of the existence of an investment under the Washington Convention, namely:

- a substantial commitment or contribution to the state;
- duration (i.e. a certain degree of longevity);
- assumption of risk;
- contribution to economic development; and
- regularity of profit and return.

Chinese BITs tend to adopt the commonly used asset-based definition of "investments" that is broad in scope, meaning that, apart from direct investments, this would include portfolio investments and intangible assets like intellectual property. However, there is often the requirement that such investments have to be made in accordance with the laws and regulations of the host state, which may narrow the scope of "investments". This can be a challenge for BRI investors navigating through the interface between these multi-levelled requirements when structuring their investments so careful consideration should be given to fitting into the investment definitions before a project is commenced.

Conclusion

Investors should structure or restructure their investments to ensure that they qualify for ISDS protections. When structuring investments, investors ought to give similar weight to considerations regarding ISDS and falling within the scope of investment treaty protections, as they do the usual tax, funding and corporate governance considerations. BRI investors should therefore engage professional advisors at an early stage to structure their investments with this in mind, so that if a dispute does arise, they have the potential benefit of these additional protections.



The rise of Chinese investors as claimants: What are the likely impacts on international arbitration?

By *Guo Shining (Shenzhen)*, *Edwina Kwan (Sydney)* and *Josephine Lao (Sydney)*

Introduction

In recent years, China has experienced unprecedented economic, military and diplomatic growth. China is now regarded as the number one economic superpower by the International Monetary Fund (IMF) on the basis of gross domestic product (GDP), surpassing the United States. Beginning with its accession to the World Trade Organisation, there have been a number of recent initiatives that have contributed to China's prolific involvement in global trade and investment including:

- China's entry into international investment agreements and free-trade agreements;
- the Belt and Road Initiative (BRI);
- the increase in Chinese foreign outbound investment; and
- the rapid rise in cross-border e-commerce.

China's entry into international investment treaties has the dual benefit of signalling to the world that China is a safe place to invest, as well as providing Chinese outbound investors with the legal framework to protect their foreign investments.

The rise in Chinese foreign trade and investment and China's open attitude towards international investment agreements has had a direct impact on the number of Chinese parties involved in cross-border commercial disputes. Specifically, Chinese parties are becoming increasingly assertive in enforcing their rights internationally.

This article explores the current and anticipated increase of Chinese investors as claimants in cross-border disputes and the cultural, legal, procedural and practical implications this has on international commercial and investor-state arbitrations.

International commercial arbitration

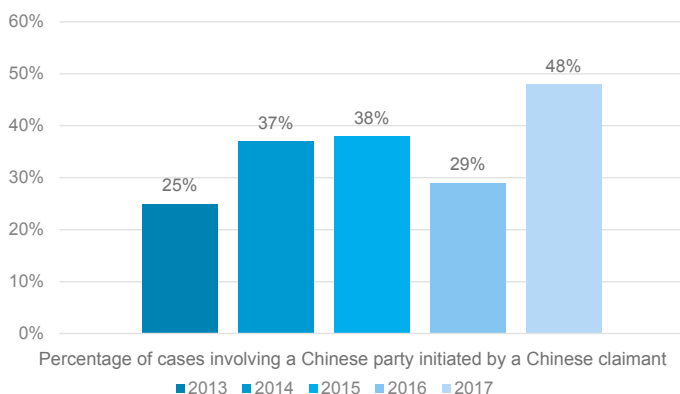
Traditionally, Chinese parties have been reluctant to be involved in any formal dispute resolution proceedings. Fearing a loss of "face" in any formal proceedings, Chinese parties have instead relied on the often intricate relationship (*guanxi*) networks held with any prospective investor, or related to a business deal to achieve a negotiated outcome as an alternative to imposing the rule of law. In the past, when conducting international business transactions, Chinese parties were unaccustomed to the concept of Western-style litigation or arbitration, that going to a court or an arbitral tribunal to resolve a dispute was not thought of as a legitimate possibility. However, with the dramatic increase in China's inbound and outbound foreign investment due in large part to China's "Going Global" strategy, Chinese claimants are now familiar with the ins and outs of international dispute resolution. Chinese parties increasingly use international dispute resolution procedures to their advantage, either at the negotiating table or when commencing proceedings against foreign counterparties.

China has taken a more liberal attitude towards international arbitration with a number of reforms in recent years signalling that the Chinese government is more open to international dispute resolution. Previously a closed market, China has allowed the major international arbitration institutions to open representative offices in the Shanghai Free Trade Zone, notably the Hong Kong

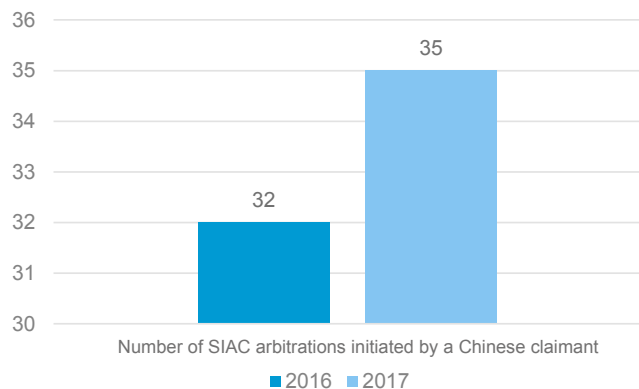
International Arbitration Centre (**HKIAC**) in 2015, the Singapore International Arbitration Centre (**SIAC**) and the International Chamber of Commerce (ICC) in 2016. The presence of these institutions in Mainland China signals the importance of the Chinese market and the growing number of Chinese parties involved in international arbitrations.

A review of statistics from these major international arbitration centres confirms an increase in cases involving Chinese parties in recent years. In 2017, Chinese parties were the second largest number of foreign users of SIAC arbitration, second only to India. The number of Chinese claimants initiating SIAC arbitrations increased from 32 cases in 2016¹ to 35 cases in 2017.² This can be compared to 2014 and 2015, where the total number

Growth in Chinese initiated HKIAC arbitrations



Growth in Chinese initiated SIAC arbitrations



of cases involving Chinese parties was only 41 and 46 respectively. This trend is mirrored in the Hong Kong Special Administrative Region (**Hong Kong SAR**), where Chinese parties are one of the largest numbers of users of the HKIAC and where the number of cases initiated by Chinese claimants has increased from just 24 cases in 2013 to 48 cases in 2017.³ According to statistics provided by the HKIAC, 48% of cases involving a Chinese party in 2017 were initiated by a Chinese claimant, as opposed to only 25% of cases involving a Chinese party in 2013.⁴

Investment treaty arbitration

Although China has signed 145 bilateral investment treaties (BITs) and 22 agreements with investment provisions,⁵ there have only been a handful of international investment treaty disputes involving a Chinese party. It is reported that Chinese investors have only commenced five investor-state dispute settlement (**ISDS**) cases, with the first one initiated in 2007.⁶ Unsurprisingly, the number of ISDS cases initiated against China is even fewer, standing at three cases.⁷ Even though Chinese involvement in ISDS cases has been relatively low to date, all of this activity has taken place in the last 10 years and, consistent with China's global and economic rise, this number looks set to rise in coming years. China's ambitious BRI is likely to create an unprecedented number of opportunities for Chinese and non-Chinese investors in BRI-related projects. This comes with the significant risk of unavoidable disputes due to political instability, hostile attitudes to foreign investment and differing legal traditions and expectations. It is

¹ In 2016 there were 76 SIAC cases involving a Chinese party. See SIAC Annual Report 2016 at page 14,

http://siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf.

² In 2017 there were 77 SIAC cases involving a Chinese party. See SIAC Annual Report 2017 at page 14,

http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf.

³ According to statistics provided by HKIAC on 12 March 2018 via an email enquiry by KWM.

⁴ According to statistics provided by HKIAC on 16 March 2018 via an email enquiry by KWM. Furthermore, according to HKIAC's response to the same enquiry, the number of cases initiated by Chinese claimant expressed in percentage against the total number of cases involving Chinese party / parties has shown an increasing trend of 25% (2013), 37% (2014), 38% (2015), 29% (2016) and 48% (2017).



anticipated that BRI-related disputes will see a dramatic increase in the number of Chinese parties involved in both international commercial and treaty arbitrations in the coming years.

Chinese commercial, legal, procedural and cultural practices and the conduct of international arbitrations

Unfortunately, Chinese parties involved in international commercial disputes unintentionally demonstrate similar behaviour consistent with concession or self-admission of fault, including but not limited to, lack of assertiveness during the early stages of negotiation or use of a modest or indirect tone when confronted with letters of demand and cooling-off notices, when in reality, there is no such intention. Rather, Chinese parties value cordiality and the maintenance of friendly relations, even in the conduct of dispute resolution and, as such, Chinese parties demonstrate a level of geniality which is generally uncommon in international commercial arbitration. In the majority of instances, this genial approach is misinterpreted by the other party, the arbitral tribunal, or the arbitration center (if any) as a sign of concession, or worse, an admission of fault.

Chinese commercial and culture practices can negatively impact the ability of Chinese parties to successfully navigate an international commercial arbitration. A common issue relates to the unfamiliarity or the lack of exposure some Chinese parties have with respect to more stringent standards of dispute resolution. Company employees, typically senior executives and/or managers of Chinese state-owned enterprises, may be reluctant to admit “mistakes” (either objectively classified as a mistake or subjectively believed to be so) for fear of occupational repercussions. Such mistakes could easily be revealed

in the process of an international commercial arbitration. Despite the fact that wrongs may readily be discoverable, senior management may simply decide not to arbitrate a claim in order to save “face”. Furthermore, if arbitration does ensue, the lack of experience some Chinese claimants have with international arbitration may reflect negatively upon their individual cases, either because they are unfamiliar with the procedural rules or because they believe the rules and instructions are merely guidelines.

In addition, if English is the arbitration language of choice, as it most often is, Chinese parties may be disadvantaged in their abilities to communicate and respond effectively. Finally, as with many Chinese parties, one debilitating issue to a party’s position in an international arbitration case is that documentary records are either not kept or are incomplete. This is more or less a result of a lack of consistently effective administrative governance and procedures. The typical reasons given by Chinese companies to their lawyers often include: company employees using personal laptops for work but not leaving behind proper documentary records to whomever succeeds them in their position; boxes of files becoming lost in the event of an office relocation; and company employees communicating with other parties via telephone or in person without keeping proper records.

⁵ <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iainnerMenu>.

⁶ https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/#_ednref3.

⁷ https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/#_ednref3.



Advice to Chinese parties when acting as claimant

When Chinese claimants decide to arbitrate a claim, a few important matters need to be considered.

Firstly, it is suggested that lawyers should be retained when disputes first emerge, rather than in the middle of an arbitration when the Chinese claimant has left the arbitral tribunal and arbitration center (if applicable) with an impression of non-observance due to their lack of experience in international arbitration and unfamiliarity with international arbitration procedural rules (which are very different to the commercial arbitration rules in China). For Chinese claimants, it is very important to engage lawyers who not only have experience in international arbitration, but who also understand Chinese cultural and business practices. It is recommended that Chinese claimants consult lawyers who specialise in international arbitration whilst negotiating the arbitration clause so that they understand and accept the possible future consequences and costs of such an arbitration.

Secondly, it is extremely important to select an arbitrator who understands Chinese cultural practices and norms, in particular an arbitrator who is aware of common behaviour by Chinese in business transactions. It is also critical when selecting an arbitrator that he or she is able to communicate Chinese business practices and behaviours to the other arbitrators. In arbitral cases where common law is the governing law, it is desirable to appoint an arbitrator who is not only familiar with the common law jurisdiction, but who understands Chinese culture and language.

Thirdly, it is important that Chinese claimants make every effort to retain documents and records, especially those related to the issues in dispute. Unlike Chinese litigation, international arbitration requires parties to produce all documents and records in relation to the dispute, whether favourable or not. It is often the case that an arbitral tribunal consisting of arbitrators who are unfamiliar with Chinese business practices are unconvinced when presented with the above-noted reasons for lost documents, despite the fact that these are issues that Chinese companies and employees regularly face.

Fourthly, Chinese claimants are advised to familiarise themselves with factual witness testimonies and cross-examinations in oral hearings. Unlike in international commercial arbitration, factual witness testimonies and cross-examinations are not common in domestic Chinese arbitration hearings. To prevent Chinese factual witnesses from performing poorly during the arbitration hearing and being unable to adequately participate in the cross-examination, it is strongly recommended that testimony procedures, the details of cross-examination and the specific cross-examination rules are communicated to all factual witnesses before the hearing.

Finally, it is recommended that Chinese claimants adequately prepare for the hearing, including the preparation of hearing bundles, reservation of hearing rooms and the retention of translators. Quality translators during witness testimonies and cross-examinations are of utmost importance.

Impact of Chinese claimants on the conduct of international arbitration

The rising number of Chinese claimants is likely to have a significant influence on the conduct of international arbitration in the future. Although Chinese parties will need to adapt to a more international style of dispute resolution, there are a number of cultural, procedural and practical recommendations that will assist those engaged in arbitrations involving a Chinese party. Mandarin is becoming more prevalent as the language of the arbitration. Familiarity with the use of the Chinese language in the conduct of the arbitration, as well as the ability to access translation services for the review of supporting documents is fundamental. Understanding Chinese cultural norms and business practices is also increasingly fundamental.

In order to attract Chinese users, international arbitration institutions will need to adopt and foster measures to (i) raise arbitrators' awareness of the danger of imputed bias in cases involving Chinese parties; (ii) increase the pool of bilingual arbitrators proficient in Mandarin; and (iii) encourage cultural awareness training for arbitrators.

Chinese parties involved in cross-border disputes will also need to adapt their business practices to minimise any perceived bias against their case and be more willing and proactive in engaging in the process at an early stage in the proceedings. Understanding the process and how to use documentary and witness evidence in support of your case is critical. Chinese parties involved in outbound investments should also seek advice on structuring their investments so as to take full advantage of the benefits and protections offered by investment treaties.



Costs in international arbitration

By *James Wang (Perth)*, *Alexandra Pieniazek (Perth)* and *Bella Skuthorp (Perth)*

While there is no universal approach to costs awards in international arbitration, “*costs follow the event*” is the starting point for most tribunals. As demonstrated by two studies discussed in this article, an emerging trend is to couple this approach with “adjusted” costs orders which reflect the relative success of the parties in the arbitration and the parties’ conduct in the arbitration. This trend makes costs allocation a potentially powerful tool in ensuring the efficiency of proceedings.

Types of costs incurred in international arbitration

Costs incurred in an arbitration can usually be divided into the following two categories:

- costs of the arbitration, being administrative costs such as the arbitrators’ fees and expenses, filing fees and other charges associated with the relevant arbitral institution; and
- party costs, being the costs individually incurred by each party in the course of the arbitration, including legal fees, counsel fees, expenses relating to lay witnesses, fees and expenses related to party-appointed experts, translation costs, document production and travel and accommodation costs.

Allocation of costs

In any arbitration, the parties have a discretion to agree on how to allocate the costs during the arbitral process. Agreement may be recorded in the arbitration agreement or the operative provisions of the contract between the parties. Tribunals will generally apply the parties’ agreements on costs allocation, unless the national law provides otherwise.¹

In the absence of an express agreement between the parties, many tribunals tend to look at the national law and the applicable arbitration rules.² Different arbitral institutions have adopted different approaches to costs allocation.

Some rules include a rebuttable presumption that the successful party in the arbitration will be entitled to recover costs.³ Other rules are silent on costs allocation and afford a broad discretion to the tribunal in deciding how costs should be apportioned between the parties.⁴ As noted below, however, where the rules are silent, the majority of arbitral tribunals appear to broadly adopt the “costs follow the event” principle which favours the recovery of costs by the successful party as a starting point, thereafter adjusting the allocation of costs as considered appropriate.⁵ Another approach is for each party to bear its own legal costs and split the costs of the arbitration equally, regardless of the outcome of the case.⁶

ICC report on costs in international commercial arbitration

In 2015, the International Chamber of Commerce (ICC) Commission published its Report on “Decisions on Costs in International Arbitration” (**ICC Report**).⁷ The ICC Report reviewed and considered costs decisions in ICC awards from 2008 to December 2014 and drew on contributions from eight other arbitral institutions.

¹ International Chamber of Commerce (ICC) Commission, *Decisions on Costs in International Arbitration* (2015) [23] <<https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/>> (*ICC Report*).

² The applicable law can raise difficulties. Some legal scholars suggest that the law of the contract should be applicable to costs decisions. The majority favour the view that the law of the seat will apply to the tribunal’s award of costs.

³ See *LCIA Arbitration Rules 2014 art 28*; *CIETAC Arbitration Rules 2015 art 52*; *PCA Arbitration Rules 2012 arts 40-42*; *UNCITRAL Arbitration Rules 2010 arts 40-42*.

⁴ See *ICC Arbitration Rules 2017 art 38*, app III; *ICC Arbitration Rules 2012 art 37*; *ICSID Rules of Procedure for Arbitration Proceedings 2006 r 28*; *HKIAC Administered Arbitration Rules 2013 art 33*; *SCC Arbitration Rules 2017 arts 49-50*; *SIAC Arbitration Rules 2016 rr 35-37*.

⁵ *ICC Report*, above n 1, [13]; Matthew Hodgson and Alastair Campbell, ‘Damages and costs in investment treaty arbitration revisited’ (2017) *Global Arbitration Review* <<https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited>>.

⁶ Also referred to as the ‘American approach’; *ICC Report*, above n 1, [14].

According to the ICC Report, a majority of tribunals adopt the recovery of costs by the successful party approach, adjusting the allocation as appropriate, depending on a range of factors. This was the approach adopted by tribunals in the majority of ICC awards examined, in 91% of HKIAC awards, in the majority of ICDR awards, in 90% of SIAC awards and in more than half of the SCC awards. This was also the case in most LCIA and PCA awards.⁸

In adjusting the allocation of costs, the following factors, amongst others, have been considered alongside the relative success of the parties:⁹

- whether the parties could have avoided arbitration;
- prevailing costs allocation principles in the applicable law;
- agreements between the parties with regard to costs;
- procedural conduct of the parties;
- the reasonableness of the parties legal fees and expenses;
- legal and factual complexity of the case;
- disparities between the costs claimed by each party; and
- whether different types of costs are recoverable.

An interesting area to watch, which the ICC Commission was unable to conclude upon trends-wise in the ICC Report, is the issue of “success fees”, and whether such amounts are recoverable.¹⁰ A related issue is the recovery of funding costs.¹¹

As to fee arrangements more generally, however, in most jurisdictions, these are generally acceptable and some form of costs shifting was broadly accepted in arbitration proceedings.¹² The reasonableness of such fee arrangements could be taken into account when allocating costs in arbitration.¹³ Certain jurisdictions, however, specifically prohibit contingency and uplift fees. In Singapore, for example, contingency and uplift fees are prohibited for Singapore lawyers (and are prohibited under the ethical rules). On the other hand, they appear to be permitted for foreign lawyers / law firm so long as they do not engage in the practice of Singapore law. An arbitration seated in Singapore or governed by Singapore law, however, is likely to amount to the practice of Singapore law, and therefore would prohibit contingency and uplift fees.¹⁴

Costs in investment treaty arbitration

Previously, it was considered general practice in investment treaty arbitration to disfavour the shifting of arbitration costs against the losing party. While it was not a universal approach applied by tribunals in investment treaty arbitration, an earlier edition of the same study showed it was the approach favoured by the majority of tribunals.¹⁵

Another recent study specifically focused on the costs of investment treaty arbitration, however, reveals that there has been a significant increase in the number of tribunals making adjusted costs orders, with only a third of tribunals

requiring each party to bear their own costs.¹⁶

Case study – Apportionment of costs in investment treaty arbitration

In 2017, an award was delivered in *Ansung Housing Co., Ltd. v. People's Republic of China*. The dispute arose out of the Claimant's investment in a golf course and condominium development project in Shenyang-Xian, China. The arbitration was submitted to the International Centre for Settlement of Investment Disputes (ICSID) on the basis of an agreement between the Government of the Republic of Korea and the Government of the People's Republic of China on the Promotion and Protection of Investments (China-Korea BIT) and the ICSID Convention, Regulations and Rules.

The award rendered by the tribunal was ultimately in favour of China and the tribunal held that Ansung's claim manifestly lacked legal merit as it was time-barred, and that the claim should not have been brought.

While the tribunal was quick to indicate that this was a decision that turned on its facts and that it “need not venture into the discussion about whether there is a general trend in ICSID practice favouring the ‘costs follow the event’ approach or ‘pay-your-own-way’ approach” to costs allocation, it awarded the Respondent its share of the direct costs of the arbitration proceedings plus 75 percent of its legal fees and expenses.¹⁷

⁷ *ICC Report*, above n 1, [23].

⁸ *Ibid* [13].

⁹ *Ibid* [21]-[27].

¹⁰ *Ibid* [17].

¹¹ See, eg, *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] Lloyd's Rep. Plus 72.

¹² *ICC Report*, above n 1, [43].

¹³ *Ibid* [21].

¹⁴ *Ibid* [44].

¹⁵ Matthew Hodgson, 'Counting the costs of investment treaty arbitration' (2014) *Global Arbitration Review* <<https://globalarbitrationreview.com/article/1033259/counting-the-costs-of-investment-treaty-arbitration>>.

¹⁶ Matthew Hodgson and Alastair Campbell, 'Damages and costs in investment treaty arbitration revisited' (2017) *Global Arbitration Review* <<https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited>>.

¹⁷ *Ansung Housing Co., Ltd. v. People's Republic of China (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/25, 9 March 2017) [159].



Open Up! How far should transparency in international commercial arbitration go?

By Emily Cossgrove (Perth) and Acacia Hosking (Perth)

The recent release of the 2017-2018 Annual Asia-Pacific Report on Investor-State Dispute Settlement and Transparency serves as a reminder of how transparency has become an accepted feature of investor-state arbitrations. Perhaps prompted by steps like the October 2017 enactment of the Mauritius Convention or transparency measures in the new CIETAC Investment Arbitration Rules, commercial arbitration users are also increasingly demanding more openness, predictability and certainty regarding the arbitral process and its players. In the competitive market of commercial arbitration, major arbitral institutions have recognised this call and are actively driving transparency measures. It remains to be seen how far these trends will evolve, and how far institutions will go to offer the desired benefits of transparency without jeopardising the continued, competing demands for privacy and confidentiality.

Moves towards greater transparency

The ICC International Court of Arbitration (**ICC Court**) has recently led the charge by implementing a number of holistic transparency measures.

In 2015, an ICC task force examined over 300 awards from various institutions to provide users with an insight into differing practices and trends in cost allocation across institutions.

Since 1 January 2016, the ICC has been publishing on its website arbitrators' names for all ICC cases. The tribunal chairperson, arbitrator nationality and whether the appointment was made by the ICC Court or the parties is also published.¹ In 2016, a revision to an ICC guidance note implemented new steps to increase transparency in the ICC Court's scrutiny process and reduce administrative fees if the ICC Court itself is the cause of delayed scrutiny.² Other amendments have provided guidance on disclosure of arbitrator conflicts by illustrating specific circumstances which may question impartiality and independence of arbitrators.³ For disputes pursuant to the 2017 ICC Rules, reasons for ICC Court decisions concerning the

appointment, confirmation, replacement or challenge to arbitrators are no longer confidential and can be communicated to the parties upon request.⁴

The LCIA was the first major institution to undertake a comprehensive analysis of its cases and release data on the cost and duration of arbitrations in November 2015,⁵ followed by a second report in October 2017. The second report covers 224 cases reaching award between 1 January 2013 and 31 December 2016.⁶ In October 2017, the LCIA also implemented changes to its 'Notes to Arbitrators' to clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries. For example, tribunal secretaries (like arbitrators) are now required to complete a statement of independence and consent to appointment to ensure there are no relevant conflicts.⁷ Recently, the LCIA released a second online database of 32 arbitrator challenge decisions between 2010 and 2017.⁸ This database

¹ ICC news update entitled ICC Court announces new policies to foster transparency and ensure greater efficiency, 5 January 2016 (<https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>) and ICC Arbitral Tribunals chart (<https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/>).

² ICC news update dated 13 July 2016 entitled ICC augments transparency in scrutiny process, 13 July 2016 (<https://iccwbo.org/media-wall/news-speeches/icc-augments-transparency-in-scrutiny-process/>) and ICC Note to Parties and Arbitral Tribunals on the conduct of the Arbitration under the ICC Rules of Arbitration, 30 October 2017 (<https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>).

³ ICC news update entitled ICC Court adopts guidance note on conflict disclosures by arbitrators, 23 February 2016 (<https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/>) and ICC Note to Parties and Arbitral Tribunals on the conduct of the Arbitration under the ICC Rules of Arbitration, 30 October 2017 (<https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>).

⁴ ICC Rules of Arbitration, effective 1 March 2017, Article 11(4).

⁵ LCIA, Tools to Facilitate Smart and Informed Choices, 3 November 2015 (<http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx>).

⁶ LCIA, Costs and Duration: 2013 – 2016, 3 October 2017 (<http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>).

⁷ LCIA, *Notes for Arbitrators* (<http://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx>).

⁸ LCIA Challenge Decision Database, released on 12 February 2018 (<http://www.lcia.org/challenge-decision-database.aspx>).

contains a brief summary of the background to each challenge and an anonymised excerpt of the LCIA Court's decision.

Promising efforts towards greater transparency have also been taken by other institutions. Whilst the *Swedish Arbitration Act 1999* does not include any basic duty of confidentiality, in practice, the parties and arbitral tribunal usually observe a level of confidentiality in the process. As such, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has recently published a practice note on challenges to arbitrators between 2013 and 2015. This note reviews the SCC Board's decisions, discusses the SCC's standards for arbitrator impartiality and explains the procedure for challenges.⁹ A recent SCC report which outlined the costs of arbitration and the apportionment of costs under the SCC Rules has also been published as a resource for users.¹⁰ Likewise, the Vienna International Arbitration Centre published a selection of 60 awards in 2015 in a measure to foster greater familiarity, predictability and confidence in relation to the arbitral process.¹¹

Additionally, PwC research has increased user visibility of the way arbitral tribunals view damages. In analysing 116 awards since 2015, PwC has provided very welcome empirical and anecdotal evidence that arbitral tribunals are taking a more consistent approach to the treatment of damages and are growing in commerciality.¹² Such publications and data are continuing to satisfy the growing desire amongst disputing parties for transparency as to the arbitral process and its players (arbitrators, secretaries etc.), while of course demanding complete confidentiality of the details of their own disputes. The question remains, however, to what degree does this increased openness increase trust and confidence in the arbitral process? On the other hand, to what extent does it undermine confidentiality and privacy? Is there any way to retreat once the curtains have been drawn? Until more disputes have been played out under the new rules, the answer must be

“wait and see”.

Transparency & third party funding

A key area in which transparency is considered by tribunals, parties and commentators is third party funding. Should the abiding principle be “say to play”?

Most institutional rules do not define or address third party funding, so there is a continued debate regarding the extent of disclosure obligations and the need for further regulation. Factors such as conflicts of interest, security for costs applications, cost allocations in awards and implications for confidentiality obligations tend to support the move toward transparency and disclosure of funding arrangements.

While it appears generally accepted that disclosing the funder's identity is necessary (to determine any conflicts of interest with arbitrators or counsel) there is more debate regarding disclosure of funding terms. In *South American Silver v Bolivia*, Bolivia requested the tribunal order South American Silver to disclose the funder's identity and the terms of the funding agreement.¹³ The tribunal ordered disclosure of the funder's name, but found no basis to order disclosure of the funding terms.¹⁴ In a similar vein, Article 27 of CIETAC's new investment arbitration rules expressly permits third party funding and requires a funded party to notify the opposing party, tribunal and centre administering the arbitration once a funding agreement is entered into. The duty extends to disclosure of the fact, nature of the funding arrangement and identity and address of the funder.

In Singapore, recent reforms to the *Legal Profession (Professional Conduct) Rules 2015* require practitioners to disclose to the court or tribunal and every other party the existence of any funding contract and the identity and

address of any funder.¹⁵ The 2017 first edition of the SIAC Investment Arbitration Rules also expressly deal with third party funding. The tribunal may order parties to disclose the existence of funding arrangements, the identity of the funder and where appropriate, the funder's interest in the outcome and whether the funder has committed to undertake adverse costs liability.¹⁶

In June 2017, the Hong Kong Special Administrative Region passed legislation to remove common law barriers to third party funding of arbitration proceedings seated in the jurisdiction, including related court proceedings, proceedings before an emergency arbitrator and mediation proceedings. Key aspects of the reforms regarding transparency include:

- the exemption of confidentiality obligations¹⁷ where information is disclosed for the purpose of "having or seeking" third party funding; and
- disclosure obligations on funded parties to provide written notice of a funding agreement and funder's identity to the arbitral body and other parties.

Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited (Essar),¹⁸ illustrates the importance of transparency of funding arrangements, given the potential cost implications. In *Essar*, an award which provided for recovery of nearly £2 million in funding costs under the ICC Rules was upheld. The arbitrator awarded costs of US\$4 million including costs of obtaining third party funding, pursuant to section 59(1)(c) of the *Arbitration Act 1996* (UK) and Article 31(1) of the ICC Rules (at the time). Section 59(1)(c) defines references to "the costs of the arbitration" as including "other costs of the parties" and Article 31(1) provided that "The costs of the arbitration shall include... the reasonable legal and other costs incurred by the parties for the arbitration". The Court found the arbitrator clearly had the power to award costs and agreed with the

arbitrator's finding that "other costs" can include costs of obtaining third party funding, reasoning the costs relate to and are for the purpose of the arbitration.

It remains to be seen whether other arbitral institutions will follow suit, particularly in the context of commercial arbitration, and through more rigorous disclosure obligations increase transparency of third party funding in arbitrations, and increase transparency generally.

The direction of travel for Asian and European arbitration is clear though: welcome to a brave new open world (just not too open – yet!).

⁹ SCC, Decisions on Challenges to Arbitrators 2013 – 2015, 23 January 2017 (<http://www.sccinstitute.com/media/176447/scc-decisions-on-challenges-to-arbitrators-2013-2015.pdf>).

¹⁰ SCC, Costs of Arbitration Report, 24 February 2016 (<http://www.sccinstitute.com/media/93440/costs-of-arbitration-scc-report-2016.pdf>).

¹¹ Vienna International Arbitration Centre, selected arbitral awards (<http://www.viac.eu/en/component/content/article/79-viac/257-selected-arbitral-awards-viac-read-more-e>).

¹² PWC International Arbitration Damages Research 2017 Update, December 2017 (<https://www.pwc.co.uk/forensic-services/assets/pwc-international-arbitration-damages-research-2017.pdf>).

¹³ *South American Silver Limited v Plurinational State of Bolivia*, (PCA Case No. 2013-15), Procedural Order No. 10, (11 January 2016) at [13].

¹⁴ *Ibid* at [79], [80], and [84].

¹⁵ *Legal Profession (Professional Conduct) Rules 2015*, r 49A (<https://sso.agc.gov.sg/SL/LPA1966-S706-2015#pr49A>).

¹⁶ Rule 24(l).

¹⁷ Pursuant to the Arbitration Ordinance (Cap 609).

¹⁸ [2016] EWHC 2361 (Comm).





Civil liability of arbitrators – The recent approach of the Spanish Supreme Court

By Alfredo Guerrero Righetto (Madrid) and Fernando Badenes Garcia-Caro (Madrid)

Introduction

Article 21 of the Spanish Arbitration Act (AA), governing the civil liability of arbitrators, has been receiving considerable attention since early 2017 as a result of the Supreme Court Judgment 102/2017, of February 15, 2017, on the civil liability suit filed by PUMA SE against the chairman of the arbitration tribunal and the co-arbitrator appointed by the counterparty, ESTUDIO 2000, S.A. (ESTUDIO 2000), in the prior arbitration proceedings between the said parties.

This ruling confirmed that these arbitrators acted with the recklessness required under the relevant provision by having breached the principle of collegiality by excluding the other co-arbitrator, appointed by PUMA SE (PUMA), from the final deliberations and voting on the arbitral award rendered in said proceedings, which was set aside by the Regional Appeals Court (Audiencia Provincial) of Madrid (Section 28) in its Judgment of June 10, 2011, precisely for this reason, ruling that such circumstances violated public policy.

The aforementioned Article 21.1 of the AA significantly

reformed Article 16.1 of the former AA of 1988, which had provided that arbitrators could be held liable for damages caused by negligence or willful misconduct in the performance of their duties in arbitration proceedings. The introduction of this new provision limited their liability to cases involving "bad faith, recklessness or negligence".

The motivation behind this reform was to avoid the previous exorbitant liability system, based on any type of fault which could in practice result in a situation with a real effect on the impartiality and independence of the arbitrators or even in arbitrators refusing to accept arbitrations for fear of becoming the target of such broad liability.

The ultimate aim of this reform was to codify the concept of "freedom to judge", enshrined in the principle of "immunity" as existing in Anglo-Saxon legislation, and which solely allowed for liability in those cases in which the conduct of the arbitrators was guided by willful misconduct or inexcusable negligence.



Finding of civil liability of the arbitrators in the PUMA case

Factual background

Before analyzing the legal grounds of the Supreme Court Judgment of February 15, 2017, a brief summary of the facts is provided below:

- PUMA initiated arbitration proceedings with ESTUDIO 2000 in relation to a distribution agreement executed between said parties on December 12, 1994. The final arbitral award was issued ordering PUMA to compensate ESTUDIO 2000 in an amount close to €100 million.
- The last meeting attended by all members of the arbitration tribunal was held on May 31, 2010. No agreement was reached at this meeting regarding the amount of compensation to be awarded to ESTUDIO 2000 in the arbitral award.
- On June 2, 2010, the chairman of the arbitration tribunal and the co-arbitrator appointed by ESTUDIO 2000 met, deliberated and issued the arbitral award without convening the co-arbitrator of PUMA to participate in the final deliberations and voting, in full awareness that the

latter was traveling on that date.

- On that same day, the arbitral award was issued with the signature of said two arbitrators and communicated to the parties and the co-arbitrator appointed by PUMA, specifying in the award that the arbitral award was not signed by the latter because he had not yet consented to the arbitral award.
- There was no evidence that the co-arbitrator of PUMA ever adopted dilatory tactics (including attempting to obstruct or block the granting of the award by the majority of the arbitration tribunal). On the contrary, it was proven that there were no reasons of urgency that would have required the arbitration tribunal to issue the arbitral award on June 2, 2010, considering that the deadline for issuing the arbitral award was July 4.
- Based on the foregoing, PUMA filed a liability suit against the chairman of the arbitration tribunal and the co-arbitrator appointed by ESTUDIO 2000, claiming the fees paid by PUMA to both arbitrators in the form of arbitration fees, totaling €750,000, plus interest, for each arbitrator.

Liability for breach of the principle of collegiality

The trial court and the Regional Appeals Court hearing the liability suit filed by PUMA both ruled in their judgments that the chairman of the arbitration tribunal and the co-arbitrator appointed by ESTUDIO 2000 were liable under Article 21.1 of the AA on the basis that the defendants excluded the co-arbitrator appointed by PUMA from the final deliberations and voting on the arbitral award in violation of the principle of collegiality, thus committing a manifest, serious and inexcusable error.

In their appeal before the Supreme Court, the appellants alleged an infringement of Article 21.1 and the case law interpreting said provision on two separate grounds.

First, they argued that a finding that the defendants' conduct met the requirement of recklessness must necessarily be based not only on gross negligence of the arbitrators in the case but must also require an analysis of the intent of the arbitrators. This was supported by the assertion that the co-arbitrator of PUMA engaged in extremely obstructive behavior aimed at preventing final rendering of the arbitral award.

Second, the appellants denied that the recklessness required under the AA could be equated to manifest, serious and inexcusable error, arguing instead that the conduct of the arbitrators was in full compliance with a previous judgement of the Supreme Court which dismissed a claim for annulment of an arbitral award where one of the arbitrators argued that the other two arbitrators ignored the former when rendering the arbitral award.

The Supreme Court confirmed that recklessness does not require intent to do harm but rather is identified as "inexcusable negligence, with manifest and serious error, without justification, and which is not linked to annulment of the arbitral award, but rather to a risky action by someone familiar with their arbitration duties and who should have applied such knowledge in the interests of those who engaged them to carry out the arbitration".

Furthermore, the Supreme Court declared this position in terms that deeply criticized the conduct of the appellant arbitrators, specifying that their conduct was equivalent to the “conduct of someone who, without the least respect for any standard of reasonableness, ignores both the rights of those who commissioned the arbitration and the duties of the arbitrators and endangering the course of the arbitration proceedings by preventing the award from being properly issued, as it happened in this case, with the resulting damages”, classifying such conduct, in very harsh terms, as “clearly unusual or unexpected conduct that goes beyond the good judgment of any reasonable human being”.

The Supreme Court concluded that the necessary inexcusable negligence to find recklessness in the conduct of the arbitrators was present on the ground that the appellants confused the provisions of Article 37.3 of the AA, which allows for the rendering of awards by a majority of the arbitration tribunal, with the very nature of the principle of collegiality, which requires that all members of the arbitration tribunal participate in all deliberations and votes held in relation to an arbitral award.

We could not agree more with the position of the Supreme Court, given that the fact that all members of an arbitration tribunal make their decisions jointly as a group—ALL OF THEM, only excluding strictly procedural decisions delegated to the chairman of the arbitration tribunal—to safeguard not only the will and autonomy of the parties who have freely agreed to resolve their disputes through the heteronomous means of dispute resolution that is arbitration, but also the impartiality and independence of the arbitration tribunal. This is therefore an issue that utterly affects international public policy relating to arbitration.

Conclusion

Following the Judgment of the Supreme Court on February 15, 2017, there is no doubt that the work of arbitrators will from now on be very closely monitored by the parties in cases of annulment of arbitral awards rendered and which involved any degree of negligence of the arbitrators that ultimately causes annulment of the arbitral award, therefore requiring the parties to initiate new arbitration proceedings, having already suffered the unwanted effects of loss of time and the costs involved by reason of the annulment of the arbitral award.

What will have to be analyzed with the passage of time is the impact this somewhat more lax interpretation made by the Supreme Court of the requirements of Article 21.1 of the AA will have in the foreseeable future. Given that such interpretation, which runs contrary to the initial quasi-absolute freedom granted to the arbitrators, will benefit arbitration, as we expect, by eliminating conduct of arbitrator(s) which could, as in the case analyzed, negatively impact the trust placed by the market operators in arbitration as an alternative to ordinary channels for the resolution of disputes. Or, if on the other hand, it will hinder the autonomy of the parties and the arbitrators, who up until now have had the sole control over the direction and development of the arbitration proceedings, making such proceedings more and more similar to the more regulated judicial regime that is the jurisdiction of judges in the courts which is not at all what an arbitral process is about.

Only time will tell.





Japan – New arbitration and mediation centres

By *Patric McGonigal (Tokyo)*

Centre for International Dispute Resolution, Tokyo

The Japanese government recently announced that it is proposing to establish a new dedicated dispute resolution centre in Tokyo. The move follows recent initiatives in countries such as South Korea and Malaysia to establish and promote international arbitration centres and reflects the increasing number of Japanese corporates that seek to resolve their cross-border disputes through arbitration.

The government's press release states that Japan's Foreign Ministry, Justice Ministry and Ministry of Economy, Trade and Industry will have joint jurisdiction over the new centre and will provide institutional support as well as staff training. It is expected that these government agencies will work together to ensure that with the forthcoming 2020 Olympics, the centre is also equipped to handle sports tribunal-related matters such as doping cases.

It is also expected that the focus will be on bringing together Japan's various dispute resolution bodies such as the Japan Commercial Arbitration Centre (JCAA) in a far more internationally focused environment than currently exists in Japan. It is hoped that the new centre will operate with a multi-lingual staff and an international board of directors, catering for the resolution of international disputes and accommodating a variety of arbitral bodies and rules, including alternative forms of dispute resolution such as adjudication and mediation.

As a sign of support from the international business community, the American Chamber of Commerce in Japan and the European Business Council in Japan issued a joint statement in January 2018 expressing their "strong support" for the development of Tokyo as an international arbitration centre. In doing so, they underlined the importance of ensuring that the openness and internationalization of Japanese arbitrations and mediations should be clarified so that foreign counsel registered in Japan and otherwise are accepted to act as advocates and neutrals in all such proceedings seated in Japan.

This development comes at an interesting time in that with the March 2018 release of the Singapore International Arbitration Centre (SIAC) 2017 case statistics, it is evident that there has been an increase in both the number of new claims involving Japanese parties and the value of those claims. In the past few years, Singapore has increasingly become the preferred seat of arbitration for Japanese corporates, not least borne out by the fact that claims involving Japanese parties accounted for USD1 billion out of a total value in dispute for all new case filings

of circa USD4 billion handled by the SIAC. Moreover, of the 27 new claims involving Japanese parties, half of these involved the Japanese party as claimant and not as respondent. This represents a significant change in approach to resolving disputes by Japanese parties who are notoriously litigation-averse.

In short, it is hoped that the new centre will lead to a more open and international dispute resolution regime in Japan such that both Japanese corporates and their foreign counterparts may be persuaded to choose Japan as their preferred seat of arbitration in appropriate cases.

Kyoto International Mediation Centre (KIMC)

More recently, it was also announced that Doshisha University and the Japan Association for Arbitrators intend on opening an international mediation centre in Kyoto in collaboration with the Singapore International Mediation Centre (SIMC). The new mediation centre will be headquartered at Doshisha University.

Acknowledging the success of mediation as a method for resolving cross-border disputes in the US and Europe, it is hoped that the new mediation centre will help to raise awareness of this form of alternative dispute resolution process amongst Japanese corporates. While court-directed conciliation for domestic matters is widely used in Japan, mediation remains little used – despite its undoubted advantages in a culture that emphasizes the importance of relationships and is therefore litigation-averse.

It is envisaged that a similar system to the arb-med-arb protocol in place between the SIAC and the SIMC in Singapore may be established. This would mean that disputes which are initially referred to arbitration could instead be mediated and if successfully settled, the agreement resulting from the mediation could form the basis of an award in the original arbitration reference. By doing so, the settlement agreement could then be enforced as an arbitration award under the New York Convention thereby addressing one of the perceived shortcomings of mediation i.e. issues surrounding the enforcement of mediated settlement agreements.

Japanese government approval is expected in May and the mediation centre is due to be launched in September 2018. A select group of senior international dispute resolution practitioners in Japan have been invited by the SIMC to participate in the first training scheme in May 2018 with a view to establishing a panel in time for the opening of the new mediation centre in the autumn.



Trends in Asia-Pacific cross-border disputes in 2018

By *Teng Haidi (Shenzhen)* and *Gao Ruimin (Sydney)*

The growth in cross-border commercial and investment activity in the Asia Pacific region, particularly with the rising economy of the People's Republic of China (**PRC**), has resulted in a corresponding growth in cross-border disputes in the region.

This has been reflected in a survey by Queen Mary University of London in 2015¹ which found that the most improved arbitral seat over the past five years was Singapore, followed by the Hong Kong Special Administrative Region (**Hong Kong SAR**). Both jurisdictions were also ranked in the top five most preferred and widely used seats globally, alongside London, Paris and Geneva.

This trend is set to continue in 2018, in view of regional developments that are likely to bolster the role of Asia Pacific jurisdictions as a forum for cross-border dispute resolution. We explore this and some of the other key trends and developments in Asia Pacific cross-border disputes below.

Belt and Road Initiative

The Belt and Road Initiative (**BRI**) has seen some USD1 trillion committed towards linking countries along the BRI routes with China.² The PRC's investment in the BRI is projected to grow in the coming years, particularly in view of the continued emphasis by the PRC leadership on the initiative. In this context, international arbitration is well-suited to play a significant role as a mechanism to resolve cross-border disputes arising from the BRI projects.

One of the key benefits of arbitrating BRI disputes is the ability to enforce foreign arbitral awards in the PRC and other countries under the New York Convention. This allows PRC parties to protect their rights by enforcing

arbitral awards overseas and for other investors to enforce foreign arbitral awards in the PRC. Since ratifying the New York Convention in 1987, PRC courts have increasingly demonstrated a pro-enforcement stance. Most recently, this can be seen in the series of judicial interpretations issued in late 2017 by the Supreme People's Court providing more detailed guidance on the enforcement laws.³

A key point addressed by one of the recent judicial interpretations includes affirmation of the three-tier reporting system for foreign arbitral awards. The system provides that where foreign arbitral awards are not recognized or enforced by a PRC court, the decision is to be reviewed by three tiers of courts in the PRC. This ensures a high level of judicial scrutiny for enforcement proceedings in relation to foreign arbitral awards. The new legal interpretations also provide answers to some commonly asked questions such as those relating to jurisdictional challenges during the recognition and enforcement process.

Third party funding

The past year has seen notable developments in the Asia Pacific region in relation to the regulation of third party funding in international arbitration.

In 2017, both Hong Kong SAR and Singapore passed legislation allowing for and regulating arbitration funding by third parties. Such funding was previously prohibited in both jurisdictions.

This trend towards regulating third party funding in international arbitration has two key benefits: (1) making jurisdictions more arbitration-friendly; and (2) mitigating the risks inherent in third party funding, such as the potential for conflicts of interest, uncertainty about costs and security for costs and questions about privilege. An



Corruption and ethics

Another area that has been increasingly the subject of discourse in recent years is corruption and ethical conduct issues for both arbitrators and counsel. Whereas there have been initiatives and provisions adopted by arbitral institutions to regulate misconduct on the part of counsel and arbitrators, there appears to be an emerging consensus to create a transnational set of ethical standards in international arbitration.

Two well-known ethical guidelines for counsel have been adopted over the last few years: the *International Bar Association (IBA) Guidelines on Party Representation in International Arbitration* (2013) and the *LCIA's General Guidelines for the Parties' Legal Representatives* (2014). The LCIA Guidelines are binding on LCIA arbitrations, whereas the IBA Guidelines only apply where the parties or tribunal agree for it to apply.

However, the IBA Guidelines continue to form part of the "soft law" applicable to arbitrations worldwide and contribute to the creation of a uniform set of rules for counsel in arbitrations. Indeed, the IBA Guidelines have been recently endorsed by the ICC Court, as well as other arbitral institutions.

Many of the leading international arbitral institutions have also established codes of conduct for arbitrators to increase transparency and legitimacy of arbitration, with a primary focus on issues of impartiality and independence. Consistent with the trend of emerging transnational standards, the United Nations Commission on International Trade Law (UNCITRAL) is currently preparing a code of ethics for arbitrators.

It will be interesting to see, over the course of 2018 and beyond, the initiatives taken toward the consolidation of a transnational binding set of ethical rules for arbitrators and counsel, and most importantly whether further developments will arise in relation to the creation of a global ethical body responsible for the enforcement of ethical rules.

example of the latter can be seen in Hong Kong SAR and Singapore where both have moved towards transparency, making it mandatory to disclose the existence of a third party funding arrangement and the identity of that third party funder.

However, certain concerns may also arise if governments in the Asia Pacific region increasingly seek to follow the lead of Hong Kong SAR and Singapore in regulating third party funding of international arbitration at a national level. This includes the potential emergence of diverging sets of national laws with varying degrees of regulation, which could lead to increased forum-shopping in the region by potential claimants seeking to take advantage by commencing international arbitration in jurisdictions with favourable (or perhaps non-existent) regulations in third party funding in international arbitration. Further, given the rigid nature of national legislative regimes, rules surrounding third party funding may lack the flexibility to avoid becoming outdated or inconsistent with future international standards.

It is worth noting that while there has also been third party funding by private funds or venture capitalist funds in the PRC, usually working together with law firms, there is currently no PRC legislation in this regard.

At the forthcoming International Council for Commercial Arbitration (ICCA) congress to be held in Sydney in April 2018, the ICCA-Queen Mary Taskforce will deliver its long-awaited final report on third party funding concerning international arbitration.⁴ It is expected that the Taskforce will provide some guidance on third party funding regulation for the Asia Pacific region and globally.

¹ The 2015 Survey 'Improvements and Innovations in International Arbitration' carried out by the School of International Arbitration at Queen Mary University of London. See full survey results published at <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

² Cgtn.com, 'One Belt, One Road, One Trillion Dollars' (10 January 2017) <https://news.cgtn.com/news/3d63544d3363544d/share_p.html>

³ Provisions of the Supreme People's Court on Issues relating to the Reporting and Review of Cases Involving Judicial Review of Arbitration, Provisions of the Supreme People's Court on Several Issues relating to the Hearing of Cases Involving Judicial Review of Arbitration, and the Notice of the Supreme People's Court Concerning Some Questions Regarding the Centralized Handling of Judicial Review of Arbitration Cases.

⁴ International Council for Commercial Arbitration, Third-Party Funding <http://www.arbitration-icca.org/projects/Third_Party_Funding.html>



KWM International Arbitration Team news

By Parnika Chaturvedi (Dubai) and Deng Dixin (Dubai)

Our Global International Arbitration Team continues to work together and achieve great results for our clients. We are pleased to share with you some of the recent successes and accolades achieved by our teams in Australia, Europe, Hong Kong SAR, Japan, Mainland China and the Middle East.

Case wins

- King & Wood Mallesons successfully represented DBS Nominees (Private) Limited, an affiliate of DBS Bank, in the enforcement of two Hong Kong International Arbitration Centre (**HKCIAC**) awards against an individual respondent before the Hefei Intermediate People's Court. The Hefei court rejected the respondent's claims of lack of notice of the proceedings and recognized and enforced the awards.
- King & Wood Mallesons successfully represented a large Chinese state-owned steel and construction company in an arbitration in Singapore under the International Chamber of Commerce (ICC) Rules of Arbitration, following dispute adjudication board proceedings, involving a dispute arising from a construction project in Fiji.
- King & Wood Mallesons, working across our London, Dubai, Sydney and Beijing offices, successfully settled a long-running USD 75 million investment treaty claim bought by BTA Bank, the second largest bank in Kazakhstan, against our client, the Kyrgyz Republic. In addition to numerous other investment arbitrations, in the past three years, we have acted for the Kyrgyz Republic in over ten investment arbitrations in the U.K., Canada, New York, Russia, France, Belarus and Kazakhstan. These representations earned the Kyrgyz Republic a win in an investment treaty interpretation case named by Global Arbitration Review as among the ten 'most important decisions' of 2014 globally, as well as a landmark judgment by which the Paris Court of Appeal set aside an arbitral award against the Kyrgyz Republic on the grounds of public policy, an extremely rare occasion in the French legal practice.
- King & Wood Mallesons successfully represented a major US design firm in a dispute for non-payment of design fees with a Chinese owner before China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (**CIETAC Hong Kong**). This was the third case administered by CIETAC Hong Kong under its new arbitration rules and the first CIETAC Hong Kong award to be enforced in Mainland China (Nanjing Intermediate People's Court).
- King & Wood Mallesons successfully represented a major property developer in the Middle East against a major Chinese construction company in Dubai International Arbitration Centre (**DIAC**) proceedings. The tribunal accepted the respondent's challenge to jurisdiction on account of the claimant's failure to establish an arbitration agreement in writing in compliance with the UAE law provisions. In addition, we represent the property developer in numerous other matters (over ten) – both litigation (before the DIFC Courts and the Courts of England and Wales) and arbitration (under the DIAC Rules).
- King & Wood Mallesons successfully represented a state-owned enterprise listed on Hong Kong Exchanges and Clearing Limited (HKEX) as respondent in a China International Economic and Trade Arbitration Commission (**CIETAC**) arbitration regarding a corporate control dispute between a coal mining company and its minority shareholder.
- King & Wood Mallesons successfully represented a Singapore environmental and energy company in a dispute regarding Build Own Operate Concession Agreement, including arbitration before CIETAC and litigation confirming the creditors' rights in bankruptcy reorganization before the Panzhuhua Intermediate People's Court.
- King & Wood Mallesons successfully represented a European equipment manufacturer in an HKCIAC arbitration commenced by its Hong Kong joint venture partner concerning the scope of their obligations under the joint venture agreement. At the end of the first week of a two-week hearing, on completion of the cross examination of the opponent's witnesses, King



& Wood Mallesons was able to achieve a liability free commercially advantageous settlement for the client.

Recognition and awards

- King & Wood Mallesons received the *Asia-Pacific Law Firm of the Year* award at the Chambers Asia-Pacific Awards held in Hong Kong on February 1, 2018.
- King & Wood Mallesons continues its position as a leader in the Asia-Pacific Market, receiving 33 Tier 1 rankings in the prestigious Asia Pacific Legal 500 for 2018.
- King & Wood Mallesons received five awards at the 2017 Euromoney Asia Women in Business Law Awards in Hong Kong, including the *Best International Firm in China Practice* award.
- King & Wood Mallesons was ranked Band 1 in Dispute Resolution by the 2018 Chambers Asia Pacific Guide.
- King & Wood Mallesons was nominated 2017 *Dispute Resolution National Law Firm of the Year-China* by Asialaw.
- King & Wood Mallesons was nominated 2017 *International Arbitration Firm of the Year in China* by Asian-Mena Counsel.
- King & Wood Mallesons was nominated 2017 *Litigation Law Firm of the Year* by Asian Legal Business China Law Awards.
- King & Wood Mallesons was nominated 2017 *PRC Dispute Resolution Law Firm of the Year* by China Business Law Journal.
- Alfredo Guerrero in our Madrid office was recognized as a Leading Lawyer in dispute resolution in Spain (Band 4) by Chambers Europe 2018. According to the legal directory, clients highlight his “*assertiveness, experience and management skills.*”
- Andrei Yakovlev and Dorothy Murray in our London office were recognized by Legal 500 (London) 2017 edition for International Arbitration.
- Ariel Ye in the Shenzhen office was recognized as Band 1 Leading Lawyer in arbitration by Chambers Asia Pacific 2018.
- Daisy Mallett and Edwina Kwan in our Sydney office were named as Future Leaders by Who’s Who Legal: Arbitration 2018.
- Gao Feng in our Shenzhen office was named by Asian Legal Business (ALB) as one of China’s Top 15 Litigators in 2018.
- Huang Tao in our Beijing office was named by ALB as one of China’s Top 15 Litigators in 2017.
- Liu Yuwu in our Beijing office was recognized as Band 1 Leading Lawyer in dispute resolution and arbitration by Chambers Asia Pacific 2018.
- Meg Utterback in our Shanghai office was appointed to the HKIAC Panel of Arbitrators and designated by the China Business Law Journal as one of China’s Top 100 Lawyers.
- Paul Starr was honoured to be invited to speak as Guest of Honour at the Annual Dinner of the Chartered Institute of Arbitrators (East Asia Branch). He was introduced by Hong Kong’s new Secretary for Justice, Teresa Cheng GBS SC.
- Tim Taylor and Joanne Strain in our Dubai office were recognised by Chambers & Partners for dispute resolution in the United Arab Emirates.
- Zhang Shouzhi in our Beijing office was recognized as an Eminent Practitioner in dispute resolution and arbitration by Chambers Asia Pacific 2018.

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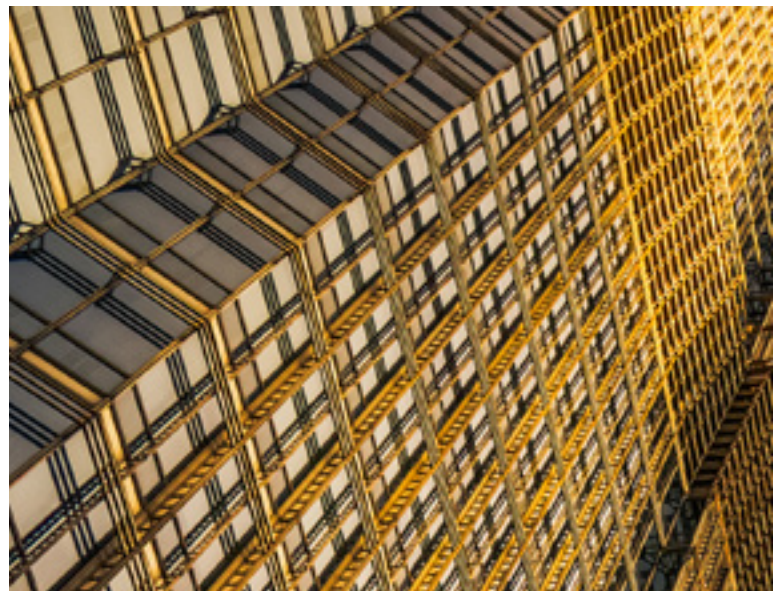
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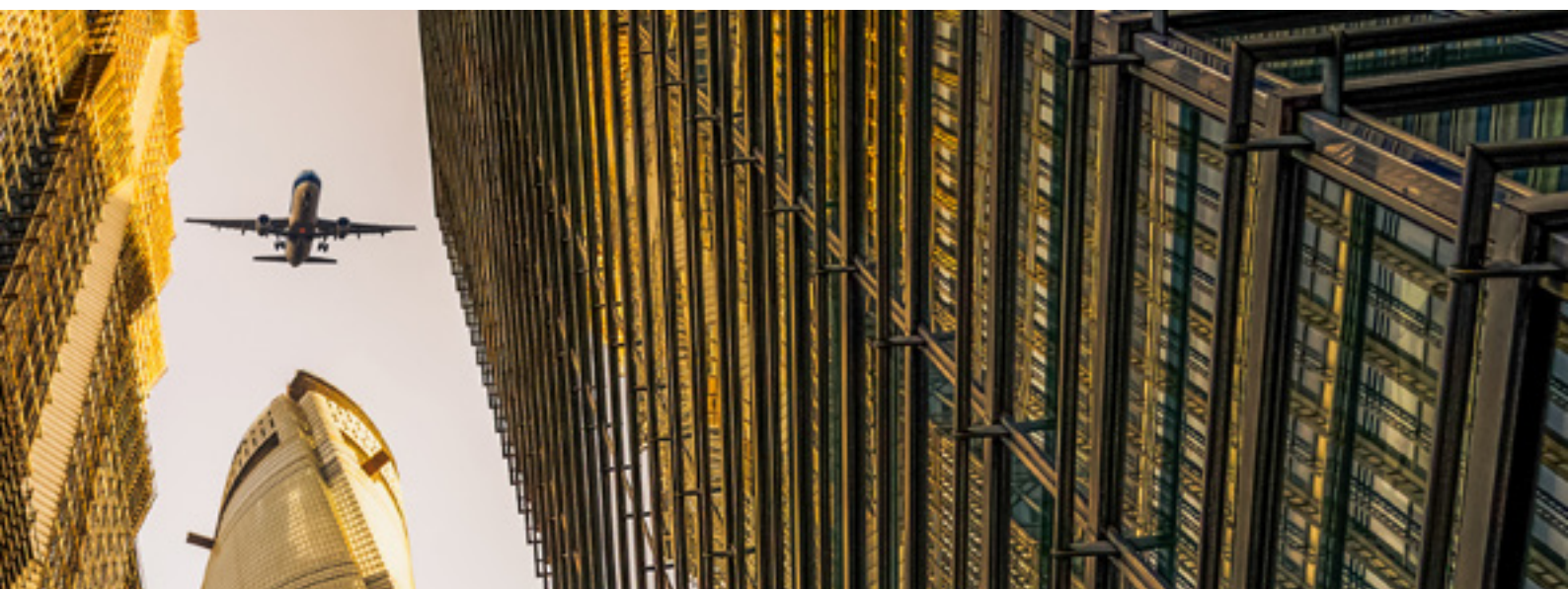
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As a leading international law firm headquartered in Asia, we help clients to open doors and unlock opportunities as they look to Asian markets to unleash their full potential. Combining an unrivalled depth of expertise and breadth of relationships in our core markets, we are connecting Asia to the world, and the world to Asia.

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