Appeal on Merits in Commercial Arbitration?–An Overview

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Finality of tribunal's decision without any challenging system on merits issues has been well established and viewed as one of the most cited benefits of arbitration, which can be found in most influential legal documents such as 1958 New York Convention and UNCIITRAL Model Law on International Commercial Arbitration (issued in 1985, as revised in 2006).

Nevertheless, among all salient features of arbitration, finality of award is probably the most controversial one. In the investment arbitration, the question has been canvassed at length and has been serving as one of the central concerns in the ongoing reform of investment arbitration.[i] While in commercial arbitration, some practitioners and commentators are also making effort to advocate an appeal system. For example, a report by Singapore Academy of Law Reform Committee in February of 2020 strongly recommended introduction of appeals on question of law into international arbitration seated in Singapore,[ii] and has ignited a debate in this regard.

In legal practice, there are some legislations or arbitration institutions provide approaches allowing for the parties to apply for reconsideration of the award, which can be summarized into 3 categories: 1. The appellate mechanism conducted by state courts; 2. Appellate mechanism within the arbitration proceedings and; 3. Alternative to appellate mechanism by arbitration society.

This article will start by giving a brief introduction about the forgoing systems, and comment on the legitimacy and necessity of appellate mechanism in commercial arbitration.

1.Appealing mechanism before the court

1.1 Appellate Mechanism in England

When it comes to appellate mechanism conducted by state courts, the appeal

mechanism for question of law as set out in section 69 of 1996 English Arbitration Act(EAA) is one of the most cited exceptions. It is undeniable that Section 69 of EAA constitutes an appellate mechanism in respect of arbitration conducted by judicial institutions. Nevertheless, some clarifications shall be made in this regard:

(1) The appellate mechanism serves as a default rule rather than a mandatory one, which allows parties to contract out of it. Apart from an agreement which explicitly excludes the appellate system, such consensus can be reached by other means. One of the methods is the parties' agreement on dispensing with reasons for the arbitral award, which is overall a rare practice in the field of international commercial arbitration while frequently used within some jurisdictions and sectors. Another way is the designation of arbitration rules containing provisions eliminating any appeal system, such as arbitration rules of most world renowned arbitration institutions. For instance, Article 26.8 of London Court of International Arbitration Rules(The LCIA Rules) explicitly stipulates that parties waive "irrevocably" their right to appeal, review or recourse to any state court or other legal authority in any form.[iii] Therefore, parties may easily dispense with the right to appeal by reference of arbitration before The LCIA Rules or under its rules.

(2) Albeit parties fail to opt out of such appeals, the court is still afforded with discretion on rejection of a leave to commence such appeal. As provided by Section 69 (3) of EAA, such leave shall be granted only certain standards are satisfied, *inter alia*, the manifest error in the disputed award or raise of general public importance regarding the debating question.

(3) The competence of the appealing court is confined to review the question of laws and shall not impugned on the factual issue. In other words, any alleged errors in fact finding by tribunal is out of the court's remit. English courts are tended to reject efforts dressing up factual findings as questions of law, and have set up a high threshold regarding mixed questions of law and fact.[iv]

The abovementioned three factors have enormously narrowed down the scope of appellate system under Section 69 of EAA. Statistics in recent years also reveal the extreme low success rate in both granting of leave and overturning of the outcome. From 2015 to March 2018, more than 160 claims had been filed, while only 30 claims were permitted and 4 claims succeeded.[v] Hence, the finality of

arbitration award is overall enshrined in England. Parties can hardly count on the appeal proceedings set forth in Section 69.

1.2 Appellate Mechanism Outside England

Some other jurisdictions have embedded similar appellate system, Canada and Australia employed an opt-out model like Section 69 of EAA.[vi] Other jurisdictions have adopted stringent limits on such appeal. in Singapore, appeal on merits of award is only provided by Arbitration Act governing domestic arbitration and not available in arbitration proceedings under International Arbitration Act. The Arbitration Ordinance of Hong Kong SAR of China provides an opt-in framework which further narrows down the use of appellate mechanism.

Appeal in the court is somehow incompatible with the minimal intervene principle as set out in legislations like UNCITRAL Model Law. Further, it will not only enormously undermine efficiency of arbitration but also make the already-clogged state courts more burdensome. The important consideration about the appeal against question of law in the court is the development of law through cases,[vii] while it is not suitable for all jurisdictions.

2.Internal appellate of arbitration institution

Apart from state courts, some arbitration institutions may have the authority to act as appellate bodies under their institutional rules, which can be summarized as "institutional appellate mechanism". While such system can be observed in the arbitration concerning certain sectors such as the appeal board of The Grain and Feed Trade Association, it is rarely used by institutions open for all kinds of commercial disputes, with exceptions such as The Institute of Conflict Prevention and Resolution (CPR) and Judicial Arbitration & Mediation Services, Inc (JAMS).[viii]

Shenzhen Court of International Arbitration (SCIA) is the first arbitration institution in Mainland China who introduced optional appellate arbitration procedure into its arbitration rules published in December of 2018 (having come into effective since February 2019), enclosed with a guideline for such optional appellate arbitration procedure.

SCIA's Optional Appellate Arbitration Procedure provides an opt-in appellate system against the merits issue of an award where the below prerequisites are all

satisfied: (1) pre-existing agreement on appeal by parties; (2) such appeal mechanism is not prohibited by the law of the seat; (3) the award is not rendered under expedited procedure set out in SCIA Arbitration Rules.[ix]

If all the above conditions are satisfied and one of the dispute parties intend to appeal, the application of appeal shall be filed the appeal within 15 days upon receipt of the disputing award and an appealing body composed of 3 members will be constituted through the appointment of SCIA's chief. The appealing body is afforded with broad direction to revise or affirm the original award, of whom the decision will supersede the original award.[x]

The SCIA appellate mechanism is a bold initiative, while some uncertainties may arise under the current legal system in Mainland China:

First is the legitimacy of an internal appellate system under current legislation system. Though the current statutes do not contain any provision specifying the institutional legitimacy of an appellate mechanism, while legal risk may arise by breach of finality principle set out in the Article 9 of PRC Arbitration Law, which expressly stipulates that both state court and arbitration institution shall reject any dispute which has been decided by previous award. In this respect, any decision by an appealing system, regardless of whether it is conducted by state court, is likely to be annulled or held unenforceable subsequently. Apparently, SCIA was well aware of such risk and set forth the first prerequisite for the system such that parties may circumvent the risk through designation of arbitral seat.

The second is the risk brought by designation of arbitration seat other than Mainland China while no foreign-related factor is involved. Current law in PRC is silent on the term of arbitration seat, even though the loophole may be well resolved by the new draft of revised Arbitration Law which has been published for public consultation since late July 2021,[xi] it is still unclear whether parties to arbitration without foreign-related factors have the right to designate a jurisdiction other than Mainland China. As per previous cases, courts across the jurisdiction has been for a long time rejecting parties' right to agree on submission of case to off-shore arbitration institutions provided that no foreign-related factor can be observed in the underlying dispute.[xii]If the same stance keep unchanged in respect of parties' consent on arbitration seat, parties' agreement on designating an off-shore seat to avoid the scrutiny will be

invalidated and the SCIA appellate mechanism will thereby not be available.

Third is the possibility of contradictory results. In Mainland China, a domestic award is final upon parties and hence enforceable without any subsequent proceedings. With this regard, SCIA's appellate mechanism may create two contradictory outcomes in one dispute resolution proceeding under the current legal system. If the successful party seeks for enforcement of award by concealing the existence of appeal proceedings, the court will enforce it basing on its text. Even though the court is aware of the appeal proceedings in the course of enforcement, it is not obliged to stay the enforcement in absence of any legal basis. In other words, the appeal mechanism will be meaningless for all parties in case of the launch of enforcement proceedings .

3.Alternatives to appealing mechanism

As mentioned above, in Mainland China there is no room for a review on merits system in commercial arbitration under Article 9 of PRC Arbitration Law. This article has been verbatim transplanted into the most recent draft of revised Arbitration Law which has been published for public consultation since late July 2021. Therefore, the much-cited bill brings no assistance in this regard.

With all that said, a few institutions have set up a special system called "pre-decision notification"??????as an alternative to mirror the function of appeal mechanism, which is said to be credited to Deyang Arbitration Commission of Sichuan Province dated back to 2004, according to a piece of news in August 2005 reported by Legal Daily, a nationwide legal professional newspaper run by the Supreme People's Court.[xiii] Pre-decision notification allows for tribunal to notice parties their preliminary opinions about the case before rendering the final decision, and ask for parties' comments within fixed duration. Tribunal's preliminary opinions can be revised by the final award based on comments by parties, occurrence of new fact after deliberation, or merely on the tribunal's own initiative.

One notable case about the pre-decision notification mechanism is decided by Xi'an Intermediate Court of Shanxi Province dated 18 April of 2018.[xiv] The case concerns an arbitration proceeding administered by Shangluo Branch of Xi'an Arbitration Commission where the tribunal dispatched preliminary opinion to parties at the outset, whilst ruled on the contrary in the final decision. The

plaintiff (respondent of the arbitration proceeding) subsequently commenced an annulment proceeding against the award on the basis that the final decision is contradictory with the one set out in pre-decision notice (together with other reasons which were not relevant to the topic of this article), whilst the court refused to set aside the award by simply indicated that the reasons replied upon by plaintiff had no merits, without giving any further comment on such system.

In another noteworthy case which concerns the fact that tribunal ruled adversely after considering parties' comments on opinion set out in pre-decision notice, in the annulment proceeding, the Guiyang Intermediate Court of Guizhou Province explicitly endorsed the legitimacy of pre-decision notification, by stating that even though it is not regulated in any current legislation, pre-decision notice can be viewed as an investigation method by means of tribunal's query to the parties, instead of a decision by tribunal. Therefore, the discrepancy between pre-decision opinion and final award does not amount to annulment of the award.[xv]

The abovementioned court decisions are somehow problematic: the pre-decision notification is by no means a mere investigating tool for the tribunal. While the preliminary opinion is made and dispatched, it shall be deemed that the tribunal has taken the stance, which shall be distinguished from tribunal's query about facts or laws in a neutral and open minded manner which is widely accepted in commercial arbitration.[xvi] Therefore, subsequent comments by parties would constitute a *de facto* appealing mechanism before the same decision-making body, which will give rise to problems such as postponing the arbitral proceedings and the question of conflict of interest. Moreover, it probably produces unfairness for parties dissatisfying with the preliminary opinion may spare no effort to change the tribunal's mind by intervening tribunal's autonomy (even by taking irregular or illegal measures).

Overall, pre-decision notification is a highly controversial practice which received lots of criticisms, and hence does not constitute a mainstream system in China. None of the first-class arbitration institutions (including CIETAC, Beijing Arbitration Commission, Guangzhou Arbitration Commission, etc.) had ever embraced such system in the field of commercial arbitration. Some institutions are seeking to repeal or limit the use of such system. For example, Zunyi Arbitration Commission abolished such system in its rules released in 2018, while other arbitration commissions who are consistently strong champions of this system also opined that it is only used in rare cases with higher controversy and

complexity.

Despite of these pitfalls and controversies, the courts' decisions clearly reveal that pre-decision notification system *per se* is not necessarily a breach of finality principle set out in arbitration legislation and hence feasible for parties if it is explicitly set out in applicable arbitration rules.

Pre-decision notification has been introduced into investment arbitration in recent years, Beijing Arbitration Commission has incorporated such system into its investment arbitration which was finalized and published in September 2019, which provides that the tribunal shall provide parties with the draft of award and seek for their comments, and may give proper consideration to the parties' feedback.[xvii] By the language, pre-decision notification will act as a mandatory rule while any investor-state case is being administered by this institution.

4.Comments

Several pertinent issues have been raised with regard to appellate mechanism in arbitration, which can be boiled down to several sub-issues including legitimacy, efficiency and fairness, as well as preference of parties.

4.1 Legitimacy Perspective

According to leading legislations across the world, the competence of state court confined to procedural issues in respect of judicial review over arbitration award, with rare and narrow exceptions such as the public policy set out in UNCITRAL Model Law and New York Convention. With this respect, even though some commentators argue that an appeal on merits is not necessarily a breach of finality and minimal intervene principles set out in UNCITRAL Model Law,[xviii] a mandatory and all-catching appealing system encompassing both factual and legal issues conducted by state court is undeniably incompatible with modern arbitration legislation.

In this respect, an internal appealing mechanism conducted by arbitration institution seems to be less controversial in respect of legitimacy at first glance. While it may also be viewed as a breach of finality of award in the context of some specific legislations such as Article 9 of PRC Arbitration Law.

4.2 Efficiency and Fairness

Finality principle in commercial perceivably enhances the efficiency of dispute resolution by relieving both parties and states from endless and burdensome appealing and reconsidering proceedings, while efficiency is not free from problem while the fairness issue is concerned, giving rise to pertinent considerations about correction of error, enhancement of consistency and the increase of transparency.

Nevertheless, the fairness argument is less convincing in the context of international commercial arbitration in which parties are seeking for a neutral forum in avoidance of local protectionism.[xix] Further, consistency and transparency is less concerned in the context of arbitration which is viewed to be tailored for individual cases while less public concerns are involved, comparing with litigation.

4.3 Preference of Parties

It can be drawn from above analysis that there is no one-standard-fitting all approach for the appeal mechanism in commercial arbitration, in that scenario, parties' preference shall be taken into account by virtue of the autonomy nature of commercial.

An worldwide survey conducted by Queen Mary University in 2015 provides that 23% of the respondents were in favor of an appeal mechanism in commercial arbitration (compared to 36% approval rate in the same question about investment arbitration),[xx] which reveals a boost about 150% while compared with the rate in 2006 survey (around 9%).In 2018 survey, 14% of the respondents had selected "lack of appeal mechanism on the meritss" as one of the three worst characteristics of arbitration.[xxi]

In a nutshell, statics reveals the increasing demand for appeal system, while it is premature to say that preference for appeal mechanism has been the mainstream in commercial arbitration, it has given rise to concerns by arbitration practitioners and proper response shall be made accordingly.

[i]See Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, in Meg Kinnear and Campbell McLachlan (eds), ICSID Review – Foreign Investment Law Journal, Oxford University Press 2017, Volume 32 Issue(3) pp. 503 – 527S https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20A

rbitration%20Awards%20on%20Questions%20of%20Law.pdf

[ii] See Singapore Academy of Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law February 2020,* available at

[iii] Article 26.8 of LCIA Arbitration Rules?coming into effective since October 2020?,available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

[iv] See Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, CIArb's 45th annual Alexander Lecture on 16 January 2020, available at https://www.doj.gov.hk/en/community_engagement/speeches/20200116_sj1.html

[v] Ben Sanderson et al.,*Appeals under the English Arbitration Act 199*6?available at https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996/#:~:text=Section%2069%2C%20meanwhile%2C%20is%20a%20non-*mandatory%20provision%20of,the%20English%20courts%20on%20a%20point%20of%20law.*

[vi]T. Dedezade, *Are You In or Are You Out? An Analysis of Section, 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 2 Intl. Arb. L.J. 56 (2006) available at http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf

[vii] Ibid.

[viii] See Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality*?, Journal of International Arbitration , Volume 30 Issue 5 p. 548?2013?

[ix] See Article 68 of SCIA Arbitration Rules(coming into effective since 2019),available at http://scia.com.cn/upload/20201027/5f97bf7833c8c.pdf

[x] See SCIA Guidelines for the Optional Appellate Arbitration Procedure, available at http://www.scia.com.cn/files/fckFile/file/SCIA%20Guidelines%20for%20the%20Optional%20Appellate%20Arbitration%20Procedure.pdf

[xi] See Anton Ware et al., *Proposed Amendments to the PRC Arbitration Law: A Panacea?*, available at http://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/

[xii] See a seminal case (2013)??????10670? by Beijing 2nd Intermediate Court in January of 2014, which concerns an award rendered in proceedings governed by KCAB, the court rejected enforcement of KCAB award by the reason that the underlying dispute did not have any foreign-related factor, despite of the fact that one party to the proceedings is an enterprise wholly subsidized by Korean citizens.

[xiii] See Li Yongli et al., Enhancing Arbitration Legislation through Pre-Decision Notification. Legal Daily, 16 August 2005, p,12???????????"????"??????????????????2005?8?16??12???

[xiv] 2018 Shan 01 Min Te No. 99?2018??01??99?

[xv] 2016 Qian 01 Min Te No. 48?2016??01??48?

[xvi] Per the common practice and well established principle, tribunals are free to delivery query to parties in respect of both factual finding and ascertaining law (Jura Novit Curia), while it shall be conducted in a manner that being prepared to consider legal positions advanced by the parties, irrespective of questions well known to the tribunal. See: Revista Brasileira de Arbitragem, *International Law Association Committee on International Commercial Arbitration Ascertaining the Contents of the Applicable Law in International Commercial Arbitration Report for the Biennial Conference in Rio de Janeiro*, August 2008,

[xvii] Article 42.4 of Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration?available at https://www.bjac.org.cn/page/data_dl/touzi_en.pdf

[xviii] See Singapore Academy on Law Reform Committee: *Report of Appeal Against International Arbitration Awards on Questions of Law*, February 2020, available at https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf

[xix] Noam Zamir ,Peretz Segal, *Appeal in International Arbitration—an efficient and affordable arbitral appeal mechanism*', in William W. Park (ed), Arbitration International, Oxford University Press 2019, Volume 35 Issue 1) p. 84.

[xx] See Queen Mary, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

[xxi] See Queen Mary & White Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF