Appeal on Merits in Commercial Arbitration?–An Overview

(authored by Chen Zhi, Wangjing & GH Law Firm, PhD Candidate at University of Macau)

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

GD Goenka – CIArb (India) International Virtual Commercial Arbitration Moot Court Competition, 2021

GD Goenka University, Gurugram is part of the GD Goenka Group. GD Goenka University was established in 2013 under the Haryana Private Universities (Amendment) Act, 2013. The GD Goenka University School of Law offers Law Degree Programs at Undergraduate, Post Graduate and Doctoral levels and strives to open new vistas in the arena of law through clinical legal studies and research. With an objective to raise the standards of clinical legal education in India, the GD Goenka University, School of Law regularly hosts Moot Court Competitions and encourages law students from various Law Schools and Universities from across India and world to learn the art and skills of advocacy.

In November 2020, School of law, GD Goenka University successfully organized an arbitration moot court competition "GD Goenka – CIArb (India) International Virtual Commercial Arbitration Competition 2020" in association with CIArb (India) Chapter. The University is now organising the **Fifth edition of *"GD Goenka – CIArb (India) International Virtual Commercial Arbitration Competition 2021" in association with CIArb (India) Chapter on 20th-21st November***. The event is expected to have participation from various Law Schools and Universities from across India & abroad.

The Registration for the Competition is open. **The registration fee is USD 11 /- only.**

You would also be pleased to know the Prizes for winners in various categories-

Winners- Rs 70,000/- (USD 935/-)

Runners Up- Rs 40,000/- (USD 534/-)

Best Speaker Male & Female- Rs 10,000/- each. (USD 133/- each)

Best Memorial- Rs 10,000/- (USD 133/-)

The link to the registration form, posters and brochure is found below.

Registration Form- https://forms.gle/ZwJpZKmsPNDJiwMN6

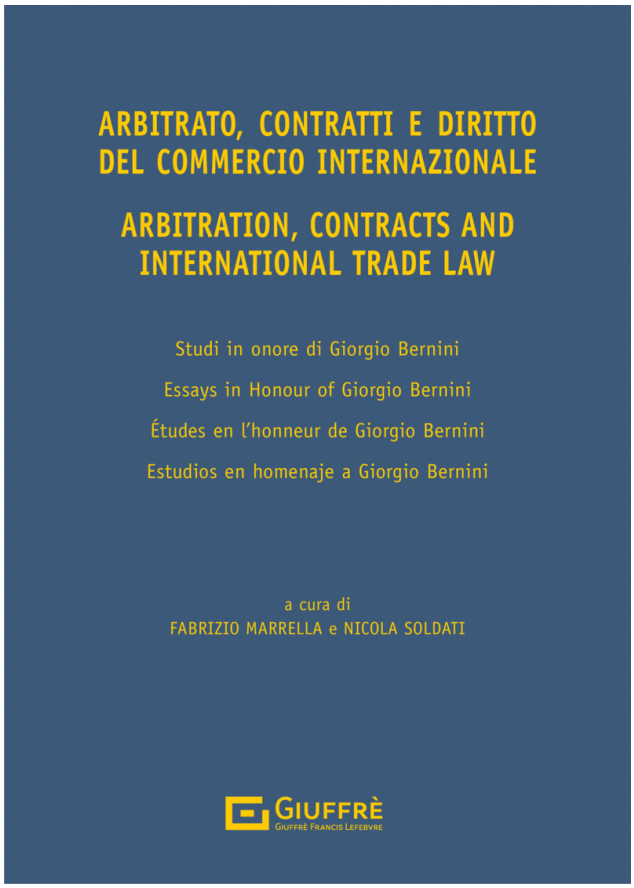
With Warm Regards,

Prof. (Dr.) Tabrez Ahmad,

Vice Chancellor GD Goenka University &

Dean School of Law

Out now: Fabrizio Marrella / Nicola Soldati (eds.), “Arbitration, Contracts and International Trade Law / Arbitrato, contratti e diritto del commercio internazionale. Essays in honor of Giorgio Bernini/ Studi in onore di Giorgio Bernini”, Milan, Giuffré – Francis Lefebvre, 2021.



This book celebrates the work and scholarship of Professor Giorgio Bernini, Honorary President of ICCA, who held the chair of European Union Law, Arbitration and International Commercial Law at the University of Bologna for almost 30 years. A very successful international lawyer, he was the Italian Minister of Foreign Trade and a Member of the Italian Antitrust Authority. Bernini has built a long career in the study and practice of arbitration with a record of 450 cases. The book is divided into an introduction and two parts, to highlight many of Bernini's contributions to the Law.

In a special introductory section of the book, entitled 'portraits of a pioneer', some authors offer specific references to some of his many activities in the field: from the ICC Institute of World Business Law to the International Council for Commercial Arbitration, from the Italian Arbitration Association to his professional life as an international lawyer. Then, in the first part of the book, essays on Contract Law and International Trade Law have been collected. The second part is dedicated to arbitration in its many dimensions: domestic, international, commercial and investment Law.

The contributors are amongst the most highly qualified publicists of the various Nations, with the highest academic credentials and proven experience in the

field: Yves Derains, Lise Bosman, Maria Beatrice Deli, Antonio Fraticelli, Guido Alpa, Alfonso-Luis Calvo Caravaca, Javier Carrascosa González, Roberto Ceccon, Gabriele Crespi Reghizzi, Abdel Hamid El Ahdab, H. Ercüment Erdem, Marcel Fontaine, Roy Goode, Kaj Hober, Ernst-Ulrich Petersmann, Fausto Pocar, Stefano Azzali, Ronald A. Brand, Sergio M. Carbone, Dominique Carreau, Claudio Consolo, Giorgio De Nova, Donald Francis Donovan, Romain Zamour, Ugo Draetta, José Carlos Fernandez Rozas, Emmanuel Gaillard, Maria Chiara Malaguti, Eleonora Finazzi Agrò, Fabrizio Marrella, Margaret L. Moses, William W. Park, Hassan Rahdi, Christoph Schreuer, Nicola Soldati, Shengchang Wang.

For further information please visit here:

UNCITRAL LAC DAY 2021 – 21 October 2021 (10:00 ARG time, 15:00 CEST time): International commercial mediation, expedited arbitration – in Spanish

The UNCITRAL LAC Day 2021 will take place online on Thursday 21 October 2021 at 10:00 Argentinian time and 15:00 CEST time (in Spanish). This event has been organised by UNCITRAL, the Organization of American States (OAS – OEA), Secretaría de Integración Económica Centroamericana / Secretariat for Central American Economic Integration (SIECA) and ASADIP.

The focus of the conference will be international commercial mediation and expedited arbitration. In particular, it will be discussed the work carried out by UNCITRAL's Working Group II: Dispute Settlement.

New Arbitration Rules of Zhuhai Court of International Arbitration

Against the background of "One Belt, One Road" initiative and the construction of Guangdong-Hong Kong-Macau Great Bay Area, after being elevated to be a national free trade zone a few years ago, Henqin Island located in Zhuhai City of Guangdong Province and neighboring Macau was re-labelled as the deeper integration (cooperation) area between Guangdong and Macau days before. To keep up with this political pace, the Zhuhai Court of International Arbitration (ZCIA) now regularly running its business in Henqing Island was established by the Zhuhai Arbitration Commission with the hope that international business people especially those pursuing Sino-Portuguese speaking countries trade could choose Henqin as the seat for their arbitration. In honor of the National Day of the People's Republic of China, Oct 1st, ZCIA publicized its updated arbitration rules yesterday. However, this time three versions of different languages were provided simultaneously ie Chinese, Portuguese and English, the last of which was translated by myself. For its latest arbitration rules, please see http://www.zhac.org.cn/?cat=3.

International Commercial

Arbitration in the European Union – Brussels I, Brexit and Beyond

With a comprehensive and informative manuscript, in *International Commercial Arbitration in the European Union – Brussels I, Brexit and Beyond* (Edward Elgar, 2020, 320 pp.: see here a previous announcement of the publication) Chukwudi Ojiegbe provides a wide-ranging overview of the status quo of international commercial arbitration in the European Union, also duly taking into account the effects arising, in this specific area of the law, from the withdrawal of the United Kingdom from the European Union.

By means of a detailed historical and policy-oriented reconstruction, the Author assesses the history of the Brussels I Recast as it pertains to the provision on the arbitration exclusion. With careful analysis, he considers the implications of the nuanced and debated interface between arbitration and litigation in accordance with the Brussels I Regime as well as the consequences of such interface for the EU exclusive external competence in aspects of international commercial arbitration. Against this background, and further contributing to this complex area of the law, he sets out the findings on the impact of the United Kingdom's withdrawal from the European Union.

In anticipation of a possible future recast of the Brussels I Regime, the Author argues in favour of the inclusion of specific rules that will allow the Member State court with jurisdiction under the Brussels I Regime the possibility of staying the litigation in favour of the arbitral tribunal. As he observes, the coordination between the jurisdiction of the courts of the Member States and arbitral tribunals would increase legal certainty, alleviating the problem of parallel court/arbitration proceedings and the risk of conflicting decisions.

Overall, this volume contributes clarity and advances the academic debate on the EU arbitration/litigation interface. By offering clear historical reconstructions and putting forth solutions to this longstanding problem, it will undoubtedly prove to be of interest to scholars and practitioners but it will also be a useful source for students who wish to deepen their understanding of this area of the law.

Nottingham Arbitration Talk on Wednesday 17 March 2021

Invitation by Dr Orsolya Toth, Assistant Professor in Commercial Law, University of Nottingham

The University of Nottingham Commercial Law Centre will hold its inaugural **Nottingham Arbitration Talk on Wednesday 17 March at 2-4 pm**. The Centre is delighted to welcome distinguished speakers to the event drawn from both academia and practice. The Keynote address will be given by Professor Sir Roy Goode, Emeritus Professor of Law at the University of Oxford. The speaker panel will host Angeline Welsh (Essex Court Chambers), Timothy Foden (Lalive) and Dr Martins Paparinskis (University College London).

The theme of the event will be 'Procedure and Substance in Commercial and Investment Treaty Arbitration'. It will address current and timeless issues, such as the influence of procedure on the parties' substantive rights, the recent phenomenon of 'due process paranoia' in arbitration and the current state of the system of investment treaty arbitration.

All welcome and free to attend. For detailed programme and registration please visit https://unclcpresents.eventbrite.co.uk

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Issue Arbitration and PIL – NIPR 2020/4

The fourth issue of 2020 of the Dutch PIL journal Nederlands Internationaal Privaatrecht is dedicated to Arbitration and conflicts of

laws.

Some of the papers are in English, others in Dutch.

Editorial

Peters & B. van Zelst (guest editors), Arbitration and conflicts of laws / p. 631-633

A.J. B?lohlávek, Determining the law governing obligations in arbitration and the applicability of the Rome I Regulation / p. 634-651

Factors specific to arbitration, and particularly the fact that the place of arbitration is often chosen as a neutral venue with no links to the domicile of the parties or to the subject of the dispute, also influence the procedures followed to determine the substantive law governing obligations. Even so, it is essential to employ a method for determining this law that is transparent, that excludes arbitrariness on the part of arbitrators, and that allows the parties to rely on a certain degree of predictability. Considering the growing importance of the seat of arbitration, which has seen the relevance of the theory of the anationality of arbitration decline in most cases, it is always necessary to assess the importance of the lex fori arbitri in determining the applicable substantive law. Unless the application of EU legislation, and hence also the Rome I Regulation, on the law applicable to obligations stems, as a matter of necessity, from the mandatory lex fori arbitri (which tends to be the exception), the application of the Rome I Regulation must always be kept to a minimum. There is therefore no reason why the Rome I Regulation cannot also be used in arbitral proceedings to determine the applicable law. Arguments such as the fact that this is a regulation applicable exclusively to civil litigation must be rejected.

Meški? & A. Gagula, *Lex mercatoria* and its limits in international arbitration / p. 652-668

This contribution aims to provide guidance on the usual steps an arbitrator undertakes when using lex mercatoria in international arbitration. The first step is the identification of rules that represent lex mercatoria and deserve such a qualification. It involves a discussion on the private international law analysis, especially absent a choice of law by the parties and its relationship to (potentially) applicable national law. The statistics presented in this paper show that parties in

an overwhelming majority of cases choose national law as the applicable law and that lex mercatoria needs to co-exist with national law. Here, the joint use of national law and lex mercatoria is discussed in the context of the example of construction arbitration as the most common area of international arbitration practice. The growing popularity of certain legal solutions of lex mercatoria in procedural or substantive matters followed by a codification trend contribute to an effect of a rebuttable presumption in the fields of its application. This triggers the question as to how the right to be heard can be preserved, especially when the initiative for the use of lex mercatoria does not come from the parties, but from the arbitral panel. The lack of a strict judicial review of the applicable law used in arbitration gives the arbitrators the power to find the right balance between the guidance offered by lex mercatoria and parties' expectations.

Shehata, Overriding mandatory rules and international commercial arbitration: the Swiss and French perspectives / p. 669-686

T*he treatment of overriding mandatory rules has always been the subject of multiple studies, especially in the field of international commercial arbitration. The fact that most arbitration jurists agree that arbitration does not have a lex fori is an essential reason for making this discussion a captivating one. Further, if we couple this lack of a lex fori in commercial arbitration with the arbitrators' duty to render enforceable awards, then we face an extremely intriguing dilemma in this regard.*

Instead of reviewing how arbitral tribunals deal with this conundrum, I try to explore this issue through the lens of selected national reviewing courts (i.e., Swiss and French Courts). In my opinion, the review by the national courts represents the end game and should prove critical in guiding future arbitral tribunals in how they should treat overriding mandatory rules at the earlier stage of issuing their arbitral awards.

Ernste, Het toepasselijke bewijsrecht in arbitrage / p. 687-698

This article focuses on the applicable law of evidence, including the law that is applicable to the allocation of the burden of proof in the case of (international) arbitration with the seat of arbitration being in the Netherlands. In international arbitration, the applicable arbitration law, including the applicable law of evidence, shall be determined by the lex arbitri. The Dutch Arbitration Act is

applicable if the seat of arbitration is in the Netherlands. An arbitral tribunal has to decide with respect to the allocation of the burden of proof whether it applies the law of the arbitral seat (based on the theory that the burden of proof is procedural) or the law governing the underlying substantive issues (based on the theory that the burden of proof is substantive). According to Dutch Arbitration law, the allocation of the burden of proof is procedural. As a result, an arbitral tribunal is not bound by rules regarding the allocation of the burden of proof laid down in the law governing the underlying substantive issues.

Zilinsky, Toepasselijk recht op de bindende kracht en de rechtsgevolgen van arbitrale uitspraken / p. 699-714

This contribution focuses on the res judicata of arbitral awards. What is actually the purpose of the res judicata of an arbitral award? Should an arbitrator or a court verify ex officio whether an arbitral award had become res judicata or should this be invoked by the parties? As the parties are free to determine the manner in which and by whom dispute resolution takes place, the question arises as to which applicable law should determine the issue of an arbitral award becoming res judicata. Although the existing instruments, such as the 1958 New York Convention, deal with the recognition and enforcement of arbitral awards, these instruments leave this question unanswered. These instruments are based on the principle that the Contracting States recognize the arbitral awards and that a recognized arbitral decision is binding. This contribution discusses the different approaches to determining the res judicata effect of an arbitral award.

Peters, Enkele gedachten over de toepasselijkheid van het beginsel van *ius curia novit* in gerechtelijke procedures in verband met arbitrage en de gevolgen daarvan voor arbitrage / p. 715-730

It is often assumed that arbitrators are not obliged to apply conflict of laws rules or to add to the legal grounds ex officio, but this is not necessarily true. In this publication the author sets out that arbitrators, under specific circumstances, should have regard to the rules that the national courts should apply in annulment proceedings and should not consider themselves to be bound by the parties' submissions. In this respect, the arbitrators should have an understanding of the scope of annulment proceedings and the application of the principle of ius curia novit in these proceedings, which are also discussed in this publication.

Van Zelst, Het recht van toepassing op de aansprakelijkheid van arbiters / p. 731-747

This article investigates and challenges existing notions of private international law aspects of the liability of arbitrators. The starting point of the inquiry is a succinct comparative analysis of how the role of the arbitrator is viewed and which standards apply to arbitrator liability in various jurisdictions. The article proceeds with an analysis of the applicability of the Rome I Convention, finding that Rome I applies to the contractual liability of an arbitrator. Subsequently, the article assesses how Rome I's substantive provisions – Article 4 more specifically – should be applied. It concludes that the law of the habitual residence (of each) of the arbitrator(s) applies to contractual claims vis-a-vis the arbitrator(s).

In addition the issue contains a case note

X.P.A. van Heesch, Samenloopperikelen bij het aannemen van bevoegdheid o.g.v. Verordening Brussel I-bis. Hoge Raad 17 juli 2020, ECLI:NL:HR:2020:1280, *NIPR* 2020, 487 (*V Marine Fuels/Dexhon c.s.*) / p. 748-759

This article discusses the judgment of the Dutch Supreme Court dated 17 July 2020, ECLI:NL:HR:2020:1280. In this case, the Dutch Supreme Court answered the question of whether the Dutch Court had jurisdiction based on Article 5 of the Arrest Convention when the Court of Casablanca had arrested the ship in question. Even though Article 5 of the Arrest Convention does not grant explicit exclusive jurisdiction to the court of the forum arresti, exclusive jurisdiction can be assumed based on the interpretation of the Arrest Convention. The author then explains the relation between the Brussels I-bis Regulation and Conventions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (specialized Conventions). The general rule regarding this relation is laid down in Article 71 Brussels I-bis Regulation and entails that the Brussels I-bis Regulation does not affect any specialized Conventions to which the Member States are parties. The Court of Justice of the European Union has provided two restrictions to this rule. These two restrictions entail that Article 71 Brussel I-bis Regulation (i) only applies to aspects that the specialized Convention governs and not to aspects that the specialized Convention does not govern and (ii) can only apply if the specialized Convention does not compromise the principles which underline judicial cooperation in the European Union (such as

the free movement of judgments, predictability as to the courts having jurisdiction and legal certainty for litigants). In the legal literature, ideas differ on how to interpret this last restriction, which is set out by the author as well. Finally, the author construes whether the Dutch Supreme Court should have applied the two restrictions on Article 71 Brussels I-bis Regulation before it ruled that the Dutch Court did not have jurisdiction in this case.

Milan Investment Arbitration Week: 15-20 February 2021

From 15 to 20 February 2021, Università degli Studi di Milano and the European Court of Arbitration, in cooperation with the Law Firms BonelliErede and DLA Piper Italy, organize the first edition of the "**Milan Investment Arbitration Week**" (MIAW), a series of different events (conferences, round-table debates, legal competitions), held in streaming and related to international investment law and arbitration. Renowned Italian and foreign experts from academia, legal profession and arbitral institutions will address from different angles some of the most relevant topics related to the field. In addition, MIAW will include two legal competitions: the second edition of the Milan Investment Arbitration Pre-Moot and the first edition of the Construction Arbitration Moot, with the participation of several Universities from all around the world. Detailed information available here.

New Year, "New" ICC Arbitration Rules

The latest amendments to the International Chamber of Commerce ("ICC") Arbitration Rules enter into force today, providing for a restyling to the 2012 rules (as earlier amended in 2017). The restyling aims to fine-tune the current rules by increasing flexibility, efficiency and transparency of the ICC arbitrations and taking in the practice that the International Court of Arbitration ("Court") has meanwhile developed and consolidated.

This post briefly lists the main novelties.

1.Multi-party disputes (and disputes arising out of multi-tier contracts) will profit from an improved **joinder** and **consolidation** regime. The new rules entitle the tribunal, once constituted and upon request of a party addressed to the Secretariat, to join third parties after considering "all the relevant circumstances", provided that the additional parties accept the constitution of the tribunal and agree to the Terms of Reference, where applicable (Article 7 (5)). Among the circumstances to be taken into account, the tribunal shall assess *prime facie* its jurisdiction over the additional party, the timing of the request for joinder, possible conflicts of interest and the impact of the joinder on the proceedings. As regards consolidation, it is also available in the case of two or more ICC arbitrations in which the disputed claims are made under multiple arbitration agreements (Article 10 (b)).

2.Yesterday a year closed which saw arbitration increasingly making use of **virtual hearings** and **electronic filings,** thereby experiencing a process of digitalization against the backdrop of the pandemic. Many benefits for the "good administration of arbitration" easily came into light, compared with the difficulties for arbitrators, parties and staff to personally meet.

Admittedly, the ongoing efforts to make arbitration resilient in these dramatic days should result in getting it more efficient (and cheaper) also in the upcoming post-pandemic era.

In this vein, the new ICC rules allow the tribunal to decide, after consulting the parties, that hearings can be conducted remotely (Article 26 (1)), thereby easing

the proceedings conduct and adding to efficiency in the light of the circumstances of the case. The option for electronic submission is acknowledged for the Request for Arbitration, the Answer and any written communication.

3.Any revision, even the slightest, in the realm of arbitration always attempts to strengthen **transparency, equality of parties, and enforceability of the awards**.

Article 11 (7) compels parties to disclose any **third-party funder** (referred to as "any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration"). This will assist arbitrators in complying with their duties of impartiality and independence, while lessening the deal of information that parties habitually keep confidential. The aim to reinforce transparency, impartiality and independence also marks the contents of Article 17 (2) and Article 13 (6). The first empowers the tribunal to "take any measure necessary to avoid a **conflict of interest**" stemming from a change in party representation. The tribunal will act so only after giving an opportunity to the parties to comment in writing within a suitable period of time. Article 13 (6) takes care of impartiality and independence in the appointment of arbitrators in **investment arbitration**, requiring the prospected arbitrators not to have the same nationality of any party.

Transparency also underpins the amendment of Appendices I and II, which respectively gather the Statute and the Internal Rules of the Court. Particularly, Appendix II features new Article 5, which governs the communication from the Court of the reasons of its decisions. Only exceptionally may the Court refuse such communication.

With the view to protecting the equality of parties and the validity of the award, the Court may exceptionally **appoint each member of the tribunal** (Article 12 (9)). This power aims to discourage practices which threaten the validity of the tribunal constitution, such as drafting arbitration agreements with one-sided clauses for the appointment of the members.

4.A clarification has been inserted as to the tribunal's power to render "**additional awards**" in case of claims that it "omitted to decide" (Article 36 (3)). Parties have to apply to the Secretariat for an additional award only in respect of "claims made in proceedings".

5.Finally, **fast track arbitration** will be open to more transactions as the maximum dispute value to trigger expedited procedures raises from 2 to 3 US$ million for arbitration agreements concluded as of today. The chance to opt-in for applying the expedite procedure to higher-value disputes remains, as it does the opt-out and the Court's assessment, upon request of a party, that the expedite procedure is inappropriate in the circumstances.

In the light of foregoing, it is apparent that, even if no full-blown revision unfolds to the arbitration community's eyes, the listed "adjustments" are designed to benefit parties, arbitral tribunal and staff in the short and long term.