



# Selected Essays on Dispute Resolution

**DR MICHAEL HWANG S.C.**



SELECTED ESSAYS ON  
DISPUTE RESOLUTION



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2018

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*To all the members of my family  
for their continuing love and support  
and  
the MH Alumni  
for their enduring friendship.*



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## FOREWORD BY GARY B BORN\*

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It is an exceptional pleasure, and equal honour, to contribute this foreword to Dr Michael Hwang's second volume of collected essays. It is also an exceptionally difficult task.

It is difficult to introduce Michael and his work, both because they are already so well known, requiring no introduction, and so diverse and subtle, making any introduction, in the available space, all but impossible. Michael's career includes the lives of several men – an academic in Australia, the head of the litigation department of a leading international law firm, a judicial officer in Singapore, the Chief Justice of Dubai's International Financial Centre Courts, the President of the Law Society of Singapore, an Ambassador to Switzerland, a Commissioner on the United Nations Compensation Commission, a prolific author and an eminent international arbitrator. Doing all this, and doing it at the heights of the profession, requires books, not pages, of description.

Michael not only accomplished exceptional things. He also did so with exceptional dignity and warmth. His cordiality towards litigants, counsel, witnesses and others, whether as arbitrator or otherwise, was unflinching. His care and generosity towards younger lawyers, who he mentored throughout his career, was unstinting. And his warmth and hospitality towards friends and colleagues was unmatched. That was all true throughout Michael's career and remains true today. Again, it requires volumes, not paragraphs, to do justice to Michael's humanity and compassion.

Michael's volume of essays contains the reflections of an exceptional lawyer and scholar who left an indelible mark on the Singapore and international legal community. It builds on Michael's first volume of essays, published in 2013. The first volume addressed a broad range of issues in international arbitration and dispute resolution, including

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\* President, SIAC Court of Arbitration; Partner, Wilmer Cutler Pickering Hale and Dorr LLP.

advocacy, confidentiality, corruption, ethics, issue conflict and public policy. With Michael's characteristic thoughtfulness and exacting rigour, these essays illustrate the breadth and depth of his scholarship and experience as counsel and arbitrator.

This second volume is still more impressive in scope. Part I contains essays on international arbitration spanning a wide range of contemporary issues, including commercial courts, international arbitration centres, witness statements and video conferencing. Part II contains reflections on mediation, while Part III contains essays that address the complex interactions between international and domestic Law. Part IV comprises a number of speeches and essays given by Michael as President of the Law Society of Singapore, through which he shares a number of observations on legal practice, professional ethics and the role of law in society.

These essays reflect the wealth of learning and expertise Michael has built over a lifetime of experiences as an arbitrator, ambassador, litigator, judge and scholar. They are an immensely valuable resource that provides practical guidance on arbitration advocacy and litigation strategy, discusses lessons learned as an arbitrator and mediator, and proposes unique solutions to complex issues of contemporary legal controversy. I cannot commend it more highly to students and practitioners of international arbitration, as well as all who are interested in learning from the experiences of a true legal giant and a giant human being.

December 2018

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## FOREWORD BY DAVINDER SINGH SC\*

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More than 30 years ago, when I was in law school, Michael was known to law students as a giant in the law. So much was said about him and of his abilities that it became something of a talking point when a student secured an internship with him. When I started practice, it became clear to me that even the profession regarded Michael with awe and respect. And as the years passed, I understood why.

I have both appeared before, and crossed swords with, him. The former was always edifying and the latter invariably painful for the thousand cuts that he inflicted on me. My respect for him grew with each wound.

It is therefore a great honour for me to be asked to contribute this foreword. It also gives me the opportunity to share my thoughts about what makes Michael special.

Michael's victories and achievements are countless. This foreword cannot do justice to all of them, and I will only diminish them if I endeavour to condense them. Instead, I shall give you a glimpse into what, in my eyes, makes Michael a lawyer *par excellence* and a lodestar for anyone thinking of distinguishing themselves at the Bar.

Let me start with what we all know. Michael is an impressive and formidable advocate. He can turn his brilliant mind to any issue, no matter how novel or esoteric. It is therefore not by accident that he has been briefed to appear in many of the complex cases that have come before the Singapore Courts. He is also the most well-known Singapore lawyer in international arbitration. His numerous appearances, appointments as arbitrator and erudite papers and speeches speak to that.

What is less known, and as I discovered over years of interaction with him, is that Michael has a rare thirst for knowledge which is matched

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\* Chairman, SIAC Board of Directors; Executive Chairman, Drew & Napier LLC.

only by an insatiable curiosity. These traits distinguish him from many others, not just in Singapore, but all over the world.

If you have had the privilege of listening to Michael, and if you listen very carefully, you will realise that Michael is never content. While many of us endeavour to learn *what* the law is, Michael is constantly asking *why* the law is. If you look closer, you will see that while the ever inquisitive section of his brain is constantly asking why the law is what it is, that richly fertile section is at the same time ceaselessly pondering over why it should not change.

This explains why, whether as Judicial Commissioner, advocate or teacher, he ventures beyond the case. He is never content to just win the argument on the basis of what are always meticulously researched and eloquently presented points of law. He is always up to mischief: prodding, pushing and provoking a discussion with his interlocutors on the nuances and direction of the law. Unfortunately, many a time (and, with me, always), Michael walks away disappointed because there are very few who can match his intellectual calibre.

However, that has not deterred Michael from continuing to share selflessly, both in his highly enriching talks and in his deep and thoughtful papers.

*Selected Essays on Dispute Resolution* is just one example of his admirable and ceaseless determination to mentor and to provide thought leadership. It represents yet another invaluable contribution, at a time of increasing flux, to an area in search of its shape.

Michael's unquenchable thirst for learning, his love for teaching, his fidelity to fairness, his formidable intellect, disarming honesty and his unfailing courtesy to everyone, foes included, provide clues to why he is so highly respected and sought after. They also explain why many of us cherish our interactions with him.

While many things have changed in the three decades after I left law school, one has not. Michael remains a giant in the law.

I would like to thank him for being every lawyer's friend and role model.  
I wish him the very best, even as I continue to lick my wounds.

December 2018

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## PREFACE

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It has been five years since the publication of my first volume of essays. This year also marks the fifth decade of my practice as an advocate and solicitor.

In this volume, I have included a selection of the speeches and papers (which I will again call essays) that I have delivered and written over the years. The scope of this volume is wider than the first, and includes topics beyond the universe of international arbitration. They reflect the variety of “hats” that I have worn over the last five decades of practice. These essays address issues that were (and still are) of particular interest to me. I have also reserved a section for my thoughts on particular legal issues in Singapore. Some of the essays in this section were written in my capacity as the President of the Law Society, and which contain my thoughts on some of the values that the law and the legal profession in Singapore should strive for.

The essays in this collection have been updated as at the end of July 2018. Where necessary, they have been amended by Rachel Ong (Associate, Michael Hwang Chambers) and Chan Yin Wai (Practice Trainee, Michael Hwang Chambers), who revisited the references in the essays to ensure that they were still current, and represented (as far as possible) the present law and practice. They are in fact co-editors with myself of this volume, and without them, this publication would not have been possible. To them, I owe my grateful thanks.

I am also grateful to the Singapore Academy of Law for their assiduous and practical assistance in providing all the necessary technical expertise in editorial management. A special word of appreciation is reserved for Academy Publishing for making this publication aesthetically pleasing and easy to read.

As with my first volume, the Singapore International Arbitration Centre (“SIAC”) has kindly agreed to be the publisher of this volume, for which I thank its Chief Executive Officer, Lim Seok Hui.

I will recognise each of the co-authors and research assistants of my various essays later in this volume, but in this Preface, I wish to thank each of them for the effort they have put into the research for these essays, and I commend them for a job well done. Their individual researches have made the essays more credible and (hopefully) more authoritative, and I hope that the essays will be all the more valuable to the arbitration and general legal community for their contributions.

I also express my deep appreciation to the authors of the two forewords to this volume. I have chosen Gary Born for his obvious connections to the SIAC, quite apart from his immense stature in the world of international arbitration. Davinder Singh also has a link to arbitration as the Chairman of the SIAC Board of Directors, but I invited him to write a short note more because he has known me for a long time in the world of dispute resolution, where we have sparred against each other on more than a few occasions. I felt that he would be able to give an objective picture of how the Singapore legal profession views me rather than if I had asked one of my former partners from my old firm, Allen & Gledhill, much as I love (and continue to admire) that firm.

Before I invite readers to read and reflect on the essays that follow, I have set out, in an introductory chapter, some musings on my career in the legal profession; recounting anecdotes that have clung to my memory, and which also track the changes and developments of the legal profession in Singapore over the last 50 years.

**Michael Hwang SC**

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December 2018

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## CO-AUTHORS AND RESEARCH ASSISTANTS

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I would like to extend my sincere gratitude to all my co-authors, without whom these essays would not have seen the light of day. The following is a brief introduction to all my co-authors in alphabetical order.

**Aloysius Chang** (co-author of “Of Forks and Dead Ends”)

Aloysius graduated from the National University of Singapore with a Bachelor of Laws in 2013 and trained at WongPartnership LLP before joining my Chambers as an associate in 2014. After he left my Chambers, he joined K&L Gates LLP in Singapore as an associate, and is currently with King & Spalding (Singapore) LLP as an associate, where he continues to practice international arbitration. He is admitted as an Advocate and Solicitor of Singapore.

**Andrew Chin** (co-author of “The Role of Witness Statements in International Commercial Arbitration”)

Andrew graduated from the University of Cambridge with a Bachelor of Laws in 2003 and from the London School of Economics and Political Sciences with a Master of Laws in 2004. He joined my Chambers as a pupil in 2005 and later as an associate in 2006. After he left my Chambers, he joined the disputes team of Hogan Lovells in Hong Kong in 2008 and Baker McKenzie in 2012, and is currently a senior associate at DLA Piper in Hong Kong. He is admitted as an Advocate and Solicitor of Singapore and a Solicitor of the Hong Kong Special Administrative Region.

**Anthony Cheah Nicholls** (co-author of “When Should Video Conferencing Evidence be Allowed?”)

Anthony graduated from the London School of Economics with a Bachelor of Laws in 2009 and a Diploma in French Legal Studies from the University of Strasbourg. He joined my Chambers as a trainee in 2012 and currently works as an associate at Shearman & Sterling LLP. He is admitted as an Advocate and Solicitor of Singapore and as an Attorney and Counsellor-at-Law of the State of New York. He also sits

with me on the Law Society of Singapore's Public and International Law Standing Committee.

**Colin Y C Ong** (co-author of "Effective Cross-Examination in Asian Arbitrations")

Colin is a Counsel at Eldan Law LLP (Singapore), Queen's Counsel at 36 Stone (London) and Senior Partner at Dr Colin Ong Legal Services (Brunei). He is a President of the Arbitration Association Brunei Darussalam, Vice President of the Appointing Council of the Thailand Arbitration Center, Advisory Governing Council of the Indonesian National Board of Arbitration and Appointing Council of the Cambodian National Commercial Arbitration Centre.

He was the first ASEAN practising lawyer elected Master of the Bench of the Inner Temple (2010), and the first ASEAN national lawyer appointed Queen's Counsel. He also holds the following titles and qualifications: Chartered Arbitrator; Visiting Law Professor; FCI Arb; FMI Arb; FSI Arb; DiplC Arb; LLB (Hons) (Sheffield); LLM; PhD (Queen Mary).

Author of advocacy, arbitration and law texts. Handled over 300 arbitrations. Listed as a top 30 arbitration practitioner worldwide by *Expert Guides: Best of the Best 2017 (Arbitration)*. Previously a GAR 45 under 45. GAR Awards 2016 Runner-up for "Most Important Reported Decision of 2015" for *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364. Most-in-Demand Arbitrators (Asia-Pacific) described by Chambers & Partners 2018 as "one of the top arbitrators in terms of degree of demand". *Who's Who Legal Arbitration 2018 Analysis*: "a world-renowned arbitration counsel who always manages to make complicated issues appear unbelievably straightforward".

**David Holloway** (co-author of "One Belt, One Road, One Clause for Dispute Resolution?")

David is a Barrister-at-Law at Gray's Inn, practising from Stone Chambers, London and Singapore. He is also an arbitrator and panel member of the China International Economic and Trade Arbitration Commission, Shenzhen Centre of International Arbitration, Arbitrator Committee, Thai Arbitration Center. David is an Assistant Professor and

Programme Director of the Master of Laws in Arbitration and Dispute Resolution at the City University of Hong Kong and is general editor of the *International Arbitration Law Review*. He completed his undergraduate studies at the University of Cambridge and also holds a European Master in Law and Economics from the Erasmus University of Rotterdam.

**Jennifer Fong Lee Cheng** (co-author of “Loss of Inheritance or Savings: A Proposal for Law Reform”)

Jennifer graduated from the National University of Singapore with a Bachelor of Laws (Honours) (Second Upper Division) in 2006. She completed her pupillage with me and continued in my Chambers as an associate after she was called in 2007. After she left my Chambers, she joined Baker & McKenzie.Wong & Leow as an associate and worked there for six years. She is currently a partner at Eldan Law. She is admitted as an Advocate and Solicitor of Singapore, as well as a solicitor of England and Wales and is called to the New York Bar.

**Jennifer Hon** (co-author of “A New Approach to Regulating Counsel Conduct in International Arbitration”)

Jennifer graduated from Hunter College, City University of New York, with a Bachelor of Arts in English and Studio Art in 2010; the University of Cambridge with a Bachelor of Arts (Honours) in Law in 2013; and the University of Oxford with a Master in International Human Rights Law in 2016, and joined my Chambers as an associate in 2015. After she left my Chambers, she joined Baker & McKenzie.Wong & Leow as a foreign legal assistant, and is currently pursuing interests in women’s rights in Barcelona, Spain. She is admitted as an Advocate and Solicitor of the Republic of Palau and the State of California.

**Katie Chung** (co-author of “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration”)

Katie graduated from the London School of Economics and Political Science with a Bachelor of Laws in Laws in 2005, and joined my Chambers as a pupil in 2006. After she left my Chambers, Katie joined the dispute resolution and international arbitration team in Norton Rose Fulbright in Singapore as an associate in June 2010, where she currently is Of Counsel. Apart from acting as counsel in international arbitrations,

she also sits regularly as an arbitrator. She is currently the Singapore representative of the Asia Pacific Forum for International Arbitration. Katie is admitted as an Advocate and Solicitor of Singapore, and a Solicitor-Advocate of England and Wales.

**Lim Si Cheng** (co-author of “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration”, “The Chimera of Admissibility in International Arbitration and Why We Need to Stop Chasing It”, “One Belt, One Road, One Clause for Dispute Resolution?” and “Breaking the Silence of the Executive: The Residual Role of the Common Law Courts in the Determination of Statehood”)

Si Cheng graduated from Durham University with a Bachelor of Laws (First Class Honours) in 2015 and is currently an associate in my Chambers. He is admitted as an Advocate and Solicitor of Singapore.

**Lynnette Lee** (co-author of “Standard of Proof for Challenge Against Arbitrators: Giving Them the Benefit of the Doubt”)

Lynnette graduated from Monash University with a Bachelor of Laws degree in 2016 and joined my Chambers as an intern in 2016. After she left my Chambers, she joined Shearman & Sterling LLP in Singapore as an intern with its international arbitration practice group. She is admitted as an Advocate and Solicitor of Singapore.

**Wong Hui Min** (co-author of “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration”)

Hui Min graduated from Singapore Management University with a Bachelor of Laws and subsequently a Master of Laws in Cross-Border Business and Finance Law in Asia in 2017 and joined my Chambers as an intern in 2017. After she left my Chambers, she joined Rajah & Tann Singapore LLP as an associate. She is admitted as an Advocate and Solicitor of Singapore, and is pursuing admission to the New York Bar.

I would also like to express my sincere gratitude to the following individuals for their invaluable research assistance and input to the various essays in this collection.

**Cathryn Neo** (“Arbitrators and Barristers in the Same Chambers – An Unsuccessful Challenge”)

Cathryn graduated from the University of Tasmania with a Bachelor of Laws (First Class Honours) in 2014. Prior to commencing her legal career, she graduated from Nanyang Technological University in 2010 with a Bachelor of Communication Studies (Honours) and a minor in Business. Cathryn joined my Chambers as a trainee in 2016 and continued as an associate thereafter. After she left my Chambers in 2018, she joined the Dispute Resolution team at Ashurst LLP. She is admitted to the Supreme Court of Victoria, Australia, and as an Advocate and Solicitor of Singapore.

**Chan Yin Wai** (“When Should Video Conferencing Evidence be Allowed?”)

Yin Wai graduated from King’s College London with a Bachelor of Laws (Honours) in 2015. He is currently a trainee in my Chambers.

**David Hu** (“Standard of Proof for Challenge Against Arbitrators – Giving Them the Benefit of the Doubt”)

David graduated from the London School of Economics with a Bachelor of Laws in 2017. He joined my Chambers as an intern in 2016 and is currently serving his Training Contract at Skadden, Arps, Slate, Meagher & Flom LLP (London). He will be admitted as a Solicitor of England and Wales in 2020.

**Desmond Ang** (“Arbitrators and Barristers in the Same Chambers – An Unsuccessful Challenge”)

Desmond graduated from National University of Singapore with Bachelor of Laws in 2004 and worked at my Chambers as trainee from 2004 to 2005 and then as associate from 2005 to 2007. After he left my Chambers, he joined Ashurst LLP in London as an associate and then O’Melveny & Myers in Hong Kong as an associate. He is currently a partner in Sidley Austin’s Hong Kong and Singapore offices. He is

admitted as an Advocate and Solicitor of Singapore, Solicitor of Hong Kong and Solicitor of England and Wales.

**Eunice Chan** (“The Hearing”)

Eunice graduated from Singapore Management University with a Bachelor of Laws in 2012. Thereafter, she joined my Chambers as a trainee in 2013 and later as an associate. After she left my Chambers, she joined Drew & Napier LLC and acquired a Master of Laws from Columbia University. She is admitted as an Advocate and Solicitor of Singapore, and as an Attorney and Counsellor-at-Law of the State of New York.

**Rachel Ong** (“Does Compulsory Acquisition Frustrate a Contract for the Sale of Immovable Property? *Lim Kim Som* Revisited” and “Loss of Inheritance or Savings: A Proposal for Law Reform”)

Rachel graduated from the University of Southampton with a Bachelor of Laws (First Class Honours) in 2015. She completed her training contract at WongPartnership LLP and is currently an associate in my Chambers. She is admitted as an Advocate and Solicitor of Singapore.

**Sean Tan Shihao** (“International Arbitration as a Model for Legal Convergence”)

Sean graduated from Oxford University with a Bachelor of Arts in Jurisprudence in 2014 and joined my Chambers as a pupil in 2016. After he left my Chambers, he obtained a Master of Laws from Columbia University in 2018, where he served as research assistant to Professor George Bermann and Co-Chair of the annual Columbia Arbitration Day. He then joined the disputes team at Debevoise & Plimpton LLP as an associate and is currently based in New York. He is admitted as an Advocate and Solicitor of Singapore and a Solicitor of England and Wales.

**Serene Chee** (“International Arbitration as a Model for Legal Convergence”)

Serene is currently a final year undergraduate from the National University of Singapore (“NUS”), Faculty of Law, and interned at my

Chambers during her second year of studies in 2016. After she left my Chambers, she participated in several moot court competitions with success, including but not limited to emerging as International Champions of the International Air and Space Law Academy Space Moot Competition 2017, clinching the Best Memorial Prize for the same competition, and emerging as Second Runner-Up at the Allen & Overy Private Law Moot Competition 2017. She also completed a semester of studies at Boston University School of Law while on exchange from NUS. Upon graduation, she will be embarking on her legal training at the Litigation and Dispute Resolution Department in Allen & Gledhill LLP.

**Stephanie Hunt** (“The Arbitrator’s Contract”)

Stephanie graduated from the Australian National University with a Bachelor of Laws (Honours) in 2012 and from the University of Geneva and the Graduate Institute of Geneva with Master of Laws in International Dispute Settlement in 2015. Stephanie interned at my Chambers in 2015. After she left my Chambers, she joined Corrs Chambers Westgarth in Melbourne as an international arbitration and litigation lawyer, and is currently an adviser to the Australian Minister for Foreign Affairs. Stephanie is admitted as a Solicitor to the High Court of Australia and the Supreme Court of New South Wales.

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**INTRODUCTION:  
MUSINGS ON MY CAREER IN THE LAW**

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Michael HWANG SC

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When I published my first volume of *Selected Essays*<sup>1</sup> to mark my 70th birthday, I did so in the context of the universe of International Arbitration, and my essays were chosen from my writings on that subject. Since then, I have continued to work in that space, and I have given more lectures and written more papers on that subject. Therefore, on the occasion of my 75th birthday, I thought it appropriate to publish a further collection of essays on that topic. However, this year also happens to be the 50th year of my admission to the Singapore Bar, and it is perhaps a fitting time to take stock of my overall work as a lawyer, both in Singapore and elsewhere in the wider legal universe. I have accordingly added some other essays written and speeches given on

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<sup>1</sup> Michael Hwang, *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013).

other areas of law which would give a more rounded picture of my legal interests over the years.

### **I. The beginnings: Teaching Fellow at the University of Sydney**

I started my career in the law when I took up my first job in 1966 as a Teaching Fellow in the University of Sydney where I worked until the end of 1967. I was a lecturer, tutor and examiner in the law of Torts, where I assisted one of the legends and founders of the Sydney Law School, Professor William (Bill) Morison. In my time at Oxford, I had been exposed to some great legal minds at close quarters, and my tutor, Robert Heuston, the author of *Salmond and Heuston on Torts*, had been a world authority on Torts. But even with that background, I always felt in awe of Bill Morison, who had an awesome intellect, and could set examination questions that required even his supporting lecturers and tutors (including myself) to see him for a quick tutorial before being able to identify what exactly he was looking for in the answers, so that we could mark the papers appropriately. His intellect was so deep that one of his fellow professors said to him one day, “*Bill, I think your lectures are so cryptic that you should give them in the crypt of St Mary’s (a nearby cathedral)*”.

My years at Oxford and Sydney inculcated in me a lifelong love of the law in all its aspects, particularly in how one analyses daily situations in terms of their legal implications and the potential legal solutions. This has motivated my choice of practice areas in my professional career, where I have found joy in the challenges presented by different practice areas which called for different approaches and different skillsets – from the analysis of a problem to explaining that analysis to a client; from drafting pleadings and submissions to drafting contracts and conveyances; and from oral advocacy to negotiating a contractual or other commercial document with another lawyer, all of which might be loosely described as exercises in the art of analysis and persuasion, which is the ultimate challenge for a lawyer.

## **II. Return to Singapore: My early years in practice**

When I returned to Singapore in 1968, I had already spent nearly a decade abroad, first for my education, and then for my stint teaching at Sydney Law School. My thought was that I now needed to qualify as a practising lawyer. While I was still keen on academia, I felt that I needed to have at least some experience of practice even if I were to eventually settle on an academic career. I thought that, in any case, I would already have at least some teaching credentials, with my Bachelor of Civil Law (“BCL”) degree from Oxford, and my 18-month teaching stint at Sydney Law School.

I had a long discussion with my father, who was a banker and was familiar with the legal scene, and who had done his own research on the major law firms where I might look for a job. Ultimately, I decided to apply to Allen & Gledhill, which was at that time one of the “Big 4” legal firms but the smallest of the four. The largest firm in terms of number of lawyers was Donaldson & Burkinshaw, with something like 15 lawyers. Then came Rodyk & Davidson, with maybe a dozen. Next was Drew & Napier, which was slightly smaller. Allen & Gledhill had eight lawyers, and I was the one pupil taken on that year. It was particularly well known for its practice in Company Law as its senior partner, Robert Booker (who was known to us as Bob), was the acknowledged leader in Singapore in that area of practice. It was also well known as a shipping firm, mainly due to the fame of M Karthigesu (whom we called Karthi) who was widely admired for his general skill as an advocate, especially in Maritime Law (and who eventually served as a Judge of Appeal in the Singapore Supreme Court).

I was interviewed by both of them, and was asked what my particular field of legal interest was. Despite my work in the area of Torts (having just written my first published legal article in that area), I still remembered being inspired by the lectures on Conflict of Laws in my BCL class by the legendary John Morris, and I said that this was the area in which I had the greatest interest. Bob and Karthi said that I would only find those problems arising in the area of shipping, and I was duly assigned to Karthi as his pupil. In fact, I did not encounter any meaningful issues concerning Conflict of Laws for the greater part of my practice

until I started getting involved in international dispute resolution, especially in international arbitration. I have never lost interest in this subject, and took the opportunity in 2014 to co-edit a special issue of the Singapore Academy of Law (“SAL”) Journal, which was a collection of essays from international scholars and practitioners on the subject of “Conflict of Laws in Arbitration”.<sup>2</sup> I suppose you could call this making up for lost time.

The irony of this assignment to work under Karthi was that I never really got immersed in the world of shipping. One reason was that Karthi kept all his shipping work to himself, and only used me for his general litigation cases. Although I was nominally Karthi’s pupil, Bob started to give me work in Company Law, and I found that the bulk of the work that I was doing was in that area. There was a lot of work in pure Company Law at that time as Singapore enacted a completely new Companies Act in 1967.<sup>3</sup> So when I started my pupillage in 1968, much of my time was spent on learning that Act and drafting letters of advice to clients on the new changes. I also became an expert in how to draft articles of association and how to incorporate companies. To this day, I can still remember the statutory forms that had to be filed for incorporation. In that sense, I could be called a “nuts and bolts” company lawyer (which the English would describe in more elegant terms as a “commercial chancery lawyer”). However, there was also some litigation work that arose in the field of Company Law, and Bob was a versatile enough lawyer to handle the litigation himself (with myself as his assistant). From there, I learnt how to draft “Instructions to Counsel” as Bob often needed specialist advice, particularly on the new provisions of the 1967 Act. That Act was closely based on the Victorian Companies Act of 1961, so we consulted Australian Counsel as often as English Silks, and I soon got to know several of them personally.

The early years of my legal practice can be divided into three broad phases. In my first couple of years, as described earlier, I worked primarily on Company Law matters in view of the need for Singapore

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<sup>2</sup> (2014) 26 SAclJ Special Issue on Conflict of Laws in Arbitration.

<sup>3</sup> Companies Act 1967 (Act 42 of 1967).

companies to adjust to the newly enacted Companies Act 1967. I became relatively expert in this area of law, which was not then part of the Oxford University syllabus, so I learnt this subject only when I had to sit for the English Bar exams and had to educate myself. My expertise then developed to the point that I was able to be a tutor in this subject at the then-University of Singapore's Law Faculty first under the supervision of Dr Tan Ng Chee, and later under Philip Pillai (who was eventually to become a High Court Judge). I must have earned Philip's confidence in my grasp of the subject as, when he had to take study leave to go to Harvard to complete his doctorate in Company Law for a whole semester, he tasked me to take over delivering the main lectures in that subject for that semester.

From Bob Booker, my supervising partner, I learnt the art (and the importance) of accurate proof-reading, which I have retained and found vital for the accuracy of all documents prepared by me or in my name. But much of this work was done in my office without much contact with clients. At some point, therefore, I asked Bob to give me some exposure to litigation so that I could engage with clients. I was promptly given a portfolio of District and Magistrates' Courts cases, as our firm's policy in those days was that no lawyer could be permitted to appear in a High Court case on his or her own until after at least one year of experience in the lower courts.

At that time, the areas of practice at Allen & Gledhill which provided the main bulk of litigation work were in debt collection and motor accidents. We acted for the East Asiatic Company Ltd, which had the agency for Vespa motor scooters, and we had to do a lot of termination of hire-purchase contracts for non-payment of hire-rent. We also acted for one of the two major insurance companies which specialised in insuring taxis, so for a while I could say that (in theory) I was the lawyer for half of the taxi drivers in Singapore. There was of course a lot of routine work involved in these cases, but I nevertheless learnt some valuable lessons of legal principles and practice from these areas of practice:

- (a) Hire-purchase and contracts of sale involved particular principles which were not usually taught at law school but were part of everyday commercial transactions. Hire-purchase combined two

areas of law and had its own peculiar legal principles, including a method of calculating the rebate due to the hirer for early repayment of the total hire-rent which was too complicated to explain by a verbal formula, and was simply referred to in a hire-purchase agreement as the “Rule of 78”.

- (b) Contracts of sale usually resulted in claims for the price of goods sold and delivered, and law schools do not usually emphasise that this is a peculiar remedy different from the normal remedy for breach of contract (*viz*, a claim for damages), whereas the action for the price is a statutory remedy for an agreed sum, which has principles of its own.
- (c) Acting for taxi drivers on the instructions of insurance companies included defending them when they were charged with criminal offences in the course of their driving. This gave me insight into the world of criminal procedure, as I became a regular visitor to the traffic courts and, more importantly, I started to become familiar with the Criminal Procedure Code. Even more important, I had to learn how to cross-examine witnesses and make oral submissions on my own, where I eventually graduated to full-blown criminal cases, as such stray criminal work that came to our firm was usually channelled to me as the most junior litigator.

After serving my time in the trenches of the lower courts, I was eventually given files that would require me to appear in the High Court on my own. Thus began the second phase of my legal development. I can still remember my first High Court case where I argued an uncontested divorce case before Justice T Kulasekaram. After my client had given evidence, I made a ten-minute submission about the cruelty which my female client had suffered, so as to justify a decree *nisi* on that ground. I was really heartened when I noticed that the Judge was writing ferociously as I was speaking, as he seemed to have considered what I said to be important. However, as soon as I had finished my submission, Justice Kulasekaram proceeded to deliver his findings, which proved to be a ritualistic incantation of the formulaic decree *nisi* to the following effect: “*Having heard the evidence of the Petitioner, and having read the relevant papers I hereby grant a Decree Nisi of Divorce which shall be made absolute in three months from today’s date unless there shall be*

*any intervention by the Attorney-General*'. Only then did I realise that he had been writing his judgment as I was speaking without regard to whatever I was saying.

This incident was memorable for another reason. As this was my first appearance in open court in the High Court, I had not yet invested in acquiring a gown of my own. I asked Choo Chong Seng (whom everyone called "Choo"), the Clerk in charge of the Robing Room, if I could borrow a gown. Without a moment's hesitation, he proffered a gown for me to wear. When I asked Choo if he was certain that the owner would not be using it that day, he confirmed that he was sure. I did not have time to discuss this with him before going off into court. But after I had finished, and was returning the gown to him, I asked him why he was so certain that the owner would not be needing it that day. He said, "*because he is dead*". I then mildly chastised him for giving me bad *feng shui* for my maiden appearance in the High Court by lending me a dead man's gown. I later came to appreciate Choo's kindly and solicitous nature to help all lawyers, and we became fast friends until his death only a few years ago.

As I was anxious to learn all aspects of legal practice, I went around the office asking the partners to teach me their own practice areas where (among other things) I learnt the intricacies of common law as well as Land Titles conveyancing. In those days, there were no formal textbooks on common law conveyancing, and one had to learn how to deduce title by being taught on the job by another senior lawyer. Land Titles conveyancing was better served, as there were textbooks on Torrens title and published forms from the Land Titles Registry. What was missing, however, was any formal instruction on the law of vendor and purchaser in the sale of real property either in law school or the Postgraduate Practice Law Course (which was the name of what is now known as Part B of the Singapore Bar Examinations). So all of this knowledge had to be acquired on the job by self-study and tips from my seniors in the firm.

Let me pause for a moment to describe the available technological support in the late 1960s and early 1970s. When I joined Allen & Gledhill in 1968, it had just acquired a photocopying machine and the

use of it was quite restricted because of the relatively high costs of photocopying. In fact, the Law Society's recommended charge to clients was \$1 per page. At that time, all correspondence had to be typed in triplicate (at least) with one copy to the addressee, the first carbon copy for the office file, and the second carbon copy for the "letter book" (which was a volume made up of the second carbon copies of every letter written by every lawyer in the firm, and bundled up together as a back-up in case the working file was lost or accidentally destroyed). If a copy was necessary for the client, then an extra copy had to be made. And before the photocopier arrived, how did lawyers convey the substance of letters they received from other law firms to their clients? It is difficult to imagine this now, but lawyers would have to painfully reproduce the exact text of the letter they had received and say: "*Dear Client: We have received a letter from the other side, which reads [whole text reproduced]. Please let us have your instructions*". Fax was unknown until much later, and I recall that Bob made an arbitrary decision that we would not acquire a fax machine until we moved to our new premises in OCBC Centre in the early 1980s.

There was also no means of mechanical speed typing of standard documents such as leases and mortgages. Every conveyancing document had to be manually typed, and then proof-read by one secretary reading it out to another secretary before it was filed in the appropriate Registry. In the early 1970s, IBM launched the revolutionary word-processor based on an electronic ball which would mechanically reproduce, at high speed, text which had been typed into its memory and was a wonder of modern technology to behold. It was then that I entered the third phase of my career, and began my conveyancing practice in earnest as I undertook responsibility for leases of office buildings and shopping centres, mortgages for banks, as well as sales and purchases both for developers as well as individual purchasers.

### **III. Jack of all trades, Master of some**

Throughout the 1970s and 1980s, I continued to practise in three broad fields – in banking and corporate, property and conveyancing, and litigation and arbitration (all in roughly equal proportions). I was proud

of the fact that I could call myself an “Advocate & Solicitor” in every sense of that term and wanted to practise both in Court and the office. I wanted to learn and to practise in every area of work that was part of my firm’s normal practice areas, and I set out to learn the sub-specialties that did not fall into the three broad categories of my normal practice areas.

### **A. *Intellectual property law***

One of these was Intellectual Property (“IP”) law. I learnt how to file an application for trademarks and, in time, learnt sufficient IP law and practice to pass off as an IP lawyer when my firm decided that we should develop our practice profile in this field. I also became the firm’s regular delegate to the Asian Patent Attorneys Association (“APAA”), which was the first Asian IP association encompassing not only lawyers but also patent attorneys and other IP professionals.

One of my early discoveries from mingling with other Asian IP lawyers was the discovery that certain other Asian jurisdictions had a regime of service marks which did not yet exist in Singapore. I resolved to try and persuade the relevant authorities in Singapore to consider this new form of IP right. My opportunity came when I was put in charge of organising a one-day workshop on a specialist subject at the APAA Annual Conference that was held in Singapore in 1987. I chose service marks as the topic, and collected all the papers presented at that workshop describing the various service mark regimes in countries in Asia and then submitted a memorandum to the Singapore Government with these country reports as appendices. This eventually resulted in the introduction of service marks by way of section 2(e) of the Trademarks (Amendment) Act 1991,<sup>4</sup> an achievement which gives me some silent satisfaction even though my contribution has never been publicly acknowledged.

One other contribution I made to the APAA Conference in Singapore in 1987 was to organise a small choir out of the Singapore delegation

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<sup>4</sup> Trademarks (Amendment) Act 1991 (Act 7 of 1991).

as each country's delegation was expected to perform some form of national song. Rather than use the so-called national songs that were commonly sung on Singapore's National Day, I chose a genuine commercial hit composed by a Singaporean band called "Matthew & the Mandarins", which performed country and western music and had composed a song about Singapore called "Singapore Cowboy". I had to hunt down Matthew Tan himself (who was the leader of the band and worked as a stockbroker for his day job) and asked to borrow the sheet music and lyrics for this song for my choir to perform. He kindly did, and for several weeks thereafter, my office's conference room was the venue for rehearsals. The actual performance was warmly welcomed when it was eventually performed, and I took a little pride in being a musical ambassador for Singapore in promoting our own local culture to an international audience.

### ***B. Banking and corporate law***

In banking and corporate work, the 1970s and 1980s were the era when investment banking (then known as merchant banking) came to Singapore. As Bob was the acknowledged leader in Company Law in Singapore, he was able to garner several of the more important players as clients, including the later infamous Slater Walker group from the UK, which was the most active player in this new market. I recall that, when the Monetary Authority of Singapore issued the first list of approved merchant banks, Allen & Gledhill acted for about a third of the banks on that list. So I entered on a rapid learning curve in the world of corporate finance, where many corporate and financing deals were structured by what were then considered exotic instruments. I spent many hours learning with fascination about *Romalpa* clauses, factoring, charges over book debts, equitable liens, reconstructions, schemes of arrangement, mergers and acquisitions, stamp duty and especially the law of insolvency. In the course of my experience of such deals, I realised that the traditional form of legal education did not provide sufficient grounding for practitioners in this field, and I urged the then-University of Singapore's Law Faculty (as I was then on its Advisory Board) to introduce courses in the law of credit and finance through some basic

courses on the law of personal property, and linking property concepts to financing concepts. I also advocated that the Law Faculty introduce a course about “The Law of Death – Personal and Corporate” as personal property and corporate assets and liabilities were greatly affected by the death or bankruptcy of natural persons, as well as the corporate equivalent of death and bankruptcy in the form of winding up and insolvency. Some of the more notable deals in which I was involved included the following:

- (i) The acquisition and sale of several hotels.
- (ii) The acquisition of several private companies by listed companies issuing shares to pay for the purchase price and, on completion, arranging for the sale of the newly issued shares to corporate finance players who were prepared to underwrite (buy) these shares as they intended to hold on to the new shares for capital gains or to place them out in the broader financial market.
- (iii) The restructuring of the Urban Redevelopment Authority (“URA”) to create Pidemco Holdings Ltd (which eventually merged with DBS Land Ltd to form CapitaLand Ltd), which was to be the privatised property ownership and management arm of the URA.
- (iv) The flotation of the first closed-end investment trust in Singapore, Harimau Investments Ltd.
- (v) The first takeover bid under the new Companies Act, which was the takeover offer of Haw Par Corporation Ltd for M&G Insurance Ltd.

### ***C. Property and conveyancing law***

In the field of conveyancing, it was the time when strata title conveyancing really started to take off. I had earned my stripes learning common law conveyancing the hard way from conveyancing partners and clerks, who would teach me things not in the textbooks (mainly because there were no local conveyancing or even property law textbooks at that time). In particular, I was part of the early professionals who helped to develop a solid legal basis for financing of properties which did not yet exist at the time of the acquisition, typically residential and commercial properties bought “off the plan” before strata titles were

issued for those properties. I worked with clients (mainly banks and finance companies) who were willing to finance such purchases provided they could have proper legal security. Such security was developed by the collective wisdom of the conveyancing bar as a whole, when we developed the concept of equitable security in the form of an assignment of the purchaser's right title and interest in the sale and purchase agreement with a legal strata title mortgage executed in escrow. We had to fashion this concept from first principles, and I think the profession as a whole acquitted itself quite well for a relatively young and unsophisticated conveyancing bar. I worked hard as the honorary legal adviser to the Real Estate Developers' Association of Singapore ("REDAS"), helping them to work with the Singapore Government on creating mandatory sale and purchase forms for "off-the-plan" sales, and even early explorations of Real Estate Investment Trusts ("REITs") when REDAS was trying to interest the Government in allowing (and even encouraging) such forms of property investment. Little did I think that many years later I would serve as a director of a listed REIT known as "Starhill Global REIT".

A little-known fact about my career is that I served on the Law Society's Conveyancing and Non-Contentious Costs Committee for 11 years answering queries from practitioners about conveyancing practice and costs. From my recollection, until I stepped down at the time of my appointment as a Judicial Commissioner in 1991, I had served longer than any previous committee member except possibly T P B Menon, who must be considered the father of conveyancing in Singapore.

But the biggest property deal I did by far was the sale of the Standard Chartered Bank Building (now known as Six Battery Road) where I acted for Standard Chartered Bank in its sale of the building to DBS Land (now part of CapitaLand Ltd) for \$800 million, which was at that time the highest value property deal in Singapore. That was a complex transaction because, apart from the sale between the parties, there were also collateral transactions as the sale was with the benefit of all tenancies, and we had to cope with the transmission of all rights and obligations of all the tenancies, as well as the negotiation of a 30-year leaseback to Standard Chartered Bank itself.

But while that was the largest property deal, the one that gave me the most satisfaction was the acquisition of the Hyatt Hotel (now known as the Grand Hyatt) along Scotts Road. This was a deal which developed into a long and fruitful relationship between myself and the Hotel and its owners which spanned over a decade or more. I acted for the Ayala Group of the Philippines which made a successful bid for the Hotel, acquiring it from the Yat Yuen Hong family, which had originally developed the Hotel. That involved, not only the purchase of the property, but also negotiations with Hyatt for it to continue as managers of the Hotel. That was successfully done, and then, after the acquisition was completed, the Hotel was revamped with a new extension which made it the second largest hotel by rooms in Singapore. Subsequently, the Ayala Group decided to take the owner of the Hotel, Sealion Hotels Pte Ltd, public (the company is now under different management and has been renamed GuocoLand Ltd). Not only was I engaged to do all the work for the flotation, I was also invited to join the Board of Directors, which was my first foray into the world of business management as such. That, in turn, led to more appointments onto the boards of various listed companies, giving me further insights into business and deals from the viewpoint of the client, as well as how businesses react to problems and crises which eventually lead to litigation. These experiences proved invaluable to my experience and judgment as a lawyer and eventually as a judge and arbitrator.

That deal also led to my relationship with two well-known Singapore investors, Ho Whye Chung and Ho Sim Guan, who engaged me to supervise their acquisition of the Hyatt Kingsgate Hotel in Sydney (engaging the local firm of Stephen Jaques Stone James, now merged into King and Wood Mallesons, with whom I developed a long and rewarding professional relationship), followed by the acquisition of another hotel in Auckland which was added to their portfolio of Hyatt hotels.

#### ***D. Litigation and dispute resolution***

And now we look at what I was doing in litigation. The strange thing is that, although I had a steady diet of litigation prior to my appointment

as a Judicial Commissioner, I did not have a huge history of reported judgments bearing my name as Counsel. For one reason or another, my cases seemed to peter out after the interlocutory stages, in which a lot of activity was generated, but I did not actually appear for trials that often before 1991. I think the period that I was busiest in litigation was at the time of the first Asian financial crisis in the late 1980s, when the fall of Pan-Electric led to chaos on the Singapore Stock Exchange. There was also the scandal of brokers relying on forward contracts and the downfall of market movers, such as Peter Tham and Tan Koon Swan, which generated multiple defaults in banking contracts and the closure of the Singapore Stock Exchange for a limited period while the authorities cobbled together a “lifeboat” to save a number of financial institutions from disaster, particularly the stockbrokers. It was that period in which Singapore first experienced the intensive use of *Mareva* injunctions and *Anton Piller* orders, and law firms (including Allen & Gledhill) went into court, not just with one partner and one assistant, but with teams of several lawyers, because we all had to work around the clock to prepare the papers for *ex parte* applications, which required an extra layer of care so as to comply with the duty of full and frank disclosure. So I was extremely busy on major pieces of litigation, but usually managed to obtain the interim relief that my clients were seeking, which effectively gave them what they wanted without proceeding to a full trial.

But I suppose I did enough work in court to bring me to the notice of the then-Chief Justice Yong Pung How, who invited me to join the Bench. We agreed that I would come on as a Judicial Commissioner rather than as a judge, as my firm felt that they did not want to lose me for good at that stage of their development, and I also did not want to commit myself to the life of a judge when I was still under 50.

My life as a Judicial Commissioner was a wonderful interlude in my career. For the first time, I was free from the discipline of having to fill in timesheets, to attend partners’ meetings or to worry about the administration and business development of my law firm. Most of all, I was free from the obligation of having the client’s interest come above all other considerations, and could address a legal problem from a purely objective point of view, and administer what I believed to be justice

under the law. The thrill of hearing arguments and having to rule on them was an intellectual challenge beyond compare. After the hearing, my old habits from private practice still followed me, and I was usually the last judge to leave the court, which led the Registrars to look for me first when they had to deal with urgent applications after hearing hours. The reason I was usually in court after regular hearing hours was to enjoy the thrill of sitting down in a room with a large table with all the papers in a case spread out together with the authorities, and I could go through all the papers and cases carefully and make the notes for the judgment I had to write. It was like being back in university preparing an essay or a mini-thesis, and it was a glorious feeling to be able to work in such wonderful working conditions without being disturbed by phone calls. One lesson I quickly learnt from being on the Bench is that there are many situations that can crop up in any case where there is no clear law to cover that situation. Each such situation will require the judge to develop a solution and in effect make new law. That is called “*developing the interstices of the law*” and, despite the size of the White Book, it does not have an answer for every little problem that may arise in practice.

During my 19-month tenure as Judicial Commissioner, I issued 15 written judgments, some of which were considered longer than average at the time. However, I was a believer in thorough getting up and going back to first principles where the legal path to a decision was unclear. Unlike a practitioner who could keep a file containing all the authorities he had researched for his submissions for future reference, a judge did not normally keep the fruits of his research in a different file from the court file, so my solution for preserving all the relevant research I had undertaken for a particular case was to cite (and explain) all the cases I had found relevant in coming to my decision, which was the reason for the relative length of my judgments. However, the trend has now changed, and the current judgments of our judges are much more detailed in their exposition of the legal authorities (which gives them greater authority and respect by the local bar as well as overseas courts, where Singapore judgments are now quite commonly cited). In any event, none of my decisions (other than three judgments which were overruled) have been subsequently disapproved by later courts, and

several have been cited with approval, both by our courts as well as in academic writings.

After my stint as Judicial Commissioner had ended, I returned to Allen & Gledhill, and found that some reforms had been instituted at the firm. Partners were assigned to departments, whose boundaries were more strictly defined, and multiple practice areas for any one partner were not encouraged. Given my recent history, I had to choose between the three practice areas that I had previously engaged in. It was eventually agreed that I would head the litigation department and focus on that area, leaving the other areas to the specialist partners in those areas. So that will explain why, in the period after 1992, my name appears more often in the law reports as I started to do more trials.

This was also the era when the concept of Senior Counsel emerged. I was fortunate to be chosen to be in the pioneer cohort of 12 Senior Counsel appointed from the ranks of private practice by the Supreme Court in 1997. Although there was some minor controversy at the time as to whether this was a meaningful concept, I think that, on the whole, it has contributed to the development of a stronger advocacy bar, with the Senior Counsel being conscious of their role as exemplars for the younger bar, and taking on extra-curricular roles in continuing professional development, as well as being part of our outreach programme to the public and keeping in touch with the Bench for informal candid dialogues from time to time.

I left Allen & Gledhill at the end of 2002 to take early retirement at the age of 59 when the retirement age was 60. I did so because I had already decided on my future career, which was to start my own practice in international arbitration, primarily as an international arbitrator. I therefore established my own sole proprietorship practice to avoid problems of conflict of interest with my old firm, although they were kind enough to offer me part of their premises as a sub-tenant, but on the basis that I would operate as a separate firm. I was also offered the opportunity to join other firms, but I resolved not to compete with my old firm, and therefore established my own practice as an independent barrister and arbitrator, free of links with any law firm. Although I had a substantial practice by this time as an independent

arbitrator, my practice was still not large enough to occupy my full resources. In any event, I still had to carry on as Counsel in a number of cases that I had started while at Allen & Gledhill, and so I continued to act as independent Counsel on these cases while also taking on new cases as a barrister for other law firms where they needed a Senior Counsel. It was not until some years later that my practice as international arbitrator grew to the extent that I needed to focus virtually exclusively on my case-load as arbitrator, and not be distracted by the demands of any client as Counsel. And so, on one fateful day, I simply decided not to accept any new cases to act as Counsel for any trial work, but only maintain an advisory role as Senior Counsel, giving legal opinions and acting as expert witness, or as Counsel in arguing cases in the High Court pursuant to any provisions of the Singapore International Arbitration Act.<sup>5</sup> Acting as Counsel has therefore now become a comparatively rare exception, except for arbitration-related litigation.

When I look back over my portfolio of reported court cases as Counsel, I find that my memories are stronger of the cases where I acted for individual, as opposed to corporate, clients. And although my forte was theoretically in corporate and commercial litigation, I found that my most successful cases were in the field of commercial crime, where I achieved some headline-grabbing wins, always against the odds (as criminal defendants are not usually successful in criminal cases which are fought to the end without any plea bargaining). As an aside, I have acted both for, as well as against, Ministers of the Singapore Government in two separate cases involving defamation. When I acted against the three Ministers concerned (who were the past, present and future Prime Ministers of Singapore), I had the opportunity to cross-examine each of them, but waived that right on clients' instructions. Space and client confidentiality do not allow any detailed discussion of my cases, but I do discuss the more interesting cases from the academic point of view in some of the Essays in this volume (see Essays 23, 24 and 25) as well as in my previous volume of Essays (see Essay 5). My memories are also

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<sup>5</sup> International Arbitration Act (Cap 143A, 2002 Rev Ed).

very clear of the arbitration cases I have argued in court, and two of them, *Kempinski Hotels SA v PT Prima International Development*<sup>6</sup> and *Tjong Very Sumito v Antig Investments Pte Ltd*<sup>7</sup> are important authorities on International Arbitration, which have been cited by other courts in jurisdictions that have adopted the UNCITRAL Model Law on International Commercial Arbitration (as well as often being referred to in arbitration hearings).

Having now practised as an international arbitrator in earnest for more than a decade and a half, and having been exposed to Counsel from other Asian countries, I have no doubt that our best Counsel are probably as good as any, and certainly better than most, comparable Counsel from other Asian countries. We have the talent to play a significant role in developing the international arbitration bar in Asia, and perhaps even beyond. The dominance of the Singapore International Arbitration Centre (“SIAC”) in international arbitration in Asia helps to give continued exposure to our lawyers in Asia, especially when we consider that the only other possible significant competitor for Asian advocates in Asian arbitrations is Hong Kong (which still retains a specialist Bar). I do not have access to statistics, but my own impression from hearing arbitration cases in Hong Kong is that relatively few indigenous Hong Kong lawyers are engaged in advocacy in arbitration, even in the Hong Kong International Arbitration Centre (“HKIAC”), because most of the cases are handled by the international firms in Hong Kong, which prefer to do their own advocacy, and whose advocates are usually local expatriates or foreign Queen’s Counsel. There are of course some highly competent counsel in other common law countries in Asia, such as India and Malaysia, but they would usually be engaged only to

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<sup>6</sup> The decisions of the High Court were reported as *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633, *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 669 and *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 670. The decision of the Court of Appeal was reported as *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98.

<sup>7</sup> *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861 (HC), *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (CA).

represent their own nationals, while Singaporean Counsel are often retained to argue cases for non-Singaporean clients, especially in SIAC arbitrations.

### ***E. United Nations Compensation Commission***

Between 2000 and 2003, I served as a Commissioner of the United Nations Compensation Commission (“UNCC”) which was a body established by the United Nations pursuant to United Nations Security Council Resolution 692 of 20 May 1991 which was established by the UNCC.

By Resolution 687 (1991) dated 3 April 1991 (sometimes called the “*mother of all resolutions*” because of its length and complexity), the Security Council resolved in paragraph 16 that “*Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait*”.<sup>8</sup> In paragraph 18 of Resolution 687 (1991), the Security Council decided “*to create a fund to pay compensation for claims that fall within paragraph 16 ... and to establish a Commission that will administer the fund*”. On 6 April 1991, Iraq accepted the terms for the cease fire as set out in Resolution 687 (1991), and by Resolution 692 (1991) dated 20 May 1991, the UNCC and the Compensation Fund was established with Geneva selected as the seat of the Commission.

The function of the UNCC was therefore to assess claims against Iraq arising from the First Gulf War. Iraq had accepted in principle to pay such claims by accepting the terms of Resolution 687 (1991). The Commission was broken up into 18 panels, each dealing with a separate

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<sup>8</sup> For a full account of the work of the United Nations Compensation Commission, see Veijo Heiskanen, *The United Nations Compensation Commission* (Martinus Nijhoff Publishers, 2003).

head of damage. My panel was the Energy Panel, made up of three Commissioners. My Chairman was from Denmark and the other Commissioner was from France. Our panel was supported by a dedicated Secretariat consisting of experienced lawyers from private practice with expertise of claims in the Energy sector. Unsurprisingly, the two lead Counsel were both from Texas (which is a great centre for oil and gas transactions). We also had an accounting expert (originally a Canadian, and then replaced by a Welshman) to assist us in the task of assessing the financial claims of the victims of the first Gulf War.

It was a peculiar concept as the process was not a judicial one. The Secretariat contained field officers who were instructed to investigate the various claims on paper, by correspondence and by site visits, and to interview the representatives of the claimants. There were no hearings held, although Iraq was given details of the claims and was allowed to comment on all these claims in writing. So every six weeks I would fly to Geneva, and spend about two or three days reviewing the latest work products and reports from the field officers as well as the comments of the team leaders and the financial expert. We would then spend the whole time discussing the reports and deciding which parts of the claims should be allowed and to what extent. We also reviewed the completed written reports based on previous discussions and worked on the draft reports so as to finally decide the amounts to be awarded and reasons for our decisions. Our reports were then submitted to the Governing Council of the United Nations sitting in Geneva (whose composition was a mirror of the Security Council in New York) which would finally approve the amount of the damages we recommended, and award compensation accordingly.

There were few real legal issues because Iraq was treated as having admitted liability for the First Gulf War by its acceptance of Resolution 687 (1991) and had agreed to pay compensation to all victims of that War. Our task was to moderate the claims and to decide on what were fair and reasonable amounts of damages arising from the War so as to adequately compensate the victims for their losses.

In the three to four years that I worked on the Commission, we only held one hearing because, under the administrative procedure we

adopted, Iraq was allowed to ask for a hearing only if a claim exceeded USD 1 billion and only one case satisfied that criterion. This was a claim by Saudi Aramco, and the hearing was fixed and took place in a grand hearing room in the United Nations headquarters in Geneva known as “Le Palais des Nations”. The hearing was heard on 11 September 2001. This case turned on one critical issue. Although Saudi Aramco had suffered great losses from the destruction, *inter alia*, of oil producing facilities and other buildings and equipment, they did also make some extraordinary financial gains in the period immediately after the commencement of the First Gulf War because of the shortage of oil supplies in the world, making Saudi Aramco’s oil stocks much more valuable than before the War commenced. The question was therefore straightforward: should the extraordinary gains made by Saudi Aramco from the War be set-off against the losses they had suffered from the physical damage caused by the War? We heard submissions from the parties into the mid-afternoon when suddenly our financial expert received an emergency call on his mobile phone. He whispered into the Chairman’s ear, and the Chairman immediately called a halt to the proceedings as our panel members went into a huddle and were informed that an attack on the World Trade Centre in New York had just taken place, and the First Tower had collapsed. The Chairman then declared the proceeding suspended, and we all ran to the Secretary-General’s office in Le Palais des Nations. As we watched the live reporting, we could see the Second Tower collapsing. No more hearings took place that day, and our panel resumed our own internal discussions on the next day. We then decided that, in principle, set-off was allowed under UNCC jurisprudence, and in the circumstances of this case, we applied that principle. The result was that each of the losses claimed by Saudi Aramco were set-off by their extraordinary gains from the increase of the price of their oil stocks which were subsequently reflected in their sales figures.

A few months later, I attended an international arbitration conference held in Dallas, Texas, organised by the Institute of Transnational Arbitration (“ITA”) and the keynote speaker was Charles Brower (one of the most famous arbitration practitioners in the world) who had been Saudi Aramco’s lead Counsel. When he saw me, he walked over and

complained, “*You gave me a big fat golden egg*”. That was not the best beginning to our relationship, but since that time we have sat together as tribunal members of two arbitrations, and got on famously.

#### **IV. My first love: The teaching of law**

Let me now turn to my first love, the teaching of law. I say my first love because, I will always remember the moment when I first made a connection with a student who did not understand a point I was making in my lecture in Sydney. I was then forced to abandon the wording of the rule as expressed in the textbook, and to re-formulate it in simpler English while still expressing it as an accurate statement of the law in one sentence. And when I saw the expression of understanding in that student’s face, I felt that I had reached a milestone in pedagogy in satisfying myself at least that I could actually teach someone a relatively difficult legal topic and make a difference to a student’s understanding of what he or she could not learn on his own from a textbook. That experience has always inspired me to return to teaching whenever the opportunity presents itself.

I have to say that my teaching record is not particularly impressive in terms of statistics. I did teach Kenneth Wee from Sabah, who faithfully attended all my lectures and went on to win the University Medal at Sydney Law School. But the three most famous ex-students of mine (at least on paper) were as follows:

- (A) Alan Cameron, who became a highly successful corporate lawyer and Managing Partner of a major Sydney Law firm, and then headed the Australian Securities and Investments Commission, eventually becoming Deputy Chancellor of Sydney University (and by whom I was conferred my Honorary LLD Degree in 2014).
- (B) Geoffrey Robertson QC, who became a renowned human rights and media law barrister, author and, perhaps, most famous as a broadcaster (and one of the relatively few lawyers to have cross-examined Lee Kuan Yew).
- (C) James Spigelman, who worked for Gough Whitlam (when he was Prime Minister of Australia), before he went to the New South

Wales Bar and eventually became Chief Justice of New South Wales, and is now a celebrated international arbitrator.

Of the three, Alan Cameron attended a couple of my lectures and actually made an intervention in one. Geoffrey Robertson attended one, and I think was silent (as I knew he was present and did not hear from him). James Spigelman did not attend a single lecture (I know because I was looking out for him). The moral of this analysis is that my brightest students seemed to have achieved the greatest success in later life in inverse ratio to the number of my lectures they attended. In other words, the fewer the lectures, the greater their success.

When I returned to Singapore in 1968, I made an appointment with the Dean of the then-University of Singapore's Law Faculty, Dr Thio Su Mien, and asked her if there was any part-time teaching post available. She said that the only vacancy was on Family Law, which was not a subject that I had learnt at Oxford or for the Bar Examinations. Nevertheless, I was so keen to teach that I accepted her invitation and then taught as a tutor under the main lecturer, Leonard Pegg. I had to learn the subject myself from scratch bearing in mind that Singapore Family Law in terms of its recognition of Chinese customary marriages was completely different from the English common law, and there was no standard textbook available to explain this phenomenon. I had to spend many evenings and weekend afternoons in the University library, reading cases so as to be able to deliver tutorials to the students in a couple of weeks' time. As I became more familiar with the materials, I began to acquire a passion for it, and when Leonard Pegg left the Faculty, I waited for the arrival of his replacement with keen interest. As luck would have it, his replacement was a lawyer from Sabah, Kenneth Wee, whom I had taught in Sydney, and who in fact graduated with first class honours and won the University Medal even though he was three years younger than his cohort. So our roles became reversed, and he became the leader and I was his follower. But we spent many happy hours exchanging ideas about Family Law, and eventually, both of us were appointed to a Committee established by the Minister of Social Affairs in 1974 for a comprehensive review of the Women's Charter. That made me even more interested and experienced in Family Law than purely by my own self-education and research. Kenneth and I were

proud of the many reforms that were made to the Women's Charter as a result of the recommendations in our report issued in 1975. This led in turn to my becoming interested in this field of legal practice, and for some years in the earlier part of my career, my portfolio of family cases was as high as 10%.

I taught at the then-University of Singapore on a part-time basis for about a decade. Apart from the fact that I enjoyed teaching, it was convenient for me to stop by the Bukit Timah campus (where the whole university was still located) on my way home, which was located just behind the Dunearn Road Hostel. But when the University moved to the Kent Ridge campus, I thought that was time to call it a day, both for logistical reasons as well as the growing pressures of work. The Law Faculty found me useful as a "spare part" because I was prepared to teach any subject where they needed a spare tutor, so at various times during my time at the University, I taught Labour Law, Torts and Civil Procedure in addition to Family and Company Law.

Years later, when I was on the Bench as Judicial Commissioner, I took a special interest in the Family Law cases assigned to me. Several of my decisions in this field have been accepted as leading authorities on different aspects of Family Law. But reverting to the principal theme of my love of legal education, I was the first person to suggest to the Law Society that we should organise informal lecture sessions on the practical side of legal practice by asking senior lawyers to share their expertise on topics that were not covered in the university courses, and to impart knowledge that could only be learnt from other senior practitioners. This was the beginning of continuing legal education in Singapore. Apart from selecting the speakers, the logistics were quite straightforward. We called these gatherings "Legal Workshops", and the first Workshop took place in 1977. The Shangri-La Hotel was our partner, and they were happy to let us rent a room from them on a Saturday afternoon for about two or three hours, charging us \$15 per attendee to cover the cost of, essentially, the tea and cakes that were served, and with free parking (how times have changed!). Eventually the workshops became more sophisticated, and the sub-Committee was renamed the "Continuing Legal Education" ("CLE") Committee, which I then chaired from 1981 to 1989, and again from 1993 to 1995 when I decided that someone

else should take over. I was also a member of SAL's Committee on CLE and served on that Committee from 1989 to 2015. It was not until former Chief Justice Yong Pung How became President of SAL that a principle was laid down that CLE was to be a revenue earner for SAL (and not charged at cost), and the Law Society then adopted that philosophy as well. So it was not because of me that nowadays much more substantial fees are charged for seminars and conferences organised by both institutions.

While I miss the old days of senior lawyers gathering together simply for the sake of sharing their knowledge and junior lawyers absorbing lessons that they could not find from textbooks, the law has become more complex and technical with the rapid developments in business and financial regulation, as well as practices in the world of technology. No lawyer can afford to be left behind, so I am content that what I started as a sort of cottage industry has developed into a high-powered institutional programme for upgrading of skills and knowledge.

For myself, owing to my passion for legal education, I am happy to accept invitations from universities around the world to speak on matters within my expertise and I am proud of my experience in that aspect, having been invited to speak (and sometimes teach) at the following universities: Oxford, Cambridge, Harvard, National University of Singapore, Singapore Management University, Nanyang Technological University, Sophia (Tokyo), Lucerne (Switzerland), City (Hong Kong), Hong Kong, Jiaotong (Shanghai and Xi'an), Sydney, Pepperdine (California) and Paris-Sorbonne (Abu Dhabi).

## **V. My role as the President of the Law Society of Singapore**

I have always been a supporter of the Law Society as it seemed a natural extension of my persona as a practising lawyer to be involved in the activities of the community which forms part of my daily life. When I eventually became senior enough for the Law Society to approach me to join particular Committees, I readily accepted each invitation proffered, and served on various sub-Committees, the most important of which were:

- Legal Workshops and Continuing Legal Education (Chairman)
- Conveyancing and Non-Contentious Costs
- Civil Legislation (Chairman)
- Ethics (Chairman)
- Audit Committee (Chairman)
- International Relations (Chairman)
- Public and International Law (Founder and Vice-Chairman)

When I was a junior member at the Bar I stood for election once, but lost to an opponent who campaigned on the basis that he would better represent the interests of the smaller firms (I being associated with the larger firms). I have never had an appetite for politics, and thereafter did not stand for election again until 2005, when Philip Jeyaretnam (then President of the Law Society) approached me to come on board the Council with a view to succeeding him when his term expired at the end of 2007. I accepted his offer and had several years' preparation on Council before becoming President in 2008. That was a unique experience, and rewarding only in terms of legal experience, although it obviously impacted adversely on my professional practice. By this time, I was already increasingly specialising in my role as an international arbitrator, although still engaged in the Singapore courts as an independent Counsel.

Given the reason for my previous election disappointment, it was ironic that I could now claim to be representing the interests of the small firms (albeit a lawyer with decades of experience in helping to run one of the biggest law firms in Singapore), and perhaps for that reason I was elected unopposed on each occasion I stood for election in the next three years. What I think I brought to the post was my long and diverse experience in all aspects of legal practice, both in transactional as well as contentious work, so I understood the problems of the practitioners from different practice areas, which assisted me in discussions relating to particular sectors of legal practitioners in Singapore. Apart from lawyers engaged in civil litigation and arbitration, I could also empathise with the problems of the criminal bar, the family lawyers, the conveyancers, the banking and corporate practitioners and the IP bar.

But the job of the President has always been a hot seat, and it is only a matter of time before any President has to disagree with the Singapore Government on some issue or other, and speak out accordingly. I have coined a term which I use when discussing the tribulations of my successors when they are subjected to their first experience of being chided by the Government for some criticism they have made of Government policies or practices. I say to them: “*All of us will sooner or later get whacked by Government, however well intentioned our criticisms, so welcome to the Whackees’ Club*”. The amount of time that a President has to devote to this job can amount to between 20% to 25% of his or her working hours, which usually means that the President’s working hours have to be extended because no President can afford to neglect his or her own practice while serving as President (compared to the President of the English Law Society who effectively takes leave from his or her practice for the duration of his or her Presidency and is actually given the use of a house in London during his or her entire term of office).

One small benefit that the President enjoys is having a soapbox in the form of the President’s monthly message in the *Law Gazette*. That gave me the opportunity to sound off on particular issues concerning legal practice in general. Occasionally I had the opportunity of writing some more philosophical musings about the proper role of laws, governments and lawyers generally. I reproduce five of my personal favourites from my collection of letters and speeches in this compendium of essays. I was fortunate to take over from Philip Jeyaretnam, one of our longest serving Presidents, who left the Law Society in a much better condition than when he found it, and I was equally fortunate in being able to find a more than worthy successor, Wong Meng Meng, to take over from me when I had to step down to assume my duties as Chief Justice of the Dubai International Financial Centre (“DIFC”) Courts in the middle of 2010.

I still retained an active interest in the activities of the Law Society after my retirement as President because, as the immediate Past President, I took on the role of Chairman of the International Relations Committee (“IRC”). Both as President, as well as Chairman of the IRC, I was able to invite prominent lawyers from other countries to speak at the Law

Society Biennial Lecture. The purpose of these lectures was to energise the younger lawyers by listening to the experiences of inspirational lawyers from other countries, who set an example for others to admire (if not necessarily to follow). Since the inaugural Law Society Biennial Lecture in 2007, I have had a hand in organising three subsequent editions of this Lecture. The first was given by Lord Peter Goldsmith, former Attorney-General of England and Wales, in 2009.<sup>9</sup> The second was by a former Judge of the High Court of Australia, Justice Michael Kirby, in 2011.<sup>10</sup> And the last took place in 2013 with a lecture jointly given by the past Chairman of the Malaysian Bar Council, Ambiga Sreenevasan, together with the then current Chairman, Christopher Leong.<sup>11</sup>

I had known Peter Goldsmith from the days when he was active at the Bar before he became Attorney-General, so when he retired from that post, he was quite happy to accept my invitation to speak to the Law Society about his life in the law. He spoke on the topic of “A Life in the Law: Home and Away”, and shared his views on the practice of law, the challenges for lawyers and the role of the law in dealing with the problems of today. After he had delivered his address, I engaged in a short dialogue with him in the Q&A session. Somehow the discussion moved to Singapore’s law about detention without trial. I pointed out to him that, although the British newspapers often criticised Singapore for having such laws, they were in fact introduced by the British during the colonial era. Peter shot back: “*but we did not tell you to keep those laws forever*”.

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<sup>9</sup> “A Life in the Law: Home and Away” Law Society Biennial Lecture 2009 <<http://v1.lawgazette.com.sg/2009-12/news4.htm>> (accessed 18 November 2018); see also Law Society website <<http://v1.lawgazette.com.sg/2009-8/news6.htm>> (accessed 18 November 2018).

<sup>10</sup> Law Society Biennial Lecture 2011 <<http://v1.lawgazette.com.sg/2011-07/152.htm>> (accessed 18 November 2018).

<sup>11</sup> “The Role of a Bar Association in Society – The Malaysian Experience” Law Society Biennial Lecture 2013 <<http://v1.lawgazette.com.sg/2013-10/863.htm>> (accessed 18 November 2018).

Michael Kirby was (and continues to be) an iconic figure as a great jurist and great advocate for human rights, who would be inspirational in any society, and we were fortunate for him to give a truly inspirational speech to our lawyers. In his address, he spoke about law reform, the application of international law in making local decisions, and the extent to which criminal law should be shaped by the values of the community. Michael and I got on so well that when he went back to Australia, he was instrumental in bringing my personal history to the attention of the University of Sydney (which had been my first employer), and the University was subsequently kind and gracious enough to confer on me the Degree of Honorary LL.D. in 2014. And just to add that personal touch, the Deputy Chancellor of the University who conferred the degree on me was my old student, Alan Cameron. To cap it all, later that year, I was invited to deliver the Clayton Utz – University of Sydney Annual Lecture at the Federal Court of Australia Building, a stone's throw away from my old Law School on Phillip Street. My lecture was called "Commercial Courts and International Arbitration – Competitors or Partners?" (which is reproduced in this collection of essays (see Essay 1)). That Essay has received a good deal of inquiry about a protocol that I created for the DIFC Courts which allows a judgment to spawn a consequential arbitration based on a dispute about payment of the judgment sum, but I am still waiting for a live case to test the validity and enforceability of my protocol.

Ambiga was famous for having led the Malaysian Bar in the "March for Justice" protesting against corruption in the Malaysian Government, and she came accompanied by the "March for Justice" video tracking the movements of the March as it happened. She was indeed an inspiring speaker, as was Christopher, who confirmed the activist role traditionally played by the Bar Council. I have always admired the courage of the Malaysian Bar Council, as would anyone reading the history of that Bar in "Justice Through Law – Fifty Years of the Legal Profession"<sup>12</sup> but we must of course appreciate that they operate under

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<sup>12</sup> Bar Council of Malaysia, *Justice Through Law – Fifty Years of the Malaysian Bar 1947–1997* (Bar Council Malaysia, 1997).

different circumstances from the Singapore Bar. So, while I was not inciting our lawyers to march against anything in particular (and, happily, certainly not against corruption in our Government), I thought it was salutary for our lawyers to understand that lawyers need not only care about their work and their clients, but also about the greater good of society and the role of lawyers in that society.

## **VI. More recent years: My judicial role in the Dubai International Financial Centre Courts**

I now turn to a unique and distinct part of my legal life – my 13 to 14 years as a Judge of the DIFC Courts. On November 13 of this year, I retired as Chief Justice of the DIFC Courts, having served as Deputy Chief Justice from 2005 before becoming Chief Justice in 2010. This is not the time or place to set out a comprehensive history of my role in the development of the DIFC Courts. But the facts do tell an interesting tale of an improbable success story of a legal experiment without precedent. Dubai is an Arabic speaking civil law jurisdiction, but actively encouraged and supported the creation of a free trade zone that was (and continues to be) dedicated to becoming one of the most important financial centres in the world. To do that, Dubai knows that the world of international finance and commerce is dominated by people who adopt English as their *lingua franca*. Further, especially in the finance industry, international transactions are largely conducted in English and the governing law of such transactions is, more often than not, English law or American law. Dubai's ambition was to make Dubai a home away from home for financial institutions to encourage them to set up a branch or subsidiary in the DIFC. The DIFC Courts were established so that international finance professionals, when arriving in the DIFC, would think that they never left home. To further this aim, Dubai allowed a working team from two Magic Circle law firms to draft legislation establishing the DIFC Courts and the infrastructure in which the Courts would operate.

Given that the basic commercial laws of the DIFC are based on the English common law and the Courts' Rules are based on the current English Civil Procedure Rules (which themselves are based on the Woolf

reforms), the lawyers entering our Courts would think that they never left home, especially when the judges in our Courts are either from common law backgrounds or (in the case of our Emirati judges) have received special education in the English common law before being appointed as judges in our Courts.

For an institution existing in theory, depending very much on the support of local and international businesses to file their cases in our Courts, there was no guarantee that the DIFC Courts would be successful to any degree, particularly when similar courts set up elsewhere on the same assumptions have not attracted anything like the same degree of interest and usage. I have had the good fortune of having highly competent former judges from England and Wales, Australia, New Zealand, Malaysia and now Singapore (who has lent us a current Court of Appeal judge) to support me. We also have had highly qualified Counsel appearing before us who were either English trained solicitors and barristers (including distinguished Queen's Counsel) or practitioners from civil law countries experienced in advocacy. So we are in a happy position of having a competent commercial Bench supported by a competent commercial Bar.

I have to confess that I had no idea what kind of reaction I would receive in Dubai to oversee a court based on English common law and English procedural rules when I did not come from a common law jurisdiction of older vintage. While it is not for me to express a view on what my colleagues at the Bench and Bar of the DIFC think of my performance, I can say that my authority has never been questioned, nor have the international lawyers who write regular commentaries on our judgments distinguished between my judgments and the judgments of my fellow judges on the DIFC Bench. It has been a unique experience, and in retrospect I felt that my wide general experience in all areas of legal practice, including heavy commercial and financial transactions, gave me a strong grounding in the necessary skills and knowledge to deal with the kinds of problems that I faced in Dubai.

Incidentally the international reputation of the DIFC Courts is well established and still growing. *The Economist*, in a recent article about the state of commercial courts around the world, re-affirmed the

supremacy of the English commercial court as the most important and popular commercial court in the world, but went on to say that Singapore and Dubai were coming up fast behind London. For the DIFC Courts to be named in the same sentence as the other two much longer and well-established courts is indeed a compliment to treasure, and I look forward to my successor, Chief Justice Tun Zaki bin Tun Azmi (former Chief Justice of Malaysia), to carry the DIFC Courts to new heights.

### **VII. Taking stock: My closing thoughts**

As I reflect on my legal career, I wonder at the diversity of my experiences that I have been fortunate to enjoy. I count myself lucky to have learnt and practised law at a time when laws were less complex than they are now, because society was less complex. This enabled me to be relatively successful in my practice, armed with fewer skills than a young lawyer now needs to have, particularly in the rapidly changing world of technology, which is forcing the profession to adopt new practices and learn new technologies. The career path I followed in my early years of “Jack of all trades, Master of some” is not a viable option in this day and age (more’s the pity) and specialisation from an early stage seems inevitable. But while we rejoice that the market for legal services has grown to the stage where specialisation enables more lawyers to enter the market with their respective special skills to make them more competitive, I (for one) regret the passing of the ability to gain depth and width of experience in different fields of practice to gain a more rounded exposure to the multiverse of laws. It is important for lawyers to have some knowledge of basic laws that affect all branches of the law, and my best example has always been the need to understand how the law of death – both personal and corporate – operates, as all legal transactions can be affected by this kind of death. So, while large modern firms need to throw their young lawyers in at the deep end straight into their chosen practice area, those lawyers need the time and opportunity to look at law in the round to equip themselves with essential knowledge of how other areas of practice can impact on their dedicated practice area. This is where mandatory CLE could be planned,

so that young lawyers are not only required to gather a fixed number of points, but are also required to garner their points from those essential areas which are not taught in law school or the Bar Examinations, but are nonetheless necessary for them to be good rounded lawyers.

In the “Musings on International Arbitration” chapter of my first volume of Selected Essays, I wrote about my band of happy warriors called the “MH Alumni”. That group of young (and now not so young) former associates has continued to grow, and we continue to thrive off each other by regular collective and individual gatherings. I continue to engage bright and promising young lawyers at or near the beginning of their professional lives, and give them an experience akin to that of Justices’ Law Clerks in the Supreme Court. They have had the opportunity to work in a small office, with direct access to me on a daily basis without reporting to a more senior associate or junior partner in between (as would be the case in any large law firm). They also enjoy the camaraderie of working together with other junior lawyers of roughly the same age and experience for between one to two years before leaving for the real world of (usually) private practice in international firms specialising in international arbitration. There are over 30 members of the “MH Alumni” who keep in touch with each other (and with me) after they leave, and we gather annually on a collective basis to celebrate my birthday. I will see some of them on an individual basis from time to time to discuss their experiences and sometimes to counsel them on career choices and help them with recommendations to prospective employers. So I follow their career development with great interest, and celebrate with them when they make partner in their chosen firm. To see young lawyers whom I have mentored and nurtured grow in maturity and recognition by the profession is something which will continue to give me joy and gratification as contributing in some way to the growth of the legal profession, particularly the international arbitration community. This may perhaps be my greatest legacy.

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## **Part I**

# **ARBITRATION**

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## **Background to Essay 1**

This was the 2014 Clayton Utz – University of Sydney International Arbitration Lecture delivered in Sydney on 11 November 2014. It was a particularly enjoyable undertaking for a number of personal (as well as professional) reasons.

I was born in Sydney during World War II and spent the first four years of my life there (of which I have no memory). But I did learn English from birth, which was a huge advantage when my parents moved back to Singapore and decided to enrol me in an English language school. In 1966, I had completed my two degrees at Oxford, and wanted to experience life as a teacher of law before going into private practice. As my sister Frances and I had been separated for several years studying in different countries, and she was then studying at the University of Sydney, I chose to accept an offer to become a member of the law faculty at that university, where I stayed on for about 18 months. It was therefore a particular pleasure to be invited by my old employer to deliver this lecture and to reacquaint myself with the current law faculty, particularly as the university had recently honoured me by conferring an honorary Doctor of Laws degree on me. It was also memorable that I was delivering the lecture in the Federal Court building in Phillip Street, just next door to the old Faculty of Law building where I had been teaching several decades earlier.

From a professional viewpoint, as Chief Justice of the Dubai International Financial Centre Courts, I had already engaged with the New South Wales and Federal Court Judiciaries in signing memoranda of guidance between my courts and the New South Wales Supreme Court and the Federal Court in 2013 and 2014, respectively. This made the lecture particularly significant because of the close links between our respective courts.

The subject matter of the lecture was also close to my heart. It addressed two topics which had dominated my professional life in recent years: international arbitration and international litigation, both in the commercial sphere. It gave me an opportunity to discuss the broad features of comparison between the two modes of dispute resolution, as well as highlight a unique tool (which I had

created, with help from other international experts) of combining both modes to utilise the advantages of litigation and arbitration in a hybrid process known as the “Referral of Judgment Payment Disputes to Arbitration” (now commonly unofficially referred to as the “Judgment to Award Conversion Protocol”).

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*I wish to extend my thanks to Oxford University Press for kindly granting me permission to republish this essay in this book.*

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## COMMERCIAL COURTS AND INTERNATIONAL ARBITRATION – COMPETITORS OR PARTNERS?\*

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Michael HWANG SC†

1 This is an emotional occasion for me. First, I have admired the Clayton Utz-Sydney University lecture series from afar for many years, and I consider it a great honour to follow in the footsteps of many distinguished arbitration practitioners who have preceded me in delivering this lecture. So I thank Doug Jones and his colleagues as well as Chester Brown and his colleagues for this invitation to share my thoughts with you this evening. Second, I am returning to a place which has special meaning for me. In 1966 and 1967, I was a member of the Law Faculty at Sydney University at 167 Phillip Street, so I know this street very well. My topic was Torts and I had to teach this subject

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\* This paper was delivered at the 2014 Clayton Utz-Sydney University Lecture, Sydney (11 November 2014).

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under the guidance of Professor Bill Morison, who was one of the founding members of this Faculty, and was someone whom everyone held in awe (including his fellow teachers). But his lectures were so esoteric that Professor Ross Parsons (another icon of the Faculty) once suggested that he should deliver his lectures in the crypt of St Mary's Cathedral as they were so cryptic. It was into this august law school that I came, fresh from Oxford, to start my career in the law. It therefore gives me enormous pleasure to return to Phillip Street to reprise my former experience as a lecturer. My class included some stars in the Sydney legal constellation, including former Chief Justice James Spigelman, Geoffrey Robertson QC and Deputy Chancellor Alan Cameron (although they mainly distinguished themselves by their absence from my lectures). So, when I am asked about how many of my students became famous practitioners, I answer that my students succeeded in their careers in inverse ratio to the number of my lectures that they attended. I am also enormously grateful to Sydney Law School for honouring me with an Honorary Doctorate of Laws degree in May this year conferred on me by my former student Alan Cameron, and this lecture is a small way of repaying my debt to the Law School.

2 I have been set this question as the topic of my lecture, "Commercial Courts and International Arbitration – Competitors or Partners?" The answer to the question could possibly be answered in one word – both. Whether that is a good or bad thing is another story, which I will develop in the rest of this lecture.

3 The courts of most Model Law countries agree that curial courts should adopt an "arbitration-friendly" policy, *ie*, to decline to set aside awards for error of law or fact, however gross; instead, courts should read awards generously and not look assiduously for defects in process, unless really serious violations of due process have occurred which have caused real prejudice.<sup>1</sup> Furthermore, courts should intervene quickly in support of arbitration by issuing court orders enforcing tribunal

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<sup>1</sup> See *BLC v BLB* [2014] 4 SLR 79 at [85] citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

decisions where judicial assistance is needed. In short, courts should supervise with a light touch but assist with a strong hand.

4 Model Law standards of curial review are not yet in place in the United Arab Emirates (including mainland Dubai) as the arbitration law is contained in a few provisions within the Federal Civil Procedure Code, which is quite different from the Model Law. However, in the Dubai International Financial Centre (“DIFC”), there is in force an Arbitration Law 2008, which is based firmly on the Model Law, and the DIFC Courts (which I head) will apply contemporary principles of Model Law jurisprudence in carrying out their role as curial court of arbitrations which are seated in the DIFC. It is interesting to note that, when the first cohort of overseas judges were appointed to the bench of the DIFC Courts, all of them were practising arbitrators, and so were familiar with arbitration theory and practice.

5 Conceptually, we also need to be reminded of the doctrine of arbitrability. There are some issues which are simply beyond the capability of arbitral tribunals to resolve. Insolvency, real and intellectual property issues involving registration, family law, criminal law, succession and rights *in rem* are generally considered beyond the realm of arbitration. But even in these areas, where parties claim entitlement to certain rights against other parties and there is an arbitration agreement in place to resolve all disputes in connection with these rights, it may be possible for an arbitral tribunal to determine those rights as between the parties and then to make an order to compel the losing party to take such actions as are necessary to vest the rights adjudicated by the tribunal in the other party. Of course, the enforcement of such an order of specific performance will eventually have to be executed by a national court, but the point is that the dispute will essentially have been settled by arbitration, leaving the national court only an enforcement role.

6 From the practical point of view, there are also constraints on the reach of arbitration. Arbitration may not be the ideal method of dispute resolution where there is a web of connected contracts that could be upstream or downstream. Typical cases are those of employer/main contractor/subcontractor disputes. Similar problems arise in

insurance/reinsurance/retrocession contracts and commodity contracts. Separate bilateral arbitrations with inconsistent decisions can be a nightmare. Despite the fact that most building contracts and subcontracts contain an arbitration clause, one may wonder why the Technology and Construction Court in England remains a much sought-after forum. One of the main reasons is that, where there is a web of contracts (sometimes called string contracts) upstream and downstream, it makes sense for the parties to resolve their disputes before one tribunal, and the only tribunal with power to consolidate or join third parties without the consent of all parties concerned will normally be a national court, since the issue of multiple party arbitrations remains an unsolved one, despite efforts to revise institutional rules to make consolidation and joinder easier.

7 Let me now move on to another topic of current interest.<sup>2</sup> What is the role of the forthcoming Singapore International Commercial Court (“SICC”) which will be launched in January 2015?<sup>3</sup> I have no mandate to speak for the Singapore Government or the Singapore Judiciary, but what I tell you is based on public knowledge and private briefings for Senior Counsel of the Singapore Bar. In short, what will happen next year will be the establishment of a separate division of the High Court of Singapore (equivalent to the New South Wales Supreme Court) to hear

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<sup>2</sup> I gratefully acknowledge that the remarks in this paragraph are taken from a speech delivered by Justice Quentin Loh of the Supreme Court of Singapore at the opening of the Regional Arbitral Institutional Forum Conference in Singapore (1 August 2014), published in the Singapore Institute of Arbitrator’s newsletter (September 2014) accessible at <<http://www.siarb.org.sg/pdf/SlArb%20September%20Issue%20Newsletter%202014.pdf>>.

<sup>3</sup> The Singapore International Commercial Court (“SICC”) was in fact launched on 5 January 2015. For an explanation of the aims and broad structure of the court, please refer to the report of the SICC Committee published in November 2013 by the Ministry of Law, *Report of the Singapore International Commercial Court Committee* (November 2013) accessible at <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>>.

international, commercial and offshore cases (which are all defined terms).<sup>4</sup>

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<sup>4</sup> Under O 110 r 1(2)(a) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed):

[A] claim is international in nature if —

- (i) the parties to the claim have their places of business in different States;
- (ii) none of the parties to the claim have their places of business in Singapore;
- (iii) at least one of the parties to the claim has its place of business in a different State from —
  - (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or
  - (B) the State with which the subject matter of the dispute is most closely connected; or
- (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State[.]

Under O 110 r 1(2)(b) of the Rules of Court:

[A] claim is commercial in nature if —

- (i) the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions:
  - (A) any trade transaction for the supply or exchange of goods or services;
  - (B) a distribution agreement;
  - (C) commercial representation or agency;
  - (D) factoring or leasing;
  - (E) construction works;
  - (F) consulting, engineering or licensing;
  - (G) investment, financing, banking or insurance;
  - (H) an exploitation agreement or a concession;
  - (I) a joint venture or any other form of industrial or business cooperation;
  - (J) a merger of companies or an acquisition of one or more companies;
  - (K) the carriage of goods or passengers by air, sea, rail or road;

*(continued on next page)*

8 The main aims of the SICC can be summarised as follows: (a) To establish the Singapore brand for dispute resolution in line with the country's increasingly sophisticated jurisprudence; (b) To cater to the expected growth in cross-border, multi-jurisdictional dispute resolution services as Asia becomes an increasingly popular destination for foreign trade and investment; (c) To harmonise the existing differences between legal systems in Asia, which have led to uncertainty and inconsistency, by developing a freestanding body of international commercial law; (d) To provide a solution to some of the limits of arbitration such as the subject matter of dispute, joinder of non-parties to proceedings and right of appeal; (e) To further Singapore's goal of being a centre of legal excellence and the legal hub of dispute resolution in Asia; and (f) To leverage on Singapore's neutrality, legal expertise, integrity and efficiency. Parties involved in cross-border disputes rely on the courts in London and New York if they do not want to arbitrate. Singapore wants to be the default court for such parties in Asia.

9 The source of jurisdiction of the SICC will be: (a) jurisdiction agreements between parties to refer their disputes to the SICC; (b) cases which are filed in the Singapore High Court, and which the High Court determines come within the jurisdiction of the SICC without a jurisdiction agreement. In the latter case, the High Court may make an order transferring the case to the SICC, but only after consulting the parties. There are many interesting features of the SICC, but for purposes of this lecture, my only analysis will be this: what is the likely effect of the SICC on the work and reach of the Singapore International Arbitration Centre ("SIAC")?

10 First, the SICC is not meant to cannibalise the caseload of the SIAC. The special appeal of having a court with certain attributes of arbitration procedure is that it can be attractive to certain parties who would not choose international arbitration as practised by arbitration institutions

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- (ii) the claim relates to an *in personam* intellectual property dispute;  
or
  - (iii) the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature[.]

(let alone consider *ad hoc* arbitrations) but would also not be happy with national courts, particularly the national courts of one of the parties to the dispute. So the target client pool of the SICC will be parties which have disputes (actual or potential) with their counterparties, and who do not immediately think of arbitration as an option. They do not wish to have their cases heard by national courts for various reasons, and yet have reservations about certain features of international arbitration. These reservations would include: (a) the right of parties to nominate party appointed arbitrators who do not have to meet any pre-qualifications; (b) the lack of an appellate process; and (c) the restrictions on the scope of arbitration because of the doctrine of arbitrability. The best example of how international commercial courts exist side by side with international arbitration centres in complete harmony comes from London, which arguably has the most successful Commercial Court in the world, in addition to being one of the major centres for international arbitration, not simply through the London Court of International Arbitration (“LCIA”) but as the seat for many other institutional and *ad hoc* arbitrations as well as being home to the Centre for Effective Dispute Resolution (“CEDR”), one of the world’s leading mediation institutions. Singapore shares many of the characteristics of the London scene, especially in the financial sector, and I expect that both the SICC and the SIAC will complement each other in providing dispute resolution options to commercial parties.

11 Secondly, to some extent, the SICC will have to compete for new business in the same way as a fledgling international arbitration centre has to (and as the SIAC had to struggle for many years until achieving its present status in the last five years).<sup>5</sup> It will have to learn to market its services, particularly to overseas parties, a task to which courts are not

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<sup>5</sup> The Singapore International Arbitration Centre (“SIAC”) caseload increased from two in 1991 (when it opened for business) to 51 in 1996 to 83 in 2000, with a plateau around that figure until 90 in 2006 (after which the increases became significantly greater), 190 in 2010 and 259 in 2013. In 2017, SIAC’s caseload was 452. Some of these figures are taken from the SIAC’s website <http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics>.

accustomed, and it may have to learn from SIAC how it will be a long slog before the numbers of new filings at the SICC start becoming significant. Even on the most optimistic scenario, a serious campaign of overseas marketing would take at least a year or two, after which SICC would hope that parties will start writing SICC jurisdiction clauses into their contracts. (It is not likely that there will be significant numbers of post-dispute submissions to jurisdiction if the experience of arbitration institutions is anything to go by). SICC would then have to wait for disputes under those agreements to arise a year or two after the date of entry into those agreements, so we are looking at a timeline of perhaps three to four years after marketing begins (or even longer) before any new cases are filed. But the SICC has one big advantage which may enable it to kick-start its marketing efforts in a way which would not be available to any new arbitration institution. I have earlier referred to one source of jurisdiction that the SICC will have. The High Court can transfer cases which meet the requirements of SICC jurisdiction (*i.e.*, “international” and “commercial”<sup>6</sup>) to the SICC after consultation with the parties. So, assuming that the High Court can secure the consent of the parties (and possibly even if such consent is not forthcoming) there could be a steady pool of cases coming through the SICC quite soon after its launch. Actual numbers would not necessarily be critical at this stage, but the point is that the SICC would be working, and be seen as working, almost immediately after its launch, and the commercial world could then see how the new SICC (and its advertised advantages) will work. Publicity will be given to its cases in a way that cannot be done for arbitration (because of the need for confidentiality)

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<sup>6</sup> Under O 110 r 12(4), read with rr 7(1)(a) and 7(1)(c) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), the High Court can transfer cases to the Singapore International Commercial Court (“SICC”) if (a) the claims between the plaintiffs and the defendants named in the originating process are of an international and commercial nature, (b) the parties do not seek relief in the form of, or connected with, a prerogative order, (c) the SICC will assume jurisdiction in the case and (d) it is more appropriate for the case to be heard by the SICC.

so public awareness of the SICC will be much higher than when the SIAC was launched.

12 Thirdly, to the extent that some of the features of SICC procedure prove popular, arbitration institutions can re-examine their own procedures and practices to see if these can be modified or even replaced by an equivalent SICC procedure. This will enable SIAC (and indeed other arbitration institutions) to remain alive to the preferences of their client pool and improve their services to meet client demands. Institutions are already sensitive to client preferences and responses to new initiatives because of the relatively closed nature of the arbitration market, where there are endless conferences and a plethora of publications on best practices in arbitration. The result is that every new initiative is broadcast and discussed, and starting a bandwagon would not be difficult. The best example of this is the way in which arbitration institutions over the last few years have, one after the other, introduced the Emergency Arbitrator procedure. There is every reason to believe that innovative procedures introduced by the SICC will be closely studied, not only by other commercial courts, but by arbitration institutions as well. The same could also be said of the DIFC Courts, which have a long history of introducing innovative dispute resolution solutions, such as the Small Claims Tribunal, which offers mediation services and fast track adjudication of small claims without legal representation, the pro bono programme as well as the appointment of a female judge to our bench. All these innovations have subsequently been followed in one or more other Middle East jurisdictions. Therefore, the success of the DIFC Courts in introducing innovations which other legal systems can emulate may augur well for the success of the SICC in being the potential leader of legal change in Asia.

13 Fourthly, some may worry about the degree of international enforceability of SICC judgments as compared to the breadth of coverage of international arbitration awards (with more than 150 countries having acceded to the New York Convention (“NYC”)). It is true that people tend to think about extra-territorial enforceability in terms of treaty arrangements for reciprocal enforcement of judgments. In Commonwealth countries there is usually a Reciprocal Enforcement of Commonwealth Judgments Act. The judgments of the SICC, as a division

of the Supreme Court of Singapore, will qualify for recognition and enforcement in those Commonwealth countries with which Singapore has a treaty or similar arrangements. However, the range of Commonwealth countries with which such arrangements have been made is relatively few.<sup>7</sup> The situation is even more parlous with non-Commonwealth countries. The only non-Commonwealth jurisdiction with which Singapore has mutual recognition and enforcement arrangements is Hong Kong. So how does the SICCC hope to make its judgments widely enforceable? The first point to note is that SICCC judgments will be enforceable in common law countries (including the US) by a common law action to enforce a foreign judgment which would apply even without reciprocity and to judgments from civil law countries as well.

Enforcement of such judgments may even be faster under the common law than the NYC because of the availability of the summary judgment procedure for a fast-track judgment. Under the NYC the disputed enforcement application would require full arguments of fact and law with respect to any ground under Article V(1) of the Convention relied upon to support a denial of enforcement.

14 Forgive me for reminding such an august audience of the features of an action on a foreign judgment:

- (a) The enforcing court will not re-examine the merits of a foreign judgment which may not be challenged on the grounds that it contains an error of fact or law; and
- (b) Common law judgments are only unenforceable where:
  - (i) the defendant did not submit to the jurisdiction of the foreign court;
  - (ii) the judgment was obtained by fraud;
  - (iii) the judgment is contrary to the enforcing court's public policy; and

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<sup>7</sup> Singapore only has reciprocal enforcement of judgment arrangements with 11 out of 53 Commonwealth countries.

- (iv) the proceedings were conducted in a manner which the enforcing court regards as contrary to the principles of natural justice.

15 These points have all been noted by the DIFC Courts, which have utilised the common law action on a foreign judgment to highlight the wide enforceability of our own judgments, and we have done so by signing Memoranda of Guidance (“MOG”) with different common law jurisdictions,<sup>8</sup> starting with the English Commercial Court, followed by the Supreme Court of New South Wales and the Federal Court of Australia, soon to be joined by Kenya later this month, Singapore in January next year and the Judicial Court of the Southern District of New York in March. We call them Memoranda of Guidance rather than Memoranda of Understanding because the latter usually import some positive undertakings by each party; in our MOGs neither party undertakes anything. The MOG is a common declaration of the broad principles which guide common law courts in recognising and enforcing foreign judgments; each party states the law and practice in its own courts, and the statements by the two jurisdictions are, for all practical purposes, the same as far as the legal principles governing enforcement are concerned (any differences in legal principles or procedural practices are identified in the MOGs). I know that Singapore is banking its hopes to some degree on the Hague Convention on Choice of Courts Agreements which is a sort of mini-version of the NYC for the enforcement of court judgments. Until April this year, only Mexico, the US, and the European Union (with the exception of Denmark) had signed the Convention, with Mexico as the only country ratifying it. However, once the EU ratifies the Convention, there will be an immediate addition of 26 more countries (Denmark being excluded for the time being) which will recognise and enforce judgments of any court which has been expressly chosen as the dispute resolution forum of the disputing parties. Now that the EU has signed the Convention, Singapore is hoping that there

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<sup>8</sup> A list of these countries can be found on the Dubai International Financial Centre website <http://difccourts.ae/category/protocols-and-mous/>.

will be a bandwagon effect with other countries, particularly in the Asia-Pacific Region, signing and ratifying it as well.<sup>9</sup>

16 The points I make are neatly summarised in a recent speech given by Justice Quentin Loh, when he said the following:<sup>10</sup>

Arbitrators should not think of the SICC cannibalising their work. Instead they should look upon it as an integral part of a vibrant dispute resolution hub. Just as mediation or adjudication or other forms of ADR complement arbitration, the SICC will do likewise for disputes that do not sit well with the private consensual dispute resolution process. If Singapore succeeds in becoming the premier dispute resolution hub of Asia, the pie will grow, hopefully enormously, your [*i.e.*, arbitration practitioner's] share will also grow, hopefully enormously too, even though it forms a smaller percentage of the whole.

What Justice Loh was saying is that the concept of Singapore as a dispute resolution hub is likely to persuade those law firms which have the task of advising their international clients (particularly those with business or investments in Asia), to look seriously at Singapore as a dispute resolution centre to resolve their disputes with their international counterparties. This is because Singapore will be offering a variety of dispute resolution solutions, one of which should fit the particular client's needs and preferences. In passing, I would add that the same could be said of Dubai in relation to the Middle East, as I will explain later.

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<sup>9</sup> On 10 October 2014, the EU Council of Justice Ministers representing the Member States ratified the Convention. The EU Parliament subsequently ratified the Convention on 25 November 2014. As a consequence, the EU Council adopted the relevant legislation on 4 December 2014, published on 10 December 2014, which provides for deposit of the instrument of approval to take place within one month of 5 June 2015 (Art 2 of the Council Decision of 4 December 2014). Following Art 31(1) of the Convention, the Convention will then enter into force on either 1 October 2015 or 1 November 2015 (depending on whether the instrument of approval is deposited before or after 1 July 2015).

<sup>10</sup> See n 3 above.

17 So the conclusion is that the SICC and SIAC will to some degree be competitors because there will be parties who, when faced with a choice of the Singapore High Court and the SIAC, might have chosen SIAC, and would now be attracted by some features of SICC. However, the greater likelihood is that SICC will attract a breed of disputants who essentially prefer (or need) the dispute to be resolved by litigation before a national court rather than arbitration by an institutional or *ad hoc* arbitration, and would have chosen the most suitable neutral national court outside the courts of either disputant (typically London). Those disputants will now have an additional choice of a national court specifically designed to cater to the needs of international parties with little or no connection to Singapore and which also recognises their special needs. Procedures which may prove attractive to international dispute resolution practitioners are:

- (a) More limited discovery and interrogatories than traditional common law rules (the SICC will follow the DIFC Courts' example in adopting document disclosure rules based on the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010);
- (b) Confidentiality in terms of private hearings and restrictions on release of information concerning the case to the public;
- (c) Special provisions relating to joinder and consolidation;
- (d) Exclusion of normal rules of evidence and substitution of foreign rules of evidence where appropriate;
- (e) Proof of foreign law may be made by submissions from qualified foreign law experts rather than by affidavit evidence subject to cross examination; and
- (f) Allowing parties the right to appoint foreign counsel to appear for them in cases where there is no substantial connection with Singapore, save for the choice of the SICC and Singapore law.<sup>11</sup>

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<sup>11</sup> This is particularly significant with respect to the regime's introduction of the concept of an "offshore case".

Under O 110 r 1(2)(f) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), an "offshore case" means an action which has no substantial connection to Singapore. An action which has no substantial connection to

*(continued on next page)*

18 In this respect, the SICC is like a hybrid; while it is emulating some of the distinctive features of international arbitration, it is clearly intended to remain a national court, but one possessing certain features peculiar to arbitration tribunals.

19 Let me complete the picture of the dispute resolution landscape in Singapore. On 5 November 2014, the Singapore International Mediation Centre (“SIMC”) was launched. Chaired by Edwin Glasgow, a distinguished English QC, and having a panel of experienced international mediators, SIMC is poised to attract mediation for international disputes to be held under the auspices of a dedicated mediation centre catering for the needs of international clients. The SIMC will therefore complete the suite of dispute resolution options available in Singapore, and which are also available to non-Singaporean disputants by opt-in jurisdiction.

20 I now turn to another international commercial court, the DIFC Courts, with a very brief word on the essential features of these courts. I have described them as “a common law island in a civil law ocean” because UAE laws are based on the civil law, while the governing law in the DIFC are laws enacted specifically for the DIFC and based on common law. The DIFC is an area of approximately 110 acres situated in the heart of Dubai City, which is well publicised internationally by its iconic symbol, the Gate. It is a free trade zone (of which there are many in Dubai) but what distinguishes this zone is that it has its own civil and financial administration, its own legal system and its own courts. Our

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Singapore is one in which: (a) Singapore law is not the law applicable to the dispute and the subject-matter of the dispute is not regulated by or otherwise subject to Singapore law; or (b) the only connections between the dispute and Singapore are the parties’ choice of Singapore law as the law applicable to the dispute and the parties’ submission to the jurisdiction of the court. An action will not be considered an offshore case if it is an action *in rem* against a ship or other property under the High Court (Admiralty Jurisdiction) Act (Cap 123): see Rules of Court O 110 r 1.

In such “offshore cases”, a party may be represented by registered foreign counsel without involving local Singaporean counsel – a novel development considering the fact that foreign lawyers could not freely represent parties in arbitrations seated in Singapore prior to 2004.

legal system is based substantially on English law in codified form, but with civil law influences. We have an Arbitration Law 2008 which is based closely on the Model Law and applies to all arbitrations seated in the DIFC. The DIFC is a separate seat from the Emirate of Dubai itself and therefore the DIFC Courts will be the curial court for all DIFC seated arbitrations. Contractual references to “arbitration in Dubai” will be interpreted as meaning seated in mainland Dubai, subject to the UAE Federal Laws on Arbitration and supervised by the Dubai National Courts as the curial court.<sup>12</sup> If an analogy is needed for this remarkable experiment, one may find it in China with Hong Kong living under “one country, two systems”.

21 The DIFC Courts can be characterised as an international court in two ways. First, nearly all of our cases involve at least one party that is not from Dubai or the UAE, which is to be expected, since our primary jurisdiction is over cases relating to parties incorporated or registered in the DIFC or cases which relate to something happening within the DIFC. Additionally, most of the occupiers of the DIFC are international persons or companies. Secondly, we have, since the end of 2011, had opt-in jurisdiction from parties around the globe whereby we have jurisdiction to hear cases which are the subject of a written jurisdiction agreement. That puts us in the same position that the SICC will be, except that we do not have a separate court with special rules. Arguably, we do not need such special rules like the SICC since our practices and procedures are largely based on the English Civil Procedure Rules (“CPR”), particularly the Rules of the English Commercial Court, which are generally accepted as being the most effective set of rules to apply in trying complex commercial cases.

22 We addressed the issue of courts *versus* Arbitration when the DIFC was first established in 2006. The original concept was that the DIFC Courts would have a partnership with the proposed DIFC-LCIA Arbitration Centre (“the Arbitration Centre”), we handling litigation, and the Arbitration Centre handling arbitration and mediation. When the

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<sup>12</sup> *DHIR v Waterfront Property Investment Ltd and Linarus Fze* [2006–2009] DIFC CLR 12 at [79]–[92].

courthouse was built, the DIFC Courts shared our premises with the Arbitration Centre for some years until our expansion made it necessary for the Arbitration Centre to move out and seek alternative premises. However, we have turned full circle and, as from this year (2014), the courts and the Arbitration Centre are now legally housed under an overarching authority known as the Dispute Resolution Authority (“DRA”), which comprises two arms: (a) the DIFC Courts, with myself as the Chief Justice, and (b) the DIFC Arbitration Institute (“DAI”) (the operator of the Arbitration Centre), with myself as the Head of this Institute. So we have an unusual situation of a Chief Justice who not only heads the courts but also acts as the nominal head of the Arbitration Centre. I should point out that this is not unique because Singapore had such a situation a decade and a half ago, when the Singapore International Arbitration Centre was housed in the Supreme Court Building and was managed under the supervision of the Singapore Academy of Law, whose President was the Chief Justice.

23 Under our Arbitration Law, all arbitrations seated in the DIFC (which is an independent seat within the Emirate of Dubai) are supervised by the DIFC Courts, which will therefore act as the curial or supervisory court of the Arbitration Centre as well as other arbitrations seated there. To prevent conflicts of interest under the new legal structure I have just described, I have appointed a Board of Trustees of the DAI who will effectively manage the business and caseload of the Arbitration Centre, and who will not report to me. The Arbitration Centre will therefore be fully independent of the DIFC Courts. Despite this separation of powers and responsibilities, this new DRA fulfils a dream that the DIFC authorities and my predecessor, former Chief Justice Sir Anthony Evans, had of making our courthouse a “house of justice” in its different forms.

24 The DIFC Courts have one significant advantage concerning the enforceability of our judgments over the SICC. DIFC Court judgments are, under Dubai Law, registrable in the state courts of mainland Dubai without any challenge posed to the substance of the judgment. When registered, those judgments (translated into Arabic) will become judgments of the mainland Dubai courts and will be treated as such in the UAE. By virtue of the Gulf Cooperation Council (“GCC”) Convention,

which provides for mutual recognition and enforcement of all court judgments between GCC countries (Jordan, Bahrain, Qatar, Kuwait, Oman and UAE), DIFC Courts' judgments are fully enforceable throughout the Gulf region. There is also the possibility of our judgments being enforceable in the wider Middle East North Africa Region ("MENA") under the Riyadh Convention, but the provisions on enforcement in that latter Convention are not as precise as those under the GCC Convention.

25 The significance of this arrangement is that neither the DIFC Courts nor the Arbitration Centre consider such co-operation to be against its own interests and, like Singapore, the imperative is to make the DIFC the legal hub of MENA by offering a suite of legal options for dispute resolution through litigation, arbitration and mediation, in addition to making sure that each option is satisfactorily delivered in accordance with parties' expectations. Like Singapore, Dubai has been inspired by London's example in maintaining a number of vibrant legal forms of dispute resolution, thereby enlarging the pool of disputes being resolved in our legal hub, and interlinking them to each other as necessary (for example between arbitration and mediation).

26 We are now about to launch in the DIFC an experiment without parallel in arbitration history. We have recently circulated for public consultation a draft Practice Direction setting out an initiative in the form of a guidance note that will have the effect of "converting" court judgments into arbitration awards. (As I will explain later, I use the term "convert" as shorthand for a more complex process.) In brief, the protocol (as set out in the draft released for public consultation) was as follows:

- (a) When parties submit to the jurisdiction of the DIFC Courts by a jurisdiction agreement, they may include within their submission agreement an arbitration clause in the following terms:

Any dispute arising out of or in connection with the enforcement of any judgment given by the Courts of the Dubai International Financial Centre, including any dispute as to the validity or enforceability of the said judgment, and satisfying all of the Referral Criteria ... shall be referred to

and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place of the arbitration, shall be the Dubai International Financial Centre.

The language to be used in the arbitration shall be English.

This contract, including any provisions relating to the choice of forum, shall be governed by and construed in accordance with the laws of the Dubai International Finance Centre.

[or]

This contract shall be governed by and construed in accordance with the laws of [INSERT PLACE], save that the laws of the Dubai International Finance Centre shall apply to any provisions relating to the choice of forum.

(b) The Referral Criteria referred to in this model clause were defined in the draft Practice Direction<sup>13</sup> as follows:

1. The judgment has taken effect in accordance with Rule 36.29;<sup>[14]</sup>
2. The judgment is a judgment for the payment of money (whether or not the judgment also provides for remedies other than the payment of money);
3. There is an enforcement dispute in relation to the judgment;
4. The judgment is not subject to any appeal and the time permitted for a party to the judgment to apply for permission to appeal has expired; and
5. The judgment creditor and judgment debtor have agreed in writing that any enforcement dispute between them shall be referred to arbitration pursuant to this Practice Direction.

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<sup>13</sup> Draft Practice Direction X of 2014.

<sup>14</sup> Rule 36.29 of the Rules of the Dubai International Financial Centre Courts 2007 (now re-numbered r 36.30 in the 2014 edition) provides that a judgment takes immediate effect from the time on the day when it is given or made, or such later time or date as the court may specify.

- (c) The most important criterion was “enforcement dispute”, which was defined as:

[A] dispute between a judgment creditor and judgment debtor with respect to money (including costs) claimed as due under a judgment, including a failure to pay on demand a sum of money due under the judgment on or after the date on which that sum becomes due under Rule 36.33.

- (d) Rule 36.33 of the Rules of the DIFC Courts 2007 (now re-numbered 36.34 in the 2014 edition) provides that judgments for the payment of money (including costs) must be made within 14 days of the judgment unless:
- (i) The judgment specifies a different date for compliance (including specifying payment by instalments);
  - (ii) Any of the other Rules of Court specifies a different date for compliance; or
  - (iii) The court has stayed the proceedings or judgment.

27 The net effect of this initiative is that, following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, the judgment creditor would be able to consider that an enforcement dispute has arisen and could refer the dispute to arbitration at the DIFC-LCIA Arbitration Centre, or indeed any other arbitration centre (the latter might not be the most sensible course for the parties, but they would be entitled to make that choice). The Arbitration Centre in turn would progress the arbitration and appoint one or three arbitrators as the parties had chosen in their arbitration agreement, and the dispute would then be referred to the tribunal for its decision in the usual way in accordance with the Arbitration Rules of the chosen Arbitration Centre.

28 This process is what I meant to encapsulate by the term “conversion” of a judgment into an arbitration award. But it is not a “conversion” in the strict sense of that word; the process enables a judgment creditor to have an additional option for enforcement of its judgment without losing its rights under the judgment in any way.

29 After our public consultation, we received a fair number of comments from several law firms within the DIFC. The principal worries emerging from the public consultation version of the draft Practice Direction, and my responses to them, were as follows:

(a) Whether our definition of “enforcement dispute” would work in creating a dispute based on a judgment sum which could not be disputed, and whether a subsequent national court which had to enforce the award would consider that it was a mere “rubber-stamping” exercise.

- There is a long line of common law jurisprudence which clearly establishes that, for purposes of arbitration, a “dispute” exists where one party makes a claim for payment of a sum allegedly due from another party, and the respondent (i) refuses to pay or (ii) keeps silent but, in any event, does not make payment. This is so even if the issue of whether the debt is owing is beyond dispute – only a clear and unequivocal admission of liability or actual payment will mean that there is no dispute.
- In particular, there has been extensive English jurisprudence on the subject because of the legislative development of section 4 of the English Arbitration Act 1950,<sup>15</sup> which originally provided that:

If any party to an arbitration agreement or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings, and that court or a judge thereof ... *unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties*

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<sup>15</sup> c 27.

*with regard to the matter agreed to be referred, shall make an order staying the proceedings.*

This provision was later repeated in section 1 of the English Arbitration Act 1975,<sup>16</sup> but was significantly modified by section 9(4) of the English Arbitration Act 1996,<sup>17</sup> which omitted the words “unless satisfied that ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. Both before and after 1996, a body of case law has developed to ascertain what a “dispute” means as well as its significance for future cases. Even before 1996, courts have referred to pre-1996 cases for guidance on the meaning and scope of the word whenever it appears in an arbitration agreement.

- In one of the earliest English cases on the subject, Lord Justice Templeman held in the 1982 case of *Ellerine Brothers (Pty) Ltd v Klinger*<sup>18</sup> that there is a dispute until the defendant admits that the sum is due and payable. Eight years later, his opinion was referred to in *Hayter v Nelson Home Insurance Co*<sup>19</sup> by Justice Saville, who expressed the view that, if the parties had agreed to arbitrate their disputes, the court should not ignore that bargain merely because the parties are seeking a quicker remedy by pursuing the case in court. Justice Saville gave the following example in his judgment to illustrate his point:

Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately be demonstrated beyond any doubt that one is right and the other wrong does not and cannot mean that the dispute did not in fact exist. Because one

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<sup>16</sup> c 3.

<sup>17</sup> c 23.

<sup>18</sup> [1982] 1 WLR 1375 at 1383.

<sup>19</sup> [1990] 2 LLR 265.

man can be said to be indisputably wrong does not, in my view, entail that there was never any dispute between them.

- In a post-1996 case, *Halki Shipping Corp v Sopex Oils Ltd*,<sup>20</sup> the English Court of Appeal had to determine the meaning of the word “dispute” in an arbitration clause, and the effect of the amended section 9 of the English Arbitration Act 1996 on the circumstances in which a stay of proceedings would be granted by the court. Two competing meanings of “dispute” were taken into consideration by the court: whether it meant that a “real” or “genuine” dispute on the parties’ rights and obligations under the contract had to exist, or whether the term simply encompassed any disputed claim not admitted as due and payable, regardless of its merits. The court held that the effect of the omission in the 1996 Act was that, in deciding on whether a stay should be granted, it no longer had to consider whether there was in fact any genuine dispute between the parties. Previous cases which turned on this distinction were no longer relevant. In summary, given this new wording, English Courts now have no discretion but to grant the stay (unless the arbitration agreement is null and void, inoperative or incapable of being performed), even in cases where it is satisfied that there is not in fact any “genuine dispute” between the parties.
- In *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*,<sup>21</sup> Justice Woo Bih Li of the Singapore High Court referred to the judicial decision in *Halki Shipping Corp v Sopex Oils Ltd*. He affirmed that the court is not to consider if there is in fact a dispute or whether there is a genuine dispute, and that a dispute exists as long as the defendant at least makes a positive assertion that he is disputing the claim.
- All these cases were examined in the 2009 Singapore Court of Appeal case of *Tjong Very Sumito v Antig Investments Pte*

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<sup>20</sup> [1998] 1 LLR 465.

<sup>21</sup> [2005] 4 SLR(R) 646.

*Ltd* and cited with approval. The Court of Appeal emphasised that it will not assess the merits or genuineness of a “dispute”, and will readily find that a dispute exists unless the defendant has clearly and unequivocally admitted that the claim is due and payable. Mere silence in the face of a demand may not be sufficient to constitute such clear and unequivocal admission necessary to exclude the existence of a dispute amounting to an admission of that demand. As the court pithily put it: “*an open-and-shut case must be distinguished from an admission*”.<sup>22</sup>

- (b) What about the enforceability of awards made under this protocol under the NYC?
- The word “dispute” does not appear in the NYC. It chooses to use the word “differences” (which, however, may be considered to be synonymous with “disputes”). Article II(1) mandates recognition of “an agreement ... to submit to arbitration all or any differences”. The term “differences” is not defined in the NYC and I have not discovered any helpful authority elucidating the meaning of this term. However, the leading authority on the NYC, Dr Albert Jan van den Berg, says unequivocally: “It should not be readily assumed that a dispute does not fall under the arbitration agreement, having regard to the ‘pro-enforcement bias of the Convention’”.<sup>23</sup>
- (c) Is “enforcement dispute” an appropriate term when the protocol does not directly deal with enforcement of a judgment? Would “payment dispute” be more accurate?
- This is a useful observation and the term has been changed to “Judgment Payment Dispute”.

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<sup>22</sup> *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (“*Tjong Very Sumito*”) at [62]. *Tjong Very Sumito* was itself approved by *Larkden v Lloyd Energy Systems* [2011] NSWSC 268 and *Cape Lambert Resources v MCC Australia* [2013] WASCA 66.

<sup>23</sup> *The New York Convention of 1958* (1981) at p150.

- (d) What would be the governing law of the payment dispute?
- Because the enforcement dispute is a separate dispute from the dispute which the judgment will already have decided, we have added extra words to the governing law provision to make it clear that any matter to be decided in relation to the enforcement dispute (now renamed as “Judgment Payment Dispute”) will have one governing law, *ie*, the laws of the DIFC.
- (e) The model arbitration agreement should only specify one arbitrator to ensure speedy processing of the arbitration.
- This seems a sensible comment, and we have changed the model arbitration agreement accordingly.
- (f) Would the arbitral tribunal have power to re-hear the dispute or entertain challenges to the DIFC Courts judgment on any ground that could have been raised in an appeal?
- That is certainly not the intention, but again, “belt and braces” have persuaded us to make express provision for clarification. The tribunal would in all probability have to apply the doctrine of *res judicata* or issue estoppel.
- (g) Would the protocol apply to summary and default judgments?
- It is certainly intended to do so, and we have amended the wording of the Practice Direction to remove any ambiguity.
- (h) Would the referral to arbitration affect the rights of the judgment creditor to enforce the judgment as such during the pendency of the arbitration? Would enforcement of the judgment be stayed, either automatically or upon application?
- We intend that the judgment will remain in full force and effect whatever the progress or outcome of the arbitration. As mentioned earlier, the term “conversion” is a misnomer because the judgment creditor is not supposed to lose any of its rights under the judgment. Appropriate amendments have been made to the Practice Direction for clarity. A judgment creditor will have control of when it wishes to exercise its alternative options for realising the fruits of its judgment – to

levy execution on the judgment, in which case it might wish to defer commencing the arbitration, or, if it sees no assets of the judgment debtor within the DIFC or elsewhere in the GCC (which it could seize through use of the GCC Convention), it might then proceed to take the arbitration route.

- (i) Should we provide for potential third-party challenges, such as applications under the re-numbered RDC 36.33, by non-parties who are directly affected by judgments to apply for setting aside?
- My thought is that these applications will simply take their course in the usual way. Because our re-numbered RDC 36.33 provides for third parties to intervene and apply for setting aside in certain limited circumstances, no judgment can be said to be beyond challenge, even if treated as final. If such applications are filed before judgment is given, they will be dealt with by the court and the outcome will be reflected in the judgment. In the unlikely event that such applications are filed after the referral to the Arbitration Centre has been filed, there may be cause for an application being made to the tribunal for a stay, which may or may not be granted depending on the circumstances. In my provisional view, if a judgment is set aside, the basis of the demand for payment of the judgment sum will have disappeared.
- (j) Should the model arbitration agreement be amended to refer to a “judgment (or any part thereof)” to address the possibility that some parts of the judgment may not relate to money (assuming that the intent is to permit the enforcement of the “money (including costs)” part of any judgment)?
- In the revised version of this Practice Direction, we have consolidated the definition of “judgment” in Referral Criteria 2 within the main definition, which has been amended to clarify the point about partial payment.
- (k) If there are multiple judgment creditors and/or debtors, will all of them need to be made parties to the arbitration?
- That will ultimately be a matter for the tribunal to decide. However, if the matter is governed by DIFC law, then that

decision will probably depend on whether (in the case of multiple debtors) the judgment debtors are jointly or severally liable. If the judgment debtors are jointly liable, the tribunal is likely to rule that all of them need to be made parties, following the common law rule that all joint debtors need be joined for an enforcement of a joint liability. The interesting question will be if a demand for satisfaction of a judgment against joint judgment debtors is only made against one of them; can the judgment creditor then commence an arbitration only against the one debtor on whom he has made a demand? This may have to be decided under English common law as there seems to be no provision in the DIFC Contract Law expressly dealing with this issue.

- (l) Is the reference in the model arbitration clause providing for referral of any dispute to the DIFC-LCIA Arbitration Centre intended to be fixed?
- No. Parties may choose to refer their disputes to arbitration to any institution or any seat of their choice. But common sense would inform them that there could be a greater likelihood of a tribunal seated in the DIFC accepting the validity of this clause than in any other seat, and, unless there is an overwhelming desire to use the Dubai International Arbitration Centre (“DIAC”) as the institution of choice (with a DIFC seat), our Arbitration Centre would seem an obvious choice.
- (m) Will the restrictions on the use of arbitration in employment and consumer matters (as provided for in Art 12(2) of the DIFC Arbitration Law 2008) apply to matters covered by the draft Practice Direction? What is intended where only part of a judgment (or only some but not all of the parties to it) have employment/consumer related content?
- As provided in the DIFC Arbitration Law 2008, disputes covering employment and consumer matters may not be enforced against the employee or consumer except under specific situations. It is therefore unlikely that judgments

encompassing such matters will be enforced. This is simply a matter of arbitrability. The draft Practice Direction has been amended in the revised version to reflect this point.

- (n) Should the suggested arbitration clauses include reference to Referral Criterion 5 – *ie*, referral pursuant to this Practice Direction?
- Since the model arbitration agreement expressly refers to the satisfaction of all the Referral Criteria, it will not be necessary to make any further amendment.
- (o) Wouldn't the effectiveness of this initiative be dependent on the number of parties who are willing to sign up for it since it is an optional submission? Why should Party A agree in advance to help Party B to enforce a judgment against Party A?
- That is a fair observation, and this protocol would probably be most likely to be adopted where:
    - (a) both parties believe that they have a fighting chance of winning, especially if a counterclaim is added; or
    - (b) one party is in a stronger bargaining position than the other so as to be able to insist on this protocol being adopted.
- (p) Finally, a query which I myself raised. What if a clever judgment debtor responds to the demand for payment by saying: "I acknowledge my liability for the judgment debt, but I simply have no liquid assets to satisfy the judgment and I seek time for payment." Will there still remain a "dispute" for purposes of a valid arbitration?
- This problem is now pre-empted by our amendment to the definition of "enforcement dispute" (now renamed a "Judgment Payment Dispute") to add the words "including any dispute about the ability or willingness of judgment debtor to pay the outstanding portion of the judgment sum."

30 We have also realised that the model arbitration clause can work as a stand-alone arbitration agreement, not inextricably linked to parties'

voluntary submission to the jurisdiction of the DIFC courts.<sup>24</sup> In particular, the model clause can be used by parties who are already compulsorily subject to the jurisdiction of the DIFC courts under Article 5 of Law No 12 of 2004. We have accordingly separated the original version of the model clause whereby parties submit to the jurisdiction of the DIFC courts. Hence we have now issued two separate model clauses.

31 Accordingly, we have made appropriate amendments to meet the concerns of our users, and the final version of this Practice Direction is known as Practice Direction 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration. We therefore intend to launch the actual initiative early in 2015. The overall reactions from our legal community in the DIFC have been largely encouraging of our intention to give DIFC judgments more global reach. If our experiment subsequently proves successful, we will have developed an important tool to synthesise litigation and arbitration by giving concurrent remedies for enforcement and thereby resolved one of the great problems of international litigation which other jurisdictions can follow. This is because there is nothing in our protocol that changes the existing common law; indeed, our protocol builds on it. If we can develop a model for the rest of the common law world, civil law countries may also be able to adopt it, because ultimately it is a question of persuading courts to interpret, not the national laws of any country, but the meaning of an “award” under the NYC, which is a matter of international, rather than domestic, law. If our bold step proves successful, this would be the ultimate partnership between commercial courts and arbitration, so I hope that all of you will wish us good luck in this venture.

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<sup>24</sup> The Singapore Court of Appeal in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [61] has affirmed that a contractual dispute-resolution agreement which operates asymmetrically (*ie*, only via the judgment creditor) is nevertheless a valid arbitration agreement.

## Background to Essay 2

This was a fun assignment. I have often been invited to contribute an essay to a *Liber Amicorum* for an international arbitrator upon reaching a particular age as a birthday present. But my instructions on this occasion for the *Liber Amicorum* of a very old friend, Michael Schneider, a Swiss arbitrator who is among the giants of our profession, were clear. Nothing learned was required from me, but simply a collection of war stories from my experiences in international arbitration. It proved a more difficult task than I originally thought – having to decide which stories I would choose, how identities could be concealed, whether my personal reactions at the time of the incidents described would still in retrospect make sense, and how much detail should be inserted. At the end of the day, I think my work product fulfilled the requirements of the editors and would undoubtedly have amused Michael (which was the main intention), although I did sit in expectation that he would one day call me up and say: “Now, if I had been in your shoes, this is how I would have handled the situation” (which thankfully he never did). It has also proved a useful present to send to people who are just starting to be interested in international arbitration. This short collection of stories would (I hope) give them some insight into the unexpected happenings that may be encountered in the course of this area of practice.

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## WAR STORIES AND THE MORALS TO BE LEARNT

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Michael HWANG SC\*

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### I. Judicial advocacy

1 I was once sitting in an ICSID annulment hearing in Washington DC together with an Australian (who was the President) and a retired judge of the International Court of Justice (“ICJ”). Both the President and I, were engaging in our usual Socratic dialogue with Counsel for both sides in the typical common law style, but the retired ICJ judge listened to the arguments without comment.

2 At some point, I received a note from the retired ICJ judge. It said: “Is this judicial advocacy?” Over lunch, I asked him what he meant. He told me: “9 years on the ICJ, I never said a word”. I then said: “But the President was asking as many questions as I did.” His reply was: “That’s different”. Much later, I recounted this incident to Judge Stephen Schwebel, another retired ICJ Judge (and former President of that Court). He explained that it was usual for the ICJ to hear oral arguments in relative silence; questioning from the bench was comparatively rare, and then usually only from the President. If an associate judge wished to

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ask a question he would normally ask permission from the President in advance. It would have therefore been somewhat of a culture shock to my co arbitrator retired ICJ Judge to hear a mere wingman launch forth with his barrage of questions.

**Moral: Ask away but, when sitting as arbitrator with retired ICJ judges, give warning of what you intend to do**

## **II. Ducks and dogs**

3 In an LCIA arbitration in London arising from a patent licensing agreement, the issue was whether certain charges imposed by certain governments on the licensed products should be characterised as “taxes” for purposes of calculating royalties on revenue payable to the licensor (“taxes” being deducted from revenue for this purpose). One witness, who advanced the contention that such charges were “taxes”, said: “if it quacks like a duck, it’s a duck.” Cross-examining counsel then shot back: “but what if the duck barks like a dog?” (his point being that the charges in question had mixed characteristics of taxes and administrative charges). The hearing then proceeded to its conclusion. Before the hearing adjourned, cross-examining counsel then announced that he had a presentation to make. To emphasise (and celebrate) his point about ducks and dogs, he and his team, who had been staying in the hotel next to the IDRC in Fleet Street, had collected all the rubber ducks which the hotel had provided to them in their bathrooms and solemnly presented them to his opponents, together with a bagful of rubber dogs (which had been procured by the hotel concierge after much research to match the size of the ducks). A month or so later, the parties announced that they had settled the case.

**Moral: A less than serious approach to settlement negotiations may have a better chance of success – Humour at least demonstrates goodwill**

### **III. Reply all**

4 In an ICC arbitration where I was Chairman, we had reached the deliberations stage after the hearing had concluded. One evening, I (as Chairman) decided to set down my thoughts on how the outcome of the case should be decided. The issue was whether, after the contract had run for several years, the price should be adjusted in view of changing circumstances. This of course depended on an interpretation of the relevant clause. I offered my opinion to my co-arbitrators that, taking a strict interpretation of the clause, the price should remain at its present level. However, given that, in the light of current circumstances, the price seemed a bit low, and would appear even lower in the later part of the contract period. I then suggested that we might declare that the current price should remain, but indicate in our award that the clause did allow of an interpretation that might make it possible for a fresh case to be brought to raise the price if certain circumstances changed. This exercise took me well past midnight, and, after I had finished, I pressed “Send” and sank gratefully into bed. At about 6.00am, I woke up with an uneasy feeling about my message, and went over to my laptop. Sure enough, I saw, to my horror, that I had obviously been so tired after completing drafting my message that I had failed to realise that I had pressed the key “Reply All” (and “All” included not only my co-arbitrators but the parties’ lawyers as well).

5 I immediately sent out another e-mail to “All”, to ask the lawyers concerned to refrain from reading the previous night’s e-mail and to delete it immediately. Both lawyers were Korean, and, as they were an hour ahead of Singapore, they replied by 7.00am Singapore time that they had complied with my direction. Bizarrely, one of my co-arbitrators responded to my original e-mail, broadly agreeing with some my suggestions, and then also pressed “Reply All” so that the problem re-surfaced immediately. I then had to send a second e-mail to the lawyers to ask them to not read that e-mail and to delete it immediately, and I got an acknowledgment that they had complied with my direction.

6 About a month later, before our award was issued, we were informed that the parties had settled. Since that time, I have never asked the lawyers (whom I have seen often) if they had deleted the offending

e-mails after reading them – it is simply a question there is no point in asking.

**Moral 1: Might this be a new form of arb-med – To indicate to the parties how the tribunal is thinking to encourage negotiations for a settlement before the award is issued? (I joke, of course)**

**Moral 2: Do not send out important e-mails after midnight, especially if they contain complex thoughts – Save it as a draft and look again at it early in the morning before pressing “send”.**

#### **IV. Leaning forward**

7 I was sitting as a sole arbitrator in an *ad hoc* arbitration in Australia, where the key witness was a party to a disputed version of a conversation which was vital in establishing the terms of a sale and purchase agreement. The key witness was Japanese, testifying on behalf of his Japanese employer.

8 The moment came when he was cross examined on the two different versions of the disputed conversation. Cross-examining counsel put a question to him essentially challenging his version of this conversation. Everyone realised that this was a key question, and everyone expected him to rebut Counsel’s challenge to his veracity. And the critical question that was put to him was: “And isn’t it true that you didn’t say X but instead said Y”?

9 This was a question to which he had to say “no”, and I am sure that the whole room expected him to say so emphatically and categorically. Instead, he did not immediately speak but started to lean slowly forward in his chair until he was almost making a bow. Everyone in the room was mesmerised by his movement, anticipating that, contrary to all expectations, he was about to say “Yes, it is true”. But having made the equivalent of a seated bow, he finally said (in Japanese): “No, that is not true.”

10 Later, I asked the Japanese interpreter why the witness had leant forward when saying this. She told me that it was a Japanese trait that,

when a speaker wanted to emphasise a point, he would sometimes lean forward in that way so as to give emphasis to the seriousness of his answer, *ie*, to make the listener realise that he was making a solemn statement rather than just denying something without thinking too much about it.

11 More recently, I discussed this incident with two experienced Japanese disputes attorneys. They opined that another possible explanation for this movement by the witness was if there was a close business relationship between the two parties in dispute (which was indeed the case). In such a situation, the witness might feel that he needed to express his sincere regret about having to disagree with his business partner on such an important matter, and resorted to the traditional Japanese way of doing so by bowing (even when seated).

**Moral: Body language needs to be interpreted having regard to cultural differences**

## **V. Walkout**

12 I was Chair of a tribunal between a western party (as Claimant) and a party from South Asia (as Respondent) in an UNCITRAL arbitration where the appointing authority was the ICC, and the seat was in Singapore. The South Asian party had nominated its party appointed arbitrator, who was an advocate from that South Asian country. The western party had appointed a well-known international arbitrator from England. As the South Asian party had complained of the high cost of the arbitration if it were to be held in a hotel in Singapore, I offered the use of my Club in Singapore, which also had (as I thought) the advantage of guest rooms at a much cheaper rate than a first class hotel. So we held the hearing at the Club, and the legal team from the South Asian country (as well as its party appointed arbitrator) all stayed at the Club.

13 Soon after the hearing started, there was a dispute between the parties over a procedural issue where the tribunal ruled against the South Asian Respondent. Counsel for the South Asian Respondent (who

was a former Attorney General in his country) then challenged the entire tribunal on the grounds of bias, which the tribunal rejected. The South Asian counsel then said that he would take his challenge to the ICC as the agreed appointing authority. The tribunal reminded him that, under the UNCITRAL Arbitration Rules 1976, the proceedings would carry on while a challenge was being ruled on by an appointing authority.

14 At this point, the South Asian counsel then said: “All of you are clearly biased against me, and I and my clients are walking out of this hearing.” I responded: “Counsel, you can do that, but I must point out that the tribunal can and will carry on hearing the case even if your client withdraws from the hearing.” He replied: “Not if I take my arbitrator with me.” He then proceeded to address his party appointed arbitrator: “We hereby revoke your appointment and you must therefore leave this hearing with us.” I then adjourned the hearing for a short while to discuss this scenario with my co-arbitrators. Our South Asian colleague on the tribunal was clearly disturbed by the attitude taken by his appointor, and asked us: “How can I stay as arbitrator if my appointor does not want me to act any more?” My co-arbitrator and I then pointed out to him that an arbitrator owes his duty, not to his appointor, but to the agreement made between all parties when a tribunal is constituted, so that it was not legally possible for a party to withdraw his appointment unless he wanted to challenge his own party appointed arbitrator.

15 My South Asian colleague then said he would think over the matter over the weekend. Conscious that he would be staying in the Club, which was a relatively small place compared with a hotel, and therefore in close proximity to his appointor’s legal team, I offered to put him up in another place, but he said he would be fine with staying on at the Club.

16 On the Monday after we had broken for the weekend, I arrived at the Club. The South Asian counsel was still there, and I thought his client had decided to continue its participation in the proceedings. Instead, he handed me a letter from his party appointed arbitrator. The letter said that, after carefully considering his position, our South Asian arbitrator felt that he could not morally carry on acting as arbitrator against the wishes of his appointor, and he had therefore left the Club and was

returning to his home country. The South Asian counsel then informed me that he and his clients were similarly leaving Singapore to return to their home country and would not be participating any more in the Singapore proceedings.

17 How this story eventually ended would take too long to recount, but I just want to highlight the way in which this part of the story came to an end. Obviously, there had been conversations between the two South Asians over the weekend, leading eventually to the South Asian arbitrator signing his letter of resignation and handing it to the South Asian counsel to deliver to me. I later learnt that the arbitrator had in fact served under the South Asian counsel in the Attorney-General's Chambers, and this explained to me why he so readily agreed to submit to his former boss's demand that he step down.

**Moral 1: Former working relationships between appointors and arbitrators should be more clearly disclosed and explored for possible lack of independence, as the above case demonstrates.**

**Moral 2: Try and avoid putting a party appointed arbitrator in the same hotel as his appointing lawyers, which was another cause of the resignation of my South Asian co-arbitrator.**

## **VI. Off the record**

18 I was Chair of a tribunal constituted under the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") where the Respondents decided not to attend the evidentiary hearing, which was therefore conducted over two days on an *ex parte* basis. The proceedings were transcribed verbatim in the usual way. At the end of the second day, after hearing closing submissions from the Claimant's lawyers, one of my co-arbitrators said: "Can we go off the record please?" He then proceeded to have a three-minute discussion with the Claimant's lawyers about shipping arrangements for his files and papers back to his home base. This was the only thing that was discussed during that "off the record" break, and we then resumed on the record with other housekeeping matters and closed the proceedings.

19 When the transcript was released, it stated, at the material part, “(short discussion between tribunal and Counsel off the record)”. The transcript was duly sent to the absent Respondents as the tribunal felt that they were entitled to have the official record of what had transpired, especially if they wished to make written submissions in response to the evidence tendered. Instead, they chose to query what had happened in the short discussion off the record, and suggested that there had been collusion between the tribunal and Counsel for the Claimant.

20 I called the transcribers and asked if they had actually recorded the “off the record” conversation, and they answered in the affirmative. I then asked them to give me a supplemental version of the final page of the transcript, and to include the entire conversation that had taken place between the tribunal and Counsel, including the remarks about shipping arrangements. I then sent the supplemental version to the Respondents, only to be met with yet further complaints that this version had been doctored, and provided further proof of collusion, not only with Counsel for the Claimant, but with the transcribers as well. Needless to say, the tribunal ignored these allegations apart from a short letter in rebuttal, and proceeded to deliver its award without further mention of this incident as it had no bearing on the outcome of the case.

**Moral: Never ask to go off the record where both parties are not present**

## **VII. Answer yes or no**

21 I was acting as Counsel in a case under SIAC Rules where both sides engaged experts in foreign law. I was cross-examining the other side’s expert, a distinguished law professor, and found that she was not answering my questions directly. So I asked her politely to please answer my questions yes or no first, and then to give whatever explanation she felt was necessary afterwards. She replied: “No, I cannot do that. I am a professor of law. I cannot just give a yes or no answer. I must first explain the general law, and then I will answer your question.”

22 So as not to waste further time in arguing this approach with her, I then asked her a question which, admittedly, was a little long and complex. She then proceeded to give a long explanation about the general principles of the relevant foreign law, but concluded her answer without a yes or a no. I said: “Professor, I have accommodated you by letting you give a long explanation of the law, but you haven’t answered my question yes or no.” She then looked at me blankly and said: “And what was your question again?”

23 This same witness, when asked about the reputation of my expert in foreign law, said: “Oh, I have the highest regard and respect for Mr X. He is such a wonderful and learned man. In fact, I think so highly of him that I suggest that the parties leave it to the two experts to settle this dispute between us. I am sure that between the two of us, we can come up with a solution to the problem.”

24 Needless to say, neither party was happy to allow their respective cases to be hijacked by the experts, and so we respectfully declined her offer.

**Moral: Be careful of the experts you choose, and do not allow them to change the rules of the game.**

### **VIII. Gifts from parties**

25 In an ICSID case between a Western investor and a developing state, all parties had assembled for the first day of the hearing. Before the proceedings formally commenced, counsel from the state said to the tribunal: “On behalf of my client, I have an apology to make to everyone in the room. In accordance with local custom, my client had thought it appropriate to bring some gifts for members of the tribunal as well as for members of our opponent’s legal team. However, we encountered a problem at customs when my client’s representatives had to declare their gifts. They had brought some bolts of cloth for the ladies, which created no problem. But they had also brought some swords (as our client is still a tribal society) and customs impounded these swords, so

we are unable to make (as we had planned) the formal presentation of the gifts to our intended recipients.”

26 At this point the President adjourned the hearing and the Tribunal went into caucus. The President’s question was: What should we do if customs eventually released the swords? Should the tribunal accept such gifts? Eventually it was decided that, if that eventuality occurred, we would accept them (as the state might take offence if we refused to accept them especially after they had taken so much trouble to bring them to us. However, on receiving the swords, we would immediately ship or courier them to ICSID and ask them to hang them in an appropriate place in their HQ. Thankfully, the customs authorities did not release the swords from their impoundment, so we did not have to address this problem anymore.

**Moral: Some things which might seem obvious should nevertheless be provided for in the all-encompassing Procedural Order No 1, to wit, parties should not bring gifts of any kind to the tribunal**

## **IX. Arbitrations in India**

27 Arbitrations held in India can be trying on the staying power of foreign arbitrators. In one case I sat as co-arbitrator in an *ad hoc* arbitration governed by the Indian Arbitration Act 1996 but without any arbitration rules. We had nine hearing tranches, and 26 hearing days for a construction dispute of moderate complexity (and this was only the time taken for determining liability; we then had to proceed to a quantum hearing). The reasons for this are:

- (a) Hearing hours were strictly confined to 11.00am to 4.00pm with an hour for lunch, so there were (in theory) only five hearing hours a day. I was told that I was lucky to have even this window of time agreed on, as most arbitration cases heard in India only start after 5.00pm so that counsel can spend the earlier part of the day on their court cases.
- (b) There was no verbatim transcription of the proceedings. Instead, we had a note-taker with a laptop who would only take down the

evidence (and not the submissions of counsel or directions or remarks of the Tribunal) at dictation speed.

- (c) As each question was asked, it was flashed up on a large screen in the hearing room after it had been recorded by the note-taker. The question was then subject to comments on how it should be improved from opposing counsel, and the Chairman of the Tribunal. When the form of the question had been settled, the witness would then give his answer. After that answer had been flashed up on the screen, it was subject to more comments from counsel and the Chairman, and the answer had to be redrafted accordingly. Questions and answers also had to refer to previous questions by their serial number (as each question was numbered as it was recorded) and documents by their number in the hearing bundle.
- (d) This procedure meant that each question and answer took about 15–20 minutes to record.
- (e) We had many days when we had to start late or finish early owing to various individuals' other commitments. At first, there were objections by opposing counsel to any requests for late starts or early finishes, but, as the case wore on, counsel became much more friendly, and (unfortunately for the Tribunal) each side was thereafter happily agreeing to any request for deviating from the limited hours fixed for hearing.
- (f) Because each of the lawyers and arbitrators had packed calendars, it was difficult to allocate more than three or four days for each tranche, and the case simply dragged on and on. So, from the time the Tribunal was constituted to the date of the last hearing on liability, it took four years and eight months to conclude Phase 1 of the arbitration.

**Moral 1: Patience is a much-needed quality in surviving arbitration hearings in India**

**Moral 2: Do not undertake hearings without verbatim transcription**

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### Background to Essay 3

This essay arose from a request by Gary Born (for whom no introduction is needed for readers of this book) to give an in-depth review of certain portions of the second edition of his treatise on international arbitration. I had already written a general review which had been published, but Gary had a custom of organising an *Agora* when he published a major textbook, which took the form of gathering a handful of scholars to critique particular portions of his treatise in greater detail to stimulate general public discussion of the themes in his book.

I fastened on a small portion of his treatise (in volume II, pages 1967–1969) where I found the best description of the “arbitrator’s contract” which I had encountered to date, having tried to do some previous research on the topic and not finding much discussion of this subject in the usual textbooks. Gary’s exposition stimulated some further thoughts in my head, and I sought to develop his exposition and carry on discussion of questions arising from his text. It is a subject which is surprisingly short on literature, particularly in analysing the relationships between the different parties to an arbitration (including the institution) from a purely contractual viewpoint. My essay was eventually included in *Arbitration International*, together with several other contributions commenting on different parts of Gary’s treatise.

This essay was originally published in (2015) 31(4) *Arbitration International* 559–566.

*I wish to extend my thanks to Oxford University Press for kindly granting me permission to republish this essay in this book.*

## Book Review

# INTERNATIONAL COMMERCIAL ARBITRATION "THE ARBITRATOR'S CONTRACT"

by Gary B Born

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Michael HWANG SC\*

1 I have in a previous book review<sup>1</sup> expressed my admiration for what I term the "Holy Book" of international arbitration, although that term needs to be understood liberally, as I certainly do not mean to suggest that Born's Treatise is filled with commandments, dogma or other *ex cathedra* pronouncements as virtually every proposition advanced by Born is amply supported by analysis, jurisprudence and practical rationalisation. My epithet was only to reflect the magisterial breadth and depth of the work, which makes it undoubtedly the first (and possibly the last) port of call when practitioners and academics need assistance on any point within the ambit of this vast topic.

2 I propose here to deal shortly with one aspect of this Treatise, which I feel deserves special attention.

3 The Arbitrator's Contract is a relatively small but highly important and unexplored area of arbitration law. The literature Born sets in Volume II<sup>2</sup> is relatively sparse (with the possible exception of two special

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<sup>1</sup> Michael Hwang SC, "Book Review" (2015) 32(1) *Journal of International Arbitration* 111.

<sup>2</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,967.

editions of the ICC Court Bulletin 1995 and 1996<sup>3</sup> respectively dealing with “The Status of the Arbitrator”). His meticulous and detailed treatment of this subject is therefore most welcome.

4 Born’s analysis of the contractual status of the Arbitrator’s Contract is a model of legal analysis. Born examines different theories and discusses the respective pros and cons of each before concluding<sup>4</sup> that the Arbitrator’s Contract is to be regarded as a *sui generis* contract which specifies the terms of the arbitrator’s adjudicative function *vis-à-vis* the disputing parties.<sup>5</sup>

5 Born also discusses the opposing views that the Arbitrator’s Contract is:<sup>6</sup>

- (a) A trilateral one in which the arbitrator is joined as a party to the original bilateral arbitration agreement between the parties; or
- (b) A separate category of agreement such as one of agency, employment or for the provision of services, distinct from the disputing parties’ arbitration agreement, arising between the arbitrator and the parties.

6 It may surprise some to know that there are few, if any, primary sources such as national legislation, international conventions or even institutional rules defining the status of the relationship between the

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<sup>3</sup> Philippe Fouchard, “Relationships between the Arbitrator and the Parties and the Arbitral Institution” *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement* (Jean-Fançois Bourque ed) (Paris: ICC Publishing, 1995); ICC Commission on International Arbitration Working Party on the Status of the Arbitrator, “Final Report on the Status of the Arbitrator” *ICC International Court of Arbitration Bulletin 7*, no 1 (1996).

<sup>4</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,978.

<sup>5</sup> This review is written using the paradigm example of two disputing parties to an arbitration dispute, but my analysis would apply *mutatis mutandis* to multi-party arbitrations.

<sup>6</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,977.

arbitrator and the disputing parties (referred to hereafter as "the disputing parties" or "the disputants"). Born's analysis of how the Arbitrator's Contract comes to be formed is therefore of particular interest to lawyers of both common law and civil law traditions, because it goes back to basics in order to construct a reasoned analysis of the nature of the contract. In a classic *ad hoc* arbitration, the Arbitrator's Contract is formed at the time the disputants select the (sole) arbitrator. The Arbitrator's Contract can be constituted in a formal document, typically incorporating the standard terms for the engagement of the arbitrator as accepted by the disputants (with or without modifications). It could alternatively, as with many commercial contracts, be made up of a chain of correspondence between the disputants and the arbitrator.

7 Born goes on to mention that this procedure is often taken to another level when the disputants opt for a three-person tribunal, with each of the disputants appointing a co-arbitrator, and the two co-arbitrators selecting the presiding arbitrator. This situation raises a host of questions.

- (a) Are we to consider each party appointed arbitrator as having a contract only with the appointing party?
- (b) Are we to consider the presiding arbitrator to have a contract only with the co-arbitrators, or should we consider the co-arbitrators to be merely acting as agents for their respective appointing parties in appointing the presiding arbitrator, who will then also have a direct contractual relationship with the disputants?
- (c) Sometimes the arbitration agreement provides (either directly or as a backup mechanism for the constitution of the tribunal) that the presiding arbitrator be appointed by an appointing authority (typically someone designated by the Secretary-General of the Permanent Court of Arbitration in UNCITRAL cases) or an institution under whose rules the arbitration is to be conducted. In such circumstances, do we consider the appointing authority to be the agent of the disputants in appointing or confirming the tribunal, or does the institution also become a party to the separate Arbitrator's Contract?

8 Born provides valuable commentary to guide his readers in answering the above questions. Based on French jurisprudence, he suggests<sup>7</sup> that a disputant which nominates a co-arbitrator does so on behalf of both disputants, pursuant to the terms of their arbitration agreement, and not on behalf of the nominating disputant alone. The co-arbitrator thus selected is neither an agent of the appointing party nor in a contractual relationship with only that party. Rather, the co-arbitrator is in a contractual relationship with both disputants, owing duties to, and having rights *vis-à-vis* each party.

9 Equally, when the co-arbitrators jointly nominate a presiding arbitrator, the offer is on behalf of both disputants and the “acceptance” of that offer is directed to both disputants, resulting in a contract between the tribunal and both disputants.<sup>8</sup>

10 Born’s discussion clarifies that the difficulty with the pure agency analysis is, indeed, that the co-arbitrators have discretion in selecting the presiding arbitrator (subject to any qualification requirements under the arbitration agreement). Not only are the co-arbitrators expected to exercise their own judgment in the appointment of the presiding arbitrator, they jointly have the right (and even the obligation) to override the appointing party’s objection to any particular arbitrator or class of arbitrators as the presiding arbitrator. As Born puts it<sup>9</sup> the role of the agent is inconsistent with the arbitrator’s adjudicative function, which is precisely to be independent of the disputants, with the obligation in some circumstances to refuse to obey their instructions. This adjudicative power and duty would (at least in common law) be inconsistent with the agency theory, where any limits imposed on an agent by its principal cannot be ignored in the exercise of any such power or discretion.

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<sup>7</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,981.

<sup>8</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,981.

<sup>9</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,978, fn 99.

11 Absent any specific restrictions or pre-qualifications stated in the arbitration agreement, the generally accepted position in international arbitration law is that the co-arbitrators jointly hold absolute discretion in the selection of the presiding arbitrator, despite the preferences of the co-arbitrators' respective appointing parties (but subject to any pre-qualifications imposed by the arbitration agreement on the arbitrators to be appointed). This apparent contradiction of normal agency principles can only be explained on the basis that co-arbitrators are appointed to an office, which carries with it certain implied powers and obligations which include the co-arbitrators' right to select a presiding arbitrator regardless of any potential or actual objection from either of their respective appointing parties. If the appointment of the presiding arbitrator proves to be objectionable on valid grounds, either or both disputants can always submit a challenge against that appointment, but the appointing party cannot override, dictate or prevent its appointed co-arbitrator's choice of presiding arbitrator. The fact that institutions often have to confirm (and therefore may reject) the choice of the co-arbitrators also does not inhibit the co-arbitrators' original discretion.

12 Again, the nature of the contract might have to be considered *sui generis* in that it incorporates some features of the law of agency and other features, giving effect to the arbitration agreement and justifying the co-arbitrators' exercise of discretion in appointing a presiding arbitrator or, indeed, on any substantive or procedural matter to be decided in the arbitration (*cf* the position of an architect or other certifying officer in a building contract who is engaged by the owner but exercises a quasi-judicial function in certifying progress payments due to the contractor).

13 That is not to say that I disagree with Born's analysis; I am merely expanding on it. I believe Born is correct in his proposition that an appointing party nominates a co-arbitrator on behalf of both disputants and that the co-arbitrators then jointly appoint a presiding arbitrator, also on behalf of the disputants. It is, however, important to emphasise that this *sui generis* contract undeniably incorporates certain features of the law of agency, namely acting on behalf of another, but with more discretion than is normally permitted.

14 There are, therefore, *three contracts* for the whole appointment exercise of a non-institutionalised *ad-hoc* three-person tribunal: *two contracts* when the two parties respectively appoint the co-arbitrators, and *the third* when the co-arbitrators jointly appoint the presiding arbitrator. After the conclusion of these three contracts, these contracts would merge so that there would eventually be one Tribunal Contract between the three members of the panel on the one hand and the two disputants on the other, which would incorporate all the terms of the arbitration agreement.

15 Another interesting conundrum is the question of the contract(s) with the institution.<sup>10</sup> Born contends that, where the parties have agreed to institutional arbitration, the institutional rules are incorporated into the Arbitrator's Contract in the same manner as the arbitration agreement (presumably by way of incorporation by reference). Born goes on to say that the relevant arbitral institution is best regarded as a party to a contract (or contracts) with the tribunal and the disputants, specifying the institution's rights and duties. In contractual terms, the arbitral institution's contract with the disputing parties is formed when an institution offers to administer arbitrations between disputing parties that have incorporated its rules into an arbitration agreement, with that offer being accepted by the disputants through the submission of a dispute arising under that arbitration agreement to the institution.<sup>11</sup> After the formation of the arbitral institution's contract with the disputants, a similar contract is formed between the arbitrators and the institution, following which a merged contract is formed between the disputants, the tribunal and the institution.

16 The final result should therefore be an enlarged Tribunal Contract ("the Enlarged Tribunal Contract") with the disputants, the tribunal and the institution all being parties to the Enlarged Tribunal Contract, which would set out the mutual rights and obligations of the parties to this

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<sup>10</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,984ff.

<sup>11</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 1,985.

Contract. However, it must be recognised that there may be disputes between two or more parties to this Enlarged Tribunal Contract which may not impinge on the rights and liabilities of the other parties to the Contract (see the following paragraph), which would not necessarily involve the disputants), and there may be problems in isolating which of the parties should be joined in an action based on an alleged breach of the provisions of the Enlarged Tribunal Contract, where less than all of the four parties are named in the court action to remedy such a breach.

17 It is likely that some rights and obligations of the tribunal and the institution *inter se* will not concern the parties and problems can arise in disputes concerning these *inter se* provisions. For example, imagine a dispute arising between the tribunal and the institution about (a) the amount of fees fixed by the institution payable to the tribunal or (b) with respect to insufficient deposits to cover the awarded fees of the tribunal. If such a dispute had to be litigated between the tribunal and the institution, then including the disputants as additional parties to the litigation may result in procedural complications. However, it is also likely that the courts would be able to solve these procedural problems although they would have to make new law in doing so because of the lack of judicial precedents in this area.

18 Moving on, I pose this question: what if, for whatever reason, the institution becomes unable or unwilling to continue to administer the arbitration? This is not a completely theoretical question in view of the recent impositions of international sanctions against certain countries, resulting in several major arbitral institutions having to work around the restrictions that these sanctions have imposed on the normal administration of an arbitration, particularly in financial matters. Could either of the disputing parties then challenge the continued existence of the arbitration on the ground that the institution's inability or unwillingness to perform its contract in accordance with its terms amounted to sufficient justification for termination of the arbitration agreement between one or both of the disputants and the institution? If so, what then would happen to the original arbitration agreement? Should it be considered to remain alive and binding so long as the disputing parties could mutually agree on another institution, and if

mutual agreement could not be reached, then would the disputing parties have to resort to *ad hoc* arbitration?

19 Presumably, if both disputants agreed to terminate their contract with the institution on the grounds of serious breach of contract or *force majeure* (where applicable), the disputants would have to jointly agree on another institution to administer the arbitration, and further difficulties might arise as to whether any orders made under the previous institution should be carried over into the new arbitration. But if agreement could be reached on these threshold questions, then there would have to be a fresh agreement between the new institution and the disputing parties incorporating the new institution's rules. But what if only one disputant claims to terminate the contract with the non-performing institution and can demonstrate valid grounds for contending that there has been breach of contract or applicable *force majeure* that justifies termination?

20 Presumably, since it is difficult to envisage an institutional contract with the parties remaining in force when one of the three legs holding up the stool is broken, that institutional arbitration could not carry on and would effectively also become discharged. And then the question may arise whether the disputant which chose to terminate the Enlarged Tribunal Contract could argue that the whole arbitration agreement, which was postulated on an institutional arbitration under a particular institution, had become unenforceable, with the result that the existing arbitration agreement could be treated as being discharged on grounds of applicable breach of contract or *force majeure*, leaving the parties (including the tribunal and the institution) to resolve their dispute in a national court. Whether or not the existing arbitration agreement (and the extant arbitration) could be salvaged by an appropriate legal theory would depend on the applicable law governing the breach of contract or the *force majeure* (which would have to be the applicable law of the arbitration agreement and all the controversy that might entail).

21 Another hypothetical problem might arise if the arbitral institution did not have a separate legal entity, but were simply a business division of another corporate entity, and this division was then sold to a third party as a business rather than as a legal entity, and the new owner

wished to carry on the business of that arbitration centre under the same name. Technically, if the arbitral centre<sup>12</sup> were not a legal entity, most systems of law would consider the contract entered in the name of the unincorporated centre to have been legally entered into by the corporate owner of the centre. Hence, because the contract between the centre<sup>13</sup> and the parties would necessarily contain actual rights and obligations between all of the contractual parties, the centre would be contractually obliged to perform its services of administration in consideration of the fees levied by that centre on the disputants. Thus, for example, what if the arbitration centre were, for reasons of labour shortage, unable to have adequately qualified or experienced officers in the centre to manage an arbitration, and the disputing parties then agreed to terminate that arbitration at the centre on the ground of serious breach of contract or applicable *force majeure*? Would the owner of the centre be liable for damages in wasted costs and new institutional fees?

22 In the case of the sale of an unincorporated arbitral institution (which would be tantamount to a sale of a business) the question would also arise whether the business of an unincorporated body (including its outstanding obligations under its contracts with various disputing parties and arbitrators) could be lawfully sold to a third party without the disputants' and the tribunal's consent. Since the contract with the centre imposes obligations on the centre (and its owner), those obligations would not (at least under common law) be assignable to a third party without the original counterparties' consent (*ie*, the disputing parties and the tribunal). If such consent were sought, it is possible that some arbitrating parties involved in an ongoing arbitration at that arbitration centre would (for reasons unassociated with the performance of the

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<sup>12</sup> In this paragraph, I will proceed by referring to "the arbitration/arbitral centre" or "the centre", rather than the arbitral institution, so as to emphasise that the discussion is about an unincorporated arbitral institution.

<sup>13</sup> I will continue this discussion on the basis that the centre is the contracting party with the disputing parties, although the legal responsibility for any contracts entered into in the name of the centre will lie with its owner.

institution's obligations but rather for their dissatisfaction at being locked into a particular arbitration as an unwilling party) be happy to deny consent as an excuse to terminate the arbitration. The owner of the centre being sold would then have to decide between (a) keeping the centre (or at least part of it) under its ownership until the dissenting parties' arbitration was completed (b) deferring the sale of the centre or (c) restructuring the sale so that the consent of the disputants would not then be required for the sale to go through, *eg*, by selling the shares of the corporate owner of the arbitration centre to the intending buyer rather than the business of the centre so that there would be no change in the contracting parties to the Enlarged Tribunal Contract.

23 For the sake of completeness, I should briefly further explore the contract between the institution and the tribunal, which mainly revolves around the latter's duties as set out in the institutional rules and in the law of the seat. The only issue likely to arise in practice between the institution and the tribunal (other than regarding payment of fees) would be the issue of the removal of arbitrator(s) by the institution and whether any removed arbitrator(s) would have recourse to the courts of the seat to reinstate themselves or to sue for damages. Issues might also arise in the computation or assessment of the correct or fair fees due from the institution to the tribunal. In terms of quantum, since there is no internal dispute resolution mechanism to resolve disputes over quantum, one assumes that such disputes would have to be settled in court (presumably in the court of the seat). A more interesting scenario might be where the institution takes charge of all financial matters, including fixing the amount of the deposits and holding them. It is unclear under most, if not all, of the institutional rules what exactly are the institution's duties to the tribunal in respect of deposits. In this respect, imagine a situation where fees are fixed by the institution but are unpaid by the disputants because of insufficient deposits. Who then is liable to the tribunal for any shortfall? Institutions normally try and take the position that they are merely agents for the tribunal in collecting deposits, and therefore do not underwrite the actual payment of fees and expenses due to the tribunal if there are insufficient funds in the institution's escrow account to pay what is lawfully due to the tribunal. But what if the institution has been negligent in failing to

collect sufficient deposits to cover the amount of fees actually awarded or allowed by the institution? Again, since there is no internal dispute resolution mechanism in most institutional rules, any dispute as to liability will also have to be referred to the relevant court of the seat.

24 Finally, Born makes the point<sup>14</sup> that the contract between the arbitral institution and the tribunal does not supersede or displace either the arbitration agreement, the Arbitrator's Contract (between the parties and arbitrators), or the arbitral institution's contract with the disputants, but instead sits alongside all of these agreements, functioning together with them to regulate the conduct of the various persons and parties involved in the arbitration. This seems a sensible analysis of the typical scenario. However, questions might arise when the arbitral institution exercises its powers under the applicable rules to remove an arbitrator (or when the arbitrator voluntarily resigns without good cause). If that removal or resignation is effected, would the arbitrator be entitled to be remunerated on a *quantum meruit* basis? Would the answer to that last question depend on whether the institution concerned remunerates its arbitrators on a per hour basis (as with LCIA and ICSID) or on a fixed fee scale charge basis (as with the ICC and SIAC)? In the former case, the ascertainment of the amount of the *quantum meruit* might be more straightforward, but in the latter case may pose more difficulties. This would be a separate question from whether or not the disputants could sue an arbitrator who was removed on the ground of misconduct or undisclosed conflicts of interest or who resigned without offering any reason, thereby disrupting the conduct of the arbitration. Those matters, however, are usually discussed as part of the overall position of arbitrators' immunity from suit.

25 I raise these various issues in the hope that they will be addressed in Born's next edition of his Treatise to give even further guidance to the international arbitration community.

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<sup>14</sup> Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at pp 1,985–1,986.

### Background to Essay 4

I have given talks on this subject from time to time in different cities, but was finally persuaded by a new law journal from India to pen my thoughts on paper for publication. India has huge potential to be a significant source for international arbitration work. I thought such an article would be of interest because, while India has been familiar with the concept of international arbitration since at least 1996 (when the Indian Arbitration and Conciliation Act was passed), there has been strong resistance within India to adopt institutional arbitration as the norm. Instead, the Indian legal profession has preferred to choose *ad hoc* arbitration governed only by the 1996 Act (which was subsequently amended in 2015), and not even applying the UNCITRAL Arbitration Rules. Nevertheless, it is clear that international arbitration as a mode of dispute resolution has been looked upon with much favour in India, and the Singapore International Arbitration Centre (“SIAC”) has been able to persuade large numbers of Indian parties to (a) choose international institutional arbitration as a strong candidate for resolving cross-border disputes involving one or more Indian parties, and (b) choose SIAC as its preferred institution.

This has resulted in mutual benefit for both countries, as India constantly remains one of the greatest users of SIAC arbitration, providing Indian users with efficient and fair arbitration, and enhancing SIAC’s reputation as one of the world’s most important international arbitration centres. The establishment of the Mumbai Centre for International Arbitration in 2016 has given hope for the growth of a homegrown international arbitration centre in India, and while this essay was written before 2016, the principles set out therein should be a useful guide and checklist for those interested in the development of an indigenous arbitration centre in India.

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*I wish to extend my thanks to NALSAR ADR Review for kindly granting me permission to republish this essay in this book.*

## WHAT DOES IT TAKE TO BE AN INTERNATIONAL ARBITRATION CENTRE?

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Michael HWANG SC\*

This short paper describes, from an objective viewpoint, the hallmarks of a successful international arbitration centre. It does not purport to recommend that India develops such an international arbitration centre as that is a decision for India to make having regard to its own needs and priorities. However, it may assist in that decision for the distinguishing characteristics of such a centre to be understood.

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### I. Good arbitration law

1 It is a pre-condition of an international arbitration centre that the country in which the centre is located must have acceded to the New York Convention (the “NYC”) as (at the latest count) the NYC has been signed by 146 countries. It is unheard of for an international arbitration centre to emerge if it is located in a country that does not recognise the NYC. A good example of this is Dubai, which had a (largely domestic) arbitration centre under the auspices of the Dubai Chamber of

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Commerce and Industry (“DCCI”) for several years, but its development as an international arbitration centre was held back by the refusal of the United Arab Emirates (“UAE”) to accede the NYC. Since UAE’s accession in 2006 Dubai has developed tremendously as a major international arbitration centre in the Gulf region with new filings at the Dubai International Arbitration Centre (“DIAC”) of over 430 cases in 2010, a figure which would be envied even by Singapore and London, which only had filings at their respective national arbitration centres in the region of 200 for the same year. India of course has acceded to the NYC since 1960.

2 The next prerequisite is to have an up-to-date arbitration law reflecting the common international standards of international arbitration practice. It is fortunate that there is a universally applicable Model Law that can be adopted as a basis for all aspiring international arbitration centres, namely the UNCITRAL Model Law, which was first promulgated on 21 June 1985 and has since formed the basis for virtually all new or reformed arbitration laws passed after that date. Notable exceptions are England and Wales, which rely on their own Arbitration Act 1996 (but Scotland has its own arbitration legislation based on the Model Law). In the USA only a minority of states have adopted the Model Law, with the Federal Arbitration Act still being the primary arbitration legislation at Federal level. In Asia, the list of countries that have adopted the Model Law is endless, but two exceptions stand out: China and India. Although China International Economic and Trade Arbitration Commission (“CIETAC”) has the highest filings of international cases in the world year after year (over 1350 cases in 2010, although the majority of them were from domestic companies, which include foreign joint ventures), it is not generally considered a major international arbitration centre. This is because the vast majority of cases are between international parties (often in the guise of Chinese incorporated companies) and Chinese parties arising out of transactions within China where international parties have limited alternative choices to have their cases heard outside China owing to strong moral and commercial pressure from their Chinese counterparties. So the number of arbitrations that are heard in CIETAC do not form the basis for a generalisation that Beijing will make

a successful international arbitration centre in the sense of hearing cases which have nothing to do with the forum.

3 India is the other major Asian country that has been reluctant to adopt the Model Law as such, although it has adopted portions of the Model Law in its Arbitration and Conciliation Act of 1996. It is not my function in this short paper to discuss the efficacy of the Indian Arbitration and Conciliation Act (particularly in the eyes of non-Indian parties), but it is sufficient to say that India's arbitration legislation is not (in its current state) likely to attract any foreign parties to arbitrate in India unless compelled by commercial or other pressures to do so. In other words, one of the reasons why two non-Indian parties are unlikely to arbitrate in India would be the way in which the Indian Arbitration and Conciliation Act has been drafted (or at least as it has been interpreted by the Indian courts).<sup>1</sup>

## **II. Arbitration-friendly judges**

4 A good arbitration law is a necessary, but not sufficient, condition for a successful international arbitration centre. A good arbitration law can make a good international arbitration centre only if the laws are applied properly by the country's judges in accordance with generally accepted international principles of international arbitration. Judges must be pro-arbitration in this sense:

- (a) Judges must not feel that arbitration is the enemy of the courts but a legitimate alternative means of dispute resolution so as to give the community a wider choice of methods of dispute

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<sup>1</sup> It is noted that the Indian Arbitration and Conciliation Act of 1996 has been amended in 2015, after the publication of the original essay in 2012. These amendments have brought about significant changes in an attempt to make arbitration a preferred mode of resolving commercial disputes, and to make India a hub of international commercial arbitration. While these changes are to be welcomed, it remains to be seen how these changes will be applied in practice.

resolution: arbitration is therefore part of the system of justice administered in the country alongside the national courts.

- (b) Judges must realise that their role is only to intervene in arbitration to support the tribunal, and not to supplant its jurisdiction unless, on the true construction of the arbitration agreement or on other (exceptional) valid legal grounds, the tribunal has no jurisdiction to hear the case.

5 It is not the court's role to second guess a tribunal's decision when arbitral awards are challenged in the courts because the power of setting aside is limited to certain grounds, which are mainly technical, jurisdictional or involve a violation of the rules of procedural fairness. A commonly invoked ground (*viz*, contrary to public policy) is strictly and narrowly defined in other Model Law countries, and does not in any event afford the courts a right of appellate review on the merits of the case because they have no such power of appellate review, but only a power to set aside awards in the narrowly defined circumstances set out in Article 34 of the Model Law.

6 These principles are well understood by the courts in major international arbitration centres like France, Hong Kong, England and Wales, Switzerland, USA, Sweden, Singapore, Korea and Japan. Again, this is not a place to discuss the merits of the well-known decisions of the Indian courts setting aside tribunal decisions, except to say that they have not been well received by the international arbitration community outside of India.

### **III. A good arbitration centre**

7 Theoretically, arbitrations can be held on an *ad hoc* basis, *ie*, without an administering institution. But there is no major arbitration centre that does not also have a famous international arbitration centre. Paris of course has the International Chamber of Commerce (the "ICC", which is not a French institution, but is a global centre based in France); London has the London Court of International Arbitration; Stockholm has its Chamber of Commerce; Zurich and Geneva have their respective Chambers of Commerce; Hong Kong has the Hong Kong International Arbitration Centre; Dubai has the DIAC (as well as the newly established

LCIA-DIFC Arbitration Centre); Beijing has CIETAC as well as the Beijing Arbitration Commission; and Singapore has the Singapore International Arbitration Centre (“SIAC”). While there are arbitration centres in India, it is fair to say that, at present, they do not enjoy either widespread national support or significant international recognition (the preference apparently being for *ad hoc* arbitrations simply relying on the Indian Arbitration and Conciliation Act).

#### **IV. Strong arbitration bar**

8 It is not coincidental that the strongest international arbitration centres also produce the strongest arbitration bars (London, Paris and New York). Switzerland handles less heavy international arbitration cases as counsel simply because of the relatively small size of its law firms, but the arbitration experience of that country is spread very wide, and year after year Swiss arbitrators prove to be in the greatest demand compared to other nationalities in arbitrations held under the auspices of the ICC. A good international arbitration centre should have a sufficient group of locally qualified arbitration practitioners who can be appointed as arbitrators, as well as a sufficient number of locally qualified arbitration practitioners, both to initiate and handle arbitration cases to be heard in the courts of that arbitration centre. Further, it is important that such locally qualified arbitration practitioners are competent to handle applications to the local court for appropriate court relief in the specific areas reserved for the local court to intervene, *eg*, jurisdictional challenges, interim reliefs, challenges to arbitrators and setting aside applications. This at least should not be a major problem for India, as it has many able arbitration practitioners, most of whom can sit as arbitrators and others of whom can act as arbitration counsel. However, it is important that those who sit as arbitrators do not conduct arbitrations in the same way as court proceedings, because the hallmark of arbitration is to provide an alternative method of dispute resolution to litigation in court, and such alternative method must be more expeditious and economical than litigation without sacrificing the essence of justice. For the same reason, it is also important for arbitration

advocates to understand this principle and not try to argue arbitration cases as if they were litigation cases.

9 It has been noted that this is a factor which leads some parties not to choose New York or another American venue as a seat, for fear that the counsel engaged for the case (as well as some of the arbitrators) might be in the classical mould of the American litigation lawyer, with his emphasis on discovery and detailed cross examination (which will be even more detailed than in an American trial owing to the lack of depositions in arbitration). This perception may be unfair, as there are experienced arbitration counsel in the major American cities, and New York is still a great arbitration centre, but such perceptions can make the difference to some parties' choice of venue, and this is a point that Indian arbitration advocates would do well to remember.

10 It is significant that the great international arbitration centres of the world are also those cities which have a substantial core of competent and experienced local arbitration practitioners. London, Geneva, Zurich, New York (despite the perceptions mentioned above) and Paris are of course the prime examples and, to a lesser extent, Dubai, Singapore and Hong Kong.

## **V. Training for arbitrators**

11 Most international arbitration centres also run training facilities for arbitration practitioners, both junior and senior. The most well-known of these are:

- (a) the Chartered Institute of Arbitrators (which has a worldwide reach);
- (b) the International Chamber of Commerce (mainly holding courses in France but in selected cities elsewhere as well);
- (c) the London Court of International Arbitration (mainly in the UK but also regularly in selected overseas centres);
- (d) Singapore has the Singapore Institute of Arbitrators as well as a branch of the Chartered Institute of Arbitrators offering practitioners courses leading to internationally recognised qualifications as arbitrators. Both universities, National University

of Singapore and Singapore Management University, also offer academic courses in arbitration;

- (e) Hong Kong has very much the same picture as Singapore with training available both at practitioner as well as academic level.

12 The real problem is the training of judges who hear arbitration matters coming before the court. This is not so much of a problem in mature international arbitration centres, where judges know their exact role and where a rich body of case law has laid down well defined principles for them to follow. In countries with less arbitration exposure, judges can (and often do) get it wrong, thereby making their arbitration centres less attractive. Countries whose national courts have attracted international criticism for their arbitral decisions include Thailand, Malaysia, Philippines and Bangladesh.

13 In Singapore, the SIAC used to organise orientation courses for retired judges to inculcate in them the principles and practices of arbitration so that they could fully appreciate the differences between the two modes of dispute resolution. This is also a necessary condition for other judges to become more acceptable as international arbitrators. The President of the Chartered Institute of Arbitrators has recently reported that retired judges score relatively low marks when taking the examinations set by the Chartered Institute of Arbitrators, so retired judges should appreciate that there is quite a bit to learn about arbitration, and that judicial practices and procedures cannot automatically be applied in arbitration without adaptation; some may even need to be abandoned.

## **VI. Arbitration-friendly city**

14 An international arbitration centre needs to be nurtured with the support of its government. Governments must give attractive financial and other support to their international arbitration centres by making immigration and employment pass regulations easy to navigate for foreign arbitration practitioners, whether as arbitrator or as counsel. Horror stories have emanated from Thailand about anti-arbitration measures being implemented by the authorities, but then Thailand is generally considered as an anti-arbitration country, even though its

international arbitration law is founded on the Model Law. Things have reached a stage where international arbitrations which have been fixed for hearings in Thailand have been moved out of that country because of political instability in the country as well as the lack of immigration and employment passes to allow participants to come and work in Thailand for the purposes of their arbitration.

15 In addition, the centre must be located in a place where things work. For example, there must be a proper hearing venue (at least in hotels with adequate hearing and breakout rooms) if not a dedicated arbitration centre, good international and internal communications, consistent power supply, good hotels and restaurants, adequate security and availability of translators and court reporters and minimal (if any) air pollution. The provision of a well-appointed and well-organised arbitration hearing centre makes an enormous difference to the popularity of the city as an arbitration venue. This has been the experience of Singapore, whose caseload increased dramatically after the establishment of a dedicated arbitration building known as Maxwell Chambers: all those who have held hearings in this facility (including many Indian parties and lawyers) have marvelled at its facilities and organisation and have spread word of “the Maxwell Experience” far and wide.

16 There are really no dedicated arbitration centres operating to international standards in India, but this is a problem that can be resolved fairly easily in the medium term. Another problem is the attitude of some major users to the appointment of international arbitrators whose fees appear high to local practitioners, particularly when they are compared to those of the retired Supreme Court judges as arbitrators. By international standards, Indian arbitrators’ fees are modest, but by definition, international arbitrations involve arbitrators with foreign parties who are entitled to appoint arbitrators of their choice, and those arbitrators come carrying their own market charges. If international arbitration is to proceed with each side having counsel and arbitrator of their choice, then the fee structure would have to be what the international marketplace will bear. The question of allocation of fees at the end of the case by way of an order for costs is a separate issue, and can be determined according to local standards if thought

appropriate, but it is not possible to grow an international arbitration centre. Unless it is accepted that the fees of international arbitrators need to reflect their market rates. Another important principle of international arbitration is that the Chair of a three-person Tribunal should not be the same nationality as either of the parties. This principle is not yet recognised in India, where the courts routinely appoint a retired Indian judge as the Chair, despite the fact that one of the parties is Indian.

17 Cost is also a factor, but obviously not a determining one, since the most famous centres are also the most expensive (London, Paris, Geneva, Hong Kong). But it helps an emerging centre if it can say that it has acceptable facilities for an international arbitration at a fraction of the cost of the most expensive centres – this is currently one of Malaysia’s main attractions for the Kuala Lumpur Regional Arbitration Centre (now renamed the Asian International Arbitration Centre).

18 It is not merely the question of being a modern city. There are cities which are relatively modern, but are not particularly attractive to foreigners who have the choice of where they want to hold their arbitration. It is probably one of the reasons why Jakarta is not yet a major international arbitration centre, because it is simply not a destination of choice for various reasons, even though there are many substantial disputes with Indonesian parties which have arbitration clauses (if the seat were Bali it would be a different story). There are a significant number of Indonesian arbitrations held in other centres such as Geneva or Singapore. India is undoubtedly a strong tourist destination, so this factor should not prove an obstacle in the development of major Indian cities as international arbitration centres.

## **VII. Location – Tyranny of distance**

19 All things said and done, an international arbitration centre must be a place where arbitration practitioners and their clients can conveniently go for their hearing. These principles are best illustrated by the present lack of popularity of Sydney, Melbourne and Auckland, each of which can easily fulfil all the preceding criteria as an international arbitration centre but do not achieve the success they deserve simply because of their

distance from the centres which generate arbitration business. The only hope for Australasian centres is if the volume of Asian cases develops to the point where parties can find some justification for holding some of them in Oceania, as opposed to other Asian arbitration centres like Singapore and Hong Kong.

### **VIII. Conclusion**

20 These are the main factors that make for a successful international arbitration centre. It brings with it immeasurable benefits for the city in which the centre is located – revenue from the parties and their legal team and witnesses raising local arbitration and advocacy standards, enhancement of a city's image as a business centre and many more. The development of such a centre is worthy of study, as Singapore has learnt to its benefit.

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## **Background to Essay 5**

This essay emerged in two parts. The first came in September 2014 when I delivered a version of this paper at a conference in Berne, Switzerland. While the written version was still being finalised, I was invited to speak at the 30th anniversary of the founding of the School of International Arbitration at the Queen Mary University of London. I chose to speak on the same topic, as I felt that the Berne lecture was still capable of refinement and improvement. The final version of the lecture was delivered in London in April 2015, after which I submitted the manuscript to both the Swiss Arbitration Association and Queen Mary University, as both institutions wanted to publish the lecture. So there is the relatively rare occurrence of a legal article appearing more or less simultaneously in two publications – one a periodical journal, and the other a book containing all the papers delivered at a conference.

As at the time of publication of this volume of essays, there is no indication yet that anyone has been able to propose a system of disciplining errant arbitration counsel, so this remains a hot topic of discussion and debate in the international arbitration community, and mine is simply another contribution to this discussion. My view is that there are pathological constraints in the system which prevent a logical and practical system from being set up. The problem of defining the basic rules of ethical conduct which ought to be observed by international arbitration counsel is not that difficult, and some compromise solution can be arrived at by yet another set of International Bar Association guidelines or by another respected international arbitration institution like the International Council for Commercial Arbitration. The pathological problem is how to enforce those guidelines. The London Court of International Arbitration Arbitration Rules 2014 come closest to a form of enforcement but, in my view, that system is flawed because the rules entrust the role of enforcement to the tribunal. In this essay, I explain why the task of disciplining errant counsel should not be imposed on the tribunal. My alternative solution is for the responsibility of drafting the necessary rules and enforcing compliance with those rules to be undertaken by the different international arbitration institutions This would be the most logical

and practical solution, if only the international arbitration institutions could find the will to take on this responsibility.

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## A NEW APPROACH TO REGULATING COUNSEL CONDUCT IN INTERNATIONAL ARBITRATION\*

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\* This is an expanded version of a presentation made by the first author at the ASA Conference, “Arbitration During the Next 40 Years: Preparing for the Challenge” in Berne on 5 September 2014. An expanded version was subsequently re-presented at the School of International Arbitration 30th Anniversary Conference at Queen Mary College, University of London in April 2015. The chapter also features in 33 ASA Bulletin 3/2015 (September). References to the first person singular are to the principal author.

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## **I. Issues within the current debate**

1 The subject of regulation of counsel conduct in international arbitration has been heavily discussed in the last few years, particularly after the introduction of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration (“IBA Guidelines”) and the 2014 London Court of International Arbitration Rules of Arbitration (“LCIA Rules”) General Guidelines for the Parties’ Legal Representatives. In my opinion, the IBA Guidelines will go nowhere. They are meant as soft law to establish a code of ethics for advocates in international arbitration. But the reason why they will go nowhere is because of Rule 1 which says: “The Guidelines shall apply where and to the extent that the Parties have so agreed”. Turkeys usually don’t vote for Thanksgiving or Christmas (and I will elaborate on this comment shortly). Rule 1 further states that the IBA Guidelines can also apply if:

[T]he Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of party representation to ensure the integrity and fairness of the arbitral proceedings.

The IBA Guidelines do not actually require the consent of the parties, and a tribunal can adopt them after “consultation with the Parties”. However, if, as a result of the consultation, one or both parties object to the adoption of the IBA Guidelines, it would be a bold tribunal which would decide to impose the IBA Guidelines on parties without the parties’ unanimous consent.

2 The reason why it is unlikely there will be widespread agreement to adoption of the IBA Guidelines by party representatives is not so much that a party’s legal team actually intends to carry on conduct in a case in a manner that would violate one or more ethical guidelines. Rather, they may fear (a) how the tribunal will interpret these guidelines when the party’s lawyers may not be familiar with the ethical codes to which the tribunal members are accustomed; and (b) that the other side may abuse the IBA Guidelines by using them as a basis for making frivolous and unfounded accusations of unethical behaviour (another method of derailment by distraction).

3 Furthermore, there are general problems with the drafting of the IBA Guidelines. Terms used are often vague, involving concepts that are argumentative. For example, Guideline 13 uses terms such as “improper purpose” and “unnecessary delay”, which serve to open up yet another controversy.<sup>1</sup>

4 By contrast, the LCIA Rules do have teeth and enforceability in the sense that the parties expressly authorise the tribunal to take certain disciplinary action against errant counsel, as well as “specifying sanctions and establishing formal processes for managing ethical misconduct of counsel”.<sup>2</sup> However, the position of the Swiss Arbitration Association (“ASA”) with respect to regulating counsel behaviour most clearly identifies a shortcoming that exists in both the IBA Guidelines and the LCIA Rules. The ASA has pointed out that it is fundamentally wrong to make the tribunal take on the responsibility for disciplining or sanctioning errant counsel. First, it is not the natural function of a tribunal, which is simply to decide a dispute. Second, if a tribunal is tasked with investigating and ruling on possible misconduct by counsel, it will generate an unhealthy tension between tribunal and counsel being investigated, with the following likely consequences:

- (a) First, it will distract the tribunal from its main task of deciding the case on its merits.
- (b) Next, it will create unhealthy tensions between tribunal and counsel.
- (c) Last, it will provide an excuse (however unjustified) for aggrieved counsel to make a challenge to remove one or more members of the tribunal on the grounds of bias against the counsel concerned.

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<sup>1</sup> Guideline 13 of the IBA Guidelines on Party Representation in International Arbitration (“IBA Guidelines”) states: “A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.”

<sup>2</sup> Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2015) *Asian Journal of International Law* 1 at 22.

5 Another concern with respect to the LCIA Rules is whether their supposed teeth and enforceability are actually an illusion. Professor William (Rusty) Park supports the suggestion of critics of this rules-based approach that these professional codes of conduct should be presented on an “opt-in” or an “opt-out” basis, rather than made applicable in all cases; this suggestion therefore should be explored in order to enhance the optimum degree of acceptance.<sup>3</sup> Yet providing an “opt-in” or “opt-out” basis merely replicates the lack of effectiveness that these rules could provide. If these professional rules of conduct are optional and parties can choose to proceed without committing to them, there is nothing to prevent them from evolving into yet another suggested guideline. As the LCIA Rules’ enforceability is one of its main attractions in comparison to the IBA Guidelines, allowing the LCIA Rules to be opted into or out of will water down this particular benefit.

6 The ASA has proposed the creation of a transnational regulatory body with jurisdiction to enforce ethical principles and sanction violations, a body to be known as the Global Arbitration Ethics Council (“GAEC”). But while I find the ASA’s position understandable and valid to a large degree, this is unlikely to succeed for various reasons:

- (a) First, confidentiality will have to be dealt with by changing the rules of the applicable institution to allow the disclosure of confidential information and documents to a third party.
- (b) Next, it is difficult to see how the GAEC could be funded.
- (c) Last, how does one impose such an overarching structure over the arbitration hierarchy? It is unlikely that both parties will voluntarily agree to submit complaints and issues against the behaviour of counsel to the GAEC for the same reasons that parties would be unlikely to submit to the IBA Guidelines. Accordingly, the only way is for institutional rules to be amended to allow the GAEC to assume jurisdiction without the consent of the parties.

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<sup>3</sup> William W Park, “A Fair Fight: Professional Guidelines in International Arbitration” (2014) 30(3) *Arbitration International* 409 at 420.

7 I also do not accept the unqualified proposition that a tribunal has no business in imposing standards of conduct which must be complied with by counsel or otherwise face sanctions. At the heart of my position is the principle that a tribunal has an inherent power to maintain the integrity of the proceedings. That means it has the power to take such steps as may be necessary to ensure that it carries out its mandate of conducting an arbitration fairly, treating both parties equally and allowing each party a reasonably full opportunity of presenting its case.<sup>4</sup> This is a proposition that few would challenge.<sup>5</sup> If the actions or omissions of counsel make it impossible or difficult for the tribunal to carry out its functions, then the tribunal surely has the right and the power to take such steps as may be necessary to restore order to the proceedings as well as maintaining the integrity of the process. To take an extreme example, if a counsel at a hearing refuses to comply with the instructions of the tribunal with regard to the length of his oral submissions or cross examination, or if he constantly interrupts the tribunal members or his opposing counsel from completing their remarks when they legitimately have the floor, such conduct can easily be classified as process-destroying. In such circumstances, few would quarrel with the tribunal's right to admonish counsel for disrupting the proceeding by warning him that future misconduct will lead to sanctions, such as a fine or being sent out of the hearing room for a specified time (*cf*a rugby yellow card). In the case of further transgressions, the tribunal could even prohibit any further participation in the proceedings by errant counsel. Of course such measures are unlikely to be readily

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<sup>4</sup> Based on Article 18 of the UNCITRAL Model Law on Arbitration (*cf*s 33 of the English Arbitration Act 1996 (c 23)).

<sup>5</sup> The Swiss Arbitration Association ("ASA") has noted that "under most if not all frequently used arbitration rules arbitrators have, expressly or implicitly, the powers to ensure the 'fundamental fairness and integrity' of the proceedings" Association Suisse de l'Arbitrage, IBA Guidelines on Party Representation in International Arbitration: Comments and Recommendation by the Board (Vorstand) of the Swiss Arbitration Association ("ASA Board"), published on 20 January 2014, memorialising the results of discussion at a meeting of the ASA Board on 3 October 2013, para 2.1.

adopted by tribunals, even with difficult counsel, because of legal problems which could arise if the offending counsel's client does not have supporting counsel to take over the advocacy role of the offending counsel after the latter has been suspended or removed. In such cases, the offending counsel's client would be likely to ask for an adjournment to engage other counsel to take over the case, which would result in an adjournment of the hearing, which is usually not a result the other side would welcome even if it had objected vigorously to the conduct of the offending counsel. But such draconian powers must be available to tribunals in the same way as the powers of national courts to impose immediate sanctions on persons who commit contempt of court during the course of court proceedings.

## **II. The actual issues**

8 The main problem with the current debate is that everyone is focusing on one question or one rule when there are actually three stages of every arbitration, with each stage requiring a different approach to ethical violations by counsel. My view of the tribunal's powers of discipline is to ask for the question of tribunal control over counsel conduct to be posed at each of the three stages.

### ***A. Prophylactic and preventive sanctions***

9 First, at the early stages of the arbitration when the tribunal has been constituted but the hearing has not yet commenced, it should be within the tribunal's power to take pre-emptive action to prevent a breach of ethical conduct by counsel. This will typically happen when there is a challenge to counsel or his law firm from representing a party in the arbitration because of serious conflict of interest. The best known example of this is *Hrvatska Elektroprivreda d d v The Republic of Slovenia*,<sup>6</sup> where a new counsel appeared at the evidentiary hearing who was from the same chambers as the chairman of the tribunal. The other

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<sup>6</sup> ICSID Case No ARB/05/24, Order concerning the participation of a counsel (6 May 2008).

side objected on the grounds of perceived conflict of interest, and the tribunal eventually ruled to disqualify that counsel in order to protect the integrity of the proceedings, meaning the tribunal was taking pre-emptive steps to prevent a subsequent challenge to the neutrality of the tribunal by virtue of the relationship between the chairman and the counsel. Another example comes from Singapore. In *Vorobiev Nikolay v Lush John Frederick Peters*<sup>7</sup> (“*Vorobiev Nikolay*”), a law firm was restrained from representing the plaintiffs for having represented the defendants in a previous related matter. Although this Singaporean case was not in relation to arbitration, the Malaysian High Court has in *Bauer (M) Sdn Bhd v Percon Corp Sdn Bhd*<sup>8</sup> (“*Bauer v Percon*”) upheld an arbitrator’s decision to order withdrawal of counsel for the claimant. The respondent had objected to both the firm and solicitor acting as counsel for the claimant as the solicitor had previously provided legal advice in a separate earlier arbitration involving the respondent. This earlier arbitration had also pertained to the same project that was in dispute in the current arbitration. The court held that the tribunal had appropriately published an interim award ordering the withdrawal of both the firm and the solicitors from acting as counsel for the claimant. Although *Vorobiev Nikolay* is not about arbitration and *Bauer v Percon* has some suspect reasoning, the point is that both tribunals (the court and the arbitral tribunal) clearly thought that they were entitled to make orders against party representatives as a pre-emptive measure against conflicts of interest. At this first stage, there can be no objection to a tribunal exercising its powers of preserving the integrity of the proceedings by whatever steps it needs to achieve that end, and it is arguable that the IBA Guidelines do not add much to this process. The tribunal will rule on the challenge or complaint against the alleged offending counsel. Whatever decision it makes will be the end of the matter, and parties will simply have to move along and try the case with a change of counsel if necessary.

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<sup>7</sup> [2010] SGHC 290.

<sup>8</sup> [2003] 6 MLJ 205.

## **B. Remedial sanctions**

10 The second stage is when the proceedings have reached the evidentiary hearing.<sup>9</sup> Again, the tribunal has the inherent power to preserve the integrity of the proceedings by ensuring that the actual hearing is not obstructed in any way by unjustified tactical behaviour. Examples of such conduct might include: (a) repeated breaches of confidentiality relating to the proceeding by one party (assuming that the proceedings are indeed subject to the protection of the doctrine of confidentiality); (b) excessive requests for document disclosure despite warnings from the tribunal; (c) refusal by counsel to comply with tribunal orders in relation to filing deadlines and not applying for extensions of time before the expiry of the original filing date; (d) repeated interruption of counsel's submissions or the other party's witnesses, not allowing them to finish what they are saying; (e) any conduct which would, in the national courts, be regarded as contempt of court.<sup>10</sup> In this second stage, where the misconduct of a counsel is

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<sup>9</sup> This stage could also include contested interlocutory applications, such as document production or interim measures. It encompasses the period of time after the filing of initial submissions up to the end of the hearing and possibly the release of the award.

<sup>10</sup> At a minimum, the test should be any conduct which would qualify as contempt in a common law court, such as refusing to comply with a direct order of the tribunal. The powers of the court are broad and meant to ensure that, once a trial is in progress or about to start, it "can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment" (Lawton LJ in *Balogh v St Albans Crown Court* [1975] QB 73 at 92). In the specific context of professional advocates, the court must balance considerations of the advocate's duty to the client and duty to the court. Generally, case law has indicated that conduct that qualifies as contempt must be either exceptional, or neutral conduct can be categorised as contempt if intent can be proven of an "abuse of process" or "a deliberate manoeuvre ... calculated to interfere with the due course of the trial" (*Bache v Essex CC* [2000] 2 All ER 847, *Lewis v Ogden* (1984) ALJR 342). Exceptional conduct that has attracted findings of contempt are a contemnor holding himself out as a solicitor and providing legal services when he had been disqualified from practice (*Re Ravinder Balli* (also known  
(continued on next page)

manifest and egregious, the tribunal could take action by first issuing a warning, followed by directions.<sup>11</sup> Finally, after giving the offending counsel an opportunity to show cause why he should not be subject to sanctions, the tribunal could issue immediate sanctions such as a fine or an order that counsel pay the costs of the additional time caused by counsel's disruptions out of his own pocket (that is, not charged to his own client). There will of course be the problem that more drastic sanctions imposed (such as sending the lawyer out of the hearing room or disqualifying him from taking further part in the proceedings) could create further problems in the speedy disposal of the case, but that would be a judgment call for the tribunal.

11 A more fundamental problem in guiding the tribunal's judgment calls is the variance in legal cultures, such as the different attitudes towards document disclosure. In this sense, the IBA Guidelines seek to impose some consistency by providing in Guideline 16 that "a Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce". Professor Park critiques the imposition of such orders of disclosure, indicating that practitioners who emphasise

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*as Ravinder Singh*) [2011] EWHC 1736), a contemnor resorting to tactics designed to lay the groundwork for a new trial by needling the court and openly accusing the judge of badgering a witness (*Shumiatcher* (1967) 64 DLR (2d) 24) and alleging partiality on the part of a judge (*Vidyasagara v R* [1963] AC 589). In Singapore, contemptuous behaviour was found from a flagrant breach of undertakings which included, *inter alia*, to refrain from making offending statements, similar to those the defendant had made in open court in a previous case which attacked the integrity of the police force, prosecution and the judiciary (*The Law Society of Singapore v Gopalan Nair (aka Pallichadath Gopalan Nair)* [2010] SGDT 11; *Public Prosecutor v Gopalan Nair* [2008] SGDC 313).

<sup>11</sup> There is the legend of the arbitrator who, after continual and repeated exchanges between counsel calling each other names in correspondence and submissions, finally issued an order that, "All future submissions by the Parties shall not contain any adjectives or adverbs".

their duty to their clients over their duty to the courts would not be likely to accept such a provision, thereby affecting the legitimacy of the provision itself.<sup>12</sup> Yet the key factor in Guideline 16 is “undertaken, or been ordered, to produce”. While there is no positive duty of disclosure in arbitration, once the tribunal has declared an order, counsel cannot actively assist a client to suppress documents. The classic case of *Myers v Elman*,<sup>13</sup> (while being in the litigation context) which imposes a positive duty of disclosure, still exemplifies the:

[u]nderlying principle ... that the Court (or a tribunal) has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally

– essentially the tribunal’s power to maintain the integrity of the proceedings.

12 Additionally, some forms of misconduct may become “non-arbitrable matters” in some jurisdictions and more properly relegated to the province of local regulatory bodies. In *Bidermann Industries Licensing v Avmar*<sup>14</sup> (“*Bidermann*”), the respondents’ claim to disqualify the claimants’ attorneys on grounds that they ought to be called as witnesses owing to their involvement in underlying issues and receipt of confidential information was deemed by the Appellate Division of the Supreme Court of New York to be intertwined with public policy considerations, and therefore “beyond the jurisdiction of arbitrators”. The Southern District of New York further affirmed *Bidermann*, determining that “attorney disqualification is ‘a substantive matter for the courts and not arbitrators’”.<sup>15</sup> I was also involved in a similar case involving a lawyer from Malaysia where complaints against the conduct

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<sup>12</sup> William W Park, “A Fair Fight: Professional Guidelines in International Arbitration” (2014) 30(3) *Arbitration International* 409 at 419.

<sup>13</sup> [1940] AC 282 at 319.

<sup>14</sup> 173 AD 2d 401 (NY App Div, 1991).

<sup>15</sup> *Northwestern National Insurance Co v Insko* 11 Civ 1124 (SAS) (SDNY, 3 October 2011) (para 4(A)(1)); 866 F Supp 2d 1124 (2011).

of advocates had to be referred to the Bar Association. In my case, a complaint was made to me as sole arbitrator to deny admission of a witness statement given by counsel for one of the parties on the grounds that advocates were prevented by subsidiary legislation from giving evidence when they were appearing as counsel in the same case. I held that any complaints based on violation of professional ethics should be referred to the Bar Association as the proper arbiter of professional misconduct, but that I would make my ruling on the admissibility of the lawyer's witness statement on the basis of evidential, rather than ethical, principles. The tribunal should be able to work around these types of problems unless they impede the proceedings so excessively that the hearing grinds to a snail's pace or even a complete halt.

### **C. *Punitive sanctions***

13 The third stage would be after the hearing is over (including the period after publication of the final award). Often, there will be misconduct by a counsel which is not so serious as to obstruct the smooth flow of the actual hearing, for example breach of the timelines for filings prior to the agreed date for the evidentiary hearing. Where the integrity of the proceedings is not threatened, the tribunal has more options and could defer its decision on sanctions until after the hearing. Even more serious ethical breaches (such as attempted bribes) will require punitive measures, but those can still be left for after the proceedings. The problem for a tribunal then is, when is the correct time to issue sanctions? In my view, that time will not be while the tribunal is still in the process of deliberating on its decision, considering counsel's post-hearing briefs and writing the award. If sanctions are imposed on a counsel after the hearing is over but before the award is issued, there is still a small risk that offending counsel could use it as an excuse for a challenge to remove a tribunal on the grounds of bias, thereby obstructing the release of the award. Unless the tribunal is prepared to face the prospect of a challenge at this stage, it might then consider deferring the question of ordering sanctions until after the arbitration is over; that is, upon the issuance of the final award. But the problem then

is that, upon the issuance of the final award, the tribunal is *functus officio*, and has no further existence and is not therefore in a position to impose any sanctions in its own name.

14 The solution might therefore be for the tribunal to refer the alleged misconduct to a third party to investigate and adjudicate upon this alleged act of misconduct. Yet the proliferation of multiple jurisdictions and regulatory bodies gives rise to the basic question of which third party to approach. While many third party regulatory bodies, such as the American Bar Association, require peer reporting of misconduct, it is not clear whether this extends to lawyers in other jurisdictions.<sup>16</sup> Even if these procedural problems can be resolved, this solution leads to further problems. Unless parties have agreed in advance to such a procedure, there is simply no rule of law or practice that permits a tribunal seated in a common law jurisdiction, even during its lifetime, from informing a third party about any matter concerning the arbitration where common law or statutory principles of confidentiality apply.<sup>17</sup> So, for example, if a tribunal felt like making a

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<sup>16</sup> The ABA Model Code of Professional Responsibility notes that “a lawyer possessing unprivileged knowledge of a violation of DR 1-102 [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation” and “a lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges” (DR 1-103).

<sup>17</sup> While it is true that some common law countries have statutory regimes of confidentiality in arbitration (*eg*, New Zealand, Australia, Hong Kong and Dubai International Financial Centre), none of these statutory regimes allow an exception to confidentiality for the purposes of making a complaint about counsel conduct to outside parties. And beyond the common law, those arbitrations which are governed by institutional rules will often be subject to confidentiality regimes imposed by those rules (*eg*, LCIA, SIAC, WIPO, SCC, CIETAC, DIAC, ICDR and HKIAC), but none of these institutional rules create an exception to the principles of confidentiality by permitting a report to be made to an outside party concerning counsel conduct. One potential regime that may allow for disclosure to a public

report to the bar association having jurisdiction over the offending counsel to make a complaint leading to disciplinary action, the tribunal would be in breach of its duty of confidentiality owed to the parties. There is no recognised exception to the common law duty of confidentiality which could allow for such a complaint to be made, giving details of counsel's behaviour which would inevitably require details of the context of the misbehaviour which would in turn require some detail on the facts of the arbitration (most likely the names of the parties concerned and the nature of the dispute) all of which are protected by the common law of confidentiality.<sup>18</sup> These are in effect punitive sanctions rather than pre-emptive or remedial sanctions and there is still simply no legal basis for tribunals (a) to impose punitive sanctions for their own sake unrelated to the integrity of the proceedings; or (b) to delegate or refer this task to an unrelated third party.

15 Professor Park has raised a case in which he was personally involved that usefully illustrates the hard issues a tribunal must consider when there are instances of misconduct in this stage of the proceedings.<sup>19</sup> In brief, claimant's counsel entered into the hearing room

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authority for a public interest purpose is rule 26(c)(iii) of the Arbitration (Scotland) Act 2010 which provides that disclosure is not a breach if it "is required in order to enable any public body or office-holder to perform public functions properly". While the scenario of complaints against counsel being referred to outside parties was not specifically envisaged in the drafting of this Rule (as advised to the principal author by one of the members of the drafting committee for these Rules), it would be a matter of debate whether the wording could be stretched to cover reports of counsel misconduct to a bar association or a competent disciplinary body.

<sup>18</sup> It should be noted that Chief Justice Sundaresh Menon of Singapore, has observed that "misconduct of counsel in arbitration proceedings is not shielded from action by any consideration of confidentiality in arbitration proceedings". However, CJ Menon does not cite any authorities for this point: "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" delivered at the ICCA Congress 2012: Opening Plenary Session.

<sup>19</sup> William W Park, "A Fair Fight: Professional Guidelines in International Arbitration" (2014) 30(3) *Arbitration International* 409 at 422.

at night and copied the respondent's legal team's documents without its knowledge. This exhibit "borrowing" consisted of documents that had been, and were going to be, disclosed to the tribunal but also contained additional notes in the margins made by the respondent's legal team. In a situation such as this, there is no way that parties can go back to square one, pre-injury. It becomes a matter for the aggrieved party. In Professor Park's case, upon discovery of the incident, respondent's counsel made an application to dismiss the claims. Professor Park noted that a tribunal's difficulty in dealing with such a situation is also compounded because both the IBA Guidelines and the LCIA Rules fail to penalise misconduct effectively and do not provide exhaustive lists of measures for the tribunal to survey in dealing with hard cases.<sup>20</sup> In practice, the tribunal will be extremely reluctant to boot out counsel because the consequence is likely to be the halting of the proceedings until a new counsel is found. The idea of striking out the entire claim is also too extreme. The remedy is worse than the cure. This can only result in an aggrieved party's reservation of the right to complain, but the problem still remains as to who will hear the complaint.

16 One solution to the problem is for institutional rules to be changed to allow for complaints concerning counsel misconduct to be referred to a competent body having jurisdiction over the ethical conduct of that lawyer. However, my view is that the solution would be better considered in the context of my recommended solution below.<sup>21</sup>

### **III. Recommended solution**

17 In my view, the solution to the problem of punitive sanctions lies as follows.

- (a) Where there is misconduct by a counsel which does not prevent the tribunal from doing its job as efficiently as it should, there is no cause for any sanctions being administered by the tribunal.

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<sup>20</sup> William W Park, "A Fair Fight: Professional Guidelines in International Arbitration" (2014) 30(3) *Arbitration International* 409 at 422.

<sup>21</sup> See especially paras 18(a)–18(d) below.

- (b) If that misconduct violates an accepted code of conduct, the tribunal may, at the appropriate time, refer the matter for investigation and sanctions by an appropriate body.

18 The key to the solution lies essentially in leaving the task of administering punitive sanctions to the arbitration institution administering that particular arbitration. For this to happen, the following steps must be taken.

- (a) The institution must promulgate a code of conduct for all counsel appearing in arbitrations administered by that institution. This code may be adapted from the IBA Guidelines or the new LCIA Rules or other published codes, or be a completely original code drafted by a universally respected institution like the International Council for Commercial Arbitration (“ICCA”).
- (b) The institution’s arbitration rules must be amended to include a provision that parties will arbitrate under that institution’s rules and will procure their respective counsel to agree that counsel will abide by the institutional code of ethics (using the 2014 LCIA Rules as a starting point).
- (c) The institution’s rules must further be amended to include a provision to authorise a tribunal to refer all complaints concerning the behaviour of counsel to the arbitration institution for determination in accordance with the code, which must provide sanctions for the various classes of offence.
- (d) Either:
  - (i) The arbitration institution should establish a disciplinary committee headed by senior arbitration practitioners (possibly from multiple jurisdictions) and a subcommittee of this committee would be appointed *ad hoc* (or selected from a panel) to investigate complaints and report findings after reviewing written statements by all parties concerned and, where necessary, oral statements by all parties, possibly by videoconference. Such reports would be made to the governing body of the institution (or a special committee appointed for that purpose) for final determination of the guilt of the offending counsel and the appropriate penalty for such misconduct; or

- (ii) The institution's rules could be changed so that parties would expressly be deemed to have consented to complaints against their lawyers' behaviour to an outside party, whether it be the ASA's GAEC or a bar association.

19 This solution has the following advantages:

- (a) It solves the problem of breach of confidentiality.
- (b) It detaches the tribunal from having to rule on disputed allegations of unethical conduct.
- (c) There would be uniformity of standards in determining breaches of ethical codes of the institution's code of ethics. Currently, one major issue underlying the debate on regulating counsel behaviour is the lack of universal agreement on cultural norms. As mentioned above, duties of document disclosure vary, and institutional rules are not yet consistent on their treatment of *ex parte* communications.<sup>22</sup> Chief Justice Sundaresh Menon has noted that "much of the international arbitral case-load is administered by a

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<sup>22</sup> Article 13.4 of the London Court of International Arbitration Rules of Arbitration 2014 prohibit *ex parte* communications that have "not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal ... and the Registrar". Rule 16.6 of the Arbitration Rules of the Singapore International Arbitration Centre 2013 states that, "all statements, documents or other information supplied to the Tribunal and the Registrar by one party shall simultaneously be communicated to the other party", without qualification, and only addresses, with specificity, the exceptions to the prohibition on *ex parte* communications for parties' communications with candidates for the Tribunal (rule 10.7). Rule 18 of the AAA Commercial Arbitration Rules & Mediation Procedures 2009 allow for *ex parte* communications with "non-neutral" arbitrators that have been directly appointed by the parties. The ICC Arbitration Rules 2012 and Swiss Rules of International Arbitration 2013 do not mention the treatment of *ex parte* communications between counsel and the tribunal.

relatively small number of arbitral institutions”.<sup>23</sup> If this small number of arbitral institutions designed ethical codes and regulations, focusing on counsel behaviour, it is likely that they would become internationally harmonised. Additionally, this might stimulate the use of best practices in counsel conduct of arbitration proceedings.<sup>24</sup>

20 The institution could impose meaningful penalties, in particular the power to prohibit counsel from appearing as such in any arbitration administered by that arbitration institution. This would be an enhanced and extended version of the “rugby yellow card”, where the “sin-binning” could be for a substantial period, say one year or more, depending on the seriousness of the misconduct. In really egregious cases (for example, attempting to bribe one or more arbitrators), there could be a permanent disqualification.

21 I was for some years a member of the Hong Kong International Arbitration Centre (“HKIAC”) Court of Arbitration (“HKIAC Court”) which was a subcommittee of the HKIAC conferring with the Panel Selection Committee. Its task was to investigate complaints against arbitrators to determine whether arbitrators should be penalised for breaches and recommend appropriate penalties if such breaches were found to exist. A complaint would initially be submitted to the Panel Selection Committee, which would then refer it to the HKIAC Court for decision, if necessary. The HKIAC Court would determine whether the complaint was justified and refer the complaint back to the Panel Selection Committee which would then decide whether the arbitrator should be removed from the panel. I sat on an inquiry which reviewed alleged ethical misconduct by an arbitrator and we eventually made our recommendation to the Panel Selection Committee, which made its own

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<sup>23</sup> Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2015) *Asian Journal of International Law* 1 at 21.

<sup>24</sup> Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2015) *Asian Journal of International Law* 1 at 22.

determination of the penalty to be imposed (which was a reprimand). Determinations were guided by a Code of Ethical Conduct for Arbitrators. Although this was a body only set up to investigate complaints against arbitrators, there is no reason why an arbitration institution could not establish a similar committee to investigate errant counsel to recommend appropriate sanctions, leaving the final decision to a senior body within the institution so that there would be uniformity in administering such sanctions.<sup>25</sup>

22 Additionally, the Chartered Institute of Arbitrators (“CIArb”) has a similar investigatory committee with respect to misconduct of its members, the Professional Conduct Committee (“PCC”).<sup>26</sup> The CIArb disciplinary structure is quite extensive. The PCC will review the papers submitted in relation to the complaint of alleged misconduct and undertake an investigation. If the PCC finds there is *prima facie* evidence of misconduct, the complaint will be referred to either a peer review panel or a disciplinary tribunal.<sup>27</sup> The peer review panel further

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<sup>25</sup> These functions have now been taken over by the Board of the HKIAC. The now defunct HKIAC Court has been replaced by the HKIAC Council. The procedure is slightly different now as the complaint is initially received by the Secretary-General who then refers the complaint to an Appointments Committee to make a final decision, but the principles used to guide determinations still remain the same. There have been at least two disciplinary inquiries (in addition to mine) resulting in the removal of an arbitrator from the Panel and the removal of an arbitrator from the List.

<sup>26</sup> The PCC consists of seven members of CIArb, together with at least one, but no more than five, lay-members appointed by the Committee from a panel of appropriately qualified lay-members (a lay person who is not a member and sits in disciplinary proceedings) established by the Board of Trustees for the purpose of investigating any allegation of misconduct and taking appropriate action, pursuant to bye-law 15.1(3). At least two of the CIArb members must be lawyers, and one must hold or have held judicial office.

<sup>27</sup> The Peer Review Panel is set up by CIArb and its members consist of experienced and qualified members of CIArb. The Disciplinary Tribunal consists of no fewer than three persons: a Chairperson, a lay person and a member who is experienced in the same discipline as the member who is

*(continued on next page)*

determines the significance of the report and can recommend that the complaint be dismissed, that the accused member undergo supervision, re-training or some other mode of assistance or refer the complaint to the disciplinary tribunal. The disciplinary tribunal has the power to impose a number of sanctions, such as reprimands, suspension, withdrawal of chartered status (if the member has such status), expulsion or orders for costs. Finally, the accused member or CI Arb is entitled to seek an appeal of the disciplinary tribunal's decision (whether sanctions or dismissal) from the appeals tribunal.<sup>28</sup> CI Arb also has the right to appeal against the disciplinary tribunal's dismissal of a case. There have been many disciplinary inquiries against arbitrators and mediators which are generally confidential. Under the Royal Charter Bye-Laws and Schedule to the Bye-Laws (Bye-Laws), CI Arb has jurisdiction to investigate "all complaints of whatever nature against any member".<sup>29</sup> This includes members of CI Arb "whether acting as an arbitrator, adjudicator, mediator *or in any other capacity*" [emphasis added].<sup>30</sup> These allegations of misconduct are defined in section 15.2 of CI Arb's Bye-Laws and the definition does not limit itself to members that are acting as "neutrals".<sup>31</sup> Theoretically, if members of CI Arb misbehave,

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under investigation. The Chairperson must be either a person who holds or who has held judicial office under the Crown, or the equivalent in other jurisdictions, or is a qualified and practicing lawyer with a minimum of ten years post-qualification experience. See para 7 of the CI Arb Schedule to the Bye-Laws.

<sup>28</sup> The members of the Appeals Tribunal are drawn from the same panels as those for the disciplinary tribunal, but no member of the appeals tribunal will have had a previous involvement in the case. The decision of the appeals tribunal is final and binding and there will be no order for costs arising out of the appeal.

<sup>29</sup> Section 2.4(1) of the Chartered Institute of Arbitrators Schedule to the Bye-Laws.

<sup>30</sup> Chartered Institute of Arbitrators, "How CI Arb Investigates Complaints of Misconduct against its Members" at p 1.

<sup>31</sup> Section 15.2 of the Bye-Laws of CI Arb defines misconduct as:

*(continued on next page)*

not in their capacity as arbitrators, but in their capacity as arbitration counsel, they will also be subject to the CIArb complaint procedure under the Bye-laws and disciplinary hearings can be held.

23 If it is felt that the procedure set out in the CIArb Bye-laws are appropriate for dealing with complaints against an offending arbitration counsel, then the most painless way would be making the CIArb (instead of the arbitration centre) the ultimate adjudicator of such complaints. Since the body and the procedures are already in place and well known, the major change that needs to be made is for the arbitration institution rules to be amended so as to allow complaints of counsel misbehaviour to be referred to the CIArb for disposal. In order to enable CIArb to have jurisdiction over all such complaints, it would have to amend its rules and bye-laws to allow the PCC to deal with and adjudicate upon complaints of counsel misconduct in arbitration. Alternatively, institutional rules when affecting the mandatory acceptance by parties to submit all complaints concerning counsel misbehaviour to CIArb could require counsel in each case administered by the institution and appearing before parties to become members of the CIArb. In both cases, the institution has to change its rules to refer disciplinary matters to a third party. The CIArb could then relax its rules to hear complaints

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- (1) Conduct which is injurious to the good name of CIArb, renders a person unfit to be a member of CIArb or is likely to bring CIArb into disrepute.
  - (2) A significant breach of professional or ethical conduct which shall include a breach of the Code of Professional and Ethical Conduct or other similar document published from time to time by CIArb;
  - (3) Falling significantly below the standards expected of a competent Practitioner (meaning any member of CIArb holding a Panel Appointment Certificate) or a competent professional person acting in the field of private dispute resolution;
  - (4) A failure without reasonable excuse, to comply with a direction and/or a recommendation of a Peer Review Panel constituted under Bye-law 15.1;
  - (5) A significant breach of any of the Articles of CIArb or of these Bye-laws (or any Regulation or rule published thereunder from time to time). *Refer to CIArb's Charter and Bye-laws and Code of Ethics.*

from non-members or institutions could further change its rules to say that (a) all complaints of counsel misconduct will be referred to the PCC of CI Arb; and (b) all counsels appearing before the institution must be fully paid up members of the CI Arb.

24 The current debate on how to approach the issue of regulating counsel behaviour focuses primarily on the issue of misconduct of counsel and, therefore has given rise to possible solutions in the form of soft law through general guidelines to try and pre-emptively address the breadth of issues that may arise or instead a more rule-based and empowered GAEC that can address all the ethical issues that have arisen in arbitrations. Yet these approaches towards regulating counsel behaviour do not address the nuances of regulating counsel misconduct in the three different stages of arbitration – prior to commencement of the hearing, during the evidentiary hearing and after the hearing is over. As outlined above, there are a number of different ways counsel conduct can affect an arbitration, and they need to be dealt with differently according to the principles governing each of those separate stages. None of the current solutions in current debate recognises the principle that each stage requires a different approach, instead of a “one size fits all” regime. My recommended solution, under which the primary task of administering punitive sanctions will lie with the arbitral institution, will allow for uniform and meaningful determinations while also avoiding the problems of perceived bias, consent and confidentiality. It is a challenge which I hope at least one arbitration will take up, so as to demonstrate the efficacy and fairness of this proposed regime.

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## Background to Essay 6

This essay arose from a case on which I was consulted by an English barrister to give a professional opinion on a possible situation of conflict of interest. He was appearing as counsel before an International Chamber of Commerce tribunal where another of his colleagues in the same chambers was sitting as an arbitrator. In turn, there was an application to disqualify his colleague as a tribunal member on the grounds of conflict of interest.

However, in view of the scarcity of authorities on this point at that time (which was before the IBA Guidelines on Conflicts of Interest in International Arbitration were published in 2004), I decided to gather all the materials I had researched for my opinion and converted them into an article for the *Business Law Journal*.

More recently, I had to revisit the point when I was asked by the Hong Kong International Arbitration Centre (“HKIAC”) to chair an inquiry into a challenge against the chairman of an HKIAC tribunal on grounds similar to the earlier case. I then turned to my earlier essay and had the research in that essay brought up to date. To my surprise, I found that the position under English law had not changed much with the passage of time, and that led me to believe that, with some updating, my original essay still had some value for scholars and practitioners, which is why this essay is included (with updates).

The original version of this essay was published in (2015) 6(2) *Business Law International* 235–257.

*I wish to extend my thanks to the International Bar Association for kindly granting me permission to republish this essay in this book.*

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**ARBITRATORS AND BARRISTERS IN THE SAME CHAMBERS –  
AN UNSUCCESSFUL CHALLENGE\***

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Michael HWANG SC†

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\* This is an expanded version of a case note published in (2005) *Transnational Dispute Management Journal/TDM* 1.

† Senior Counsel and Arbitrator, Singapore. I am grateful to my pupil, Desmond Ang, for his assistance in the preparation of this paper.

Although I am a member of the ICC International Court of Arbitration, I was not present at any of the deliberations of the court or its committee dealing with this case, nor did I receive any material documentation or information pertaining to those proceedings. Accordingly, this note is written from the perspective of an outsider rather than a member of the court. My knowledge of this case is derived from my role in furnishing an opinion to one of the parties on the principles governing challenges for conflicts of interest under Singapore law (the law of the seat). I should also declare my interest as a door tenant of a set of barristers' chambers in London (albeit non-resident in England).

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1 Strange as it may seem, the International Chamber of Commerce (“ICC”) International Court of Arbitration recently (apparently for the first time) ruled on a challenge to an arbitrator based on the grounds that the arbitrator and counsel for one of the parties were from the same chambers. There had been a challenge based on the same ground some years ago, but that challenge was not ruled on because the arbitrator concerned was persuaded to step down.

2 The facts of the recent challenge are interesting and raise some new questions about an old problem, particularly in the light of the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).

### **I. Facts**

3 The arbitration was between a European party (represented by a London firm of solicitors) and an Asian party (represented by an Asian law firm). The seat of the arbitration was Singapore, where the relevant law governing challenges to arbitrators was the Model Law, and in particular Article 12 which lays down the test of “justifiable doubts as to [an arbitrator’s] impartiality and independence”.

4 The tribunal consisted of a British Silk (“Arbitrator QC”) (nominated by the European party), an Asian law professor (nominated by the Asian party) and a Singapore practising lawyer as presiding arbitrator.

5 When the arbitration first commenced, the London solicitors retained another British silk (“Counsel QC”) to advise them on case strategy and the preparation of the Case Summary for inclusion in the Terms of Reference. However, Counsel QC was not named as one of the lawyers representing the European party, and his involvement in the case was therefore unknown to the Asian party as well as to all the members of the tribunal (including Arbitrator QC).

6 Although Arbitrator QC and Counsel QC were members of the same Chambers, and shared the same senior and junior clerks in those Chambers, their respective briefs were nevertheless kept confidential from each other, as there was no system of conflict checks in barristers' chambers, since they were all independent practitioners and not partners. Thus, while Counsel QC was aware that Arbitrator QC was an arbitrator in the case on which he was advising (because Arbitrator QC's name appeared in the papers given to him) Arbitrator QC was not (until the events described below) aware of Counsel QC's involvement in the case.

7 Another junior barrister from the same Chambers (Ms Junior) had assisted Counsel QC in his work on the present case, although her involvement was likewise unknown to the Asian party as well as the tribunal (including Arbitrator QC).

8 About three weeks before the evidential hearing, the London solicitors instructed Counsel QC to appear as Counsel at the hearing. While his name was disclosed to the Asian party, it was unclear whether his common membership of the same Chambers as Arbitrator QC was disclosed. The tribunal itself was informed of Counsel QC's engagement as counsel ten days before the date of the evidential hearing. Four days before the hearing was due to commence in Singapore, the Asian party raised with the tribunal the fact that Arbitrator QC and Counsel QC were members of the same Chambers, and reserved its position on whether it wished to object to Arbitrator QC's position as arbitrator, while it asked for more details of the relationship between Arbitrator QC and Counsel QC. Although the European party asked the Asian party to make its position clear before the evidential hearing took place, the Asian party did not ask for the hearing to be postponed, which accordingly took place over the following week as scheduled before the tribunal (including Arbitrator QC).

9 After the close of the evidential hearing, but before the time for lodging a challenge to an arbitrator under the 2012 ICC Arbitration Rules ("ICC Arbitration Rules") had expired, the Asian party lodged a challenge to Arbitrator QC with the ICC's International Court of Arbitration in the light of the information supplied by the London

solicitors (during and immediately after the hearing) about the relationship between Arbitrator QC and Counsel QC.

## II. Arguments

10 The grounds of challenge were as follows.

- (a) Arbitrator QC and Counsel QC had been members of the same Chambers for 27 years and practised in the same area of law.
- (b) They shared senior and junior clerks.
- (c) They shared the use of the same junior barristers in Chambers, including Ms Junior who had worked in this particular case with Counsel QC (not with Arbitrator QC).
- (d) They had (many years ago) shared a room in Chambers for three years.
- (e) Arbitrator QC had led Counsel QC in cases before Counsel QC had become a Silk.
- (f) Their relationship was “cordial”.
- (g) Reliance was placed on paragraph 3.3.2 of the Orange List in the IBA Guidelines (which states that counsel and arbitrator being from the same chambers is a matter requiring disclosure) and on *Liverpool Roman Catholic Archdiocesan Trust v Goldberg*<sup>1</sup> (where the English Court of Appeal ruled that the expert witness evidence of a tax barrister was inadmissible in defence of a charge of professional negligence against another tax barrister in the same chambers who had a close personal relationship with the witness).
- (h) (There was a further ground which has been omitted here as the facts were very specific to this case.)

11 The following arguments were made in response on behalf of the European party.

- (a) The leading authority on the issue of conflict in this fact situation was still *Laker Airways v FLS Aerospace*<sup>2</sup> (“*Laker Airways*”), where

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<sup>1</sup> [2002] 4 All ER 950.

<sup>2</sup> [1999] 2 Lloyd’s Rep 45.

the English High Court held that there was no conflict of interest in this scenario. Although the decision has been criticised as an insular *ex parte* decision by an English judge (Rix J, himself a former barrister) to protect the interests of the English Bar, the following points are worth noting:

- (i) Rix J, conscious of the importance of the decision, had called for an *amicus curiae* from the Bar Council to assist his deliberations.
  - (ii) Rix J had made a full discussion of, not only the English authorities, but the only other known non-English decisions on this point (discussed below).
- (b) The previous English authority on the point was *Nye Saunders and Partners v Alan E Bristow*<sup>3</sup> (“*Nye Saunders*”), a Court of Appeal decision coming to the same conclusion (that is, no conflict of interest) in a national context (where both parties would have been familiar with the traditions and practices of the English Bar). Although the challenge was to a recorder rather than an arbitrator, it is accepted English jurisprudence that the same principles for disqualification apply to judges and arbitrators.
- (c) The international authorities relied on by Rix J were *Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA*<sup>4</sup> (“*Kuwait*”) (a decision of the Paris Court of Appeal) and a decision of an arbitral tribunal held that under LCIA Arbitration Rules. In both cases, challenges on similar grounds were made (one after the award, and the other while the arbitrator was still sitting) and both were dismissed. The Paris Court’s judgment was particularly instructive as a reasoned analysis of the problem from a foreign and civil law perspective, and the LCIA decision was worthy of note since two out of the three tribunal members were European.
- (d) The Orange List in the IBA Guidelines only provided for disclosure of common membership of the same chambers, but disclosure did not raise any presumption of disqualification. Indeed, the position of English (and other) barristers was discussed more fully in

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<sup>3</sup> [1987] 37 BLR 92.

<sup>4</sup> [1993] 2 ADRLJ 167.

section 4.5 of the Background Information on the IBA Guidelines, a document available on the IBA Website and one which must be read for a full comprehension of the IBA Guidelines. The Background Information did not conclude that common membership of the same Chambers *per se* would amount to a conflict. Hence, sections 4.3 and 4.5 of the Background Information only stated that disclosure of common membership was necessary, and that the purpose of disclosure was to set the stage for a dialogue between the parties to ascertain whether a conflict actually existed.

- (e) The remarks of the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties*<sup>5</sup> (“*Locabail*”) were relevant to the facts of this case. The court emphasised the importance of timely objection when a conflict of interest first became apparent. It drew a distinction between the position when a conflict revealed itself well before the hearing commenced and when it was discovered very shortly before the hearing, or after the hearing had commenced. The court said that, among the factors to be considered on a challenge to a judge or arbitrator for conflict of interest, were:
- (i) If the case had already started, how much had been going on and how much was left?
  - (ii) What would be the expense consequences if the judge (arbitrator) withdrew?
- (f) These remarks were significant when applied to the present case since:
- (i) the Asian party had known of the common membership before the evidential hearing started (although not the more detailed facts which were contained in its eventual challenge);
  - (ii) the evidential hearing was over at the time of the challenge, and all that was left was for the tribunal to issue its award; and
  - (iii) the Asian party’s application was for the ICC to remove Arbitrator QC and to allow the two remaining arbitrators to complete the arbitration under rule 12 of the ICC Arbitration Rules.

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<sup>5</sup> [2000] QB 451.

- (g) The IBA Guidelines distinguished between relatively remote professional relationships between arbitrator and counsel (Green List paragraphs 4.4.1 and 4.4.2), which did not require disclosure, and closer professional and personal relationships (Orange List paragraphs 3.3.2 and 3.3.6), which did require disclosure. But even paragraph 3.3.6, which required disclosure of a close personal friendship between arbitrator and counsel, did not mandate disqualification when such a relationship existed (otherwise the situation would have been classified under the Red List). Paragraph 4 of the “Practical Application of the General Standards” in the IBA Guidelines stated that the purpose of disclosure was to allow the parties to explore the situation further to ascertain whether – viewed objectively – there was a justifiable doubt as to the arbitrator’s impartiality or independence. (That is, the test propounded by Article 12 of the Model Law.)
- (h) Nevertheless, unless the relationship was so close that an arbitrator would himself feel doubtful of rendering an impartial award because of his friendship with counsel (or where such doubts could be presumed by an objective third party in the case of close family relationships), the normal presumption should be that arbitrators would allow their obligation to duty prevail over their friendship with counsel. That was a situation that existed between bench and bar in most countries (where judges were friends with many counsel appearing before them), and there was no reason to suppose that a person who accepted appointment as arbitrator would act otherwise than in accordance with his legal duty to decide a case on its merits, regardless of his friendship with counsel.
- (i) Where the personal element might affect an arbitrator’s judgment could be demonstrated by the *Liverpool* case (although, strictly speaking, that case was distinguishable as a case concerning an expert witness rather than an arbitrator). In that case, a tax barrister was being sued for professional negligence and sought to call another member of his chambers to testify that the advice he had given was not improper and was in accordance with normal tax planning advice. The witness stated that he was a close friend of

the defendant barrister and, while that would not affect his testimony, “my personal sympathies are engaged to a greater degree than would probably be normal with an expert witness”. The court held that:<sup>6</sup>

[W]here it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusion of the expert might probably be.

This case illustrated the difference between two situations:

- (i) where the arbitrator’s decision would have *personal* consequences for the barrister/counsel with whom he was friendly (as in the *Liverpool* case); and
  - (ii) where the arbitrator’s decision would only have *professional* consequences for the barrister/counsel who is the arbitrator’s friend.
- (j) Put another way, it was necessary to distinguish between situations where counsel appeared before his arbitrator friend on behalf of his client (who would suffer or enjoy the consequences of the award) and where counsel appeared as a party or otherwise had a personal interest in the case which was being decided by his arbitrator friend. Only where the counsel/friend might be *personally* affected by the award would the issue of his close friendship with the arbitrator arise. On this approach, the normal presumption would be that the arbitrator, both for reasons of duty as well as in his own self-interest as a professional arbitrator, would act in accordance with his obligation to be independent and impartial, and questions of close personal friendship with counsel would normally not be grounds for challenge. This distinction was noted by Rix J in the *Laker Airways* case discussed below.
- (k) Following this approach, it would not be profitable to explore further how “cordial” the relationship was between Arbitrator QC

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<sup>6</sup> *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2002] 4 All ER 950 at [13].

and Counsel QC, since the latter had no personal interest in the case.

- (l) Disclosure of Counsel QC's representation of the European party to the tribunal was only made ten days before the evidential hearing. Assuming that there was a "Chinese Wall" in his Chambers between the different barristers (as is the usual practice in English chambers) Arbitrator QC would not have known of Counsel QC's involvement in the case and was therefore unable to comply with the Orange List paragraph 3.3.2 requirement of disclosure. There was some doubt as to whether the existing wording of General Standard 7(a) (which required parties to disclose any relationship between themselves and the arbitrator) would have required disclosure of the relationship between one of its counsel and an arbitrator. Should the European party have disclosed from the beginning that it had retained Counsel QC (and his junior Ms Junior) as its legal advisers, albeit not as counsel for the hearing? It was submitted that the answer was no. The evil that Orange List paragraph 3.2.2 addressed was the possible danger to the arbitrator's objectivity caused by a friend or colleague appearing before him. For so long as the arbitrator was unaware of his friend or colleague's involvement, that danger did not exist, and hence, even if there had been a duty on parties to disclose actual or potential conflicts of interest, that duty would not have applied in this case. This point could be demonstrated by asking the hypothetical question: if Counsel QC (and his junior, Ms Junior) had continued to provide legal services to the European party behind the scenes, drafting and advising but never appearing before the tribunal in their own names, would that have required disclosure? So long as Arbitrator QC remained unaware of Counsel QC's and Ms Junior's involvement in the case, there is no logical reason why such disclosure would be required.
- (m) In any event, paragraph 5 of the "Practical Application of the General Standards" of the IBA Guidelines stated that non-disclosure of a circumstance coming within one of the situations described in the Orange List did not of itself warrant disqualification; only the relevant circumstance itself would do so. So, whether or not

disclosure of Counsel QC's involvement should have been made earlier, the issue of disqualification of Arbitrator QC would still have had to be decided on its own merits.

- (n) Given the foregoing analysis, the grounds of challenge raised by the Asian party did not raise any justifiable doubts about Arbitrator QC's independence and impartiality.

### **III. Outcome**

12 The ICC International Court of Arbitration dismissed the challenge and (in accordance with rule 7(4) of the ICC Arbitration Rules) did not disclose its grounds for dismissal. However, this case is unlikely to be the last word on the central question raised in the challenge, particularly in the absence of reasons given by the ICC for its dismissal. All challenges on grounds of conflicts of interest will depend on the peculiar facts and circumstances of the case, and the IBA Guidelines, particularly on questions involving the Orange and Green Lists, can only be a starting point in helping to resolve such challenges.<sup>7</sup>

### **IV. Further discussion**

13 I now return to a discussion of some of the key authorities mentioned above. I will also discuss a recent authority which will affect future approaches to questions of conflict of interest in common law countries.

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<sup>7</sup> The ICC International Court of Arbitration ("ICA") takes the view that, while the IBA Guidelines on Conflicts of Interest in International Arbitration are an interesting attempt to deal with complex and difficult discussions, they are not guidelines for the ICA, which applies its own standards and practices rules dealing with challenges for conflicts of interest.

### A. **Nye Saunders and Partners v Alan E Bristow**

14 The facts in *Nye Saunders and Partners v Alan E Bristow*<sup>8</sup> (“*Nye Saunders*”) were as follows:

A claim for fees owing under an employment contract was heard before a recorder of the High Court (“*Recorder*”). The Recorder was also a practicing Queen’s counsel, and therefore only a part-time judge. The Recorder dismissed the claim and the Plaintiff (“*P*”) appealed. One of the grounds of appeal was that P entertained a reasonable suspicion that it had not received a fair hearing since:

- (a) the defendant’s counsel (“*DC*”) was from the Recorder’s chambers;
- (b) the case could have been discussed in their common chambers, since the case had commenced in 1977 and the Recorder only gave judgment in 1985, and P had not been assured that there had been no such discussion;
- (c) P was not informed of the fact that the Recorder and DC practiced in the same chambers, and P only learnt about it after the trial had been progressing for some days.

15 The Court of Appeal held as follows:<sup>9</sup>

[C]ounsel appearing for the appellant became aware after two or three days that his opponent was a member of the same chambers as the recorder, but that fact was not communicated to the lay client or to the solicitor; however counsel was aware of it ... No submission has been made that the judge in this case, Mr Recorder Keating QC, was showing partiality in some way to a particular party. There has been no suggestion that he had ever been consulted by any of the parties to this case ... *The complaint is based on mere suspicion.* The position is that Mr Keating is not a member of a firm: *he is a recorder; he is one of the judges of the land who has taken the judicial oath (in point of fact he is also a distinguished Queen’s counsel); and it is to be accepted in my judgment that a recorder acting, as he was doing, as a judge of the High Court would inevitably, had he felt that there was any possible ground for conflict or any possible basis for considering that he had*

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<sup>8</sup> [1987] 37 BLR 92.

<sup>9</sup> *Nye Saunders and Partners v Alan E Bristow* [1987] 37 BLR 92 at 101.

*previously exhibited any interest in the case of any kind, have excused himself from undertaking or proceedings with the matter.*

I venture to suggest that, if counsel for the appellant then acting ... had thought that there was any likelihood of any conflict of interest or any embarrassment of any kind, he would have raised it at that stage. In point of fact the trial continued for a further seven days or so. I say that I regret that this ground of appeal has been raised because in my judgment in this case it is wholly without substance and appears more, on the face of it, to be mischievous. [emphasis added]

(1) *Comments on Nye Saunders and Partners v Alan E Bristow*

16 The decision in *Nye Saunders* gave significant weight to the judicial oath taken by the Recorder when he assumed his judicial appointment. To the Court of Appeal, once a judicial officer had taken his oath to administer justice without fear or favour, it must be assumed that he would discharge his duty by reason of his experience and professional training. The court would not question his professional and judicial integrity without at least some evidence of bias. The mere possibility of a deviation from the standards of neutrality expected from a judge would not be sufficient to displace the presumption of independence and impartiality raised by the judicial oath.

17 The accepted English jurisprudence is to apply the same principles for disqualification to both judges and arbitrators. This means that the reasoning in *Nye Saunders* ought to apply with equal force to a challenge against an arbitrator. The logic in *Nye Saunders* would lead to the assumption that an arbitrator, by accepting his appointment as such in any particular case, would have considered whether he could maintain an objective mind and act impartially in respect of both parties. The acceptance of an appointment as arbitrator (normally requiring a declaration of independence to be signed) would necessarily mean that the arbitrator had applied his mind to any circumstances which might affect his independence and impartiality, and had come to the conclusion that there was no circumstance that would prevent him from exercising his duty of neutrality. The respect accorded to a judicial oath and to an arbitrator's declaration of independence (express or implied), is a form

of recognition of the professional standards that the English courts are prepared to assume in favour of judges and arbitrators. This assumption is of course rebuttable, but in *Nye Saunders* there were no overt circumstances indicating any possible reason to question the Recorder's independence other than his common membership of chambers with counsel and speculation that counsel and the Recorder might have previously discussed the case. The fact of their common membership without more was regarded as insufficient to displace the presumption of neutrality.

### **B. Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA**

18 The facts of *Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA*<sup>10</sup> (“*Kuwait*”) were as follows:

The defendant's advocate was an English barrister from the same chambers as the president of the arbitration tribunal. At the time of his appointment, the president could not have disclosed this fact, because the particular barrister had not yet been appointed by the Italian party but, at least by the time of these hearings, such disclosure was possible. The claimant was unaware that the president and the advocate practised from the same chambers. An interim award was rendered in favour of the defendant. The claimant then noticed for the first time that the president and the defendant's advocate practised from the same chambers and applied to the French courts to annul the award on various grounds, including (a) irregularity in the composition of the arbitral tribunal and; (b) infringement of their rights to procedural fairness.

19 The Paris Court of Appeal dismissed the application in the following manner:<sup>11</sup>

[Expert evidence were led to the effect] ... that the professional practice of a barrister is essentially independent and that the fact of

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<sup>10</sup> [1993] 2 ADRLJ 167.

<sup>11</sup> *Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA* [1993] 2 ADRLJ 167 at 169.

belonging to the same chambers of barristers (a unique institution, particularly to the English system) is characterised by the fact that they share the same offices and clerks without creating for that purpose any professional link implying, for example as the French law association, common interests or any kind of economic or intellectual relationship between the various members of the chambers, often required, due to the specialisation within the chambers, to appear against each other or to take part in arbitral tribunals where other members of the same chambers act as counsel;

...

Given that, as a consequence, no objective element existed in the case to affect the independence of the chairman of the arbitral tribunal due to the fact that he belongs to the same chambers as counsel for one of the parties, this situation leaving the arbitrator and that party completely independent in the arbitration;

Given that it has transpired that the fact that KFTCI Co [the claimant] and its counsel were not informed that the counsel of the arbitral tribunal belonged to the same chambers as counsel for one of the parties, this situation leaving the arbitrator and that party completely independent in the arbitration;

Given that, in these conditions, it has not been specifically proved that the arbitrator at whom the appeal is aimed did not employ the independence of thought necessary to exercise his judicial power, in such a way as to invalidate the constitution of the arbitral tribunal or to violate the principle of equality of the parties and the respect of the rights of the defence;

The arguments ... are therefore unjustified.

(1) *Comments on Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA*

20 The interesting aspect of the *Kuwait* decision was that it affirmed, from a civil law perspective, that the mere fact that an arbitrator came from the same barristers' chambers as one of the party's counsel would not destroy the arbitrator's neutrality. This decision suggests some form of international recognition of the notion that a barrister is independent from a fellow barrister practicing in the same chambers.

21 However, it is important to note that, in *Kuwait*, the challenge was only made after an award had been rendered. Once an award has been made, courts would normally be slow in overturning it because of the principle that finality of awards must be recognised.<sup>12</sup> It may be that the Paris Court of Appeal expected much more substance from the challenge for it to succeed. The Paris Court of Appeal noted that the applicant had failed to prove that the arbitrator had not been independent. Thus, the objective element, which the Paris Court of Appeal suggested must be present to challenge the independence of an arbitrator, may be subject to a high threshold where a challenge is only made post-award. Short of actual bias, it would be difficult for a court to set aside an award merely on the basis that the arbitrator and counsel came from the same set of barristers' chambers if the principle of finality of arbitral awards were to be given full recognition.

22 Had the challenge been made at the appointment stage rather than after the award had been rendered, the Paris Court of Appeal may well have arrived at a different conclusion because the principle of finality of arbitral awards would not then be a relevant consideration. If the final award had not yet been made at the time of challenge, it must be speculative whether the Paris Court of Appeal would have arrived at a similar conclusion, as it might not have been so ready to accept the view that barristers with common memberships of the same chambers are independent of one another.

23 From another perspective, one could argue that, if a challenge was mounted at the appointment stage rather than at the post-award stage, the issues of the financial consequences of the withdrawal of an arbitrator and the inconvenience for the parties, (which were considered by the Court of Appeal in *Locabail* to be of some importance) would not enter into the equation. When a challenge is mounted earlier in the

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<sup>12</sup> This is the logical consequence of the *Locabail* approach which requires a removing authority to deal with late challenges more strictly where made late in the proceedings in view of the expense and disruption to the proceedings resulting from the removal of an arbitrator after much time and expense have been invested by all parties in the arbitration.

proceedings, the chances of success are likely to be higher compared to a similar challenge launched post-award or even pre-award but made at a late stage of the proceedings.

24 In contrast, the IBA Guidelines do not make a distinction between a challenge made at the appointment stage from a challenge made post-award. General Standard 3(d) provides as follows:

When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.

25 This should be contrasted with the practice at the ICA, where (in line with the *Locabail* considerations) late challenges to arbitrators on the grounds of conflicts of interest are less likely to succeed than if such challenges had been made at the appointment stage.

### **C. Laker Airways v FLS Aerospace**

26 The facts in *Laker Airways* were as follows:

A dispute arose out of a contract between FLS and Laker (the applicant). FLS appointed Mr Bunton QC as their arbitrator on 23 September 1998. At that time, Mr Michael Sullivan, who had recently joined the set of chambers where Mr Bunton also practised, had already been instructed in the dispute on behalf of Laker. On 30 November 1998 Laker's US attorneys asked whether it was true that Mr Sullivan and Mr Burnton practised in the same chambers. When this was confirmed, they requested FLS to make a new appointment. On 22 December 1998, Laker's then London solicitors wrote to Mr Burnton asking him to resign. Mr Burnton replied on 4 January 1999 stating that he would resign if requested to do so by both parties, but declined to do so on the request of one party only. On 29 January 1999, Laker applied to remove Mr Burnton as arbitrator. When the application came to be heard, Laker was absent from the proceedings. However, FLS appeared together with an *amicus curiae* representing the General Council of the Bar of England and Wales before Rix J.

27 In dismissing the application, Rix J observed:<sup>13</sup>

Their [that is, Mr Bunton and Mr Sullivan's] rooms are in different buildings. They are clerked by different teams of clerks. Their documents are kept in different rooms. They do not have access to each other's computers. It is common for members of their chambers to appear on different sides in the same litigation, as is the case in all large sets of commercial and other specialist chambers. Their administrative staff is experienced in dealing with that situation and in ensuring no misdelivery of documents or leakage of information. There had never been an incident in chambers of such misdelivery or leakage.

...

Nor does it seem to me that the principle of *nemo iudex in sua causa* [no one must be judge in his own cause] has been invoked. The highest that Mr Bolkenhol's affidavit puts the matter is that there is a connection through chambers between Mr Burnton and an advocate in the arbitration and that Mr Burnton's views may be 'coloured by his familiarity' with that advocate. *It seems to me, however, that there is of course a difference in principle between an advocate and the party which he or she represents.* It does not seem to me that a Judge can be said to be Judge in his own cause because he knows the advocate, even if he knows him well, or shares or has shared tenure in the same set of chambers with him.

...

[Quoting from the DAC Report on Arbitration Law] [I]t is often the case that one member of a barrister's chambers appears as counsel before an arbitrator who come from the same chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law.

...

[Commenting on *Nye Saunders*] That case arose entirely within a domestic (national) context ... [I] am particularly impressed by a decision of the Paris Court of Appeal in *KFTCIC (Kuwait Foreign Trading Contract & Investment Co) v Icori Estero SpA*.

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<sup>13</sup> *Laker Airways v FLS Aerospace* [2000] 1 WLR 113 at 116.

...

[After quoting an extract from *Kuwait*] I have set out the judgment of the Paris Court of Appeal at some length because it represents the reasoning of a foreign Court faced by evidence of the English legal scene; because that Court was required under the relevant law to consider not only the question of impartiality but also that of independence; because the parties to that arbitration were both foreign to England; and because the Paris Court of Appeal has great experience in this field since the presence in Paris of the International Chamber of Commerce (ICC) makes Paris one of the world centres of international arbitration.

...

In his statement Sir Michael Kerr [his statement was part of the material before the Paris Court] also referred to an arbitration held under LCIA (London Court of International Arbitration) Rules in which the continuation as arbitrator of an English barrister was challenged on the ground that counsel in the same chambers was instructed in the case. Under the rules the challenge had to be decided by a special tribunal composed of three members of the LCIA Court of Arbitration. The members of this tribunal were the director of the Austrian Chamber of Arbitration, a distinguished Dutch lawyer and editor of leading works on international arbitration, and an English QC. They unanimously rejected the challenge, holding that

*... The fact that [the English arbitrator] is located in the same Chambers as Counsel for the Respondent is no sufficient ground to give rise to justifiable doubts as to his impartiality or independence.*

It is to be observed that *both the Paris Court of Appeal and the LCIA tribunal composed of leading international arbitrators from LCIA's Court of Arbitration, even while considering the challenges that arose before them from the point of view of independence as well as impartiality, concluded that no difficulty arose from the appointment of an arbitrator and the instruction of counsel in the same case who were members of the same chambers.*

...

The fact that members of chambers share expenses does not mean that they have a financial interest in the outcome of each other's

cases. Counsel do not share fees or profits. Nor, which is a different point again, does the fee of either counsel (at any rate under traditional fee arrangements) or of course arbitrator depend on the outcome of the proceedings.

Mr Bolkenhol's first point regarding a conflict of interest between counsel and arbitrator is misconceived. Of course there is a conflict of interest, or more properly speaking duty, between them. It is the duty of counsel to advance the case of his client within the limits of his professional responsibilities, while it is the duty of the arbitrator to adjudicate impartially between the parties. A conflict of interest properly so called only arises as an impediment when the same person (or what is in law regarded as the same person) undertakes conflicting duties to different clients or puts himself in a position where he has a conflict between his duty to his client and his own self-interest.

...

Mr Bolkenhol's second point, regarding the risk of transmission of information between barristers in the same set who are on opposite sides of a dispute, or who are counsel and tribunal in the same proceedings, is in legal theory tied up in the same considerations ... For the purposes of s 24(1)(a) of the Act, the applicant must show that the organisation of chambers gives rise to justifiable doubts about an arbitrator's impartiality because of the danger of accidental or improper dissemination of confidential information or because of the danger that the arbitrator will not observe the rule against holding conversations with only one party outside the presence of all parties to the arbitration.

...

For these purposes, I do not accept that Laker has shown such a case. On the contrary, Mr Burnton's affidavit is to the effect that nothing of such a nature has ever been known in his chambers. For good measure, he has explained how his papers and Mr Sullivan's papers are kept in separate rooms, and that their rooms are in separate buildings. Even in the absence of such evidence, however, I believe that I could take judicial notice of the fact that I am aware of no case in which a problem has arisen due to the improper transmission of information between members of chambers.

...

Mr Bolkenhol's third point is that familiarity may colour Mr Burnton's judgment. On the particular facts of this case, it turns out that Mr Burnton and Mr Sullivan hardly know one another. That said, however, it remains the case that in any given specialty the Bar's numbers, even in London, are not so great as to make it unlikely that counsel, and particularly senior and experienced counsel such as may well be appointed to an arbitral tribunal on the one hand or to represent a party in an important arbitration on the other, do not know each other well ... *the title of 'learned friend' with which counsel refer to one another in Court is more than an empty courtesy and represents the long established tradition of the Bar. That has never been thought of as constituting a conflict of interest or as justifying doubts as to a tribunal's impartiality.*

Mr Bolkenhol also suggested, in another passage in his affidavit, that there is something of a collegiate atmosphere within a set of chambers, with members promoting the employment of their fellows, socialising with one another, and holding themselves out to clients as a group sharing a special expertise or experience ... *[E]ach barrister is in competition with his fellow for work. Rivalry and friendship may co-exist. Although it may be true that, with the relaxation in recent decades on the profession's attitudes to marketing, there has been a greater tendency for sets of chambers to promote themselves as a whole, it remains the case in my view that chambers are made up of their individual barristers with their separate reputations, each working on their own papers for their own clients, and sharing neither career nor remuneration.*

*I have sought to resist the temptation, to which a person, such as I, who has spent many years growing familiar with the English legal system may be prone, to assume that what is so familiar to me would be clear to foreign parties, or to overlook or underestimate concerns which such foreign parties may have. Thus I have borne well in mind that Laker is a foreign party. That is why I have been particularly assisted by the findings and conclusions of such foreign or international tribunals as the Paris Court of Appeal or the LCIA Court of Arbitration.*

[emphasis added]

(1) *Comments on Laker Airways v FLS Aerospace*

28 Rix J noted the argument that barristers ought not to be considered as independent because of the modern practice of barristers' chambers trying to market themselves as a single entity, which is likened to a law firm rather than a collection of individuals. The argument is frequently made that these marketing practices would have the effect of blurring the distinction between barristers' chambers and law firms. However, the essence of a set of barristers' chambers is still fundamentally different from that of a normal law firm. Barristers' chambers essentially comprise of separate individuals, each with his or her own reputation to build and maintain, each working only for his or her own clients, each self-employed. Even though the judgment was issued in 1999, the marketing of barristers' chambers as a whole unit were already a common practice by then. The judgment of Rix J is therefore still highly relevant in today's legal world.

29 The criticisms of the *Laker Airways* decision as an insular *ex parte* decision have overlooked the crucial fact that the decision was made only after Rix J. had the advantage of listening to the submissions made by an *amicus curiae*. Rix J not only based his decision on the English notion of independence of barristers, but also derived support from how a civilian jurisdiction (the Paris Court of Appeal) and an international tribunal (the LCIA Tribunal quoted in *Laker Airways*) viewed the same notion.

30 The Paris Court of Appeal and the LCIA Tribunal considered the unique features of the English system, and came to the conclusion that such a system ought to be respected as preserving the concept of independence of the Bar. Rix J was clearly aware of the need to justify his decision, not solely from the English perspective, but also from the civilian and international arbitration perspective.

31 In the light of Rix J's extensively reasoned decision and close analysis of foreign authorities, any criticisms that his decision merely rubber-stamped the English practice are unfounded. There is a strong tradition in the English judiciary that a judge hearing a case where one of the parties is unrepresented (and *a fortiori* where that party does not even appear at the hearing) will try and explore to the best of his ability

what the unrepresented or non-appearing party's arguments are so that the judge can have regard to those arguments when coming to his decision. Rix J must have been conscious of the importance of this case to the English legal profession, especially when the Bar had asked to be represented by an *amicus curiae*, and he would doubtlessly have tried to understand and consider the arguments which the non-appearing party would have made had he been present. Furthermore, under English law, the role of an *amicus curiae* is to assist the court to the best of his ability from an independent standpoint (especially where one of the parties is not represented) although the *amicus* is not prevented from advancing his own personal views provided he genuinely believes in those arguments. The *amicus* in *Laker Airways* would therefore have been under a duty to present both sides of the case notwithstanding that he had been instructed to appear by the Bar Council. The arguments which are commonly made against the barristers' position that they are completely independent of all external interests were taken into account by Rix J and specifically dealt with in his judgment. There may be disagreement with his conclusion, but no one can criticise him for a one-sided judgment.

## **V. Background information on the IBA Guidelines on Conflict of Interest in International Arbitration**

32 The Working Party's views on the independence of barristers can be found in the Background Information on the IBA Guidelines.

33 Section 4.5 of the Background Information provides as follows:

While the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms. It is because of this perception that the Working Group decided to keep on the Orange List, and thus subject to disclosure, the situation in which the

arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers ... The vast majority of English barristers practise as individual sole practitioners, within what are known as 'Chambers'. The working expenses (salaries of clerks, rent and other outgoings) are shared among the members of the chambers in question. ('Door tenants' will typically make a small contribution to chambers out of such fees as they may earn.) The share of these outgoings attributable to a particular barrister generally reflects the seniority and the earnings of the barrister concerned relative to other members of chambers, but income is not shared among the members of chambers, as it would be in the case of a partnership. It is right to point out that in other common law jurisdictions (*eg* New Zealand) such operational arrangements do not obtain: barristers in those jurisdictions may well enter into separate arrangements for the leasing of premises; they do not typically share office facilities or operate a clerk system; and there are no chambers promotional materials. There is a clear and obvious distinction to be drawn between barristers and law firms operating in these jurisdictions. Moreover, most sets of chambers, members of which practise as international arbitrators, maintain procedures that make it impossible to undertake general conflict searches of those members' individual current or concluded case lists. As well as separate clerking facilities, these chambers also provide secure dedicated fax and direct line telephone facilities for international arbitration practitioners, so as to ensure that communication of sensitive information remains confidential. Nevertheless, the Working Group considers that full disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. *Thus, barristers (including persons who are 'door tenants' or otherwise affiliated to the same chambers) should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity.* [emphasis added]

34 The last sentence of section 4.5 of the Background Information may have to be re-evaluated in light of the factual matrix of the recent challenge. It is likely that the last sentence of section 4.5 of the Background Information was drafted without envisaging the situation that existed in this particular case where Counsel QC had only provided

legal advice behind the scenes, but whose participation was not made known to Arbitrator QC. So long as Arbitrator QC was not aware of Counsel QC's involvement, he could not have been influenced (if at all) by Counsel QC's participation in the proceedings. Thus, the last sentence may need some modification in the future if it is accepted that there was no evil resulting from Counsel QC participating in the arbitration from behind the scenes without Arbitrator QC's knowledge of his involvement.

35 A client is entitled to have the identity of his legal advisers (as opposed to his legal representatives) kept confidential. If a client involved in an arbitration employs X as his legal representative and later takes a second opinion from Barrister Y, who comes from the same chambers as the arbitrator presiding over the dispute, why should the client disclose the fact that he has taken a second opinion from Y? If it is accepted that this particular client need not disclose Y's identity, a similar logic should apply to the facts of the recent challenge.

36 If it is generally agreed that no disclosure was required by the client employing Counsel QC under these circumstances, section 4.5 would need to be qualified to that extent.

### **A. Lawal v Northern Spirit Ltd**

37 *Lawal v Northern Spirit Ltd*<sup>14</sup> ("*Lawal*") is a new case, which was not cited in the arguments before the ICC but which is relevant to our discussion on conflicts of interest. Although the facts of *Lawal* are vastly different from the facts arising from the recent challenge, it is worth a comment as it contained a considered statement of general principle from the House of Lords on the test of conflict of interest.

38 The facts were as follows:

The practice of the Lord Chancellor's Department was to appoint leading barristers who were recorders to sit as a part-time judge in the Employment Appeal Tribunal ('EAT') together with two other lay members. The appellant raised the issue of whether the hearing

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<sup>14</sup> [2003] UKHL 35.

before the EAT was compatible with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') and the common law test of bias, when a recorder (who was also a Queen's Counsel) appearing on an appeal before the EAT as counsel for one of the parties, had previously sat as a part-time judge in the EAT with one or both of the lay members (called the 'wing members') hearing that appeal.

39 The question for the House of Lords, following the common law test of bias laid down in *Porter v Magill*,<sup>15</sup> which modified the *Gough* test of bias to harmonise it with Commonwealth authorities and the requirement of Article 6 of the ECHR, was whether in the view of a fair-minded and informed observer, there was a real possibility of subconscious bias on the part of the lay member or lay members.

40 The House of Lords held that the EAT practice of allowing part-time judges in the EAT to appear as counsel as well as tribunal members would fail the common law test of bias, and ruled that, as a result of *Porter v Magill*, there is now no difference between the common law test of bias and the requirements of Article 6 of the ECHR.

41 The importance of this decision lies in the following remarks of the House of Lords:<sup>16</sup>

The principle to be applied is that stated in *Porter v Magill*, namely whether a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge. The observer may also be credited with knowledge that a Recorder, who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve. Despite the differences between the two cases, the observer is likely

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<sup>15</sup> [2002] 2 AC 357; [2001] UKHL 67.

<sup>16</sup> *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [21].

to attach some relevance to the analogy because in both cases the judge gives guidance on the law to lay men. But the observer is likely to regard the practice forbidding part-time judges in the Employment Tribunal from appearing as counsel before an Employment Tribunal which includes lay members with whom they had previously sat as very much in point ... In favour of this view there is the fact that the EAT hears only appeals on questions of law while in the Employment Tribunal the preponderance of disputes involve matters of fact. The observer would not necessarily take this view. But he is likely to take the view that the same principle ought also to apply to the EAT.

42 The House of Lords remarked that:<sup>17</sup>

It is true, of course, that unlike the relationship between the jury member and the presiding judge, the lay member and the judge of the EAT are colleagues sharing a professional relationship. Counsel appearing as *amicus [curiae]* has, however, pointed out that this factor may cut both ways: whilst it may lessen the impact of the influence exerted by the EAT judge over a wing member it creates a collegiate relationship between them, which is not present in the relationship between the jury member and the presiding judge, and which may be no less worrying in the eyes of the fair-minded observer.

(1) *Comments on Lawal v Northern Spirit Ltd*

43 While the modification of the *Gough* doctrine to harmonise with European and Commonwealth law is welcome, *Lawal* has no direct bearing on the issues raised in the present case. The actual decision deals with a situation of a lay tribunal member being unconsciously influenced by submissions of law made by a distinguished Silk who has previously served on another tribunal with the layman. The reasoning of the House of Lords may be subject to criticism since it comes close to the argument that, if a law professor were to appear as counsel before his former pupil who was serving as an arbitrator, one of them should be required to step down because of possible influence by the professor on his

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<sup>17</sup> *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [17].

former pupil. That latter proposition is not generally accepted as a situation *per se* requiring a disqualification because there should be no presumption of undue influence between former teacher and student (where the student acting as arbitrator would as a matter of practice invariably be a mature and expert lawyer).

44 In any event, the decision of the House of Lords is confined to the situation where a lay member might be influenced by the legal submissions of a counsel that they have formerly relied on for legal advice. That is a far cry from the situation where a barrister appears as counsel before another colleague (who may be more senior or even more learned than him) sitting as arbitrator. In the latter situation, there can be no presumption of undue influence.

45 The alternative argument raised by the House of Lords, namely that there might be an element of collegiality between the lay tribunal member and a counsel who has formerly sat with him on another tribunal which might give rise to justifiable doubts about the lay member's independence is equally challengeable as a general statement, and is not in accord with the principles set out in the IBA Guidelines, which distinguish clearly between mere professional associations<sup>18</sup> and close friendships<sup>19</sup> (and do not require automatic disqualification even for the latter situation).

46 Accordingly, while any discussion of the problem of conflicts of interest should take into account the *Lawal* judgment because of its high authority, its actual impact beyond England and Wales (and even within those countries outside of the specific fact situation in that case) is unlikely to be substantial in international arbitration, particularly when matched against the detailed analysis set out in the IBA Guidelines.

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<sup>18</sup> IBA Guidelines on Conflicts of Interest in International Arbitration Green List para 4.4.1 and Orange List para 3.3.2.

<sup>19</sup> IBA Guidelines on Conflicts of Interest in International Arbitration Orange List para 3.3.6.

## VI. Conclusion

47 These and other issues arising from the common involvement of barristers and solicitors from the same chambers will no doubt recur from time to time. It is suggested that a pragmatic, rather than a dogmatic, approach be taken to each case on its own particular facts. The various Lists set out in the IBA Guidelines do not always give the correct answer to each fact situation since most fact situations contain more relevant facts that need to be considered than the bare skeleton described in the various Lists. The facts described in the Lists may not be the only facts that need to be evaluated to decide whether the arbitrator should be found to be under a conflict of interest. The IBA Guidelines must therefore be regarded as a starting point for examination and evaluation and not a conclusion to be automatically applied whenever the fact situation described in a particular rule occurs. The actual fact situation in *Lawal* would on the face of it have come within Green List paragraph 4.4.2 (“*the arbitrator and counsel for one of the parties have previously served together as arbitrators*”). So, according to the IBA Guidelines, no disclosure would have been necessary, let alone disqualification. However, the critical facts as found by the House of Lords (namely, the dependence of the lay member on the barrister in the previous hearing) are not part of the given scenario in paragraph 4.4.2, and the inclusion of those facts would clearly have put a different complexion on the question, probably to the extent of transferring that scenario from the Green List to the Orange List. This simply demonstrates that the inclusion of fact situations in the Green or Orange List are only valid on the basis of the fact situations set out in those Lists *without more*. If any other relevant facts are added to the scenario, the characterisation of those situations as Green or Orange List situations will have to be reconsidered. At the end of the day, what matters is the litmus test of conflict, General Standard 2(c) of the IBA Guidelines, which provides as follows:

Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

Ultimately, it is this test which must be applied and not the unthinking application of the Lists.

48 One point that may need to be further explored is the relationship between the IBA Guidelines test of conflict set out above and the test propounded by the House of Lords in *Porter v Magill and Lawal* (whether a fair-minded and independent observer will conclude that there is a real possibility that the tribunal will be biased). Is there a difference between “likelihood” in the IBA Guidelines and “real possibility” in the House of Lords’ formulation? As a matter of language, “likelihood” connotes probability while “real possibility” may imply a less than 50% chance of occurrence. What is the burden of proof that will fall on the party who alleges a conflict of interest on the part of an arbitrator that requires disqualification? We await further elucidation through the cases.

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## Afternote to Essay 6

Michael HWANG SC\* and Cathryn NEO†

Since the time this article was published in 2005, more international authorities have developed in line with the approach that the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 (“IBA Guidelines”) serve as a starting point rather than an automatic conclusion in determining whether an arbitrator should be found to be under a conflict of interest. For the sake of completeness, I will mention each case authority briefly.

### *Belize Bank Ltd v Government of Belize*

In *Belize Bank Ltd v Government of Belize*<sup>1</sup> (“*Belize*”), the US Court of Appeals for the District of Columbia Circuit rejected arguments by the government of Belize (the “Belize government”) that an arbitral award was “contrary to public policy”. The Belize Government questioned the impartiality of Zachary Douglas as a member of a London Court of International Arbitration (“LCIA”) arbitral tribunal on the basis that another member of Matrix Chambers, the English barristers’ chambers that Douglas belonged to, had – in previous unrelated matters – advised a partial owner of the Belize Bank and represented other interests adverse to the Belize government. In support of its arguments, the Belize government also referred to promotional material in which Matrix Chambers “marketed itself as a collaborative venture”.<sup>2</sup>

In dismissing the arguments of the Belize government and upholding the arbitral award, the US Court of Appeals referred to Rix J’s judgment in

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<sup>1</sup> DC Cir No 16-7083 (31 March 2017).

<sup>2</sup> *Belize Bank Ltd v Government of Belize* (DC Cir No 16-7083) (31 March 2017) at fn 5.

*Laker Airways Inc v FLS Aerospace Ltd & Stanley Burton*<sup>3</sup> (“*Laker Airways*”) and explained the difference between US law firms and British barristers’ chambers:<sup>4</sup>

Contrary to Belize’s description, Matrix Chambers is *not* a law firm – it is an English chambers. As the LCIA correctly noted, an English chambers is composed of independent solo practitioners housed together and operating under a common name, a structure vastly different from an American law firm in which, *inter alia*, confidential client information – as well as assets and liabilities – are shared among partners ... [emphasis in original]

In coming to this conclusion, the court also took into account the perspective of the parties in considering an appearance of neutrality:<sup>5</sup>

At the same time, however, questions about appearance are resolved from the perspective of the parties. See *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 700 (2d Cir. 1978) (considering ‘*Commonwealth Coatings* principle of disclosure’ for arbitrator conflicts applicable only to information ‘of which *the parties* cannot reasonably be expected to be aware’); see *Freeman v Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013). As the LCIA noted, the ‘chambers system of barristers acting as independent practitioners’ was ‘familiar’ to Belize based on Belize’s historical association with the British justice system and the fact that, in an earlier proceeding involving Belize, Matrix Chambers barristers appeared on opposing sides of the *same* appeal with no objection from Belize. *Belize Bank Ltd.*, Case No. 81116, at 17. [emphasis added by the Court of Appeal]

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<sup>3</sup> [1999] QB 45.

<sup>4</sup> *Belize Bank Ltd v Government of Belize* (DC Cir No 16-7083) (31 March 2017) at p 9.

<sup>5</sup> *Belize Bank Ltd v Government of Belize* (DC Cir No 16-7083) (31 March 2017) at p 12.

***A v B***

The facts in *A v B*<sup>6</sup> were as follows. The parties in an LCIA arbitration appointed a QC, *X*, to act as a sole arbitrator. At the time of his appointment, *X* had received instructions as counsel from both firms of solicitors (once from SJ Berwin in 2005, and twice from Dewey & Leboeuf in 1999 and 2004). In particular, the litigation in 2004 was instructed by Dewey & Leboeuf (“Y Litigation”). The Y Litigation led to proceedings in 2006. However, the parties reached a settlement and proceedings were subsequently stayed by the time of the LCIA arbitration. *X* did little work in the Y Litigation when the LCIA arbitration was ongoing. The settlement in the Y Litigation broke down in late 2009 and *X* was instructed by Dewey & Leboeuf to advise his clients. According to *X*, he only started trial preparation of the Y Litigation in November 2010, by which time he had completed most of the work on the award in the LCIA arbitration. On 6 December 2010, after the first three days of the trial of the Y Litigation, *X* wrote to the parties in the LCIA arbitration to disclose that he was acting for Dewey & Leboeuf in the Y Litigation. Dewey & Leboeuf were counsel for *B* in the LCIA arbitration. *X* issued a partial award on 17 December 2010, which was largely in *B*'s favour. *A* invited *X* to resign but he refused. *A* then challenged *X*'s appointment under LCIA rules, but the challenge was dismissed. *A* subsequently applied to remove *X* under section 24(1)(a) of the English Arbitration Act 1996<sup>7</sup> on the ground that there were “justifiable doubts as to his impartiality”. *A* also argued that *X*'s failure to disclose his relationship with Dewey & Leboeuf was a breach of his duty as an arbitrator to act impartially.

On an examination of the facts, Flaux J found no evidence of *X* having to defend the conduct of Dewey & Leboeuf and no criticism of Dewey & Leboeuf in the LCIA arbitration. He also highlighted that there were few junior staff members common to both cases, and these staff members had no direct contact with *X*. Additionally, *X* did not discuss the arbitration with anyone at Dewey & Leboeuf who was involved in the

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<sup>6</sup> [2011] 2 Lloyd's Rep 591.

<sup>7</sup> c 23.

Y Litigation. In rejecting the applications, Flaux J emphasised three aspects of the common law test for apparent bias which is reflected in section 24(1)(a) of the English Arbitration Act 1996:<sup>8</sup>

23. ... First, the test is an objective one and not dependent upon the characteristics of the parties, for example their nationality, so that it is nothing to the point that the claimant companies are registered in foreign jurisdictions or that the individuals who control or manage them are foreign nationals who might, for example, regard as odd the way in which a member of the English bar can be instructed in one case by a firm of solicitors whilst acting as arbitrator in another case where the same firm of solicitors was acting for one of the parties. The issue is whether the impartial objective observer, irrespective of nationality, would conclude from those facts that there was a real possibility that the arbitrator was biased.

24. That it is not necessary or appropriate to draw a distinction between cases where there is a foreign party and cases where there is not ...

25. The second aspect of the common law test which is of particular relevance to the present case is that the test assumes that the impartial observer is 'fair-minded' and 'informed', in other words, in possession of all the facts which bear on the question whether there was a real possibility that the arbitrator was biased ...

...

28. The third aspect ... is that, although the fair-minded and informed observer is not to be regarded as a lawyer, he or she is expected to be aware of the way in which the legal profession in this country operates in practice ...

### ***Hrvatska Elektroprivreda, d d v The Republic of Slovenia***

The situation in *Hrvatska Elektroprivreda, d d v The Republic of Slovenia*<sup>9</sup> ("Hrvatska") is slightly different from a normal challenge

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<sup>8</sup> *A v B* [2011] 2 Lloyd's Rep 591 at [23]–[25] and [28].

<sup>9</sup> [Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings] ICSID Case No ARB/05/24 (6 May 2008).

against an arbitrator. Ten days before the commencement of the substantive hearing, the respondent announced the addition of Mr David Mildon QC to its legal team. Mr Mildon QC is a barrister at Essex Court Chambers where the presiding arbitrator was Mr David Williams QC, a door tenant. While the claimant had strongly objected to Mr Mildon QC's participation in the substantive hearing, the parties indicated that they did not wish the presiding arbitrator to resign.

In coming to its decision to exclude Mr Mildon QC's involvement in the arbitration, the tribunal explained that barristers are sole practitioners, and barristers' chambers are not law firms. However, the tribunal expressed that there is no "hard-and-fast rule" precluding the involvement of barristers from the same chambers and "there is no absolute rule to [the] opposite effect".<sup>10</sup>

The tribunal considered the relevant circumstances, including the fact that the London Chambers system was "wholly foreign" to the claimant which was the national power company of the Republic of Croatia. The tribunal's decision was mainly persuaded by the respondent's conscious decision not to inform the claimant or tribunal of Mr Mildon QC's involvement when he was engaged by the respondent two months earlier, and its subsequent refusal to disclose the scope of Mr Mildon QC's role. Additionally, the tribunal distinguished the facts of this International Centre for Settlement of Investment Disputes ("ICSID") arbitration with the International Chamber of Commerce ("ICC") case described in my article.<sup>11</sup> The tribunal noted that the complaining party in the ICC case of my article knew of the common chambers membership but did not make any challenge until after the hearing was concluded. The challenge against Mr Mildon QC's involvement was made prior to the commencement of the substantive hearing.

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<sup>10</sup> *Hrvatska Elektroprivreda, d d v The Republic of Slovenia* [Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings] ICSID Case No ARB/05/24 (6 May 2008) at [31].

<sup>11</sup> Michael Hwang SC, "Arbitrators and Barristers in the Same Chambers – An Unsuccessful Challenge" (2005) 6 *Business Law International* 235.

### Comments on recent authorities

Having considered these recent case materials, it is interesting to note the different positions taken with regard to the familiarity of the complaining party with the chambers system. In *Belize*, the US Court of Appeals took a slightly different view from Flaux J in *A v B* with regard to cases where there was a foreign party who might be unfamiliar with the British chambers systems of barristers as independent practitioners. In *Belize*, the US Court of Appeals stated that “questions about appearance are resolved from the perspective of the parties”.<sup>12</sup> In applying the specific facts of *Belize*, the US Court of Appeals found that the Belize government was familiar with the chambers system of barristers acting as independent practitioners based on its historical association with the British justice system, along with the fact that, in an earlier proceeding involving the Belize government, Matrix Chambers barristers appeared on opposing sides of the same appeal with no objection from the Belize government. In *Hrvatska*, the tribunal took into account that fact that the “London Chambers system is wholly foreign to the Claimant”, which was a national power company of the Republic of Croatia.<sup>13</sup> On the other hand, Flaux J in *A v B* found that the test is an “an objective one and not dependent upon the characteristics of the parties, for example their nationality”.<sup>14</sup> The differing perspectives on this measure of objectivity is certainly an area which may need to be further explored.

### Hong Kong International Arbitration Centre Challenge Panel

I sat as chairperson on a challenge panel in an arbitration administered by the Hong Kong International Arbitration Centre (“HKIAC”) in 2017 (the “Challenge Panel”). The Challenge Panel was tasked to consider the

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<sup>12</sup> *Belize Bank Ltd v Government of Belize* (DC Cir No 16-7083) (31 March 2017) at p 12.

<sup>13</sup> *Hrvatska Elektroprivreda, d d v The Republic of Slovenia* [Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings] ICSID Case No ARB/05/24 (6 May 2008) at [31].

<sup>14</sup> *A v B* [2011] 2 Lloyd’s Rep 591 at [23].

respondent's challenge against an arbitrator who was appointed by the claimants (the "Challenged Arbitrator"). The challenge was made early in the proceedings, after the claimants filed their statement of claim. The respondent filed its notice of challenge after it discovered that the Challenged Arbitrator and two of the claimants' co-counsel, whose names were added into the statement of claim, were from the same barristers' chambers in Hong Kong. The respondent argued that the failure of the Challenged Arbitrator and the claimants to promptly disclose this fact and other circumstances surrounding the lack of disclosure gave rise to justifiable doubts as to the arbitrator's independence or impartiality. After submitting its notice of challenge, the respondent filed two further grounds: (a) one of the claimants' co-counsel, Mr C1, and the Challenged Arbitrator had acted as co-counsel in the past three years, another scenario which fell under the Orange List of the IBA Guidelines; and (b) one of the claimants' co-counsel, Mr C2, had also chambered for the Challenged Arbitrator as a pupil. It was later discovered that the Challenged Arbitrator had disclosed his association with the claimants' co-counsel to the HKIAC, namely, that they belonged to the same set of barristers' chambers, but it was the HKIAC which failed to inform the parties. The Challenge Panel therefore only examined the non-disclosure on the part of the claimants.

In our recommendation to the HKIAC, the Challenge Panel undertook a review of the recent authorities and applied the test in *A v B* where the court referred to the need to show that there was a danger of accidental or improper dissemination of confidential information within chambers, or that there was otherwise a significant risk that the arbitrator might not observe the rule against holding conversations with one party only. On an examination of the specific facts, the Challenge Panel found no such risk present, and considered that the respondent's challenge did not give rise to justifiable doubts as to the impartiality and independence of the Challenged Arbitrator. The Challenged Panel was also not persuaded by the additional grounds raised by the respondent. In our recommendation to the HKIAC, the Challenge Panel noted that the Hong Kong bar is smaller than the English bar, particularly in the field of international arbitration. This could work in support of either party's

position, and therefore did not change the Challenge Panel's position on the specific facts of the challenge.

### **Exploring the test of conflict**

At the end of my article, I noted that the relationship between the IBA Guidelines test of conflict and the test propounded by the House of Lords in *Porter v Magill*<sup>15</sup> and *Lawal v Northern Spirit Ltd*<sup>16</sup> – whether a fair-minded and independent observer will conclude that there is a real possibility that the tribunal will be biased – may be further explored.

In my recent article titled “Standard of Proof for Challenge Against Arbitrators: Giving Them the Benefit of the Doubt”, I examined the various competing tests to challenge arbitrators across different jurisdictions and rules.<sup>17</sup> As I was one of the original 19 members of the Working Group that created the 2004 IBA Guidelines, in that article, I also found it useful to explain the origins of certain concepts such as the General Standard 2(c), General Standard 3 and the Orange List in the IBA Guidelines. Upon examining the thresholds outlined by different national and academic standards, I found it difficult to establish a precise applicable standard of proof as the appearance of bias remains a hypothetical enquiry, as opposed to actual bias. In my conclusion, I found that the IBA Guidelines provide a starting point which reflects best international practices, and strikes a balance between the right of parties to participate in the appointment of the tribunal and the integrity of the tribunal.

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<sup>15</sup> [2002] 2 AC 357.

<sup>16</sup> [2003] ICR 856.

<sup>17</sup> Michael Hwang & Lynnette Lee, “Standard of Proof for Challenge Against Arbitrators: Giving Them the Benefit of the Doubt” in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Patricia Shaughnessy & Sherlin Tung eds) (Wolters Kluwer, 2017) ch 18.

## **Guidelines from the Bar Council of England and Wales**

On 6 July 2015, the Bar Council issued an “Information Note regarding barristers in international arbitration”. This note makes (among others) the following points.

- (a) English law on this point is still as set out in *Laker Airways*.
  - (b) Barristers should generally accept instructions to act in cases where a member of their chambers is a member of the tribunal because of the “cab rank” rule.
  - (c) However, they should advise their instructing solicitor and client of possible difficulties which may arise if barristers and arbitrators come from the same chambers.
  - (d) To pre-empt or mitigate such difficulties, barristers and arbitrators in such situations should consider prompt disclosure of their representation for their client to the other side as soon as possible (in accordance with paragraph 3.3.2 of the IBA Guidelines), which will then require their objection to the arbitrator’s appointment to be made within 30 days or be deemed to be waived.
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### Background to Essay 7

This was an essay written by me for the *Liber Amicorum* in honour of another legendary arbitrator, Pierre Karrer. In this essay, I addressed two issues.

First, I ventured to expound on the standard of proof which had to be satisfied to mount a successful challenge against an arbitrator.

Second, I proceeded to explore the adequacy of the IBA Guidelines on Conflicts of Interest in International Arbitration, which had been criticised by Gary Born as being an inappropriate benchmark.

The need to address the first issue requires no explanation. The second issue was something I felt I needed to address in view of Gary's criticism since I felt that I was in a unique situation to comment, having served as a member of the original IBA Committee that drafted those guidelines in 2004.

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*I wish to extend my thanks to Kluwer Law International for kindly granting me permission to republish this essay in this book.*

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## STANDARD OF PROOF FOR CHALLENGE AGAINST ARBITRATORS: GIVING THEM THE BENEFIT OF THE DOUBT

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Michael HWANG SC\* and Lynnette LEE

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## **I. Introduction**

1 An arbitrator must be independent and impartial. This is a universal principle applicable to any arbitrator.<sup>1</sup> However, a universal acceptance

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<sup>1</sup> This universality of the independence and impartiality is in the context of international arbitration. See, for example, Julian DM Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 95: The “*Magna Carta*” of International Commercial Arbitration has two main rules: (1) due process and fair hearing; and (2) the independence and impartiality of

*(continued on next page)*

of a principle does not always mean a universal interpretation of its rules.

2 The test for bias has seen its variations in jurisdictions all over the world. That said, many countries have incorporated the UNCITRAL Model Law's standard of "justifiable doubts" under Article 12(2) as part of the *lex arbitri* of the jurisdiction.

3 Article 12(2) is in the following terms:

An arbitrator may be challenged only if circumstances exist that give rise to *justifiable doubts* as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.  
[emphasis added]

4 Even then, it is important to appreciate the varying tests used in national arbitration laws, which not only operate in *ad hoc* arbitration with a seat in that country, but also inadvertently influence the finding of bias while national courts are applying the "justifiable doubts" standard.<sup>2</sup> Perhaps this could be attributed to the fact that "justifiable doubts" is an abstract concept itself that is open to numerous interpretations.

5 Nevertheless, a lack of clarity surrounding the meaning of the term was the main reason why the Original 2004 IBA Working Group for the Guidelines on Conflicts of Interest ("Original Working Group") introduced a practical definition of "justifiable doubts" under General Standard 2(c).<sup>3</sup> Since its introduction in 2004, the IBA Guidelines on

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arbitrators; Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 2: *Nemo debet esse iudex in propria causa*, meaning every man has a right to an impartial (and independent) adjudicator.

<sup>2</sup> See *HSMV Corp v ADI Ltd* 72 F Supp 2d 1122 (CD Cal, 1999), where the court purported to apply Art 12(2) of the Model Law, which was applicable in that case, but went on to expound on the 'evident partiality' common law principles common in the US.

<sup>3</sup> For discussion on this, see paras 30–52 below.

Conflicts of Interest in International Arbitration (“2004 IBA Guidelines”)<sup>4</sup> have been widely referred to before arbitral tribunals as well as national courts in various jurisdictions.

6 Prior to the main discussion, it is important to distinguish between *apparent* and *actual* bias, even though this paper will not deal with the latter issue at length.<sup>5</sup> The fundamental distinction is that apparent bias focuses on the *appearance* of bias rather than whether the bias *actually* exists.<sup>6</sup> This affects the nature of the test, since apparent bias is judged *ex-ante* and actual bias is judged *ex-post*. In other words, independence (apparent bias) is judged prospectively, and impartiality (actual bias) is judged retrospectively. The hypothetical nature of this *ex-ante* test is the cause for much difficulty in interpretation. Against this backdrop, the paper will later address some criticisms directed at the 2004 IBA Guidelines by Gary Born.

7 The discussion over the applicable standard of proof for challenging arbitrators will be broadly divided into three main sections:

- (a) This paper will first consider various competing tests for apparent bias across academic commentaries and several jurisdictions to

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<sup>4</sup> This discussion will refer to both the 2004 and the 2014 versions of the IBA Guidelines on Conflicts of Interest in International Arbitration. The changes made to the 2014 version are not substantial, but they will be highlighted in the text where appropriate. The 2014 version of the IBA Guidelines will be referred to as “2014 IBA Guidelines”.

<sup>5</sup> There appears to be only one reported English case where an arbitrator was removed for actual bias. See *Re Catalina (Owners) and Norma MV (Owners)* (1938) 61 Ll L Rep 360, where the arbitrator questioned the credibility of evidence submitted by witnesses of Portuguese descent based on their ethnicity during the course of the proceedings. He was overheard saying, “The Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese [directly then referring to the two Portuguese who had given evidence on July 13].”

<sup>6</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 294.

- reflect a spectrum of varying thresholds for challenging arbitrators.<sup>7</sup>
- (b) More specifically, this paper will interpret the applicable standard of proof under General Standard 2(c) of the IBA Guidelines in the light of the origins and aims of the IBA Guidelines, concluding that this standard refers to “more than 50% probability”. This paper will also consider Born’s critique of the General Standard 2(c) definition of “justifiable doubts” against the intent and discussions of the Original Working Group when the 2004 IBA Guidelines were drafted.<sup>8</sup>
  - (c) Finally, this paper will address Born’s critique of disclosure requirements under General Standard 3 and the Orange List of the IBA Guidelines.<sup>9</sup>

8 This explanation of the inner workings of the Original Working Group will enhance one’s understanding and employment of soft-law instruments like the IBA Guidelines.

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<sup>7</sup> See paras 9–29 below.

<sup>8</sup> The 19 members of the Original Working Group for the IBA Guidelines on Conflicts of Interest in International Arbitration (2004) (“2004 IBA Guidelines”) were Henri Alvarez (Canada); John Beechey (England); Jim Carter (US); Emmanuel Gaillard (France); Emilio Gonzales de Castilla (Mexico); Bernard Hanotiau (Belgium); Michael Hwang (Singapore); Albert Jan van den Berg (Belgium); Doug Jones (Australia); Gabrielle Kaufmann-Kohler (Switzerland); Arthur Marriott (England); Tore Wiwen Nilsson (Sweden); Hilmar Raeschke-Kessler (Germany); David W Rivkin (US); Klaus Sachs (Germany); Nathalie Voser (Switzerland) (Rapporteur); David Williams (New Zealand); Des Williams, (South Africa) and Otto de Witt Wijnen (The Netherlands) (Chair). In 2012, the 2004 IBA Guidelines were reviewed by the expanded Conflicts of Interest Subcommittee, chaired by David Arias and later co-chaired by Julie Bédard, with the review process led by Pierre Bienvenu and Bernard Hanotiau. This revised version was later published as the 2014 version of the IBA Guidelines. See paras 30–52 below.

<sup>9</sup> See paras 53–66 below.

## II. Standard of proof for challenging arbitrators

### A. Standard of proof spectrum for challenging arbitrators

9 There are various formulations of the test to challenge arbitrators across different jurisdictions and rules. We will begin by exploring the most commonly used “justifiable doubts” test as set out in the Model Law followed by other formulations of the test for bias. While all these tests are focused on establishing apparent bias,<sup>10</sup> they differ in terms of the requisite standard of proof in assessing the merits of a challenge. In other words, particular facts and circumstances may be relevant in two tests, but a difference in the threshold required may result in contrasting findings of bias.<sup>11</sup>

#### (1) Academic commentaries

10 In common law jurisdictions, various tests for bias include the “reasonable apprehension” test,<sup>12</sup> the “real possibility” test,<sup>13</sup> the “real danger” test,<sup>14</sup> and the “evident partiality” test.<sup>15</sup> Even among academics, there are differences in interpreting the applicable standard of proof for bias.

11 For one, Waincymer concludes that the applicable standard of proof depends on the likelihood of doubt – whether “there *may* be

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<sup>10</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 295.

<sup>11</sup> See for example, Edmund-Davies LJ in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 606: “the different tests, even when applied to the same facts, may lead to different results is illustrated by *R v Barnsley Licensing Justices* itself”.

<sup>12</sup> This test is from the judgment of Lord Hewart CJ in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256.

<sup>13</sup> This test is from the decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357.

<sup>14</sup> This test is from Lord Goff of Chieveley, in *R v Gough* [1993] AC 646.

<sup>15</sup> This formulation is from the US as stated in the Federal Arbitration Act 9 USC § 10(a)(2).

doubts, there are *likely* to be doubts, or there *would* be doubts”<sup>16</sup> [emphasis in original] – superimposing these distinctions on the following standards: the “reasonable apprehension” test, the “real possibility test” and the “real danger” test.<sup>17</sup>

12 Born interprets the standard of justifiable doubt as “a *real, serious possibility* that the arbitrator lacks independence and impartiality”<sup>18</sup> [emphasis added]. Born adds that “this standard of proof should require more than a 5%, 10% or 20% chance of bias, ... where there is a *realistic (or ‘justifiable’) possibility* that an arbitrator genuinely lacks impartiality or independence”<sup>19</sup> [emphasis added].

13 He reaches this conclusion by focusing on “the existence of *risks or possibilities* of partiality, rather than requiring a *certainty or probability* of partiality” [emphasis in original].<sup>20</sup> Born also rejects a “more likely than not standard [which] introduces unacceptable risks in (inevitable) cases of erroneous analysis of the underlying conflict”.<sup>21</sup> He explains that the relatively lower standard of “realistic possibility” is to maintain “the integrity of the arbitral tribunal and arbitral process, particularly given the extremely limited review available for substantive or procedural errors by the arbitrators”.<sup>22</sup>

14 In contrast, Luttrell contends otherwise, that this lower standard has precipitated the rise of “the Black Art of tactical challenges [–]

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<sup>16</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 294.

<sup>17</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 295.

<sup>18</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1779.

<sup>19</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1779.

<sup>20</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1778.

<sup>21</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1779.

<sup>22</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1779.

unsuccessful, often frivolous challenges that attempt to disqualify or remove arbitrators for trivial interests, associations, and events”.<sup>23</sup> Instead, Luttrell calls for a higher standard found in the “real danger” test, rejecting the “reasonable apprehension” and “real possibility” tests.<sup>24</sup>

15 Finally, Moses’ interpretation of the applicable standard of proof is that it “requires more than the mere possibility that the circumstances in questions could create doubts about impartiality and independence”.<sup>25</sup> Moses also cites General Standard 2(c), “justifiable doubts are those that would persuade a reasonable third party that the arbitrator *might* make a decision based on factors other than the merits of the case”<sup>26</sup> [emphasis added]. In this case, Moses is supportive of a threshold in between “mere possibility” and “likelihood”.

## (2) *Arbitral rules*

16 Most of the arbitral institutions have adopted the standard of “justifiable doubts” from the Model Law.<sup>27</sup> For one, Article 10(3) of the London Court of International Arbitration Rules of Arbitration (“LCIA Rules”) states that an arbitrator may be challenged where “circumstances exist that give rise to justifiable doubts as to his impartiality or independence”. Article 14(1) of the International Centre for Dispute Resolution International Arbitration Rules (“ICDR

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<sup>23</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 278.

<sup>24</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 278.

<sup>25</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2nd Ed, 2012) at p 137.

<sup>26</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2nd Ed, 2012) at p 137.

<sup>27</sup> For Art 12(2) of the Model Law, see para 3 above.

International Arbitration Rules”) contains the same wording, as do other arbitral rules.<sup>28</sup>

17 In contrast, Article 57 of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), which only governs arbitrations between investors and states while administered by the International Centre for Settlement of Investment Disputes (“ICSID”) states that an arbitrator may be disqualified “on account of any fact indicating a *manifest lack* of the qualities required by paragraph (1) of Article 14” [emphasis added]. Paragraph 1 goes on to list some qualities including “independent judgment”.<sup>29</sup>

18 This standard of “manifest lack” imposes a high evidentiary threshold, where challenges can only be brought on *facts* rather than *inference*,<sup>30</sup> and there is “a *real risk* of lack of impartiality based on those facts (and *not any mere speculation or inference*)”<sup>31</sup> [emphasis added]. However, that tribunal also opined that the threshold is whether there is “reasonable doubt”.<sup>32</sup> While the “manifest lack” standard is comparatively higher than the “justifiable doubts” test (which is based on inferences, rather than facts), the inclusion of “reasonable doubt” puts

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<sup>28</sup> Other arbitral institutions such as the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), Singapore International Arbitration Centre (“SIAC”) and Hong Kong International Arbitration Centre (“HKIAC”) also adopt a similar “justifiable doubts” test.

<sup>29</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art 14(1).

<sup>30</sup> Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2010) at p 134.

<sup>31</sup> *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001), (2002) 17 ICSID Review–FILJ 180 at [25].

<sup>32</sup> *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001), (2002) 17 ICSID Review–FILJ 180 at [25].

into question whether this threshold is on par with White J's interpretation of "evident partiality".<sup>33</sup>

### (3) *National arbitration laws*

19 While drafting the 2004 IBA Guidelines, the Original Working Group submitted thirteen National Reports from the following jurisdictions: Australia, Belgium, Canada, England, France, Germany, Mexico, the Netherlands, New Zealand, Singapore, Sweden, Switzerland and the United States. The jurisdictions that have not adopted the Model Law nonetheless reflect a similar standard for challenging arbitrators. The standards adopted by various national jurisdictions are set out as follows.

20 In England, section 24(1)(a) of the English Arbitration Act 1996<sup>34</sup> provide that an arbitrator may be removed if "circumstances exist that give rise to justifiable doubts as to his impartiality". This standard has been interpreted as facts leading a "fair-minded and reasonable observer" to conclude that there is a "real possibility" of bias.<sup>35</sup>

21 In Sweden, section 8 of the Swedish Arbitration Act 1999 ("SAA") indicates a lower threshold than IBA Guidelines: "an arbitrator shall be discharged if there exists any circumstance which *may* diminish confidence in the arbitrator's impartiality" [emphasis added]. The SAA also provides a non-exhaustive list of such circumstances.

22 In Switzerland, arbitral proceedings are governed by Chapter 12 of the Federal Private International Law Act ("PILA"). Similar to the Model Law, Article 180(1)(c) of the PILA prescribes a "legitimate doubts"

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<sup>33</sup> For an analysis of the "evident partiality" test used in the US, see paras 19–28 below.

<sup>34</sup> c 23.

<sup>35</sup> See *A v B and X* [2011] EWHC 2345 (Comm).

standard of proof. Here, Liebscher has suggested that “a bare minimum of independence” will be sufficient.<sup>36</sup>

23 The US has adopted the test of “evident partiality”,<sup>37</sup> leaving the courts to articulate the applicable standard of proof. Unfortunately, courts have experienced much difficulty in establishing a uniform standard, as illustrated in the seminal case of *Commonwealth Coatings Corp v Continental Casualty Co*.<sup>38</sup> In that case, Justice Black and Justice White adopted differing thresholds. While the former called for a lower threshold requiring “arbitrators [to] disclose to the parties any dealings that might create an *impression of possible* bias”<sup>39</sup> [emphasis added], the latter articulated a much higher evidentiary threshold, where “a reasonable person, considering all of the circumstances, *would have to conclude* that an arbitrator was partial to one side”<sup>40</sup> [emphasis added].

24 This divergence in opinion has led some courts to apply Justice Black’s view,<sup>41</sup> with others relying on Justice White’s standard.<sup>42</sup> In relation to the latter standard, Kantor has noted that this is higher than

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<sup>36</sup> Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer Law International, 2003) at p 191.

<sup>37</sup> Federal Arbitration Act 9 USC § 10(a)(2).

<sup>38</sup> 393 US 145 (1968).

<sup>39</sup> *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145 at 148–150 (1968).

<sup>40</sup> See *NGC Network Asia v PAC Pacific Group International, Inc* 511 F Appx 86 at 88 (2d Cir, 2013).

<sup>41</sup> See for example, *New Regency Prods, Inc v Nippon Herald Films, Inc* 501 F 3d 1101 (9th Cir, 2007); *Montez v Prudential Sec, Inc* 260 F 3d 980 (8th Cir, 2001) and *Olson v Merrill Lynch, Pierce, Fenner & Smith, Inc* 51 F 3d 157 at 160 (8th Cir, 1995).

<sup>42</sup> See for example, *AIMCOR v Ovalar Makine Ticaret ve Sanayi, AS* 492 F 3d 132 (2d Cir, 2007); *Freeman v Pittsburgh Glass Works, LLC* 709 F 3d 240 (3d Cir, 2013); *Bapu Corp v Choice Hotels International, Inc* 371 F Appx 306 (3d Cir, 2010); *ANR Coal Co v Cogentrix of NC, Inc* 173 F 3d 493 (4th Cir, 1999); *Morelite Constr Corp v NYC Dist Council Carpenters’ Benefit Funds* 748 F2d 79 (2d Cir, 1984).

Article 12(2) of the Model Law and General Standard 2(c) of the 2004 IBA Guidelines.<sup>43</sup> Luttrell also comments that Justice White's standard comes "very close to a requirement that actual bias be shown".<sup>44</sup> The authors believe that the jury is still out, and the applicable standard hinges on the view which the particular court decides to adopt.

25 France does not have a statutory duty of independence or impartiality, but such challenges can be made under the general test for partiality, where the threshold is "reasonable doubt".<sup>45</sup> This objective test has been applied with a relatively high evidentiary threshold, and will normally fail unless a "definite risk" of partiality is proven.<sup>46</sup> Further, Article 341 of the New Code of Civil Procedure exhaustively sets out the factual circumstances under which a challenge may be brought. That said, Article 341 is not as thorough as the general test of "reasonable doubt".<sup>47</sup>

26 Apart from adopting the Model Law as its *lex arbitri*, Hong Kong has kept in step with the common law rules applied in England, relying on the *Porter v Magill*<sup>48</sup> standard of "real possibility" in *Suen Wah Ling v China Harbour Engineering Co.*<sup>49</sup>

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<sup>43</sup> Mark Kantor, "Arbitrator Disclosure: An Active But Unsettled Year" [2008] Int ALR 11 at 25.

<sup>44</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer Law International, 2009) at p 153.

<sup>45</sup> See Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at pp 78–80; Otto Lo de Witt Wijnen, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration" (2004) 5(3) Bus L Int'l 433 at 440. See for example, Cass Civ 1, 16 March 1999, *Etat du Qatar v Société Creighton* 96-12748, Rev Arb 1999 at 308.

<sup>46</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 80.

<sup>47</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 79.

<sup>48</sup> [2002] 2 AC 357.

<sup>49</sup> [2007] BLR 435.

27 In India, section 12 of the Arbitration and Conciliation Act 1996 incorporates the Model Law test of “justifiable doubts”. Similarly, the courts have applied an evidentiary threshold “judged from a *healthy, reasonable and average point of view* and not on mere apprehension of any whimsical person”<sup>50</sup> [emphasis added].

28 In Singapore, developments of the test for bias have generally followed developments in English law. First, the “reasonable suspicion” standard was laid out in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd*.<sup>51</sup> After some doubt,<sup>52</sup> this was later confirmed by Sundaresh Menon JC (as he then was) in *Re Shankar Alan s/o Anant Kulkarni*.<sup>53</sup> In that case, he distinguished the “real likelihood” standard – which requires a sufficient degree of possibility – from the “reasonable suspicion” standard, where it is sufficient “that a *reasonable number of the public* could harbour a reasonable suspicion of bias even though the court itself thought there was *no real danger* of this on the facts”<sup>54</sup> [emphasis added]. Considering these authorities, Luttrell also comments that this standard closely resembles “the *Sussex Justices* reasonable apprehension” standard of proof.<sup>55</sup>

29 Overall, the various standards of proof, as mentioned earlier, can be illustrated on a spectrum below:

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<sup>50</sup> *International Airports Authority of India v KD Bali* 1988 (2) SCC 360.

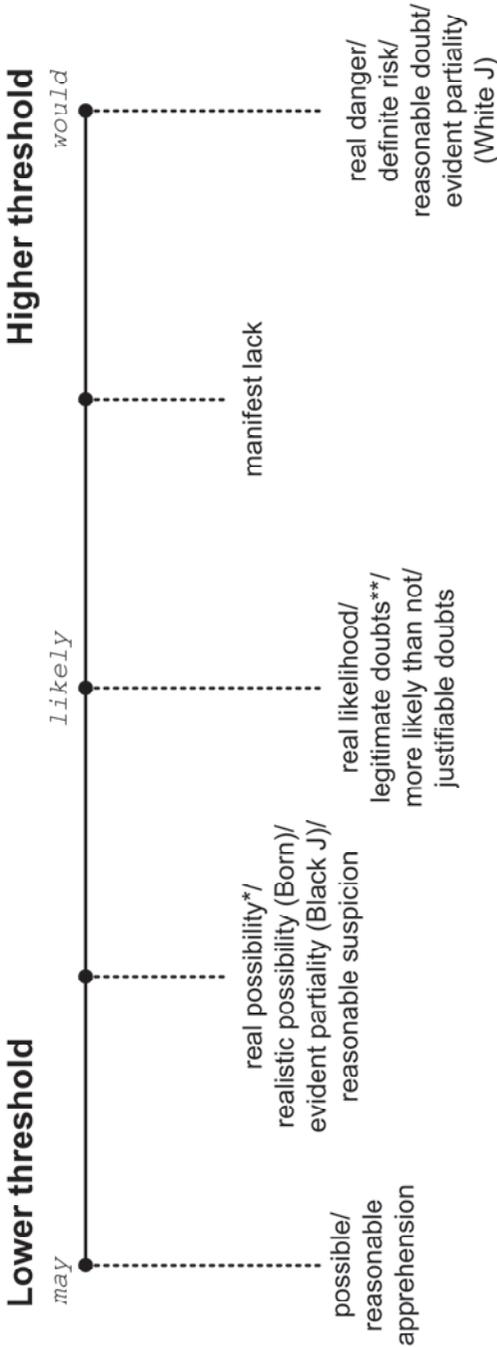
<sup>51</sup> [1988] 1 SLR(R) 483.

<sup>52</sup> A year before *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85, in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 at [39], Andrew Phang JC (as he then was) likened this test to the standard of “real likelihood”, commenting *obiter*, that “there appears ... to be no difference in substance between the ‘reasonable suspicion of bias’ and ‘real likelihood of bias’ tests”. However, Sundaresh Menon JC disagreed, giving his analysis as seen above.

<sup>53</sup> [2007] 1 SLR(R) 85.

<sup>54</sup> *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [75].

<sup>55</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 179.



\* See Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer Law International 2009) at p 39, where Luttrell states that "real possibility" confers a higher standard of proof than "reasonable apprehension" because "[w]hile a suspicion (or apprehension) may be reasonably founded insofar as it has been formed in the mind of a person as a result of his or her exercise of the faculty of reason, the facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a real possibility".

\*\* Even though different terms have been used, the "legitimate doubts" test in practice means the same thing as the "justifiable doubts" test since the term "justifiable doubts" in Art 12(2) of the Model Law is translated into *doutes légitimes* ("legitimate doubts") in the official French version.

### III. Applicable standard of proof for the “justifiable doubts” test under the IBA Guidelines<sup>56</sup>

30 Using the “justifiable doubts” test as a starting point, this raises the issue of what the term means. General Standard 2(c) of the 2014 IBA Guidelines identifies<sup>57</sup> and addresses this issue by defining “justifiable doubts”:<sup>58</sup>

Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a *likelihood* that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision. [emphasis added]

31 The key question here is: What doubts would justify the removal of an arbitrator?

#### A. *The intentions of the original working group for the definition of “justifiable doubts”*

##### (1) *The interpretation of “likelihood”*

32 The standard of “likelihood” refers to one that is “more likely than not”. In other words, “more than 50% probability”. In my view, the words “*there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case*” are simply to focus the inquiry on the litmus test of independence. The question that must be asked at

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<sup>56</sup> This section has been solely authored by Michael Hwang SC.

<sup>57</sup> Part I: General Standards Regarding Impartiality, Independence and Disclosure, Explanation Part (c) to General Standard 2 of the 2014 IBA Guidelines, which deliberately highlights that the “[*]aws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination*”. Note that the 2004 edition has the same explanation as well, with very similar wording.

<sup>58</sup> The version in the 2004 IBA Guidelines is very similar, except that “having knowledge of the relevant facts and circumstances” is replaced with “informed”. That said, both wordings essentially set the same requirement.

the time the objection is raised is: what do we know of this arbitrator that might lead us to the conclusion that he is more likely than not to depart from the straight and narrow? Facts will be placed before the body which has to decide on the challenge, and those facts can be of any nature but, so long as that conclusion is reached, it follows that the arbitrator was *likely* to base his decision on other factors rather than the evidence and law placed before him.

(2) *Best international practice*

33 This interpretation of General Standard 2(c) accurately reflects the rationale and aims of the IBA Guidelines: to explore various jurisdictions and practitioners' experiences in order to find the best international practice. In fact, this goal is achieved by balancing the various interests of the parties, their counsel, arbitrators and arbitration institutions.<sup>59</sup>

34 While the Original Working Group knew that this was a noble endeavour to strive for, this often meant finding a compromise of contrasting standards in reality.<sup>60</sup> One example is the contrast between the vastly different approaches adopted by Born and Luttrell. On one hand, Born espouses the lower standard, a "real, serious possibility", in order to maintain the integrity of the arbitral process and tribunal. On the other hand, Luttrell calls for a higher "real danger" standard because of the rise of insubstantial and frivolous challenges that tribunals and courts face. Luttrell's stance is also reflected in Germany's interpretation of the "justifiable doubts" test, where a high threshold of "grave and obvious partiality or dependence" is required, especially when setting

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<sup>59</sup> See para 4 of the Introduction to the IBA Guidelines in either the 2004 or the 2014 version.

<sup>60</sup> Otto de Witt Wijnen, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration" (2004) 5(3) *Bus L Int'l* 433 at 435, fn 5, where the Original Working Group had different perspectives on many issues but ultimately agreed that the final draft was the best practice available.

aside an award.<sup>61</sup> German courts' aversion to finding arbitrator bias is due to its policy preference in "*upholding the certainty of the arbitral bargain and process*".<sup>62</sup>

35 With that in mind, the difference between their views depends on the values to be emphasised. While Born focuses on the integrity of the arbitral process, Luttrell stresses the importance of its efficiency. Even though both standards have individual merit, they are also mutually exclusive because they sit at diverging ends of the spectrum, prioritising one interest over another. Hence, the "more than 50% probability" interpretation reflects a fair compromise between terminal ends of the spectrum. While it does not accommodate the interests of everyone involved, this balanced approach reflects the preferred approach to the issue of "justifiable doubts".

### ***B. General Standard 2(c): The explanation of "justifiable doubts"***

36 Born has recently made a series of strong criticisms against the 2004 IBA Guidelines.<sup>63</sup> This is not the place for a full critique of Born's views. However, as I was one of the original 19 members of the Working Group that created the 2004 IBA Guidelines, it may be useful for the international arbitration community to understand how certain key concepts in these Guidelines were conceived.

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<sup>61</sup> See BG decision dated 4 March 1999, ZIP 859 (1999). See also the decision of the Hanseatic OG (Hamburg) of 3 Apr 1975 (II YB Comm Arb 241), where the award was set aside on public policy grounds because of the arbitrator's consideration of *ex parte* communications.

<sup>62</sup> Julian DM Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 314.

<sup>63</sup> See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 1841–1865 and 1906–1907. It should be noted that his criticisms are against the original 2004 version, which has been modified and reissued in the current 2014 edition. However, given Born's deep-seated skepticism of the value of the IBA Guidelines, it is unlikely that he would change his opinion of the 2014 version.

(1) *The 2004 and 2014 versions of General Standard 2(c)*

37 To put things into context, I would like to highlight the changes that have occurred between both versions of General Standard 2(c) of the IBA Guidelines. The 2004 version is as follows:

Doubts are justifiable if a reasonable and *informed* third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision. [emphasis added]

38 This has been slightly amended in the 2014 version:

Doubts are justifiable if a reasonable [omitted] third person, [*having knowledge of the relevant facts and circumstances*], would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

39 There is effectively no difference between the two versions.

(2) *Born's critique*

40 Born's complaint is as follows:<sup>64</sup>

[T]he elaboration of the 'justifiable doubts' formula contained in General Standard 2(c) appears to be unduly expansive, prescribing a materially stricter approach to the concepts of impartiality and independence than that under the UNCITRAL Model Law (and many other national arbitration statutes): the likelihood that an arbitrator 'may' be 'influenced' by factors other than the merits of the parties' cases would, if taken literally, disqualify most arbitrators in most cases.

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<sup>64</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1843.

41 His contention is made on the following grounds:<sup>65</sup>

Any decision-maker, no matter how independent and impartial, not only 'may' be, but inevitably is, 'influenced' by factors other than the merits of the parties' cases – including his or her legal training, philosophical approach towards law and business, cultural and national characteristics, and countless other factors. The general formula set forth in General Standard 2(c) ignores these realities, instead prescribing a standard of independence and impartiality that, read literally, is more demanding than that under many national laws and institutional rules. In addition, General Standard 2(c) also fails to provide a means of distinguishing between those external influences on an arbitrator which are acceptable and those which are not.

(3) *Born's alternative: A higher threshold?*

42 Born's solution is as follows:<sup>66</sup>

The better approach would be to redraft General Standard 2(c) so as not to depart from the existing standard of impartiality and independence in the Model Law (and many other jurisdictions), and instead to focus the standard on the risk that an arbitrator will in fact base his or her conclusion on considerations other than an independent evaluation of the evidentiary record and the applicable law. This formulation would introduce a higher standard of causality (an arbitrator basing a conclusion, as compared to being influenced) and a more useful effort to define improper external factors (by recognizing that the arbitrator inevitably brings a personal background and legal training to evaluation of the record and the law).

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<sup>65</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1844.

<sup>66</sup> See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1844.

(4) *Origins of General Standard 2(c)*

43 In order to properly assess the validity of Born's criticisms, let me first explain the origin of General Standard 2(c). When the Original Working Group began to draft the IBA Guidelines, it was quickly accepted that the benchmark for the test of conflicts of interest would be the Model Law standard of independence and impartiality. I then pointed out to my colleagues that neither the Model Law nor any of the other laws or rules which adopted the same criterion of "justifiable doubts" as to independence and impartiality defined the test for when such doubts would arise. I therefore submitted the first draft version of General Standard 2(c), which was worked on by several other pens before emerging in its final form in the 2004 IBA Guidelines. My strong feeling was that it was essential for the 2004 IBA Guidelines (if they were to be of real assistance to the international arbitration community) to give a tangible and workable guideline which would be the litmus test in any challenge to an arbitrator.

44 I agree with Born that the emphasis in General Standard 2(c) should be on the duty of the arbitrator to decide the case purely on the merits of the case as presented by the parties. That is the litmus test of whether or not an arbitrator has been faithful to his duty. Born objects to the words, "there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case",<sup>67</sup> and he suggests an alternative formula which will "focus the standard on the risk that an arbitrator will *in fact* base his or her conclusion on considerations other than an independent evaluation of the evidentiary record and the applicable law"<sup>68</sup> [emphasis added]. I tend to agree that this might be an improvement in wording, but not necessarily for the reasons he advances.

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<sup>67</sup> See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1843.

<sup>68</sup> See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1844.

(5) *The litmus test of independence*

45 Born argues that it is wrong to bar an arbitrator on the basis that he is influenced by other factors, and I acknowledge that every arbitrator is unique, and will consequently be influenced by his or her own set of circumstances. That said, these factors on their own do not matter, so long as the arbitrator follows the narrow path of deciding the case on the merits as presented (including an independent evaluation of the evidentiary record and the applicable law as expounded by Born).

46 When testing the independence of an arbitrator (impartiality only capable of being tested based on the actual conduct of the arbitrator in acting after appointment), parties do not normally question arbitrators on their education, race, religion or political views. There are of course cases where such issues might be relevant in testing independence (and/or impartiality) because the issue is whether or not a conflict of interest exists (which is typically judged in relation to the relationship between the arbitrator and one of the parties). This might lead to a predisposition in favour of that party, and not on the arbitrator's background,<sup>69</sup> affiliations<sup>70</sup> or beliefs<sup>71</sup> outside of the issues in the case at hand. To the extent that certain cases might raise questions concerning these factors, they tend to be questions or challenges based on *issue* conflicts rather than conflicts of *interest*.

47 As mentioned before, the words "there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case" are simply to focus the inquiry on the litmus test of independence. It is uncontroversial that one arbitrator can be very different from another in terms of the factors mentioned by Born, and these factors are to be put aside for the purposes of deciding a case (unless there is evidence to suggest that these factors should not be disregarded in

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<sup>69</sup> For example, whether the arbitrator went to the same exclusive school as one of the parties.

<sup>70</sup> For example, whether the arbitrator and one of the parties are both members of the same exclusive society like the Freemasons.

<sup>71</sup> For example, whether the arbitrator and one of the parties are both members of a relatively small religion like the Jehovah's Witnesses.

terms of assessing the independence and/or impartiality of the arbitrator).

(6) *Application of General Standard 2(c)*

48 The only relevant criteria when determining a case should be:

- (a) What are the facts? and
- (b) What is the applicable law?

49 Indeed, if the arbitrator follows the test according to how the parties have presented them, and not based on speculation or independent inquiry by the tribunal, the problem of “other factors” will disappear.

50 The formula under General Standard 2(c) is meant to elaborate and clarify the meaning of the critical term “justifiable doubts” in the Model Law. If a reasonable and informed third party (or, as in the 2014 version, one “having knowledge of the facts and circumstances”) would reach a conclusion that it is *likely* (meaning a greater than 50% possibility) that the arbitrator is not going to decide the case solely on the merits based on proven facts and applicable law, then that would be a proper ground for challenge, regardless of the exact reason for the departure from this norm.

51 In short, the difference between Born and myself might be only semantic. At the same time, it must be remembered that this test is normally applied *before* an arbitrator’s appointment is confirmed by an institution (or very shortly after appointment if no independent confirmation is required), and before he has commenced his duties. At that stage, it is difficult to apply Born’s test that the alleged disqualifying matters should be judged on the basis of *actual causality*; instead decisions have to be made only on the basis of *forecasts* based on the objective evidence of likely bias or prejudice available at that stage (rather than on any overt acts of bias or prejudice).

52 Personally, at the time I drafted them, I intended the words “*influenced by factors other than the merits of the case*”<sup>72</sup> to indicate where the straight and narrow path lay, and thus anything that led the arbitrator to stray from that path must be considered “other factors”. I was not thinking of the personal makeup of the arbitrator in terms of the factors described by Born, but rather factors indicating potential bias; in other words, the examples given in the Red and Orange Lists (which are nearly all based on a prior or current relationship with one of the parties rather than issue conflict).

#### IV. Disclosure requirements under the IBA Guidelines<sup>73</sup>

##### A. *General Standard 3: Disclosure requirements*

53 The debate over the applicable standard of proof for challenging arbitrators inexorably spills over to what arbitrators are required to disclose upon appointment. I will now address two main issues: disclosure requirements in this section and the Orange List in the following section. In particular, I will compare Born’s critique of these areas with the findings of the Original Working Group.

##### (1) *Disclosure requirements under General Standards 3(a) and 3(c) of the 2004 IBA Guidelines*

54 General Standard 3(a)<sup>74</sup> of the 2004 IBA Guidelines states:

If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to

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<sup>72</sup> General Standard 2(c), Part I: General Standards Regarding Impartiality, Independence and Disclosure, 2004 IBA Guidelines.

<sup>73</sup> This section has also been solely authored by Michael Hwang SC.

<sup>74</sup> The 2014 version is almost identical to the 2004 version with the omission of “to” in “and [to] the co-arbitrators”.

the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

55 General Standard 3(c)<sup>75</sup> of the 2004 IBA Guidelines provides a further obligation in case of doubt:

Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

*(2) Born's critique: Excessive disclosure requirements*

56 Born attacks General Standards 3(a) and 3(c) on the grounds that such requirements are unduly excessive and inconsistent with the generally accepted standard under the Model Law and other national jurisdictions because the "justifiable doubts" test for bias is an objective and not subjective test.<sup>76</sup>

*(3) Universal acceptance of the IBA Guidelines*

57 Again, it must be understood how these Guidelines came into being. There was a debate within the Original Working Group as to whether the test for disqualification should be objective or subjective, with the consensus being in favour of objectivity. Nevertheless, it was eventually agreed that, for purposes of disclosure, a subjective test should be adopted. This was so that the IBA Guidelines as a whole would be acceptable to the International Chamber of Commerce ("ICC"), which has, since time immemorial, relied on a subjective test for disclosure for potential conflicts of interest according to the expectations of the parties, rather than those of a reasonable and informed third party.<sup>77</sup>

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<sup>75</sup> The sentence in the 2004 version is identical to the one in the 2014 version, save for the fact that it was renumbered as 3(d) in the 2014 version.

<sup>76</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1844.

<sup>77</sup> See Art 11(2) of the International Chamber of Commerce Rules of Arbitration 2012: "disclose ... any facts or circumstances which might be  
*(continued on next page)*

58 In contrast, it was agreed that the test for disqualification should be stated as objective; hence the viewpoint of a “reasonable third person, having knowledge of the relevant facts and circumstances”<sup>78</sup> being adopted as the overriding criterion. This explains the apparent contradiction between the tests for disqualification and disclosure. I should also point out that the ICC test of “the eyes of the parties” is only applicable at the disclosure stage and is not the test for ultimate denial of confirmation or removal.<sup>79</sup> However, on the basis that no express standard for actual disqualification is stated in the ICC Rules, it cannot be said that there is any contradiction between the IBA Guidelines and the standards prevailing at the ICC.

## **B. Circumstances to disclose under the IBA Guidelines**

### *(1) The Orange List 2004 IBA Guidelines*

59 The purpose of the Orange List is outlined in the 2004 IBA Guidelines as follows:<sup>80</sup>

The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations.

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of such a nature as to call into question the arbitrator’s independence in the eyes of the parties”.

<sup>78</sup> General Standard 2(b), Part I: General Standards Regarding Impartiality, Independence and Disclosure, 2004 IBA Guidelines.

<sup>79</sup> As International Chamber of Commerce (“ICC”) decisions on disqualification have historically been taken by the votes of the members of the ICC Court without publishing any reasons for the decision, it is difficult to generalise about the exact formula applied in ICC cases, until recently. Since 2016, the ICC has introduced a system whereby parties may apply for the grounds of a decision of a challenge.

<sup>80</sup> Paragraph 3, Part II: Practical Application of the General Standards, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004).

(2) *Born's critique*

60 Born attacks the Orange List as giving rise to a presumption of disclosure,<sup>81</sup> and thus “a basis of disqualification” for any of the circumstances mentioned in that list.<sup>82</sup> His view is predicated on the use of language relevant to the standard of disqualification and authorities which have “cited Orange List items in considering applications to disqualify arbitrators (or annul awards) on grounds of arbitrator independence or impartiality”.<sup>83</sup>

(3) *Concept of subjective relevance*

61 This was certainly not the intention of the Original Working Group. As explained in the immediately following paragraph of the 2004 IBA Guidelines:<sup>84</sup>

[S]uch disclosure should not *automatically* result in a disqualification of the arbitrator; no presumption regarding disqualification should be arise from a disclosure. The purpose of the disclosure is to inform the parties of a *situation* that they may wish to explore further in order to determine whether objectively – *ie*, from a reasonable third person's point of view having knowledge of the relevant facts – there is a justifiable doubt as to the arbitrator's impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act.' [emphasis added]

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<sup>81</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1849.

<sup>82</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1850.

<sup>83</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1849.

<sup>84</sup> Paragraph 4, Part II: Practical Application of the General Standards, 2004 IBA Guidelines.

62 The 2014 version of the same provision has a slightly expanded wording, but, for the purposes of this discussion, its intent is substantially the same. It provides:<sup>85</sup>

Disclosure does not imply the existence of a conflict of interest; nor should it *by itself* result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a *situation* that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator’s impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. [emphasis added]

63 Evidently, the objective of the Orange List is to encourage relatively full disclosure and possible conflicts of interest beyond the call of duty because of the concept of subjective relevance. Disclosure would at least give the opposing party an opportunity to seek clarification and information about potential conflicts of interest. If the answers given by the putative arbitrator satisfy the hypothetical reasonable and informed third party that the circumstances disclosed would not jeopardise his independence, then any challenge or objection made by the opposing party should then be withdrawn or dismissed.

64 In practice, the system has worked relatively well. The ICC does not recognise the binding authority of the IBA Guidelines because the criteria for disqualification are governed by its own rules. Nevertheless, it does take into account arguments from either party based on the Guidelines in objections to appointment as well as in applications for removal.

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<sup>85</sup> Paragraph 4, Part II: Practical Application of the General Standards, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004).

(4) *Comparison with ICC Guidance Note on disclosure requirements*

65 In February 2016, as part of its updated practice note (“ICC Guidance Note”),<sup>86</sup> the ICC outlined specific circumstances which may raise the question of independence and/or impartiality. While there are many overlaps between the 2014 IBA Guidelines and the ICC Guidance Note; for example, the requirement to state the identity of the law firm, ongoing duty to disclose, and other factors, there are also key differences between the two regimes.

66 It is notable that the 2014 IBA Guidelines only imposes a three-year limitation on the arbitrator’s involvement with one of the parties,<sup>87</sup> but the ICC Guidance Note requires disclosure without any time limit.<sup>88</sup> On a broader view, the ICC continues to employ a wholly subjective test, without the “traffic-light” system of the 2014 IBA Guidelines. On the one hand, the ICC imposes stricter requirements of disclosure than the 2014 IBA Guidelines because of the test’s subjective nature and lack of time limits. On the other hand, the fact that there is no traffic-light system in the ICC Guidance Note makes it more liberal than the IBA Guidelines because there are no strict obligations. This is not the time or place to go into a detailed comparison of the two lists, except to say that

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<sup>86</sup> See International Chamber of Commerce, “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” [http://res.cloudinary.com/lbresearch/image/upload/v1456236629/note\\_to\\_parties\\_and\\_arbitral\\_tribunals\\_on\\_the\\_conduct\\_of\\_arbitration\\_22\\_231116\\_1410.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1456236629/note_to_parties_and_arbitral_tribunals_on_the_conduct_of_arbitration_22_231116_1410.pdf) (accessed 8 July 2016) (“ICC Guidance Note”).

<sup>87</sup> See Art 3.1 Orange List Part II: Practical Application of the General Standards, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014).

<sup>88</sup> International Chamber of Commerce, “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” [http://res.cloudinary.com/lbresearch/image/upload/v1456236629/note\\_to\\_parties\\_and\\_arbitral\\_tribunals\\_on\\_the\\_conduct\\_of\\_arbitration\\_22\\_231116\\_1410.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1456236629/note_to_parties_and_arbitral_tribunals_on_the_conduct_of_arbitration_22_231116_1410.pdf) (accessed 8 July 2016) at para 20, “Section A – Statement of Acceptance, Availability, Impartiality and Independence, Part III – Arbitral Tribunal”.

international standards of disclosure will continue to evolve as the international arbitration community begins to use the ICC Guidance Note more frequently.

## V. Conclusion

67 My conclusions can be summarised as follows.

- (a) Across the various thresholds outlined by different national and academic standards, one underlying thread is the difficulty in establishing with surgical precision the applicable standard of proof. However, as mentioned earlier, much of the difficulty is attributed to the fact that we are trying to gauge the *appearance* of bias – which requires a hypothetical enquiry – rather than *actual* bias.
- (b) This obfuscation provides more impetus for tribunals to apply the IBA Guidelines, which not only seek to reflect best international practice, but also focus on a centered approach (that is, the “likelihood” standard) which lies at the heart of any analysis of conflict of interest under the IBA Guidelines.
- (c) Born’s critique of the 2004 IBA Guidelines are understandably predicated on a textual analysis of the IBA Guidelines, as he would not have had access to the intentions of the Original Working Group. I therefore hope that this explanation will have given some insights as to some of the underlying premises that underpinned the 2004 IBA Guidelines (and, to a lesser extent, the 2014 IBA Guidelines), which might help the international arbitration community to understand them better. That said, the fact that such a distinguished practitioner and scholar as Born can arrive at a very different understanding of the meaning of seemingly controversial sections of the IBA Guidelines may be cause to review the wording yet again.

68 This article has demonstrated that, in international arbitration, challenges against arbitrators are not as straightforward as many would expect, since there is no universal consensus on the basis of “justifiable doubts”, and the applicable standard of proof.

69 Against this context, this is precisely what the IBA Guidelines seek to do – provide an international consensus. More fundamentally, they strike a balance between the rights of parties to participate in the appointment of the tribunal and the integrity of the tribunal. Its significance in the international arbitration community lies in preserving the reputational integrity of arbitral tribunals – the trust of the international community that decisions are made by independent tribunals. If that confidence begins to erode, then the attractiveness of arbitration as a forum for dispute resolution will diminish along with it.

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### **Background to Essay 8**

This essay grew out of a number of speeches and lectures I have made on this topic. It reflects my views after a lifetime of experience as a disputes practitioner, both in litigation and arbitration.

I have given this speech twice in 2017, once at the Law Society of Singapore's Annual Litigation Conference, and the second time in Seoul, South Korea, for a gathering of the Seoul International Dispute Resolution Centre (with only minimal amendments to the text to change references from litigation to arbitration).

Although I now rarely appear in court as an advocate, I was recently asked to act as lead counsel in a court case after giving these two talks, and I felt that I had to put my own principles into practice. So I gave an opening statement which lasted for the better part of a full day (in contrast to my opponents who took only about half that time for their opening statements even though there were two separate opening statements). The case was about whether a declaration of trust should be set aside on various grounds of fact and law, including misrepresentation, mistake, undue influence and unconscionability. The issues did, however, turn on disputed matters of fact, and there were inevitably several days of cross-examination. Nevertheless, the areas of cross-examination had already been foreshadowed to a large extent in my opening statement, where I had pointed out the defendant's version of events and compared them with the known and undisputed facts, as well as my client's opposing affidavit evidence. I also used my oral opening statement to question the credibility of the defendant's account. My point is that I had prepared the court fully for everything that was to follow the opening statement so that the court could look out for what I said were the weak points in the defence, and then make good the assertions in my opening statement when I revisited all the outstanding issues in my closing statement.

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## RETHINKING ADVOCACY IN COMMERCIAL ARBITRATION CASES

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Michael HWANG SC\*

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### I. Purpose of talk

1 The purpose of my talk today focuses on what kind of advocacy works best for commercial arbitration disputes, so my message today does not necessarily apply to non-commercial disputes, especially those where important issues of fact are dependent on the credibility of oral testimony; for example tort, crime, and matrimonial cases.

2 I will emphasise the importance of both the written and oral opening statement and contrast the relative lack of importance of cross-examination in the majority of commercial cases *versus* the importance of written and oral submissions.

### II. What is the basis for my theory of advocacy?

3 Commercial cases are usually based on contract.

4 Contractual liability is usually strict subject to certain common law and sometimes statutory defences as well as defences provided by the contract – this means that liability is not usually dependent on proof of

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fault, unless there is an argument about the term “reasonable” which appears in the contract and is relevant to the issue of liability.

5 Liability in contract is normally based on who has assumed responsibility for loss resulting from certain happenings which may be foreseeable (and therefore identified) or unforeseeable (which may not be expressly identified). In the latter case the question will then be to see what the construction of the contract is to see who is impliedly understood to have taken on the responsibility for bearing unforeseen risk). Liability becomes a question of allocation of risk, and cross-examination rarely assists on questions of construction.

6 Hence, there will be a large amount of facts which will not be seriously disputed, but rather the argument will be about who has undertaken to bear the responsibility for what has happened.

7 Commercial disputes are inevitably well documented through contractual documents as well as correspondence and documents generated in the course of a typical commercial transaction like purchase orders, delivery orders, shipping documents, invoices, receipts, site meeting minutes and the like. There will usually be a high number of such documents, each of which may have contractual consequence, and will eventually contribute to the question of liability.

8 The task of the advocate is to make sense of all these documents against the background of the undisputed facts and argue a case for liability based mainly on the documents rather than the oral testimony of one or more witnesses. Let me give you two rules which I have formulated based on my experience:

- (a) There is an inverse ratio between the volume of documents in the hearing bundle and the need for cross-examination. The more documents there are, the less the need for cross-examination.
- (b) The more relevant documents there are, the greater the need for counsel to take the tribunal through the documents to explain where they fit into counsel’s theory of the case.

9 No less a person than Lord Neuberger, the President of the English Supreme Court agrees with me. In a lecture given on 10 February 2017,

he said: “as for cross-examination, most of the best points that emerge from questioning can be made much more shortly in argument”.

10 This is not unusual when you think that there are express rules of court that provide for commercial disputes to be decided by the court without oral testimony and cross-examination. There is the general rule on Originating Summonses and other more specialist rules for special types of litigation such as Originating Petitions and Originating Motions. So there is no presumption that all kinds of litigation require oral testimony and cross-examination. When these non-writ forms of action are filed, there will usually be a need for an affidavit or witness statements deposing to the necessary facts in support of or against the application, but where affidavits or witness statements conflict, advocates can usually gloss over the differences as they are usually not on key factual issues which will be determinative of liability. Therefore, we should be used to arguing cases without the crutch of cross-examination unless there is really some factual issue in controversy which is critical to the outcome of the case.

### **III. What does my theory mean in practice?**

11 First, if cross-examination is less important than we think, then we need to beef up the other parts of our litigation tools. In particular, the opening statements should be critical. Historically, advocates in Singapore in the late 1960s have paid less attention to it than it deserved. When I started practice, people used to think that the Opening Statement was merely for introducing the parties, counsel, and the bundles of documents that were going to be referred to. (This took about five to ten minutes.) Since this was before the days of the photocopying machine and word processing machines, all documents had to be typed from scratch, so the Agreed Bundles were pretty short and did not take much time to get through.

12 Our local advocates used to think that everything of importance was contained in the oral testimony of the witnesses (and this was before the days when there were compulsory written witness statements filed before the hearing). Even when written witness statements were introduced, counsel still believed that the story and the

issues should be told through the witnesses, and winning or losing the case depended primarily on how cross-examination of the witnesses turned out; with all the real arguments and analysis of the issues in the case being left for the Closing Statement. But when we started to import QCs to lead us in our cases, we started to learn from them the importance of the Opening Statement as a tool for educating the court or the tribunal as to what the case was about.

13 QCs would spend substantial time on (a) the written Opening Statement; and (b) the Oral Opening at the beginning of the trial. The written Statement would go into the facts in some detail, providing extensive cross references to the Hearing Bundle documents, highlighting facts that were admitted or not seriously disputed as a basis for their legal arguments. There would be extensive references to the documents in favour of the proponent's case, but there would also be references to the key documents relied on by the opponent and those would be criticised as seen fit, so that the tribunal would already be invited to review those documents with caution.

14 I remember a conversation with V K Rajah (later Justice of Appeal and finally Attorney-General) quite long ago when both of us were not yet SCs. We were discussing techniques of written submissions, and he told me: "I write my Opening Statement as if it were my Closing Statement". In other words, he put his best case forward in his Opening and didn't save up all his best points to put into his Closing. Until then, I was still working on the theory that, in the Opening, you gave enough to the tribunal to make it interested in your theory of the case but you would save the best for (a) your (hopefully) devastating cross-examination of the other side's witnesses; and (b) your best factual and legal arguments in your Closing when you knew the full extent and strength of your opponent's case and then put forward your own best case at that point, hoping that some of your best points (which might be heard for the first time during the Closing Statement) might surprise the other side, leaving them no or little opportunity to reply.

15 After that conversation, I began to appreciate what he and the QCs were trying to achieve by their technique.

16 First, they were trying to achieve a high level of credibility with the tribunal, by saying, in their Opening Statement:

I have reviewed all the pleadings, affidavits and relevant documents in the case, I can tell you why my client's case is to be preferred to that of the other side, and I will tell you in some detail so that you can form an early impression of the strength of my case. I will show you how exactly my case is built up and hangs together; I will also show you why the other side's case is either not credible or cannot stand in the face of the documentary evidence; and we will see how well my case stands up in the course of the evidentiary hearing, and at the end of that hearing I will report back to you to tell you what part of my case (if any) has changed in the light of the evidence which has been adduced.

17 This is a bold technique, but, if you think about it, it is an absolutely logical one. In today's conditions, there are not supposed to be any surprises in terms of testimony or documents revealed at the trial. The totality of the oral evidence is supposed to be contained in the witness statements and the totality of the written evidence is supposed to be in the Agreed or Hearing Bundles. Hence, counsel should be able to plow through all those documents and come up with a viable theory of the case, emphasising all his client's strengths as well as all the other side's weaknesses. There is no need to hold back anything except in some cases of uncertainty about critical facts, which can be expressed in the Opening with some reservations, to allow room for the possibility that cross-examination might result in some change to a party's case to be made by the time of the Closing Submission. So what counsel should be aiming at when he or she finishes the Opening Statement is to try and put the tribunal in a position that, subject to hearing the other side, the tribunal would be prepared to find in favour of the party whose Opening Statement has just been presented.

18 Remember that, especially for the counsel for the plaintiff, the Opening Statement is the first and best chance for counsel to have the undivided attention of the tribunal to hear (as opposed to read) what counsel's case is. In that sense, the tribunal's mind will be to some degree a blank easel on which counsel for the plaintiff can paint the picture he or she wants without (at that stage) any contradiction from

the other side. Put another way, this is plaintiffs' counsel's best chance of poisoning the mind of the judge from the beginning of the case. Of course, the danger is that if you pitch your case too high and cannot prove what you say you will prove your credibility before the tribunal will quickly vanish.

19 In the case of counsel for the defendant, if the Defence Opening Statement is presented orally at the end of the plaintiff's case, the plaintiff will have the advantage of his or her words staying in the mind of the tribunal while the plaintiff's case is presented. Because of this possibly unfair advantage, this practice no longer exists in international arbitration, where both Opening Statements are made one after the other, usually taking at least half a day to one full day in total so that the tribunal has both sides' positions in its mind while it listens to the oral evidence and can bear in mind the particular points of note which counsel has already highlighted in their respective Opening Statements. This works much better in practice and I think it would be better if defence counsel were to seek the tribunal's permission to make his or her Opening Statement immediately after the plaintiff's Opening Statement so as to cancel out to the extent possible the prejudicial effects of that Statement in the mind of the tribunal while it is still fresh.

20 What then will happen after the end of the cross-examination of all witnesses? Put another way, what does counsel then do with their Closing Statements, oral or written? The answer is that, ideally, counsel will say to the tribunal: "You will have heard my client's case being put in my Opening Statement at the beginning of this trial. Now I want to tell you what has changed in my Opening Statement as a result of the evidence we have heard". That is the heart of what should happen; how that Closing Statement is constructed will obviously depend on what actually has happened in the course of cross-examination or (inevitably) the introduction of some new documentary evidence. Counsel will have to deal with that by modifying his or her theory of the case and to fit in the new facts and documents that have emerged. Hopefully, some of the facts and documents actually strengthen counsel's case and he or she will naturally highlight these. Other facts and documents may weaken counsel's case and he or she will have to deal with them as best as

possible, trying to maintain the essential integrity of his or her theory of the case intact as far as possible.

21 This is not a fanciful theory of advocacy. I have been sitting as arbitrator for 20 or more years, and this happens as the standard form of advocacy in international arbitration, certainly from common law advocates, whether they be solicitors or barristers. The modern tendency is very much for good counsel in arbitration to give their all in their Opening Statements, and to waive post hearing briefs as such. However the tribunal will often ask parties to make written submissions on problems that particularly concern them, which in such cases will be Closing Submissions; but they would be more in the nature of answers to specific questions from the tribunal, rather than a re-hash of the Opening Statements updated to take into account changes in their respective cases in view of new facts or documents.

22 My belief in the potential of the Opening Statement is shared by several speakers at the GAR Live Stockholm on 27 April 2017. Stockholm-based partner Pontus Ewerlöf explained that “you hope that the tribunal has reviewed all of the documents in the case but opening statements are an opportunity to make sure they have made the connections”. Hong Kong-based partner Nils Eliasson said counsel can “gain confidence and credibility in the eyes of the tribunal through their mastery of facts and evidence and responses to questions”. Columbia Law School professor George Bermann said that, if written arguments are filed, they should be more of a “road map” than a “skeleton”, showing the “progression of argument, not just its components”.

23 Stories abound from the English Bar where top Queen Counsel have taken, not simply hours but days, for their Opening Statements where areas of fact and law are extremely complex. I have even heard stories of cases where parties have settled after hearing the plaintiff’s counsel’s Opening Statement when the defendant’s counsel finally realises that there are arguments to which he will simply have no meaningful answer. I, myself, have been on one case when I was arguing on behalf of a petitioner claiming relief from the court to order that the defendant shareholder of a private company buy out my client’s shares in the company on the grounds of oppression by the majority

shareholders. As I delivered my Opening Statement and narrated the acts of oppression one by one, I found my opponent slipping me notes during the course of my opening speech offering certain sums by way of settlement. With each offer, I shook my head, and carried on narrating the next act of oppression. This went on for a few times until finally defendant's counsel asked for an adjournment. We then negotiated the final buy-out sum. I should not exaggerate the potency of an Opening Statement, but this war story demonstrates its value.

#### **IV. Why do I think that the benefits of cross-examination in commercial cases are exaggerated?**

24 If both counsel have presented their respective Opening Statements in the way I have described, the room for anything really new being discovered by cross-examination is relatively limited. As I said earlier, the relevant facts are usually not heavily disputed (except in cases which do turn to some extent on differences in oral testimony, such as construction disputes where there are often disputes about communications between owner's representatives and contractor's representatives, cases where there is some dispute arising from oral conversations between important players in the case which could lead to a variation of contractual obligations or even an oral collateral contract, or defences of waiver and estoppel).

25 I have sat through countless arbitrations (and court hearings in my capacity as a judge in the DIFC Courts) and became so disenchanted with the uselessness of cross-examination in contributing to my knowledge of the case that I decided to test my perception with my co-arbitrators. As each witness left the room, I asked my co-arbitrators: "and how much did you learn from that cross-examination?" "And the answer would inevitably be – "not much".

26 One of the main reasons for my lack of enthusiasm for cross-examination as a forensic tool is the way in which questions are asked. They are generally divided into seven classes:

- (a) Demonstrating facts which are plain from documents and are not challenged by the witness;

- (b) trying to persuade a witness to agree on the meaning of particular documents when that will be typically a matter for submission and objective analysis;
- (c) arguing with the witness on the legal position taken by his party;
- (d) arguing with the witness on his opinions or characterisation (which are generally inadmissible and unhelpful to the tribunal save in the case of experts);
- (e) demonstrating the lack of credibility of the witness by bringing in evidence of extraneous facts to contradict his statements on matters unrelated to the main issues (there simply isn't enough time for such forensic tricks);
- (f) trying to break the witness down into admitting facts (for which there is not usually time in an arbitration with its limited hearing time) or on matters of construction of documents or matters of law (all of which are matters for counsel to argue rather than the witness); and
- (g) exploring the witnesses' state of mind unless that state of mind is a relevant factor in a party's theory of the case. In the typical commercial arbitration, the issues are based on contractual obligations which have to be performed regardless of the contracting party's intentions, so of what relevance is the witness's intention or motive in doing or not doing something? His actions or inactions are normally judged against the requirements of the contract, which impose strict liability for performance, so the issue is whether a party has performed or not performed, and his reasons for doing so or not doing so are usually irrelevant.

27 Let me add further criticisms of some common examples of useless cross-examination:

- (a) the principles of contractual interpretation render questions about a witness's intentions, motives and interpretation of documents pointless because:
  - (i) the approach to contractual is objective; and
  - (ii) the tribunal only looks at a limited factual matrix.
  - (iii) questions of construction are a matter for the tribunal. Pre-contractual negotiations and post contractual conduct

may generally not be taken into account for contractual interpretation.

- (b) there are some counsel whose main motive in cross-examination is not so much to glean new facts but to make the witness look bad. Such an objective may occasionally be justified in a full-scale court trial where greater latitude is given for lengthy cross-examination to explore issues of motive and character. But it has no place in international arbitration, where hearing time is at a premium, especially if the tribunal imposes a chest clock;<sup>1</sup>
- (c) the “put your finger on this page” approach;
- (d) legal issues are matters for submission;
- (e) questions which take a witness through facts and documents with a view to making the witness agree with the other party’s interpretation of a document or characterisation of events;
- (f) cross-examination is about asking questions rather than arguing with the witness. The tribunal normally does not allow time for far-ranging cross-examination whose object is to break a witness rather than to elicit facts (what might be termed “questions for forensic experts” as described above<sup>2</sup>). And tactically, once it is clear what witness’s evidence is, counsel is usually better off submitting on inconsistencies to the tribunal rather than using inconsistencies to argue with the witness.

28 The proper use of cross-examination in commercial cases is mainly for (a) challenging or testing the veracity of witnesses on issues where their statements of fact are important; and (b) extracting information from them which is not in their witness statements which are necessary or helpful for the presentation of the cross-examiner’s case.

29 I have become so fed up with listening to useless cross-examination over the years, that I started a hobby of making a note of common cross-examination questions which I found of no value to me as a tribunal. It was written in 2010 and was entitled “10 Questions not to ask in Cross-Examination in International Arbitration”. In 2012, I revised

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<sup>1</sup> See para 27(f) below.

<sup>2</sup> See para 26(b) above.

the list to 15 Questions, and a couple of years later, I increased it to 21 Questions, and I have stopped counting.

30 I am not quarrelling with the value of cross-examination when the character and credibility of a witness are central to issues of liability, but in most cases liability in a commercial case is ethics-neutral. The issue usually does not turn on; “Who is the good guy and who is the bad guy?” The issue usually is: “who has broken the contract? If so, has he any justifiable reason for it?” or “what does the contract say about who is to bear the risk of what has happened in this case?” Hence, cross-examination which sets out to make a witness look bad doesn’t usually help in the long run. If the witness has written a bad letter, it is bad regardless of what that witness thought he or she was writing – the letter will speak for itself. Indeed, that is the short answer to long cross-examination of multiple documents – they will speak for themselves, and then it will be a question of law what the legal effect of that letter is.

31 Let me give you a recent example of an ineffective cross-examination by one of the top London Silks (with some editing of the transcript). The Silk is cross-examining a witness who only understands Chinese, and the line of questioning generally concerns an allegation that the Chinese party (for whom the witness works) has copied certain industrial designs of the QC’s client.

32 The QC is cross-examining the witness about an article about the Chinese company announcing details of its new plant:

1	QC	Go back to the article, please, and just look at the last page of the article. We looked at the detailed information which was provided in Table 3 and Table 4. This is not public domain information; this is information about results taken in the course of running the plant. (which was allegedly based on a copy of the QC’s client’s design)
2	A	What do you mean by that?
3	QC	Look at the first main paragraph of this, where it says that the company has invested in the construction of a 250,000 [edited] tonne project.
4	A	Yes, that is what it says.
5	QC	Yes, and it says in the same paragraph that the plant has, two or three lines from the end, “achieved safe operation and achieved premium-grade [edited] products in its first run”.

6	A	What do you want me to say? What do you mean? I am listening to what you said.
7	QC	That statement by the company was a true statement, was it not?
8	A	I do not know. This is something to do with the management to do with the Board of Directors. I do not know about things like this; I am just a technical person.
9	QC	You are aware that one of the complaints made by the claimants was that [your company] had copied the size of the two [edited] reactors in the [edited] unit.
10	A	What do you want me to say?
11	QC	The real reason you said that the reactor size was 12 metres is because you wanted to dispute the claimants' allegation that you copied their reactor specification of 10 metres, and you were caught out.
12	A	That is your personal view. What do you want me to say?
13	QC	Drawing [edited] is another drawing you have refused to provide.
14	A	That is your guess. What do you want me to say?
15	QC	The explanation you give in detail in paragraph 81 of your witness statement, is not true and it is obvious that it is not true because the explanation you give does not make sense. Please comment.
16	A	What do you want me to say?

33 There are 3 problems with the QC's questioning:

- (a) He makes assertions instead of asking questions, leaving the witness in a state of bewilderment as to how he is supposed to respond.
- (b) While this is excusable in the early stage of cross-examination when preparing the witness for the really important questions, he continues making assertions without asking a question, with the result that the witness has to ask him "What do you want me to say?"
- (c) The real reason why this cross-examination leads nowhere is that it is really unnecessary, since the points that the QC wishes to make could all have been made in Submissions more effectively than this method of making assertions to a witness and waiting for a reaction. All the evidence he was relying on was in the Hearing Bundles and he could have made his point much more effectively by

showing the relevant documents to the tribunal and submitting on them without interruption and without having to force the witness to admit what is not easily denied in any event.

34 There are certain types of commercial cases where cross-examination will be important and even crucial. Fraud stands out of course, where credibility and motive are often critically important, but I foreshadowed this in my opening remarks, where I pointed out that tort cases (particularly commercial torts) typically required intensive cross-examination, and fraud cases usually involve a tort as well as knowledge and dishonesty, which need to be tested by cross-examination.

35 I like to say to counsel in arbitration: “We are not bound by the rule in *Browne v Dunn*<sup>3</sup> so you don’t need to put everything in dispute to the witness”. But even in litigation I take the view that you don’t have to slavishly put every little fact that you dispute to the witness for formal contradiction – forensically the tribunal learns nothing from such a formal process. But there are ways of challenging a party’s evidence that has some forensic effect. The principle should be that if one party wishes to challenge the other party’s witness, the other side should be allowed to rebut that challenge, either by the witness or by some other means. This brings us back to the Opening Statement, where my thesis is that, if you want to say that the other side’s witness’s version of a fact is wrong, you make that plain in your Opening Statement and you say that you will demonstrate this by other witnesses’ evidence or by a document, so that the other side has notice of what you are relying on. To me that should be sufficient compliance with the spirit of *Browne v Dunn* because the other side has notice of the challenge and can then have the opportunity of asking for leave to adduce additional direct oral evidence to rebut the challenge made against her. If then counsel who made the original Challenge wishes to cross-examine, then he will have

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<sup>3</sup> *Browne v Dunn* (1893) 6 R 67 is a very old English case which requires counsel to put to the witness a fact which counsel’s client disputes or has a contrary version, and failure to do so will preclude counsel from making an allegation in closing about the credibility of the witness on his unchallenged evidence.

something new to ask about, that is, the witness's rebuttal evidence of the original Challenge – then the cross-examination will become meaningful.

36 Another area where cross-examination may be necessary and meaningful is in expert evidence. Of course, one side's expert report will be met by an opposing expert's report, and it will not usually be easy for the tribunal to tell which expert is correct on which issue without some testing or clarification by cross-examination. But the modern solution guided by international arbitration practice is witness conferencing, meaning that the two experts come together and produce a joint report identifying the issues on which they agree and disagree. In the latter case they will also indicate why they disagree, so that the issues in dispute between them are clearly set out and their reasons clearly stated. The experts then answer questions from the tribunal and after those questions have been asked counsels are permitted to ask additional questions in cross-examination but (in my experience) there is not usually much cross-examination necessary after the process I have described.

37 My conclusions are therefore as follows:

- (a) You should rethink how to achieve the best results for your clients by your advocacy instead of following long standing practices which are no longer achieving their purpose.
- (b) We should place much more importance on the Opening Statement, both written and oral, as the primary means of getting our case across to the tribunal. We should tackle all issues which we can foresee being contested in that Opening Statement and deal with it on the basis of the best evidence available at the time of drafting the statement and subject to our right to amend the same in our Closing Statement.
- (c) we should limit our cross-examination only to those questions which are absolutely necessary and where we can reasonably hope for some positive effect that cross-examination will have on the mind of the tribunal instead of (as in most cases) giving the impression of cross-examining simply because it is customary and without a clear idea of what might realistically be expected to

emerge on cross-examination. Try and work on the premise of “less is more”.

- (d) Use the Closing Submission as a supplement to the Opening Statement and not as a substitute or a restatement. So always keep the Opening Statement alive and then use the Closing Statement to convince the tribunal of the validity of your original theory of the case subject only to the developments that were revealed in the trial.
- (e) The process I have described above will impress the tribunal that you as counsel are really on top of your case and have an answer for all challenges to your theory of the case which will in turn be likely to persuade the tribunal that your case should prevail over that of the other party.

38 This should be the way of the future.

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### Background to Essay 9

This was an essay written in 2006 for a presentation at the biennial Congress of the International Council for Commercial Arbitration (“ICCA”) held in Montreal in that year. Although witness statements are now commonplace both in civil litigation and arbitration, this practice was not so universal until the publication of the IBA Rules on the Taking of Evidence in International Commercial Arbitration in 1999.

As Singapore had already adopted the use of witness statements for virtually all civil litigation (except family law cases) by the early 1990s, I was already familiar with how this practice had developed, and how this could be adapted to international arbitration with some deviations from court procedures. The invitation to speak at an ICCA conference is always a great honour, and this was the third occasion I was speaking at an ICCA conference.

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## THE ROLE OF WITNESS STATEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION\*

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## I. Introduction

1 Witness statements are very commonly used in international commercial arbitrations nowadays,<sup>1</sup> although they are not commonly used in arbitrations conducted in the civil jurisdictions of Asia, such as China.<sup>2</sup>

2 The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitrations (“IBA Rules”),<sup>3</sup> the UNCITRAL Arbitration Rules (“UNCITRAL Rules”)<sup>4</sup> and the London Court of International Arbitration Rules of Arbitration (“LCIA Rules”)<sup>5</sup> explicitly provide for the taking of witness statements.

3 Although the International Chamber of Commerce Rules of Arbitration (“ICC Rules”) do not explicitly provide for the taking of

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<sup>1</sup> See Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) at pp 6–85. See also Laurent Levy, “Concluding Remarks” in *Arbitration and Oral Evidence* (Laurent Levy & V V Veeder ed) (ICC Publishing SA, 2005) at pp 143–148.

<sup>2</sup> See comment by Michael Moser in (2005) 21(4) *Arbitration International* 583 at 588.

<sup>3</sup> See rr 4.4–4.8, available at the International Bar Association website <http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf> (accessed 27 June 2006).

<sup>4</sup> See Art 25(5), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (accessed 27 June 2006).

<sup>5</sup> See Arts 20.3–20.6, available at [http://www.lcia.org/ARB\\_folder/arb\\_english\\_main.htm](http://www.lcia.org/ARB_folder/arb_english_main.htm) (accessed 27 June 2006); available at International Chamber of Commerce website [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf) (accessed 27 June 2006).

witness statements,<sup>6</sup> Derains and Schwartz observe that witness statements are widely used in ICC arbitrations:<sup>7</sup>

In order to save hearing time ... it has become commonplace in ICC arbitrations for parties to present the direct testimony of witnesses either wholly or partly by means of written witnesses statements. But if this is done, the witnesses are nevertheless generally required to be made available at the hearing for questioning. If a witness does not appear without a valid reason, the weight of his witness statement will be considerably reduced and it may even be stricken from the record.

4 In this paper, the role of witness statements in international arbitrations will be discussed, and some suggestions will be offered on the preparation of witness statements.

## **II. Uses of witness statements**

5 The Working Party which prepared the IBA Rules<sup>8</sup> describes the role which witness statements play in international commercial arbitrations:<sup>9</sup>

If Witness Statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party thus can better prepare its own examination of the witness and select the issues and witnesses it will present. The Tribunal is also in a better position to follow and put questions to these witnesses. Witness Statements may in this way reduce the length of oral hearings. For instance, they may be considered as the 'evidence in chief' ('direct

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<sup>6</sup> See Art 14(1) of the International Chamber of Commerce Rules of Arbitration, which gives the arbitral tribunal the power to establish the facts of the case by all appropriate means rather than explicitly providing for the taking of witness statements.

<sup>7</sup> Yves Derains & Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd Ed, 2005).

<sup>8</sup> The IBA Rules were prepared by the Working Party appointed by the Arbitration Committee of the International Bar Association.

<sup>9</sup> IBA Working Party, "Commentary on the New IBA Rules of Evidence" (2000) *Business Law International* 14.

evidence'), so that extensive explanation by the witness becomes superfluous and examination by the other party can start immediately. In order to save on hearing time and expenses, very often the Arbitral Tribunal and the parties can also agree that witnesses whose statement is not contested by the opposing party do not have to be present at the hearing. Of course, the drafting of a Witness Statement requires contacts between the witness and the party that is presenting him.

6 As observed by the IBA Working Party, witness statements are used to replace the oral examination-in-chief of the witnesses. This brings about substantial savings of time during the hearing. This is particularly important for international commercial arbitrations, where the arbitrators, parties and their witnesses may come from various jurisdictions, and it is the international aspect of international commercial arbitration which contributes significantly to the costs of the arbitration.

7 In addition, the provision of witness statements from both parties before the evidentiary hearing will allow the arbitral tribunal to focus its attention on the key points of contention between the witnesses, leading to greater efficiency in the fact finding process during the evidentiary hearing.

8 Witness statements are particularly helpful in putting across the testimony of witnesses who are not fluent in the language of the arbitration more effectively to the arbitral tribunal. This ensures that the key points of what the witness is trying to put across in his evidence is not confused or lost simply because the witness is unable to communicate effectively through an interpreter. However, witness statements carry the obvious danger that the contents of the witness statement may not correctly reflect what the witness may want to say.

### **III. Abuses of witness statements**

9 Notwithstanding the benefits of witness statements, commentators have observed that witness statements are often used as a mouthpiece

for the lawyers to make their pleadings. As observed by V V Veeder QC:<sup>10</sup>

The practice of taking factual witness statements requires urgent reform. Increasingly, many international arbitrators pay little credence to written witness statements on any contentious issue, unless independently corroborated by other reliable evidence. It is perhaps surprising that many sophisticated practitioners have not yet understood that their massive efforts at reshaping the testimony of their client's factual witnesses is not only ineffective but often counter-productive. Most arbitrators have been or remain practitioners, and they can usually detect the 'wood-shedding' of a witness.

10 Unfortunately, this has become such a common practice in the international arbitration community that no one finds it surprising any more. As Anne Veronique Schlaeepfer notes:<sup>11</sup>

It is also accepted that witnesses usually do not write their statements themselves. The practice of having the last page of the statement only containing the date and the signature of the witness (in different characters from the other pages of the document) does not seem to surprise anyone anymore.

11 V V Veeder QC further observes that such practices "diminishes the statement's probative value and increases the need for oral cross-examination".<sup>12</sup>

12 The utility of witness statements would be grossly diminished if the arbitral tribunal cannot have the basic assurance that the witness statement contains what the witness actually wants to say. The arbitral tribunal will have the unenviable task of identifying the parts of the

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<sup>10</sup> V V Veeder, "The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith" (2002) 18(4) *Arbitration International* 431.

<sup>11</sup> Anne Veronique Schlaeepfer, "Witness Statements" in *Arbitration and Oral Evidence* (Laurent Levy & V V Veeder ed) (ICC Publishing SA, 2005) at p 68.

<sup>12</sup> V V Veeder, "The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith" (2002) 18(4) *Arbitration International* 431.

witness statement which have been tailored by counsel to suit his case or to attack the opposing party's case.

13 In England, witness statements filed in court will have to be accompanied with a statement of truth signed by either the witness or his legal representative.<sup>13</sup> The form of the statement of truth is as follows:<sup>14</sup>

I believe that the facts stated in this witness statement are true.

14 If a witness statement is not accompanied by a statement of truth, then the court has the discretion not to admit the witness statement. This is a worthwhile direction to impose in arbitration, possibly coupled with a statement as to whether the witness has been assisted by anyone in the preparation of his statement, as well as the nature and extent of that assistance, so that everyone will know how spontaneous the statement actually is.

#### **IV. Points of interest**

##### ***A. How should an arbitral tribunal treat testimony given during supplemental examination in chief by counsel if it expands on material given in the witness statement?***

15 There is no rule in international commercial arbitration that bars a party from orally examining its own witnesses by way of supplemental examination in chief even after witness statements have been submitted. But there is an inherent danger in that a witness, after having read the opposing party's witness statements, may be tempted to tailor his own witness statement by introducing new material into the record. This

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<sup>13</sup> See Pt 22 of the English Civil Procedure Rules (SI 1998 No 3132) and the accompanying Practice Direction available at [http://www.dca.gov.uk/civil/procrules\\_fin/contents/parts/part22.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part22.htm) (accessed 27 June 2006).

<sup>14</sup> See Pt 22 of the English Civil Procedure Rules (SI 1998 No 3132) and the accompanying Practice Direction available at [http://www.dca.gov.uk/civil/procrules\\_fin/contents/parts/part22.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part22.htm) (accessed 27 June 2006).

causes difficulties for opposing counsel as they might be caught by surprise and thus unable effectively to cross-examine the witness.

16 A tactic which has been used by some counsel to surprise opposing counsel is to insert only broad and conclusory statements into the witness statement, and introduce more detailed evidence through the witness by way of cross-examination or re-examination. This practice serves to reduce the intensity of cross-examination by opposing counsel, as he cannot effectively cross-examine the witness on the new material raised, not having been forewarned of it in advance. And if new evidence is orally introduced in re-examination, unless the cross-examiner can persuade the tribunal to allow him a second round of cross-examination, he may not even be able to cross-examine on the new material at all.<sup>15</sup> Of course, according to traditional common law rules of evidence, re-examination should only deal with matters raised in cross-examination, but, since the strict rules of evidence do not apply in arbitration, anything could happen in practice, particularly if the arbitrator is not an experienced common law litigator.

17 An arbitral tribunal has the discretion to reject such new evidence given by the witness, but it is likely to be confronted with an argument by counsel that there has been a breach of a party's right to have a full opportunity to present its case before the arbitral tribunal under Article 18 of the UNCITRAL Model Law. However, the brief text of Article 18 of the UNCITRAL Model Law does not take us very far, as standards of procedural fairness differ between jurisdictions. This difficulty is highlighted by V V Veeder QC:<sup>16</sup>

For the parties to an international commercial arbitration, justice should be the paramount objective; and procedural fairness by their legal representatives is subsumed in that single objective. But the practice of international arbitration is not so simple, certainly not

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<sup>15</sup> See comments of David Lane, "Act II: Pre-Hearing Advocacy" (2005) 21(4) *Arbitration International* 561 at 579.

<sup>16</sup> V V Veeder, "The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith" (2002) 18(4) *Arbitration International* 431 at 434-435.

for the parties' professional lawyers coming from different jurisdictions to a still different place of arbitration.

18 It is generally accepted that there is no unlimited right for a party to present its case. As long as the procedural rules are applied fairly between the parties, there should not be any ground for argument that a party has been denied a full opportunity to present its case. In this regard, Holtzmann and Neuheus provides an insight into the legislative history behind Article 18 of the UNCITRAL Model Law:<sup>17</sup>

The terms of Article 18 were modelled on Article 15(1) of the UNCITRAL Arbitration Rules. The Commission Report provides no authoritative guidelines to interpreting the terms 'treated with equality' and 'full opportunity of presenting his case'; nor do the reports of the Working Group. It is submitted that this may be because the delegates considered that the terms were so well understood in all legal systems that comment was unnecessary and that detailed definitions might limit the flexible and broad approach needed to assure fairness in the wide variety of circumstances that might be encountered in international arbitration. It is also submitted that the terms 'equality' and 'full opportunity' are to be interpreted reasonably in regulating the procedural aspects of the arbitration. *While, on the one hand, the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. For example, as the Secretariat noted, the provision does not entitle a party to obstruct the proceedings by dilatory tactics, such as by offering objections, amendments or evidence on the eve of the award. An early draft that would have required that each of the parties be given a full opportunity to present his case 'at any stage of the proceedings' was rejected precisely because it was feared that it might be relied upon to prolong the proceedings unnecessarily.* [emphasis added]

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<sup>17</sup> Howard M Holtzmann & Joseph E Neuheus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at pp 551–552.

19 In my view, a witness should not be allowed to add to the matters contained in his witness statement subject to four exceptions:<sup>18</sup>

- (a) the witness wishes to correct an error or ambiguity in his witness statement or affidavit;
- (b) the witness wishes to elaborate on some relatively small detail in his witness statement or affidavit;
- (c) the witness wishes to respond to matters raised in the opposing party's witness statement which he had not seen at the time when his own witness statement was filed; and
- (d) the witness wishes to give evidence about relevant facts which have occurred since the date of his witness statement.

20 In Singapore, the practice of arbitrators in international commercial arbitrations is to regard the witness statement as his complete testimony in chief. Singaporean arbitrators trained in our court system are reluctant to allow expansion of the contents in the witness statement by a witness during the evidentiary hearing unless one of the four exceptions stated above apply.

21 In other words, as a general rule of thumb, the arbitral tribunal should not allow opposing counsel to be taken by surprise by matters that a witness may state during supplemental examination in chief, subject to the four exceptions.<sup>19</sup>

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<sup>18</sup> See Michael Hwang, "Advocacy in International Commercial Arbitration: Singapore" in *The Art of Advocacy in International Arbitration* (Doak Bishop ed) (Juris Publishing Inc, 2004) ch 13, at p 423.

<sup>19</sup> The element of surprise was taken into account by the Singapore High Court in the case of *Lee Kuan Yew v Vinocur John* [1995] 3 SLR(R) 38 where the judge held that the plaintiff's witnesses were allowed to supplement their affidavits of evidence in chief because the oral evidence to be given was nothing more than an amplification of the evidence given in their witness affidavits. Although this case dealt with court proceedings, the views of the judge could be applied in the context of international commercial arbitration.

**B. *Should witness statements be exchanged simultaneously or sequentially?***

22 The IBA Working Party summarised the advantages of simultaneous and sequential submission of witness statements in this way:<sup>20</sup>

Simultaneous exchanges cause less delay and lead to more disclosure and equality between parties. There is also less tailoring of statements to neutralize statements received from the other party. On the other hand, consecutive exchanges allow parties to focus better on the relevant points, which makes the statements more efficient. In order to combine the advantages of simultaneous and consecutive exchanges the Arbitral Tribunal may organize two rounds of simultaneous exchanges. In the second round, only information contained in the other party's statements, submitted in the first round, should be addressed.

23 In my standard directions for witness statements,<sup>21</sup> I normally make provision for two rounds of simultaneous exchange of witness statements, with the second round of witness statements to deal only with matters raised in the first round of witness statements.

**C. *How should arbitral tribunals draft their procedural orders in relation to witness statements?***

24 Special care must be taken by the arbitral tribunal when giving directions on witness statements. If this is not done properly, a possible consequence is that counsel on one side may have filed witness statements which give away the party's case in full (whether as a result of misunderstanding of the terms of the direction or otherwise) while counsel for the opposing side may file only skeletal witness statements, with the full witness testimony to follow during the evidentiary hearing. The result is that the party which has exposed its case in full will be

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<sup>20</sup> IBA Working Party, "Commentary on the New IBA Rules of Evidence" (2000) *Business Law International* 14.

<sup>21</sup> See para 25 below.

tactically disadvantaged against the party who has only filed skeletal witness statements.

25 Two sample directions dealing with witness statements which I often use in the international commercial arbitrations that I am involved with are set out below:

(a) Parties are to prepare statements of evidence in chief (*in numbered paragraphs*) containing the *full evidence in chief* of all witnesses of fact upon whom they propose to rely. Photographs of the witnesses should be attached to their respective witness statements if possible. *All documents* intended to be referred to in the evidence in chief of the witnesses must be attached to the statements of evidence in chief and copies provided with the statements of evidence in chief if not previously provided to the Tribunal. Statements of evidence in chief are to be filed and exchanged by [insert date]. Parties are at liberty to file further statements of evidence in chief (either of the same witnesses or of new witnesses) *only in response to the original statements*. Responsive statements are to be exchanged by [insert date].

(b) All witnesses who have given statements of evidence in chief are to attend for cross examination, if requested by the other Party. If a witness so requested does not attend then, on good cause shown, the Tribunal may accept the statement and decide what weight, if any, to attach to it. Each Party is to give the other Party notice whether any of the other Party's witnesses are not required to appear for cross examination not later than [insert date]. If any witness requested to attend cannot attend, notice of non-attendance must be given at the earliest possible opportunity to the other Party.

[emphasis added]

26 A few important points to note from the two sample directions:

- (a) *in numbered paragraphs* – numbering of paragraphs is important as it allows for easy referencing by the arbitral tribunal and the parties;
- (b) *full evidence in chief* – this is to prevent skeletal statements with witnesses wanting to amplify their written statements with detailed oral testimony at the hearing. The test of whether new oral

evidence should be allowed at the hearing should be whether opposing counsel will be required to spend extra time in preparing supplementary cross-examination on the oral evidence;

- (c) *all documents* – if witnesses have something to say about a document, that document should be either attached to his statement or in a bundle of documents which is available at the time the statement is filed;
- (d) *only in response to the original statements* – unless the arbitral tribunal limits the scope of the responsive witness statements, this could lead to further surprises if one party decides to put in new evidence in the responsive witness statement. One of the consequences of this type of order (which is not always appreciated) is that, if the opposing party chooses not to cross-examine the witness, the party who called the witness cannot be allowed to supplement the witness's statement by way of oral testimony, subject to the four exceptions set out above.

27 In addition, the attachment of a statement of truth to every witness statement as mandated by the English Civil Procedural Rules should be encouraged.<sup>22</sup>

#### ***D. Pointers on preparation of witness statements***

28 The following pointers will hopefully help counsel to achieve what Robert S Rifkind describes as the four objectives to meet in preparing witnesses:<sup>23</sup>

First, the witness must be put at ease and made to feel comfortable with the task at hand.

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<sup>22</sup> Part 22 of the English Civil Procedure Rules (SI 1998 No 3132) and the accompanying Practice Direction available at [http://www.dca.gov.uk/civil/procrules\\_fin/contents/parts/part22.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part22.htm) (accessed 27 June 2006).

<sup>23</sup> Robert S Rifkind, "Practices of the Horseshed: The Preparation of Witnesses by Counsel in America" in *Arbitration and Oral Evidence* (Laurent Levy & V V Veeder ed) (ICC Publishing SA, 2005) at p 68.

Second, the witness must be given an understanding of the process in which he is to participate and how his part of the story fits into the overall picture.

Third, the witness must be intimately engaged in a dialogue that results in an outline of the questions and answers that will comprise his direct testimony.

Fourth, the witness must be prepared in detail, so far as humanly possible, for every difficulty that he will face on cross examination.

29 Although the comments above by Robert S Rifkind apply to the role of counsel in preparation for oral examination in chief, they apply equally to the preparation of witness statements.

*(a) Attachment of an executive summary*

30 An executive summary of each witness statement should be provided so as to allow the arbitrators to focus on the main points on which a witness is expected to testify. This is especially important where a witness is providing testimony on technical matters, as the arbitrator may get lost in the myriad of detail. Furthermore, an executive summary serves to refresh the memory of the arbitral tribunal where the evidentiary hearing may stretch over many weeks.

*(b) Use of the witness's own words in so far as possible*

31 As far as possible, counsel should ensure that the witness own words are used in the witness statement. This will avoid embarrassment to the witness during cross-examination when the witness is confronted with his own statement which he may not understand if drafted by counsel. In addition, the arbitral tribunal may tend to see a witness as more credible if the witness statement is in the witness's own words, in contrast to a witness statement that has been elegantly drafted by counsel. Legalistic words like "peruse" and "I verily believe" should be avoided at all costs.

32 On this point, Gerald Asken offers this piece of advice:<sup>24</sup>

Finally, in most of my arbitrations, I advise counsel at the beginning that if we are going to have witness statements, each witness should prepare the first draft by himself. Counsel can put the witness's testimony into a more logical order and line up the legal arguments.

*(c) Use of cross referencing between witness statements*

33 Very often, witnesses testifying on the same issue have a tendency to repeat the same facts in their testimony during examination in chief. Witness statements offer witnesses the opportunity to cross refer to each other's witness statements, so that any facts which have already been the subject of testimony by one witness need not be repeated by the other. This enables substantial saving of time and simplifies matters for the arbitral tribunal, as the arbitral tribunal need not review the same material again.

*(d) Use of big projector screens to take the witness through his witness statement*

34 Counsel should go through the first draft of the witness statement with the witness by flashing the statement onto a large projector screen. This has the psychological effect of focusing the witness's attention on the words of his witness statement, and serves to prepare him to defend every word in his witness statement when cross-examined (when the same technique may be used by opposing counsel).

*(e) Demarcate between the witness's testimony of fact and opinion*

35 Witness statements very often contain, not only a witness's testimony of fact, but his opinions on why the opposing party's case is

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<sup>24</sup> Gerald Asken, "Act III: Advocacy with Witness Testimony" (2005) 21(4) *Arbitration International* 583 at 589.

misconceived. This may arise from counsel's desire to give the arbitral tribunal the words from the "horse's mouth" by putting in everything which a witness wishes to say into his witness statement. However, while the strict rules of evidence do not apply to arbitrations, it is a rule of common sense that a lay witness should only be giving factual evidence and not his opinions unless he is an expert.

36 Recently, I sat as arbitrator in an ICC arbitration where the claimant buyer was suing the respondent seller for damages arising out of equipment which did not meet the contractual specifications. The claimant alleged that the respondent was responsible for the faulty design of the equipment. The respondent responded by saying that the failure of the equipment to meet the contractual specifications was due to the claimant failing to maintain the equipment properly and failing to provide the correct conditions for operation of the equipment. In addition, the claimant alleged that the respondent had made fraudulent misrepresentations which induced the claimant to enter into the contract. The witness statements by the respondent's in-house experts (who were ostensibly held out as factual witnesses) contained testimony both of fact and opinion on why the equipment failed to meet the contractual specifications and why the respondent felt it was justified in making the alleged misrepresentations. The tribunal gave a direction that the respondent's in-house experts should avoid giving opinions on matters that would be dealt with by external experts unless the in-house experts' opinions were necessary to explain their own contemporaneous actions, for example, to show that in-house experts did not have a fraudulent state of mind at the relevant time when they made various representations concerning the equipment. The rationale for this direction was to prevent an unreasonable burden being placed on the claimant to have to cross-examine all of the respondent's in-house experts on technical issues.

*(f) Highlight portions of the witness statement which are based on hearsay*

37 A practice has arisen whereby some counsel select one witness as their key witness who will testify to all the facts on which their case is

based, regardless of the personal knowledge of the witness of those facts. If this is done, the portions of the witness statement that are based on hearsay should be highlighted and the witness should further state the source of his information. Unless the arbitral tribunal and opposing counsel have notice of the hearsay portions in the witness statement, the key witness would lose his credibility unnecessarily if he is perceived to be pretending to have first-hand knowledge of the matters in his witness statement but is eventually unable to withstand cross-examination on those matters of which he has no personal knowledge. The practice of highlighting the hearsay portions of the witness statement helps to preserve the credibility of the key witness, and signals to the cross examiner that he should save his cross-examination on the hearsay matters for those witnesses who have first-hand knowledge of those matters. Counsel cannot also assume that, even if hearsay evidence is not struck out (as it might be in court), it will be relied on by the tribunal, since the rule against hearsay is based on common sense that it is normally less reliable than first hand evidence, and counsel should always aim to get witnesses with such first-hand evidence except where the facts are not crucial or controversial.

*(g) Exhibit documentary evidence as appendix or extract*

38 If a witness wishes to rely on a particular document to support his point, this document should either be exhibited as an appendix or sufficiently extracted in the body of the witness statement. It is very tiring for members of the arbitral tribunal to dig into cartons of bundles of documents to obtain the relevant document, apart from increasing the time taken for the hearing.

*(h) Use of paragraph numbering*

39 This is a basic but important practical point. The use of paragraph numbering enables counsel to quickly refer the witness to passages in his witness statement during cross-examination. This practice will lead to savings of time and should be insisted on by the tribunal.

## **V. Conclusion**

40 Witness statements are indispensable tools in modern arbitrations to save time and make advance preparations for the hearing more efficient. However, they must be crafted with care and propriety if they are to fulfil their intended purpose of accurately and fairly setting out the witness's testimony.

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### Background to Essay 10

Some years ago, Colin Ong, the first lawyer from Southeast Asia to be appointed an English Queen’s Counsel, asked me to co-author an essay with him on cross-examination in Asian arbitrations. Despite having written two other published essays on cross-examination, I felt that I still had new ideas on this topic to share and joined Colin in this project.

The essay was subsequently published as a chapter in a book of essays entitled *Take the Witness: Cross-Examination in International Arbitration* (Lawrence W Newman & Ben H Sheppard Jr eds) (JurisNet, 2010). The book must have sold well enough, because we were recently asked by the publishers to refresh our essay for a new edition of the same book. This refreshed essay contains some additional insights which Colin and I have acquired over the years since our original essay, and will appear in a new edition of the same book in 2018.

*I wish to extend my thanks to JurisNet for kindly granting me permission to republish this essay in this book.*

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## EFFECTIVE CROSS-EXAMINATION IN ASIAN ARBITRATIONS

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Michael HWANG and Colin Y C ONG

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1 Experienced practitioners in international arbitration often exchange war stories of how a particular case where they had sat as tribunal or acted as counsel had been affected by effective cross-examination. One sometimes hears of stories whereby an entire case has collapsed because the key witness had succumbed to skilful cross-examination by opposing counsel. The art of cross-examination forms a very important component of the interlocking threads of general advocacy skills.<sup>1</sup> The skill of a counsel in nullifying or attacking the case theory and credibility of the opposing witness can be vital in seeking to swing the pendulum of victory in his client's favour.

2 Leaving aside an impeccable knowledge of the law, a successful cross-examiner will need to have a combination of skills which will include good preparation; forceful but pleasant presentation; practice; graceful decorum; the ability to control a witness and, most importantly, the ability to read and effectively communicate his intentions to the arbitral tribunal. An advocate who does not have the last skill will be at a severe disadvantage to one who is able to effortlessly make his case look like the more probable and believable event.

### **I. Universal skills applicable to any tribunal**

3 Although this chapter seeks to focus on which cross-examination techniques are most effective with Asian arbitrators, there is in fact a majority of universal advocacy and non-advocacy skills that can be used by counsel in front of almost every arbitral tribunal in the world.<sup>2</sup> Arbitrators have an often difficult task of trying to work out both the nature and strength of the cases of the respective parties. It is important that a cross-examiner is well prepared in what he is trying to achieve

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<sup>1</sup> For further reading on the art and techniques of cross-examination, see Colin Ong, "Advocacy and Cross-Examination" in *The Asian Leading Arbitrators' Guide to International Arbitration* (Michael Pryles & Michael J Moser eds) (Juris Publishing Inc, 2007) ch 12.

<sup>2</sup> See Michael Hwang, "Arbitrator's Perspective on Advocacy" in *The Art of Advocacy in International Arbitration* (R Doak Bishop ed) (Juris Publishing Inc, 2004).

and prove to the tribunal. Indeed, tribunals need to be careful and avoid being placed in a situation of actual “misconduct” in the course of running the proceedings. It may turn out to be a more serious matter if one party can show that it did not have the right to a fair hearing<sup>3</sup> because the tribunal has for some reason refused to permit cross-examination of a relevant witness who has some relevant evidence, simply because that witness was advised to tactically confine himself to limited evidence as provided in his evidence-in-chief.

4 The first step that any successful counsel must undertake is that he must be well prepared and know what his case theory and strategy are. Cross-examination is the mirror image of the art of presenting evidence-in-chief. Having understood his own case theory and knowing which evidence to present in his evidence-in-chief, the advocate is then able to mentally prepare how to cross-examine the other side systematically and sensibly so as to expose weaknesses in the other side’s case.

5 Cross-examination is not a necessary or even desirable weapon in counsel’s armoury in every case. Careful attention has to be given to the merits and circumstances of each case, taking into account the different characteristics of arbitration as compared to litigation, and no assumption should be made that every witness must be cross-examined. A witness statement can be attacked by submissions rather than cross-examination (the advantage of submissions being that the witness cannot answer back or argue). Where a witness statement is long on argument and conclusory assertions (as opposed to matters of disputed fact), the need for cross-examination is greatly reduced and may even be eliminated because arguments and bald assertions can be effectively dealt with by submissions without the need for questioning.

6 Even where a witness deposes to contentious factual matters, counsel should consider the best way to challenge the witness’s version of disputed facts. In commercial arbitration, tribunals try to look for contemporaneous documents to support or contradict witnesses’

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<sup>3</sup> Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

versions of disputed facts, and tend to make their findings of fact based on such documents rather than the oral evidence of the witness. Accordingly, where such documents exist, counsel should decide how much value cross-examination will add to his case.

7 It is only in cases where there is a paucity of contemporaneous documents and the factual dispute boils down to a clash of two (or more) differing oral versions of meetings or events that cross-examination is probably necessary and even vital. In such cases, counsel should seriously consider the use of witness conferencing where the two (or more) witnesses giving their different versions of the same facts are cross-examined in the same session so that the tribunal can see how the witnesses confront each other with their differing versions. Each witness will be allowed to hear the opposing witness's version of the disputed facts and (with the assistance of his counsel) challenge that version, so that each counsel will be cross-examining the opposing witness with the active assistance and participation of his own witness. Once counsel has adjusted to this regime of cross-examination, he will find that cross-examination in fact becomes easier, because the onus of destroying the credibility of the opposing witness will in reality fall on his own witness rather than on himself. Ultimately, especially with the guidance and intervention of the tribunal, the truth is much more likely to emerge simply by the strength of the process rather than the forensic skills of counsel.

8 Arbitrators in general are not keen to hear repetitive cross-examination on established factual issues or irrelevant topics that do not assist any party. Where an opposing witness has given his statement that is irrefutably backed up by contemporaneous documentation, then, unless counsel has evidence to contradict that statement, it is not wise for counsel to repeatedly challenge the witness in the hope that he will change his mind. This is in fact counterproductive to the counsel who is asking the questions as the credibility of the witness is then buttressed by the cross-examination. Where the facts or expert evidence are in dispute, it is then important for counsel to adhere to his case strategy as "the advocate must remain in control of the pace of the cross-

examination and keep the witness under a tight parameter in how the witness can possibly answer the questions”.<sup>4</sup>

9 Nothing is more tedious than watching counsel in cross-examination take five minutes to locate the document he wants to show to the witness, and the witness take another five minutes to locate that document out of a dozen (or more) hearing bundles. All these delays can be eliminated if counsel has prepared his cross-examination in advance and knows exactly what documents on which he wants to question the witness. He can then compile all the documents from the hearing bundles (retaining their bundle references for cross-referencing to the hearing bundles) and the cross-examination bundles can then be given to the witness immediately before the commencement of the cross-examination.<sup>5</sup> If a witness is being cross-examined by video conferencing, this would in fact be the only practical way of cross-examining a witness (who is not in the hearing room) on particular documents, short of having a fax machine or computer next to the cross-examiner and the witness.

10 Arbitrators (particularly from continental Europe) are not likely to welcome long cross-examination of individual witnesses. In the great majority of commercial arbitrations, the credibility of a witness is not usually the key factor in determining whether or not the tribunal accepts that witness's evidence. Certain techniques that are permitted in litigation may therefore be disallowed or discouraged by the tribunal. Thus, the general rule in litigation that cross-examination is not confined to the evidence-in-chief of the witness but can extend to any relevant issue in the case may have to be applied more strictly in arbitration. For example, questions unrelated to an issue in the case and asked purely to

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<sup>4</sup> Colin Ong, “Advocacy and Cross-Examination” in *The Asian Leading Arbitrators’ Guide to International Arbitration* (Michael Pryles & Michael J Moser eds) (Juris Publishing Inc, 2007) ch 12, at p 318.

<sup>5</sup> See Roberto Ceccon, “UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence” (1997) 14(2) *Journal of International Arbitration* 67.

test the general credibility of a witness may be permissible in common law countries, but are unlikely to find favour with tribunals.

11 Of course, when the tribunal adopts a strict or modified version of chess-clock hearings, the question of the length of time for cross-examination of individual witnesses may become academic because it then becomes entirely a matter of counsel's own sense of proportion as to how much time he needs to spend on each witness in relation to the maximum time he has been allocated for his presentation of his whole case.

12 Many lawyers from common law countries who are inexperienced in international arbitration, especially before civilian arbitrators, may find themselves in for a rude shock. Civilian arbitrators are unused to long (sometimes euphemistically called "thorough") cross-examinations and counsel may find themselves "timed out" of finishing their cross-examination before they get to the most critical part. At the very least, they may end up annoying the arbitrator by having to plead for more time to cross-examine because they have taken too long to demonstrate their point.

13 The first thing that arbitration neophytes have to learn is that arbitrators (even common law arbitrators) in Europe and Asia do not like fixing long evidential hearings to the same length as a court trial. This is particularly true if the arbitration is institutional rather than *ad hoc*, as institutions like the Singapore International Arbitration Centre, International Chamber of Commerce, Badan Arbitrase Nasional Indonesia and Korean Commercial Arbitration Board fix fees by reference to the value of the claim rather than by the time spent. Accordingly, a tribunal held under the auspices of these institutions will often be disinclined to fix long hearings because the arbitrators are not going to be paid anything more for the longer hours and consequent time sheets that they will keep.

14 Even if parties have a large number of witnesses, the tribunal is more likely than not to adopt some form of case management system to

bring both time and costs under control.<sup>6</sup> The tribunal may therefore exhort parties to get together to agree the maximum time each witness will have, subject to the final discretion of the tribunal to extend time. The tribunal may even adopt the “chess-clock” method, confine parties to a total amount of time and make all parties stick to it.

15 Counsel in such fixed-time arbitrations will need to be frugal with how time is used and be very selective about the line of cross-examination he wants to adopt. In short, he needs to get to the point very quickly. There is simply no room in arbitration for questions like the following:

- (a) Look at this document – does it contain any reference to x?
- (b) Do you agree that you wrote this letter?
- (c) Could you please read out paragraph \_\_ of your letter?
- (d) I put it to you that you are not telling the truth (unless counsel explains the basis for his challenge).

16 The reason for our criticism is that such questions may be characterised as “forensic” questions which do not enlighten the tribunal but are solely designed to introduce what are largely uncontroversial matters and are therefore asked either as “throat-clearing” exercises for the cross-examiner, or because counsel wants to use the witness to demonstrate his own folly or lack of credibility, or simply for dramatic effect.

17 Such techniques are luxuries in international arbitration, which does not allow a time budget for questions purely designed to rattle a witness without advancing the knowledge of the tribunal about the matters in issue. If the witness is not co-operative in answering, a disproportionate amount of time will have been lost by such techniques, which in turn will destroy the value of this weapon in counsel’s armory and simply frustrate the tribunal if one party has run out of time.

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<sup>6</sup> See Colin Ong & Michael O’Reilly, *Costs in International Arbitration* (LexisNexis, 2013) ch 10 and ICC Commission Report, *Controlling Time and Costs in Arbitration* (2nd Ed, 2012).

18 It is not common to have lawyers from the same team cross-examining the same witness, but this does occur from time to time in international arbitration. While there is nothing fundamentally wrong with allowing this mode of practice so long as there is no repetition of questioning in the same area by different lawyers, in practice counsel would be well advised to adopt this course of action only in exceptional situations. Using two or more counsel to cross-examine the same witness may come across as poor or ineffective cross-examination technique to the tribunal. This should not usually be done for lay witnesses but rather for expert witnesses in special situations, *eg*, where the range of issues covered by the expert is quite vast or diverse and it is not easy for a single lawyer to master the finer details of scientific or technical matters in more than one field.

## **II. Cross-examination on the meaning of contractual documents or intentions of witnesses**

19 Even in litigation it is often questionable whether there is anything to be gained by cross-examining a witness on the interpretation of contractual or commercial documents, as ultimately this is for the tribunal to decide. Some counsel believe that it is good advocacy to develop a case which is capable of argument on the documents alone but they choose to put it through the mouths of witnesses, particularly by forcing witnesses on the other side to agree with the interpretation canvassed by the cross-examining counsel. While it is debatable whether this achieves a greater “forensic effect” than a well-reasoned written brief, we suggest that, in commercial arbitration, cross-examination should generally be confined to matters of fact rather than matters of argument. A related point is whether or not it is legitimate or helpful to cross-examine a witness on what his actual intentions were in agreeing to the wording of certain contractual provisions. There may be a difference depending on the governing law of the contract. If the applicable law is common law, then the rule of contractual interpretation is that, in general, the tribunal is not concerned with the subjective intention of the parties in their choice of the words. A contract is normally interpreted in accordance with the objective meaning of the

words used. The general approach adopted in common law jurisdictions is for a court or tribunal to determine the ordinary and natural meaning of the terms of the contract in context while considering “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”.<sup>7</sup> The latest pronouncement on the law on interpretation of contracts by the UK Supreme Court in *Wood v Capita Insurance Services Ltd*<sup>8</sup> has made it clear that the task of a court or tribunal is to ascertain the objective meaning of the language which the contracting parties had chosen to express their agreement. The exercise is not meant to be a literal one, focusing solely on an analysis of the wording of the particular clause. The court or tribunal must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to the elements of the wider context in reaching its view as to that objective meaning.

20 However, parties will still not be allowed to give evidence of their subjective intentions or evidence of negotiations about the wording of the contract.

21 But if the applicable law is civil law, then there may be some room for evidence of subjective intention. Civil law does not recognise the parol evidence rule and pays regard to the subjective intention of the parties. Accordingly, when the governing law is a civilian system, such cross-examination may be permitted.

22 There is a fundamental rule of English court procedure which requires any assertion of fact made by a witness which is disputed by the other side to be formally challenged in cross-examination. Since this is a formal rule of evidence and the rules of evidence do not normally apply to arbitral tribunals, the tribunal should not be bound by this rule (in any event unknown outside the British Commonwealth). Nevertheless,

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<sup>7</sup> This doctrine was initially promulgated by the UK Supreme Court in *Arnold v Britton* [2015] AC 1619, quoting Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [15].

<sup>8</sup> [2017] AC 1173 at [10].

applying Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, *Browne v Dunn*<sup>9</sup> may still be observed in practice so that a witness statement should not be attacked in closing submissions on a ground on which the witness has not had the opportunity to defend himself. To that extent, if counsel intends to assert that a witness's evidence of fact is untrue or contradicted by other evidence, the principle underlying Article 18 would require that witness's attention to be drawn to the alleged untruth or to other evidence that supposedly contradicts his own, so that he is given a chance to explain why his evidence is indeed true and correct or why the other contradictory evidence should be rejected or can be reconciled. Unlike in state court proceedings, statements of witnesses of fact in international arbitrations are not deemed to be proved merely because they have not been challenged in cross-examination by the other party. Counsel should be aware that neither party is under any absolute duty to put all the relevant parts of its own case to each opposing witness. This general observation can also be applied to questions of foreign law. The traditional approach of English common law systems is to regard foreign law as a question of fact, which means that it must be proved by appropriate evidence. Unlike state court proceedings which would require the production of written expert reports on foreign law and cross-examination of such experts on those reports, arbitrators are not bound by these strict procedures.

23 To what extent should a tribunal intervene to protect a witness from aggressive common law style cross-examination? Cross-examination tones that are adopted by counsel in state courtrooms in common law countries can sometimes become very hostile. In comparison with this approach, the practice of international arbitral tribunals is to generally discourage this type of aggressive behaviour. Instead, tribunals place a great deal more emphasis on the ability of counsel to elicit oral testimony in a civilised and orderly manner. Many witnesses are not used to cross-examination, particularly in a foreign language. However, witnesses who speak in their own language, and are cross-examined in

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<sup>9</sup> (1893) 6 R 67.

another, usually stand up better to cross-examination than those speaking the same language as a cross-examiner. This is because aggression somehow loses its thrust in translation and certain terms in one language when translated into another lose the sting of the original question. The likely difficulty comes from witnesses who are fluent in English for purposes of normal conversation but not good enough to deal with an aggressive cross-examiner. Here the difficulty of trying to understand the thrust of the question in a second language often proves extremely stressful for a witness, sometimes resulting in a witness doing less than justice to himself. It is important for the tribunal in such a case to keep a watchful eye to maintain equality of arms and guide the witness through the aggression to point out the underlying factual point of the question. The witness can then properly address his mind to the issue and free himself of the distractions of hostile or tendentious language used by counsel.

### **III. Re-examination**

24 Re-examination can sometimes turn out to be counter-productive and should be avoided unless necessary. A rule of practice in common law systems that is often adopted in international arbitration proceedings is that once a witness has started to give his evidence, he is not allowed to discuss the case or his evidence with any person until he has finished. As such, it is very difficult for counsel who is conducting re-examination to know how his witness is going to respond to any question.

25 More importantly, counsel cannot put leading questions to his own witness in re-examination. The witness will have to be sufficiently aware and perceptive to mentally work out the points which his counsel wishes to hear in the re-examination questions. It will take the most skilled of counsel to make judgment calls as to how many and what kind of questions should be put to his witness in re-examination. An unskilled counsel may end up with his own witness giving answers that are helpful to the wrong side.

26 Nevertheless, greater leeway would need to be given to counsel in cases where there are allegations of fraud or dishonesty, or where the witness's credibility is central to the issue. Counsel should then be

allowed more latitude in terms of length of cross-examination to try to determine whether the witness is credible, as well as the manner of cross-examination where a certain amount of confrontation may be necessary to expose the dishonesty or lack of credibility of the witness.

27 The hearsay rule is a formal rule of evidence that applies only in litigation and has no direct application in arbitration. Nevertheless, common sense dictates that the tribunal would hesitate to accept hearsay evidence on critical issues of disputed fact, especially from a witness who is giving second- or third-hand hearsay evidence. On the other hand, where the source of the hearsay evidence is generally accepted as reliable (*eg*, a news report on a public event witnessed by thousands of people on a particular day), the rule can safely be ignored. The real problem comes when a witness is made to be the representative spokesperson for a party's entire case, and simply used as a mouthpiece for narrating matters of historical fact which occurred before the witness came onto the scene, as well as statements of legal position and arguments. Where a witness is clearly saying more than he actually knows, the question is how best to cross-examine such a witness. One way may be to demonstrate with a few quick questions that there are matters in his witness statement that he clearly has no knowledge of and then to invite the tribunal to discount that part of the witness's testimony instead of cross-examining him on matters where he will be unable to assist the tribunal further from his own knowledge.

#### **IV. Cross-examination of experts**

28 The art of cross-examining an expert witness requires slightly different skills from that of cross-examination of lay witnesses. The objective of cross-examining a lay witness is to test and expose the truth and accuracy of the lay witness's recollection or account of events that have taken place. A lay witness must give evidence that is strictly limited to facts within his personal knowledge. This general rule limiting the scope of the lay witness's evidence-in-chief does not strictly apply to an expert witness who is called on questions on which expert evidence is

admissible.<sup>10</sup> However, the expert witness may not express his opinion on any of the issues, whether of law or fact, which the tribunal or court has to determine.<sup>11</sup>

29 The objective of cross-examining an expert is to test the knowledge and skills of the expert with a view to exposing inaccuracies in the methodology set out as expert evidence of the expert, as well as to get the expert to admit that there is a possibility of another equally compelling or probable theory. The expert witness's evidence would be subject to greater doubt the more an advocate can get the expert to agree that there is an alternative credible theory, thereby causing cracks or even ruptures in the opponent's case theory. Expert testimony has been described as "an ancient courtroom phenomenon. However, such long experience has not bred certitude among judicial gatekeepers as to exactly which expert testimony ought [to] be admitted through the evidentiary portal".<sup>12</sup> Nonetheless, research in the US courts has shown that 70% of judges and lawyers indicate that juries actually attribute more credibility to scientific evidence than other evidence. The research also shows that 75% believe that judges find scientific evidence more credible.<sup>13</sup> Effective cross-examination of an expert witness is therefore a formidable undertaking.

30 A tribunal must therefore have the right balancing skills in dealing with expert testimony. As there is much greater flexibility on rules of admissibility of evidence in the arbitration process, it is important that

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<sup>10</sup> See the decision of *United States Shipping Board v Ship St Albans* [1931] AC 632 where the Privy Council held that "[t]he opinion of scientific men upon proven facts may be given by men of science within their own science".

<sup>11</sup> See *Crosfield & Sons v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378.

<sup>12</sup> See M Neil Browne, Carrie L Williamson & Linda L Barkacs, "The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France" (2002) 18 Conn J Int'l L 55.

<sup>13</sup> See Carol Henderson Garcia, "Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness" (1991) 12 Mississippi College L Rev 39 at 45.

both tribunal and counsel remain sensitive to examining the weight of expert evidence. There are experts or parties who profess to be experts in almost every imaginable topic and such purported experts are even involved in ordinary lawsuits.<sup>14</sup>

31 It is a general duty of counsel and, to a lesser extent, of the tribunal to properly limit the expert witness's testimony to the area described in his declaration. This rule is also applicable to cross-examination by opposing counsel. Counsel should not be allowed to cross-examine extensively on an expert's expertise outside what the witness has declared his expertise to be, unless the expert has chosen to opine on matters beyond his known expertise, in which case those opinions should be challenged and discredited for want of objectivity or expertise.

32 The tribunal should always remember that expert witnesses have different roles to play and must be distinguished from lay witnesses or bystanders. Unlike third-party bystanders, expert witnesses are paid for their services much like counsel, and the expert witness has been carefully selected by counsel for his client. Since an expert is usually called to work for one party to the arbitration process, it is important that the arbitral tribunal must not unquestioningly accept the expert testimony, regardless of whether or not there has been cross-examination by a counsel who may well have ineffective advocacy skills.

33 Although it is by no means conclusive, the fact that an expert is to be rewarded by means of contingent fees is an important factor for the tribunal to take into account, as the tribunal cannot discount the possibility of bias in such situations where the expert is working for a claimant whose case depends to a very large extent on the success of the expert's evidence. A commentator has made a rather controversial description of experts by suggesting that "Gentlemen of the jury, there are three kinds of liars, – the common liar, the d—d liar, and the

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<sup>14</sup> See Randall K Hanson, "Witness Immunity Under Attack: Disarming 'Hired Guns'" (1996) 31 *Wake Forest L Rev* 497.

scientific expert”.<sup>15</sup> Further, experts are reimbursed for any expenses that they incur in their research and one therefore cannot deny the description given by a commentator that the act of testifying as an expert witness is a business transaction.<sup>16</sup> The above statement setting out the controversy and polarised position surrounding the possibility of bias and expert witness shopping is a perennial problem that continues to exist<sup>17</sup> more than a century later.

34 One useful question that can be asked of an expert is what proportion of his time is spent on giving expert evidence: if it is more than 50%, he could be classified as a professional expert witness whose main occupation is selling his expertise to the highest bidder rather than an expert who has taken time off to assist the tribunal with his expertise. Indeed, counsel sometimes cross-examine where they have evidence to suggest that an expert earns a substantial part of his professional income from providing services as an expert witness.

35 A very grey and controversial area faced by tribunals is to know how much latitude to give to counsel who insist on cross-examining the opposing expert witness about the financial remuneration paid to the expert for providing his services in the case at hand. It is suggested that the tribunal allow this line of cross-examination to continue for a limited time only where the counsel conducting the cross-examination has empirical evidence to show that the particular expert has indeed derived a large part of his income from acting as an expert witness (or is earning a particularly large fee for his evidence in the current case).

36 The tribunal should carefully observe the way in which the expert presents his answers under hostile cross-examination. How an expert presents himself can affect his credibility. Generally, the best expert

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<sup>15</sup> See, William Foster, “Expert Testimony: Prevalent Complaints and Proposed Remedies” (1897) 11 *Harvard Law Rev* 169 at 169.

<sup>16</sup> See C M McDowell, “Authorizing the Expert Witness to Assassinate Character for Profit” (1997) 28 *U Memphis L Rev* 239.

<sup>17</sup> See Jeffrey J Parker, “Contingent Expert Witness Fees: Access and Legitimacy” (1991) 64 *S Cal L Rev* 1363 and Angela Wennihan, “Let’s Put the Contingency Back in the Contingency Fee” (1996) 49 *SMU L Rev* 1639.

witness comes across as neutral, direct and enthusiastic. An expert witness who does not hesitate to answer questions put to him in cross-examination and who is able to provide credible logical answers is a cross-examiner's worst nightmare.

37 At its worst, cross-examination may provide the expert with further credibility and enhance his evidence on dubious methodology or theory. A commentator has suggested that in some cases oral evidence is counterproductive as it leads to divergence from the truth. It was felt that expert witnesses may be judged according to demeanour and how well the expert witness stands up to cross-examination.<sup>18</sup> Careful and diligent preparation is always needed when going against an expert witness.

38 It is therefore important for counsel to bear in mind that effective cross-examination of an expert witness requires advance preparation. Such preparation will no doubt require careful discovery of whatever expert evidence is to be introduced. In addition, unlike other lay witnesses, expert witnesses may base their opinions on facts that are generally not admissible as evidence, if such evidence is of a scientific nature that has been or is reasonably relied on by peers of the expert in the same field.

39 Before even thinking of cross-examination, counsel needs to research and obtain proper evidence with which he can then attack the expert's qualifications and experience in his particular field of expertise so as to query whether the theories or methodologies used are scientifically sound or accepted in the industry. Counsel should, in his preparation for cross-examination of the opposing expert witness, consult independent experts or conduct independent research to determine whether the assumptions, theories or techniques relied on by the expert are generally accepted in the relevant scientific community, or are liable to significant error or unreliability when applied in practice.

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<sup>18</sup> Lord Wilberforce, "Written Briefs and Oral Advocacy" (1989), 5(4) *Arbitration International* 348 at 349.

40 Another possible avenue of attack is to try to get the expert to concede that the matters on which expert evidence has been given far exceed the reasonable limits of his or her expertise and/or experience. Counsel will have to slowly establish the inherent limits of an expert witness's professional discipline before seeking to discredit that expert's opinion by suggesting that it is beyond the scope of the expert's field of expertise. All cross-examination that challenges the opposing expert witness's expertise or experience has to be done in a polite, non-abusive manner. Tribunals generally do not particularly condone or like counsel who are disrespectful, rude and overly aggressive. One of the best places where counsel can start researching for background information on the expert to be cross-examined is to use search engines such as Google or Yahoo. This sometimes throws up unexpected information on the background of an expert, *eg*, previous articles written by the expert that may be totally contrary to what he is saying in the current case.

41 The work of opposing counsel is to carefully search through the history of the expert and see if he had previously in another case given contradictory evidence to what he is currently presenting. The expert's contradictory statements may even have occurred within the same (or related) arbitration although this is unlikely. It is more likely that the expert may have given expert evidence in another case that differs from the evidence that he is now giving in the arbitration. Counsel who has such evidence that may be in the form of a law report, prior affidavits, or published articles in journals or books can quite easily destroy the credibility of an expert under cross-examination. Such documents and published materials thrown up by a Google search often refer the researcher to other source materials that may then shed more light on the history of the expert.

42 Internet searches may even throw up court judgments where the expert's evidence in other cases has been rejected or criticised – all this can be useful material for challenging the expert's credibility by attacking either his competence or his intellectual integrity.

43 Finally, an expert witness's opinion is only as good as the facts on which the opinion is based. It is therefore vital to ascertain what factual assumptions the expert has made in arriving at his opinion and counsel

must at an early stage seek to ascertain what factual instructions have been given to the expert for him to issue his opinion. Once those facts are put into dispute (and the expert usually cannot determine which version of disputed facts is correct), his expert opinion evidence can then be shown to be based on an unproved (and even disputed) premise.

44 Witness conferencing among experts can prove useful where there is a great divergence in the evidence of opposing expert witnesses. It is very important that counsel consider the implications of taking on an expert in his own field without the benefit of another friendly expert by his side. Short of calling an expert a liar (which is not at all encouraged in international arbitration), an inexperienced counsel may sometimes be frustrated by his inability to crack an expert witness because counsel lacked a good grasp of the subject matter at hand.

45 Experts tend to be respectful of each other in the face of empirical evidence and research and they tend to be able to agree on common issues that were originally in dispute because of a lack of understanding or breakdown in communication between the experts and their respective counsel. In recent years, the practice of expert witness conferencing has become an accepted feature of international arbitration as tribunals now, more often than not, strongly encourage counsel to adopt this method of joint examination of opposing experts who have given differing expert reports on common issues. This practice is commonly called “hot tubbing”, where the two expert witnesses are first directed to meet to prepare a joint report which will:

- (a) identify the technical issues which the tribunal needs to decide; and
- (b) set out each expert’s view on each such issue but only in summary form (with cross-references to the place in the expert report where there is a full discussion of that issue).

46 The experts are then called upon to answer questions on their expert reports and are provided with the opportunity to engage the other expert witness in a supervised dialogue to carry the argument to its end. The tribunal often decides to lead the dialogue in asking questions of the experts, mainly for clarification so that, as lay persons, the tribunal members can have the experts explain the technical issues to the degree necessary for the tribunal to be able to make an informed

decision on the issues that are to be decided. Many counsel would be happy to delegate this discussion to the tribunal for the following reasons:

- (a) It is a given that the expert will know more about the subject than the cross-examining counsel. While counsel can be briefed on the list of questions to ask the other side's expert in cross-examination, it is generally difficult for counsel to remain in control of the cross-examination when the expert witness gives an unexpected answer which is not in counsel's script. Counsel then has to quickly confer with his own expert in order to adapt to a new and unexpected direction which the expert is taking.
- (b) It follows that the best person to cross-examine an expert witness is another expert, and that is what expert witness conferencing is supposed to achieve, except in a less hostile and adversarial manner. Instead, with the assistance of the tribunal as moderator, the dialogue between the experts and the tribunal becomes more of an academic discussion rather than a session where counsel tries to destroy the credibility of the opposing expert. Such a task is already a challenge and, provided that a good expert is selected by counsel, he usually has a better opportunity of pointing out errors or misstatements by the other expert with more conviction than counsel.

47 There are, however, times when there might be certain issues where the forensic skill of counsel might be useful in attacking the expert's credibility. This comes where there might be errors or inconsistencies in the expert report (particularly if counsel has previous reports or articles published by the expert in question and can thereby challenge the expert's credibility with those materials). It is at this point that counsel's forensic skills can be more useful than his expert, who might be too polite to point out the vulnerabilities of a fellow expert's report. As such, if there is expert witness conferencing, counsel should always reserve the right to ask further questions after the tribunal has finished guiding the two experts through their respective views, and counsel can then attempt to attack the expert's credibility (if he thinks he has grounds to do so).

48 It is also effective for counsel to cross-examine and attack the expert's data (or lack of it) and whether the expert has made adequate investigation before arriving at a firm opinion. This line of cross-examination of disputing or disproving the factual predications on which the opposing expert's evidence is built should only be done after counsel has already consulted his own expert, who has gone through the data and is able to point out inconsistencies in the opposing expert's erroneous predications. It is done with the sole intention of discrediting, reducing and/or even destroying the weight of evidence that will be accorded to that expert's opinion by the tribunal.<sup>19</sup>

49 Where the experts all sit together in the same room, it would be rather difficult for an expert to try to make a statement that cannot be substantiated scientifically or technically before his peer expert. This technique also reduces the time needed to repeat the same question to each side. The main advantage of witness conferencing is that it does away with the inequality and inefficiency of a clash between an expert witness and a lay counsel assisted by counsel's expert. It then becomes a direct clash of experts where their views are tested against each other, instead of being conveyed through the (often inefficient) medium of the lay counsel.

50 Witness conferencing can be successfully used in resolving disputed issues of fact. This normally occurs in construction disputes where there are often discrete issues of fact that are disputed, and several witnesses will be called to testify on such issues. The traditional method of presenting witness evidence would require key witnesses, such as the architect, engineer, project manager, quantity surveyor, and key personnel on the project to give evidence sequentially about their knowledge of each of those disputes, and be cross-examined accordingly. This usually results in repetitive cross-examination, with the testimonial evidence being scattered all over the transcript so that both counsel and tribunal (when preparing their submissions and award, respectively,

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<sup>19</sup> Article 9(1) of the International Bar Association Rules on the Taking of Evidence in International Arbitration provides: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence."

after the close of the evidentiary hearing) will have to separate their submissions and findings under separate hearings. They will also have to trawl through the whole transcript in multiple places to find the relevant evidence. In such situations, consideration may be given to having (in effect) mini-hearings on each individual disputed issue separately. This would allow the tribunal to fix particular days to hear all the evidence on a particular topic (*eg*, the defective fire doors). On that day, every witness who has in his witness statement made any material statements about the fire doors will appear for collective cross-examination. Counsel will then be at full liberty to cross-examine any witness he wishes, and to immediately call upon his own witnesses to respond. In this way there is a collective discussion of the problems relating to that single topic, and eventually all the material testimonial evidence in relation to the fire doors will be in one place in the transcript, which will assist both counsel and tribunal in dealing with all the disputed issues.

51 Once counsel has adjusted to this regime of cross-examination, he will find that cross-examination in fact becomes easier, because the onus of destroying the credibility of the opposing witness will in reality fall on his own witness rather than on himself. Ultimately, especially with the guidance and intervention of the tribunal, the truth is much more likely to emerge simply by the strength of the process rather than the forensic skills of counsel.

#### **V. Distinction between a common law Asian tribunal (former English colonies) and a civil law tribunal (Japan, Korea, Indonesia, Thailand, Taiwan)**

52 To a large extent, the approach of counsel towards cross-examination of expert witnesses will depend on the personal background and geographical origins of the expert witness. Tribunals will have to be mindful of the need to distinguish between expert witnesses coming from common law backgrounds and those from civil law backgrounds. Counsel who appear before tribunals from common law backgrounds will not be able to take advantage of the fact that an expert does not have academic credentials. This is because in jurisdictions with English

common law backgrounds,<sup>20</sup> the only stated qualification needed by an expert to offer expert evidence is “competence”.<sup>21</sup> In contrast, counsel who appear before tribunal members with civil law backgrounds could cross-examine incessantly and strongly against an expert’s lack of academic qualifications as such credentials are highly regarded in civil law countries as establishing the credibility of the expert witness.

53 A tribunal should therefore be mindful of the dichotomy in the approach of the civil and common law systems in determining who are experts. Having said this, we would advocate that a tribunal should still be urged to investigate the real credentials of an expert<sup>22</sup> and should allow a degree of cross-examination by counsel in determining whether or not such a person is indeed an expert in his professed field of practice. Counsel should also be mindful that some Asian arbitration centres appear to favour the appointment of common law lawyers while others appear to favour civil law arbitrations in default situations. This is something that counsel needs to factor in when he begins the initial

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<sup>20</sup> Examples would include Brunei, Hong Kong, India, Malaysia, Pakistan and Singapore.

<sup>21</sup> See Ian R Freckelton, *The Trial of the Expert: A Study of Forensic Evidence and Forensic Experts* (Oxford University Press, 1987) at p 20 wherein the author states that “[i]n England, it has been consistently held that the expert need not have formal academic qualifications” and at p 27: “the tendency in Australia and England has been to look to the substance of the expert’s knowledge rather than to how her or she acquired it”. However, where competing expert opinions have to be evaluated, the qualifications of the rival experts will as a matter of practice, be carefully scrutinised by the tribunal.

<sup>22</sup> See *R v Turner* [1975] QB 834 at 841 where the court held that the “fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves”.

preparation of case strategy and how to deal with the advocacy aspects of the case<sup>23</sup> at hand.

54 Another important difference between the common law and civil law traditions in relation to the hearing of expert witness evidence is that, while it is normal in common law countries for each party to engage expert witnesses, it is more common in civil law countries for the court or arbitral tribunal to appoint its own independent expert witness.<sup>24</sup> In Asia, civil law countries such as Korea adopt a similar approach. Expert witnesses in Korea tend to be court-appointed and are not expected or used to undergo cross-examination, as this is often allowed only with the leave of the court.<sup>25</sup> Tactically, common law counsel who face such expert witnesses (who would be unused to being cross-examined) may have an advantage in international arbitration, where the norm is to allow for parties to have cross-examination (albeit limited) of opposing witnesses.

55 A useful neutral set of evidentiary rules that can be adopted by parties and tribunals alike in international arbitrations are the International Bar Association Rules on the Taking of Evidence in International Arbitration.<sup>26</sup> In “exceptional circumstances”, a tribunal may appoint an “independent and impartial expert” to look at and review particular documents which form the subject of an objection. The validity of such an objection can only be judged by a review of the document. The expert is “bound to confidentiality”, and in the event that the

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<sup>23</sup> See Colin Ong, “Case Strategy and Preparation for Effective Advocacy” in *The Guide to Advocacy* (GAR, 2nd ed, 2017) ch 1.

<sup>24</sup> Peter R Griffin, “Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings” (2000) 17(2) *Journal of International Arbitration* 19.

<sup>25</sup> See Eric Ilhyung Lee, “Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study” (1997) 19 *Loy L A Int'l & Comp L J* 585.

<sup>26</sup> On 29 May 2010, the International Bar Association (“IBA”) Council approved the revised version of the IBA Rules on the Taking of Evidence in International Arbitration (the “Rules”). See Arts 5 and 6 of the Rules concerning expert witnesses.

objection is upheld, the expert witness “shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the document reviewed”. Bearing in mind that the expert has been appointed by the tribunal, and also the earlier discussions above on the tone of cross-examination, common law counsel who are used to conducting cross-examination aggressively and making frequent interruptions must tone down their aggression and reduce the frequency of their interruptions. This caution to adopt a more orderly and less forceful cross-examination technique should be adopted where the majority of the tribunal members have civil law backgrounds.

56 The question can be posed whether the tribunal in an international arbitration has an independent duty to screen evidence to ensure that it is rationally reliable. Should the tribunal need to independently determine (a) whether the expert has used proper scientific methods; (b) whether the theory or technique provided as evidence has been previously subjected to review by other peer experts in his community and; (c) whether or not there has been publication?<sup>27</sup>

57 We would suggest that, although the tribunal has an overall right to pose such questions to experts, this responsibility falls squarely in the lap of the opposing counsel. The tribunal can only do its best to ask questions if it has doubts about any expert methods, but it cannot be reasonably be expected to spend a significant amount of time to research expert techniques or methodology.

## **VI. Cross-examination of witnesses whose statements have been drafted by others**

58 Many counsel draft their witness statements for their witnesses as if the witness were the muse of the counsel. In other words, the witness is used as a mouthpiece to say what the lawyer wants him to say, rather

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<sup>27</sup> See *Daubert v Merrell Dow Pharmaceuticals, Inc* (1993) 509 US 579 at 595 where the US Supreme Court has recognised that expert “evidence can be both powerful and quite misleading because of the difficulty in evaluating it”.

than the lawyer taking down the thoughts of the witness on the relevant topics and then putting them together in a coherent and logical manner. All too often, a witness is chosen as a “representative witness” whereby he becomes the lead spokesperson for his party, and is made to discourse, not only about matters which he knows but matters clearly beyond his personal knowledge.<sup>28</sup>

59 While it is true that the hearsay rule does not apply in full to arbitrations, counsel drafting witness statements must nevertheless consider the effect of cross-examination on a witness who is quickly shown to be unable to back up the statements he makes by personal knowledge or at least second-hand knowledge which he has made some attempt to verify.

60 From the cross-examiner’s point of view, such witnesses are often a godsend because they can be exposed as persons who are prepared to swear by anything that has been put in front of them by their lawyers without question. Their credibility and the quality of their evidence will then suffer even on matters on which they have direct knowledge. Managing directors or chief executive officers (“CEOs”) who give evidence on a whole range of matters down to the last detail are also good material for cross-examiners because on cross-examination they often show that they do not really know the more detailed aspects of the history of the matter in question; those aspects would in fact have been handled by a subordinate, whose briefings have been blindly accepted by the witness without doing any due diligence check. In a recent conference, one experienced arbitration practitioner opined that CEOs are usually least susceptible to “witness coaching”. Witness coaching is not permissible in many jurisdictions, particularly in common law jurisdictions. The Singapore Court of Appeal held that counsel may prepare but not coach or train witnesses.<sup>29</sup> It went on to rule that other persons, including witnesses and the counsel, should not actually

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<sup>28</sup> For example, matters which occurred before the witness came on the scene, or matters which have been told to him by others.

<sup>29</sup> *Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar, SA* [2018] 1 SLR 894 at [138].

supplant or supplement the witness's own evidence. The Hong Kong Court of Appeal cautioned against "repetitive drilling" of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party.<sup>30</sup> The English Court of Appeal formulated principles in the context of criminal proceedings in England to caution against witness preparation being carried out in groups.<sup>31</sup> The English court held that group preparation exacerbates the risk that witnesses may change their testimony to bring it in line with what they believe the "best" answer to be. The common law system in the US encourages witness preparation but not witness coaching. However, there is no clear line of demarcation between these two concepts in the US. Civil law jurisdictions also generally discourage against witness coaching, but the degree varies from jurisdiction to jurisdiction. The German Code of Civil Procedure allows for witness preparation in giving evidence by going through records and documents with the witness to refresh his memory. The Swiss Canton of Geneva prohibits lawyers from discussing the evidence of witnesses and from influencing witnesses of any kind.

61 It is important to note that the International Chamber of Commerce Commission on Arbitration and ADR ("ICC Commission") mandated a task force to study and advise on ways to enhance the probative value of witness evidence in arbitration.<sup>32</sup> The ICC task force suggested measures to reduce distorting influences and their effect on witness evidence. The task force explained that contemporary science and psychological studies indicate that factors such as cognitive bias, language, culture, and the limitations of human memory all affect witness evidence. As the ICC Commission had put together its set of suggested guidelines with both civil law and common law jurisdictions in mind, it is important for counsel to familiarise themselves with this task force report.

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<sup>30</sup> *HKSAR v Tse Tat Fung* [2010] HKCA 156 at [73].

<sup>31</sup> *R v Momodou* [2005] 1 WLR 3442.

<sup>32</sup> See the International Chamber of Commerce Commission on Arbitration and ADR task force on "Maximizing the Probative Value of Witness Evidence".

62 It is even more dangerous to get such witnesses to express opinions in their witness statements, because they often have not thought through the rational justification for their opinions and, when cross-examined, can be shown to have blindly adopted words crafted by their lawyers without fully understanding them or thinking of how to defend them. While these failings are not confined to Asian witnesses, many Asian lawyers do make this error, particularly those coming from countries in the region who are unused to full witness statements that common law lawyers are used to.

63 In summary, we recommend that counsel bear the following matters in mind in cross-examination:

- (a) whether cross-examination rather than submissions should be used to attack a witness's statement;
  - (b) if cross-examination is necessary or desirable, the need to reduce cross-examination to areas where it is most needed in the light of the time constraints in arbitration;
  - (c) the need to avoid or reduce aggression in cross-examination before Asian tribunals;
  - (d) cross-examine an expert witness by testing the expert's knowledge and skills to expose the inaccuracies of his methodology, and demonstrate that there is a credible alternative methodology or theory;
  - (e) research on an expert's paper trail, *eg*, articles and court judgments which records the expert's testimony to discover possible inconsistent opinions previously expressed by the expert;
  - (f) the advantages of witness conferencing for both expert and fact witnesses;
  - (g) the distinction between presenting expert evidence before an all common law tribunal as opposed to an all civil law tribunal; and
  - (h) cross-examination of witnesses whose statements have been drafted by others.
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## Background to Essay 11

This essay arose from a hearing in Dubai in the Dubai World Tribunal (where I was sitting as one of the tribunal members). In that case, the claimant refused to come to Dubai to give evidence in person because he feared that the defendant would instigate the local police to arrest him on trumped-up charges. He therefore applied for permission to give his evidence via video link. This application was strongly opposed by the defendant. Consequently, lengthy submissions and authorities were submitted by both sides about whether a court should allow a key witness, especially one for the claimant, to avoid giving evidence in person for reasons which did not arise from ill health or other causes that physically prevented the witness from travelling, but rather from a fear of some form of arrest or physical detention.

Eventually, our tribunal ruled in favour of the claimant and granted him permission to appear to give evidence via video link. To my disappointment, the chairman of the tribunal decided not to give reasons for our decision, which I thought was a pity as the jurisprudence on this point was not very clear. I felt that the profession in the common law world could benefit from the fruits of our research in this case. When I returned to Singapore, I decided to write an essay on the topic without reference to my Dubai case, so that it would be a generic article on a generic topic. This made it easier for me to get it published in a legal journal like the *Singapore Law Gazette* (which also had the benefit of being published monthly), so the article appeared within a relatively short time after the hearing in Dubai, and while my memory of the issues was fresh.

Although the essay was written as a guide to the use of video conferencing as a means of witness testimony in court cases, the guiding principles set out here can also inform an arbitral tribunal which is faced with a contested application for a key witness to give evidence via video link.

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*I wish to extend my thanks to the Law Society of Singapore for kindly granting me permission to republish this essay in this book.*

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## WHEN SHOULD VIDEO CONFERENCING EVIDENCE BE ALLOWED?

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## **I. Introduction**

1 Advances in technology allow witnesses to give testimony via video conferencing (“VCF”) with greater visual and auidial clarity than ever before. But in stark contrast, how the courts decide whether VCF evidence should or should not be admitted is often relatively unclear. References are casually made to factors in favour or against it, depending on the facts of each case. But the courts rarely address this question with a comprehensive, fully structured approach.

2 This article will first examine the statutory basis for VCF evidence. It will then look at factors that the courts have considered when deciding applications for its use. Finally, the authors will propose a series of questions that the courts could ask themselves when deciding future VCF applications. These questions are based on factors that have arisen in case law, and are intended to form a framework to aid judicial decision making. As things currently stand, the courts exercise a large amount of discretion, yet have offered relatively little guidance on how this should be exercised.

## **II. Basis for allowing video conferencing evidence**

3 Order 38 rule 1 of the Singapore Rules of Court<sup>1</sup> contains the general principle that witness evidence should be given in person, in court. However, this general principle is subject to an important caveat, which is introduced in the provision’s opening line:<sup>2</sup>

*Subject to these Rules and the Evidence Act (Chapter 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court. [emphasis added]*

4 Section 62A(1) of the Evidence Act<sup>3</sup> contains the statutory basis for one of these exceptions; the use of VCF evidence. However, the parties

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<sup>1</sup> Cap 322, R 5, 2004 Rev Ed.

<sup>2</sup> Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 38 r 1.

<sup>3</sup> Cap 97, 1997 Rev Ed.

are not entitled to use this as of right but must instead make an application seeking leave from the court to do so.

5 When considering such applications, the courts ask an initial threshold question: does this application fall under any of the four preliminary grounds for using VCF evidence? These four preliminary grounds are listed in section 62A(1) which provides:

**Evidence through live video or live television links**

**62A(1)** Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter,<sup>4</sup> if —

- (a) the witness is below the age of 16 years;
- (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
- (c) the witness is outside Singapore; or
- (d) the court is satisfied that it is expedient in the interests of justice to do so.

[reference added]

6 This article is only concerned with the courts' decision making in the context of section 62A(1)(c): the witness is outside Singapore. In fact, it is likely that this is the most commonly cited reason for using VCF evidence. The drafters of the Evidence Act certainly thought that this provision warranted extra attention since it is the only preliminary ground for which the Evidence Act provides a statutorily guided second stage of questioning.

7 Parties seeking to rely on section 62A(1)(c) should take particular notice of these extra factors. The imperative wording of section 62A(2) demonstrates that the courts are obliged to consider these factors, and it would therefore be highly inadvisable for parties not to have regard to section 62A(2):

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<sup>4</sup> For more details on the giving of evidence through live video or live television links in a criminal matter, see *Kim Gwang Seok v Public Prosecutor* [2012] SGHC 51, affirmed by the Court of Appeal in an oral judgment in May 2012.

**62A(2)** In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, *the court shall have regard to all the circumstances of the case including the following:*

- (a) the reasons for the witness being unable to give evidence in Singapore;
- (b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
- (c) whether any party to the proceedings would be unfairly prejudiced.

[emphasis added]

8 But although this provision states that a court *shall* consider these three factors, it is important to note that the courts are not limited to *only* considering these three. They are only three of many which might affect whether VCF should or should not be allowed in any particular case.

9 The local courts have therefore looked to English case law to consider what other factors might also influence their decision making. And in English jurisprudence, no case has had a larger impact on this area of law than the House of Lords' decision in 2005 in the landmark case of *Polanski v Conde Nast Publications Ltd* ("*Polanski*").<sup>5</sup>

### **III. *Polanski***

10 The appellant in this case was the Academy Award winning, French/Polish film director Roman Polanski. In 1977, the appellant was convicted in the US but fled before sentencing. He then resided in France from where he could not be extradited to the US. Many years later, the appellant brought a claim for libel against the respondent publishers before the English courts. The appellant refused to give evidence in the UK for the purpose of his libel case because he would risk extradition from the UK to the US.

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<sup>5</sup> [2005] WLR 637.

11 The issue before the House of Lords was whether the appellant should be allowed to testify via VCF from France, in order to further his English civil proceedings, notwithstanding that he was a fugitive from justice in the American criminal proceedings. The House of Lords' discretion was based on the very vague and widely phrased language of Part 32.3 of the Civil Procedure Rules,<sup>6</sup> which states as follows:

32.3 The court may allow a witness to give evidence through a video link or by other means.

12 This clearly does not give any guidance on when the court *should* allow this to happen. Accordingly, both the majority and minority decisions referred to the commentary in Annex 3, paragraph 2 of Practice Direction 32. This Annex is meant to supplement Part 32 of the Civil Procedure Rules. It is the closest thing to criteria (or at least guidelines) which were available to the court in *Polanski*. Delivering the majority decision, Lord Nicholls of Birkenhead paraphrased the commentary:<sup>7</sup>

11. One matter is clear. There can be no doubt that, as between Mr Polanski and Condé Nast, the judge's order was rightly made (to allow him to testify via video conferencing). The Practice Direction supplementing CPR Part 32 provides that when the use of video conferencing is being considered a judgment must be made on *cost saving* and on whether use of video conferencing 'will be likely to be *beneficial to the efficient, fair and economic disposal of the litigation*'. As between the parties that test is satisfied in the present case. [emphasis added]

13 The highlighted words from the Practice Direction are not identical to section 62A(2) of the Evidence Act, but they do contain the same general message. Both give guiding principles based on practicality and fairness but otherwise do not impinge on the courts' very wide discretion. Using these guidelines, Lord Nicholls highlighted various factors that affected his decision in favour of allowing VCF evidence. These factors were as follows:

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<sup>6</sup> SI 1998 No 3132.

<sup>7</sup> *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 at [11].

- (a) **The appellant had *bona fide* reasons for bringing the case in that jurisdiction (England), and he appeared to have done so in good faith.** There was no issue of the libel action being an abuse of the English court process. The respondent did not suggest that the appellant's choice of England as the forum for his proceedings was improper. In all respects, the case had been brought *bona fide* before the English courts because the appellant had suffered damage to his reputation in England.<sup>8</sup>
- (b) **The respondent would not suffer any prejudice if VCF evidence was allowed.** All involved agreed that the respondent would not suffer any prejudice if the appellant gave his evidence by VCF. As Lord Nicholls noted “[a] direction that Mr Polanski’s evidence may be given by means of video conferencing, or ‘VCF’ in short, would not prejudice Conde Nast to any significant extent ... Conde Nast does not suggest otherwise”.<sup>9</sup>
- (c) **The appellant would suffer much prejudice if VCF evidence was not allowed.** Unlike the respondent who had no real concern whether the order was given or not, the appellant would “be gravely handicapped in the conduct of these proceedings” if VCF evidence were not allowed.<sup>10</sup>
- (d) **There were public policy reasons in favour, as well as against, the use of VCF evidence.** Both sides could rely on strong public policy arguments. On the one hand, public policy suggested that the courts should not help a party that does not obey the law yet, it also suggested that everyone should have the right to bring a civil action if their rights are infringed. With such strong arguments on both sides, public policy appeared to take a back seat in favour of the practicalities of the case.<sup>11</sup>

14 Bearing these in mind, the House of Lords (by a 3-2 decision) allowed the use of VCF evidence.

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<sup>8</sup> *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 at [12].

<sup>9</sup> *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 at [12]–[13].

<sup>10</sup> *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 at [15].

<sup>11</sup> *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 at [17].

15 To differing extents, these factors have since become influential. The second and third factors are almost consistently cited and are amongst the most important factors that courts take into account. When cited, the fourth has so far only come down in favour of allowing VCF. The courts appear to have decided that public policy almost always favours VCF evidence over no evidence at all, even when there are public policy reasons strongly against allowing it, as per *Polanski*. The first factor is likely to crop up where there are issues of forum shopping, though this has not often occurred in the case law.

16 Additionally, it is submitted that other factors which were relied upon by the minority should also be instructive in the courts' decision making. Whilst the majority's conclusion accorded with that of Eady J in the High Court, the minority's conclusion accorded with the decision of the Court of Appeal. These minority opinions could therefore have easily been the majority if the case had come before a differently constituted House of Lords.

17 Like the majority, the minority considered the prejudice that each side would suffer if the order were or were not granted. The minority also considered the case management and public policy considerations in favour and against, though ultimately concluding that the policy considerations against granting the order were stronger. But in addition, Lords Slynn and Carswell considered the following two factors, which were not addressed at all by the majority:

- (a) **The fundamental reason why the appellant wanted to use VCF evidence was because he was a fugitive.** The minority looked at the application at its most basic level and asked "why does the Applicant want to give his evidence by VCF? Why is he not testifying in person?" The answer to this wider, more general question, was that the appellant was a fugitive. It was not because the journey would be too expensive or disruptive for the appellant to give testimony in London in person. It was because he was a fugitive and did not want to be subject to criminal proceedings in England.
- (b) **The choice of the jurisdiction was in the appellant's hands.** The appellant was the claimant in this case and therefore had the choice

of where he wished to bring the proceedings. He then chose a jurisdiction in which he was not willing to testify in person. There would have been more sympathy for the appellant if he had been the respondent because these proceedings would have been brought against him. The choice of jurisdiction would have been forced upon him by the other party. But in this case, it was not.

18 As mentioned above, these factors were ultimately not included in the majority opinion. Nonetheless, there is no reason why the courts should not take them into account if they are important factors in later cases, or at least include them as matters for consideration.

#### **IV. English cases since *Polanski v Conde Nast Publications Ltd***

19 Many cases since *Polanski* have re-examined the circumstances under which VCF evidence should be allowed. These cases often relied on the above factors, thereby re-establishing their importance. For example the Queen's Bench Division of the High Court in *Marketmaker Technology Ltd v CMC Group plc* ("*Marketmaker*")<sup>12</sup> directly applied the principles from *Polanski*.<sup>13</sup> Even in the criminal/disciplinary case of *Dr Robin Edward Lawrence v The General Medical Council* ("*Lawrence*"),<sup>14</sup> involving a different statute for VCF, the Queen's Bench Division of the High Court again relied on *Polanski* to determine the reasonableness of using VCF.<sup>15</sup>

20 But there are other cases which have highlighted factors in addition to those from *Polanski*. These factors might also be relevant in other cases and are therefore interesting to examine:

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<sup>12</sup> [2008] EWHC 1556 (QB).

<sup>13</sup> See *Marketmaker Technology Ltd v CMC Group plc* [2008] EWHC 1556 (QB) at [42]–[69].

<sup>14</sup> [2012] EWHC 464 (Admin).

<sup>15</sup> *Dr Robin Edward Lawrence v The General Medical Council* [2012] EWHC 464 (Admin) at [57]–[106].

- (a) *Attorney General of Zambia v Meer Care & Desai*<sup>16</sup> – The Court of Appeal considered the *expense and cost that would be incurred to hear testimony from Zambia via VCF*. The court noted that the less developed infrastructure in Zambia meant that large, additional costs would have to be incurred in order to use the VCF technology.
- (b) *Bank of Credit and Commerce International SA v Rahim* (“*BCCI v Rahim*”)<sup>17</sup> – The Chancery Division of the High Court asked whether the person giving VCF evidence was also a party to the proceedings, or only gave testimony as a witness. If the witness is not a party, they are not compellable and the courts are more likely to allow the use of VCF.
- (c) *K v K*<sup>18</sup> – The Family Division of the High Court considered *the time at which leave to use VCF evidence is sought*. If this is only asked for at the very last moment, the court should be disinclined to grant it.
- (d) *McGlinn v Waltham Contractors Ltd*<sup>19</sup> (“*McGlinn*”) – The High Court (Technology and Construction Court) considered two additional factors: *was the weight of the witness’s evidence of crucial importance or only ancillary?* If it was only ancillary, it would be less important that the person appear in person and therefore the court would be more likely to allow VCF. Second, the court also asked *whether there was a real, as opposed to fanciful reason why VCF evidence is being sought*. If only fanciful, the court would clearly be less inclined to grant the application for VCF.

21 Many of these factors are not completely distinct from the grounds in *Polanski* and could, to a greater or lesser extent, be subsumed with earlier identified factors. But others are very distinct and certainly deserve to be considered in their own right.

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<sup>16</sup> [2006] 1 CLC 436.

<sup>17</sup> [2005] EWHC 3550 (Ch).

<sup>18</sup> [2005] EWHC 1070 (Fam).

<sup>19</sup> [2007] EWHC 149 (TCC).

## V. Singapore cases applying *Polanski v Condé Nast Publications Ltd*

22 While the local courts have followed their English counterparts, the extent to which they will continue to follow them is unknown. At the very least, we know for certain that they have approved of *Polanski* itself. V K Rajah J (as he then was) expounded the benefits of using VCF evidence in the High Court decision of *Peters Roger May v Pinder Lillian Gek Lian*<sup>20</sup> (“*Peters Roger May*”), where he positively cited the *Polanski* decision:<sup>21</sup>

26 The easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings ... The advent of technology however has fortunately engendered affordable costs of video-linked evidence with unprecedented clarity and life-like verisimilitude, ... the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the ‘physical convenience’ of witnesses as a yardstick in assessing the appropriateness of a forum ... I also find it heartening that my preferred approach in endorsing the convenience, affordability and reliability of video-linked evidence is amply supported by some observations made in the very recent House of Lords decision in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637.

[V K Rajah J then quoted from Lord Nicholls of Birkenhead and Lord Slynn of Hadley]

27 The respondent has not advanced any arguments, cogent or otherwise, why adducing evidence by video link in this case would be in any way inconvenient, unsuitable or prejudicial.

[emphasis added]

23 The subsequent decision of *John Reginald Stott Kirkham v Trane US Inc*<sup>22</sup> before the Court of Appeal (in which V K Rajah JA sat on this

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<sup>20</sup> [2006] 2 SLR(R) 381.

<sup>21</sup> *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 at [26]–[27].

<sup>22</sup> [2009] 4 SLR(R) 428.

occasion) reaffirmed the above passage,<sup>23</sup> including the excerpts from the House of Lords.

24 These two cases demonstrate that the local courts have adopted *Polanski* and appear open to the idea of using VCF. However, they have not expressly stated whether they differ from the post-*Polanski* cases, or whether they agree with these further English developments.

25 There is no reason why the local courts should not adopt the post-*Polanski* case law. They have not given any reason as to why they would depart from them. While none of these cases have strong precedential or persuasive value they can, and (it is submitted), should, take heed of them when deciding similar cases.

## VI. A proposed approach

26 The above case law suggests that, while the normal method of giving oral evidence is in person, there is no strong presumption that this must be the preferred method if there are reasonable grounds advanced in support of an application to give evidence via VCF. The considerations that will influence the courts to decide such applications appear to be largely practical rather than doctrinal, and the main question is “will the applicant gain an advantage which, in the circumstances of the case, will be unfair?”

27 In the view of the authors, the courts may wish to approach this by asking themselves the following questions.

### ***A. Does the applicant genuinely believe in the grounds which he advances for his reasons why he is unable or unwilling to come to the forum of the hearing?***

28 This is a straightforward threshold test. Courts should not entertain an application which is not made in good faith. For example, applications made at a very late stage might suggest that the applicant is

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<sup>23</sup> *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [39].

only seeking to gain a procedural advantage and acting in bad faith.<sup>24</sup> The courts might also be suspicious of an application where the applicant himself chose the jurisdiction over other, more suitable alternatives. However, in practice, it will not be easy to make a positive finding of fact against the applicant on this point, especially on the basis of written witness statements only, and most courts have in fact given the benefit of the doubt to applicants.

***B. Even if he does, is his belief fanciful?***

29 There must be an objective, as well as a subjective, basis for the application. However, the bar will not be a high one, as the decided cases have usually also given the benefit of the doubt to the applicant where the expressed fear is of the loss of personal liberty or property.<sup>25</sup>

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<sup>24</sup> The High Court in *Marketmaker Technology Ltd v CMC Group plc* [2008] EWHC 1556 (QB) considered disallowing VCF evidence where the application was made on the eve of the hearing. The opposing party argued that the application was nothing more than a delaying tactic (that is, it is made in bad faith), and that the lateness of the application demonstrated this. While the court was sympathetic to this argument, ultimately, it held, on the facts, that the applicant had expressed his wish to testify through video conferencing a considerable time prior to his application. But for this fact, it is likely that the application would have been dismissed for lack of good faith.

<sup>25</sup> See *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637. See also *Bank of Credit and Commerce International v Rahim* [2005] EWHC 3550 (Ch) where the witness was allowed to give evidence via video link from Pakistan owing to, *inter alia*, his fear of possible arrest. In *Marketmaker Technology Ltd v CMC Group plc* [2008] EWHC 1556 (QB), the witness was allowed to give evidence through video conferencing because he could have been served with a bankruptcy petition and an order not to leave the jurisdiction. The witness in *McGlenn v Waltham Contractors Ltd* [2007] EWHC 149 (TCC) preferred not to come to the forum because he might have been liable to pay a substantial amount in capital gains tax.

**C. Do his reasons amount to the furtherance of a valid/legitimate personal interest of the witness?**

30 Even if the witness has a genuine belief in the reasons for his aversion to giving evidence in person, and such belief is not fanciful, the courts still need to assess whether that reason should *objectively* be regarded as a valid reason which should (subject to the considerations set out in the following questions) allow VCF evidence to be given.

31 It will be a matter for the courts' discretion to determine how low the threshold will be set. But there is an indication from *Peter Rogers May v Pinder Lillian Gek Lian*,<sup>26</sup> where V K Rajah J stated that:<sup>27</sup>

If sufficient reason is given why the actual physical presence of foreign witnesses cannot be effected, a court should lean in favour of permitting video-linked evidence in lieu of the normal rule of physical testimony. Sufficient reason ought to be a relatively low threshold to overcome and should be assessed with a liberal and pragmatic latitude.

32 For example, a witness's wish simply to remain in his home town to attend a good friend's birthday dinner on the date of the trial might not be considered sufficiently valid in itself. Yet that wish might be worthy of consideration if the occasion were a milestone event in his own life, such as his silver or golden wedding anniversary. But even if that reason were to pass the threshold criterion, the quality of that reason would still have to be measured against the other considerations listed below.

33 It should be noted that the unattractiveness of the witness's reasons for wishing to give VCF does not of itself make the reason invalid or illegitimate. Indeed, in *Polanski*, Lord Hope stated:<sup>28</sup>

But now that we are looking for a general rule, I would hold that the appellant's case falls within the generality of cases where the fact that the claimant wishes to remain outside the United Kingdom

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<sup>26</sup> [2006] 2 SLR(R) 381.

<sup>27</sup> *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 at [27].

<sup>28</sup> *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637 at [66].

to avoid the normal processes of law in this country is not a ground for declining to allow him to remain abroad and give his evidence by VCF.

34 On the other hand, courts must also consider whether the applicant is seeking to derive an unfair advantage over the other party or otherwise commit an abuse of process. However, the courts have said on more than one occasion that a witness, particularly one who is a litigant, in fact puts himself at a disadvantage in terms of establishing his credibility by subjecting himself to VCF and the risks of poor quality of VCF transmission.<sup>29</sup> An additional observation is that a VCF witness-litigant will also suffer a disadvantage if he remains in his remote location, away from his legal team when they are prosecuting the case. This is because they will not be able to give instructions as the evidence of the other witnesses is presented. It should also be borne in mind that giving evidence by VCF from locations with extreme time differences from that of the forum may result in a disadvantage for a witness who has to face lengthy cross examination late in his time zone. Furthermore, when a witness gives evidence by VCF, his facial features and reactions are often magnified to a greater extent to a tribunal or court viewing his evidence if a large high definition screen is used, and this will address the concerns of counsel who insist on being able to see “the whites of his eyes” of a witness under cross-examination. Accordingly, the balance of advantage will normally be neutral, if not adverse, *vis-à-vis* the witness in a remote location.

***D. How important is the evidence of the witness in relation to the outcome of the critical issues of the case?***

35 In every such application, there will be competing interests which have to be balanced. The more important the witness’s testimony, the greater the need to demonstrate that the interests of justice will not be prejudiced by allowing the witness to give VCF evidence. Expressed

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<sup>29</sup> See, for example, *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637 at 647 and *Dr Robin Edward Lawrence v The General Medical Council* [2012] EWHC 464 (Admin) at [105].

differently, the more important the witness's testimony, the greater the need to demonstrate that the use of VCF evidence will not diminish the courts' ability to analyse the witness's testimony. However, *Polanski* and the cases following it have emphasised that there is no inherent disadvantage in cross examination by VCF, which is now a regular feature of court proceedings. Accordingly, the criticality of the evidence of the witness will not normally be a factor against the application, and may even, for reasons expressed in the case law above, militate in favour of VCF evidence.

***E. What prejudice will be suffered by the opposing party if the witness gives evidence via VCF?***

36 This is an important consideration that must be balanced against the needs or wishes of the witness. Inevitably, the standard argument raised by the cross-examining party in all the reported cases has been (at least in part) about the perceived advantages of cross-examining a witness in person, rather than by VCF. However, the English courts have repeatedly stated that cross-examination by VCF is not in itself prejudicial to the cross-examining party. Accordingly, the argument that the evidence of the witness in question is critical and therefore cross-examination must be face-to-face should find no favour with the courts.

***F. What prejudice will be suffered by the party presenting the witness for VCF evidence if the application is not allowed?***

37 This has often proved to be a vital element in the equation, especially if the witness is a party in the action and/or his evidence is critical to the determination of a material issue in the case, and the consequence of the decision to disallow his VCF evidence is that he does not give evidence at all. This has usually been considered to be determinative of any balance of prejudice in favour of the applicant.

**G. What will be the wider consequences of allowing or disallowing the application of the witness, both in terms of public policy and the overall justice of the case at hand?**

38 This is the ultimate determining factor. The highest value is normally placed on the right to a fair trial to each litigant, however unattractive his position may be. Therefore, if denial of an application for VCF evidence will result in a litigant being denied the opportunity fully to present his case with the witnesses at his disposal (including himself), the approach has been that the application will be granted, however unattractive the reasons for the witness's unwillingness to give evidence in person. Indeed, in some ways, the more unattractive the argument, the greater the validity of the reason for the application. *Polanski* and *McGlinn* are examples of this phenomenon.

39 It is only when there is a competing public policy which the courts find compelling that the application may be denied. Given that *Polanski* was a somewhat extreme case where the House of Lords (admittedly by a narrow 3-2 majority) found that a fugitive from justice was entitled to give VCF evidence in order to avoid the risk of arrest and extradition, it is not immediately possible, in the absence of further examples from decided cases, to say when such competing public policies might take precedence over the need to allow a litigant to have a fair trial by using all the forensic means available to him under the applicable rules of court.

40 It is therefore suggested that the above seven factors will, in the vast majority of cases, set out the relevant questions for examining the merits of an application to give oral evidence by VCF. Whether such principles can be applied to a similar application for leave to give oral evidence over the telephone will be the next challenge.

**H. Addendum: Anil Singh Gurm v J S Yeh & Co**

41 Shortly before this volume of essays went to press, the High Court of Singapore delivered its judgment in the case of *Anil Singh Gurm v*

*J S Yeh & Co*<sup>30</sup> (“*Anil Singh Gurm*”) which considered the question of whether a witness who is located overseas should be permitted to give evidence via VCF. This was the first occasion on which a Singapore court decided on this question directly, and is worth setting out (at least in brief) even though the decision is being appealed at the time of writing this addendum.

42 This was a case concerning a prospective witness who did not wish to give evidence in person out of fear of prosecution for his role in a transaction involving the purchase of a residential property in Singapore. An application was made for the prospective witness to give evidence via VCF from overseas and the key underlying question for the High Court was whether the prospective witness’s fear of prosecution was a sufficient reason for the Court to allow for evidence to be given via VCF. This was a question which required the High Court to consider the three factors provided in section 62A(2) of the Evidence Act.<sup>31</sup> In this regard, the High Court observed that these three factors were not exhaustive, and considered that questions of public policy were inevitable in a case such as this and would therefore form part of the circumstances that the Court must consider.

43 The High Court first considered whether the prospective witness was “unable” to give evidence in Singapore pursuant to section 62A(2)(a) of the Evidence Act. The High Court observed that the general principle in civil proceedings was that evidence should be given orally and in person in open court. Evidence given via VCF was the exception rather than the norm. The High Court considered that the plain meaning of the word “unable” suggested a “physical incapacity to attend, or an inability to attend caused by reasons other than of the witness’s own doing”.<sup>32</sup> In other words, an *inability* to attend must be distinguished from an *unwillingness* to attend.<sup>33</sup> In the view of the High Court, a mere

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<sup>30</sup> [2018] SGHC 221.

<sup>31</sup> See para 7 above.

<sup>32</sup> *Anil Singh Gurm v J S Yeh & Co* [2018] SGHC 221 at [24].

<sup>33</sup> The High Court cited with approval several cases from Hong Kong which supported this distinction: see *Re Chow Kam Fai* [2004] 1 HKLRD 161;

(continued on next page)

unwillingness to attend would be a “weighty factor that pointed against allowing the application”.<sup>34</sup>

44 In coming to this conclusion, the High Court considered the House of Lords’ decision in *Polanski*, but found that the decision was of no assistance to the enquiry of whether the witness was “unable” to give evidence pursuant to section 62A(2)(a) of the Evidence Act. It was observed that the relevant English procedural rule did not contain any express requirement for the court to undertake such an enquiry. By contrast, the regime under section 62(A)(2)(a) of the Evidence Act required the Court to examine the question of the witness being “unable” to attend. The High Court considered that nothing in *Polanski* addressed the question of “inability”, and nothing in *Polanski* addressed the question of whether “inability” was wide enough to accommodate mere “unwillingness”. The question in *Polanski* was whether unwillingness to attend for fear of arrest and prosecution was sufficient to allow the application for evidence to be given via VCF, which to the High Court, was a different question from the one before it.

45 The High Court distinguished two judgments from Singapore, which were cited as local authorities that had endorsed the majority’s decision in *Polanski*.<sup>35</sup> First, the High Court observed that the two judgments concerned the use of VCF as a factor in the *forum non conveniens* analysis, and did not deal with the question of whether the court should allow evidence to be given via VCF in the first place. Second, the High Court did not consider that Rajah J’s (as he then was) observations in *Peters Roger May* were to the effect that unwillingness alone was sufficient to permit evidence to be given via VCF. The decision in *Peters Roger May* also did not provide any answer as to what would be “sufficient reason” to permit VCF. Further, Rajah J was not called

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*Raj Kumar Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1419 and *Daimler AG v Leiduck, Herbert Heinz Horst* [2013] HKCU 812.

<sup>34</sup> *Anil Singh Gurm v J S Yeh & Co* [2018] SGHC 221 at [38].

<sup>35</sup> See *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 and *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428.

upon to examine the specific consideration of whether a witness is “unable” to attend under section 62A(2)(a) of the Evidence Act. In the circumstances, the High Court found that the two local cases cited were of no assistance to the plaintiff’s case.

46 The High Court also did not accept the proposition that the court should ordinarily be more amenable to VCF evidence being allowed where the witness was not a party to the proceedings. While the English High Court decision of *Bank of Credit and Commerce International SA v Rahim*<sup>36</sup> was cited as authority for such a proposition, the High Court stated that it “could not discern such a proposition from that judgment”.<sup>37</sup> Further, the High Court found that section 62A(2)(a) of the Evidence Act did not distinguish between witnesses who were a party to the proceedings and those who were not, and held that there was no principled basis in making such a distinction.

47 On the facts, the High Court found that the prospective witness was merely “unwilling” to give evidence in person and was not “unable” to do so pursuant to section 62A(2)(a) of the Evidence Act. Consequently, the High Court held that this factor alone would be sufficient to dismiss the application.

48 Notwithstanding the findings above, the High Court proceeded to examine the public policy considerations applicable in this application. The High Court considered the reasoning of both the majority and minority in *Polanski*, but ultimately preferred the reasoning of the minority that it would be contrary to public policy to grant an application for VCF where the sole reason given for the witness not attending was his professed desire to avoid the risk or likelihood of arrest or extradition. The High Court endorsed the view that the policy consideration of satisfying a criminal sentence was by no means less important than the desirability of permitting a fugitive to enforce his civil rights. Further, the court should not assist a fugitive from avoiding the consequences of his criminal acts, and it would be an affront to

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<sup>36</sup> [2005] EWHC 3550.

<sup>37</sup> *Anil Singh Gurm v J S Yeh & Co* [2018] SGHC 221 at [31].

public conscience and bring the administration of justice into disrepute if a fugitive was permitted to give evidence via VCF so that he could stay out of jurisdiction and avoid arrest. The High Court noted that the reasoning of the minority in *Polanski* was the unanimous view of the Court of Appeal in the same case below it, and was also preferred by the *Australian Federal Court in Seymour v Commissioner of Taxation*.<sup>38</sup>

49 By contrast, the High Court declined to adopt the reasoning of the majority in *Polanski*.<sup>39</sup> First, the High Court considered that the public policy consideration that fugitives from justice should not be precluded from enforcing their civil rights through the courts was not applicable as the prospective witness was neither a fugitive nor was he seeking to enforce his rights. The High Court rejected the argument that it was the plaintiff who would be disentitled from enforcing his civil rights and denied access to justice. This was because parties in civil proceedings were never entitled to call upon any witness they wish or by whatever means of giving evidence they desire. If the prospective witness was unwilling to attend in Singapore to give evidence, it would be up to the plaintiff to make as best a case he could out of the evidence available to him.

50 Second, the High Court was critical of the assumption of the majority in *Polanski* that a fugitive would not return whatever the result of the application. The High Court observed that “[a] fugitive from justice who absconds and fails to serve a comparatively light sentence, but stands to lose the bulk of his personal wealth if he does not pursue his civil action, might take a different approach”.<sup>40</sup> In this regard, the High Court expressed its doubt as to whether a general principle should

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<sup>38</sup> [2016] FCAFC 18.

<sup>39</sup> The High Court summarised the key public policy considerations identified by the majority in *Polanski v Conde Nast Publications Ltd* [2005] WLR 637 as being twofold. First, fugitives from justice should not be precluded from enforcing their civil rights through the courts. Second, allowing an application for video-link evidence would not assist the fugitive’s evasion of justice as the fugitive would in any case avoid coming into the country regardless of the outcome of the application.

<sup>40</sup> *Anil Singh Gurm v J S Yeh & Co* [2018] SGHC 221 at [43].

be extracted from the facts of *Polanski* that an application for evidence to be given via VCF made by fugitives from justice should generally be allowed because allowing or refusing it would make no difference to the offender's evasion of the normal processes of the law.

51 On the facts, even though the prospective witness was not a fugitive, and was not charged or being investigated, the High Court considered that the prospective witness's unwillingness to attend for fear of prosecution was simply a desire to avoid the normal processes of the law. The High Court further added that the effect of allowing the prospective witness to give evidence via VCF would be to allow evidence that could be potentially exculpatory in respect of any criminal charges that might be preferred against him. This would circumvent the various statutory prohibitions on VCF evidence being given from out of country in criminal proceedings. In the circumstances, the High Court held that the public policy considerations weighed heavily against allowing the application, and this alone would have been sufficient to dismiss the application.

52 Given that two factors that weighed strongly against the application had been established, the High Court did not consider it necessary to examine the consideration of prejudice. Nonetheless, the High Court acknowledged that this was a case that raised an important question of general principle and considered that it would be to the public advantage to have a pronouncement from the Court of Appeal on this matter. Consequently, leave to appeal was granted, and it remains to be seen how the Court of Appeal will decide on this issue.

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## Background to Essay 12

In 2011, I was invited to be on a team of contributors to write a book on the law of international arbitration in Singapore. I chose to write on “The Hearing” as I have always been more interested in the practical science of arbitration procedure than in the academic and philosophical bases of arbitration theory. It also gave me a chance to express my views on how I would conduct arbitration hearings, which is exactly the area where arbitration allows the individual discretion of the tribunal to find its own expression without rigid adherence to strict rules, as contrasted with court procedures which need to obey the Rules of Court as much as the rules of law. In this regard, Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) is the liberating rule that allows improvisation in arbitration, and which reads:

Failing such agreement [of the parties as to procedural matters], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The only real guideline to whether a procedure, which is not in any applicable national law (or international soft law guide), is likely to be set aside by the curial court is the test laid down in Article 18 of the Model Law, which reads: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

In 2017, David Joseph QC and David Foxton QC, the editors of the original edition of *Singapore International Arbitration: Law & Practice*, decided to publish a second edition of the book. This gave me a chance to expand on my thinking and elaborate on matters of practice on which relatively little had been written. Parts of this chapter may be provocative, and not every arbitrator may follow my practices in every respect, but I hope that this discourse will open up arbitral thinking on what is possible in arbitration and why. This is my small contribution to enlarging the jurisprudence on a subject that has yet to be sufficiently explored.

The original version of this essay was published as a chapter in *Singapore International Arbitration: Law & Practice* (David Foxtton QC & David Joseph QC eds) (LexisNexis, 2014). This updated essay appears in the second edition of the same book published by LexisNexis in 2018.

*I wish to extend my thanks to JurisNet for kindly granting me permission to republish this essay in this book.*

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## THE HEARING\*

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Michael HWANG SC

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\* This writer is grateful to his former associate Eunice Chan and his associate Lim Si Cheng for their substantial assistance in preparing this chapter.

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## I. Skeletals or pre-hearing memorials

1 It is customary in international arbitrations for tribunals to direct that parties file skeleton arguments or pre-hearing memorials ("Opening Written Statements") shortly before the evidentiary hearing.<sup>1</sup> This direction is a matter of practice, and is not usually mentioned either in arbitration statutes or institutional rules. They are therefore not mandatory, and tribunals are occasionally asked to dispense with this direction where there is a tight schedule leading up to the hearing, and the tribunal can be persuaded by the parties that the issues of fact and law have been clearly identified and canvassed in earlier pleadings or memorials. However, in the vast majority of cases, parties are willing

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<sup>1</sup> This is to be distinguished from pleadings (in the litigation sense) and memorials which are effectively pre-hearing submissions attaching and relying on witness statements and documentary exhibits.

(and indeed keen) to file their Opening Written Statements. The forensic importance of this part of the hearing process is linked to the Opening Oral Statements, which are typically delivered as the first order of business at the evidentiary hearing. Most counsels<sup>2</sup> (and certainly most tribunals) would prefer to have an Opening Written Statement from both parties for pre-reading, so that all participants at the hearing will know in advance the essential elements of the case to be advanced by each party, as well as the exact relief claimed. This will enable the tribunal to cogitate over what issues it may wish to raise with the parties at the beginning of the hearing, in order to have a clear idea of what to look out for when the witnesses come to give their oral testimony or to give guidance to the parties on which areas to emphasise in their respective presentations.

## II. Place of hearing

2 It is important to distinguish between the seat (otherwise known as the legal place) of the arbitration and the venue of the evidentiary hearing.<sup>3</sup> In short, the seat is the place where the parties have agreed that the arbitration will be *legally* located; that is, the law of that legal

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<sup>2</sup> In this article, references to “counsel” and “witness” use the masculine gender purely for convenience, but these terms are intended to include the feminine gender (where applicable).

<sup>3</sup> For an explanation of the seat or place of arbitration, see Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at pp 171–175, paras 3.53–3.61.

place will be the law governing the process of the arbitration (as opposed to the governing law of the dispute).<sup>4</sup>

### III. Legal representation and attendance

3 Rule 23.1 of the Arbitration Rules of the Singapore International Arbitration Centre 2016 (“SIAC Rules”) establishes the right of each party to be represented before the tribunal by legal practitioners or any other representatives. The *prima facie* meaning of this rule is that a party may choose any lawyer he wishes from any jurisdiction to act on his behalf or even a non-lawyer if he believes that this non-lawyer is the best person to represent him because of that person’s special expertise (for instance, a claims consultant in a construction claim). However, the right conferred by rule 23.1 is subject to mandatory Singapore law concerning the right of foreign lawyers and non-lawyers to appear in arbitral proceedings held in Singapore.<sup>5</sup>

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<sup>4</sup> This distinction is highlighted in Art 20 of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), which is incorporated into the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”), and r 21 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016) (“SIAC Rules”). See also Michael Hwang SC, “Determining the Parties’ True Choice of the Seat of Arbitration and *Lex Arbitri*” in *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013) at p 545, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017).

<sup>5</sup> Foreign lawyers and non-lawyers are permitted to represent parties in arbitration proceedings without the need to engage a Singapore advocate and solicitor as co-counsel and regardless of whether the issues in dispute involve Singapore law. See s 35 of the Legal Profession Act (Cap 161, 2009 Rev Ed) (“LPA”). The current s 35 of the LPA was repealed and re-enacted in 2004 to enable foreign lawyers to appear in all arbitrations, including instances where Singapore law governs the dispute. Before the re-enactment of the current s 35 of the LPA, the LPA was amended to enable foreign lawyers to appear where the law governing the dispute was

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4 There is also debate within the international arbitration community about whether a tribunal has an inherent right to disallow a party from choosing a particular lawyer or law firm if that choice would affect the integrity of the arbitral process.<sup>6</sup> The debate has intensified since the publication of the IBA Guidelines on Party Representation in International Arbitration 2013 (“IBA Guidelines on Party Representation 2013”) setting out desired ethical standards for parties and their legal representatives in the conduct of the arbitration. Guideline 26 provides that if the tribunal, after giving the parties notice and a reasonable opportunity to be heard, finds that a party representative has committed misconduct, the tribunal may:

- (a) admonish the party representative;
- (b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the party representative;
- (c) consider the party’s representative’s misconduct in apportioning the costs of the arbitration; and
- (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

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a law other than Singapore law; where Singapore law governed the dispute, foreign lawyers could appear, only if they appeared together with Singapore lawyers. This amendment was prompted by *Turner (East Asia) Pte Ltd v Builders Federal (HK)* [1988] 1 SLR(R) 281 where Chan Sek Keong JC (as he then was) held that foreign lawyers appearing in arbitral proceedings held in Singapore were practising as advocates and solicitors in contravention of the Legal Profession Act.

<sup>6</sup> In *Hrvatska Elektroprivreda dd v The Republic of Slovenia* ICSID Case No ARB/05/24, the tribunal rejected a very late application to include new counsel who was a member of the same chambers as the presiding arbitrator, thus raising justifiable doubts about conflicts of interest in the minds of the other party (who, being European, was unfamiliar with the concept of independence of English barristers). The tribunal asserted its right to exclude counsel on the basis of its duty to protect the integrity of the proceedings.

5 It is important to distinguish between three situations:<sup>7</sup>

- (a) where the evidentiary hearing has yet to begin;
- (b) where the evidentiary hearing is ongoing; and
- (c) where the evidentiary hearing is over.

6 In situation (a), where the choice of lawyer or law firm gives rise to a conflict of interest, the tribunal should have the power to make an order disallowing counsel from appearing in the hearing yet to come in order to preserve the integrity of the proceedings.<sup>8</sup>

7 In situation (b), where the conduct of the counsel during the course of an evidentiary hearing threatens the integrity of the process, it is more difficult to make such an order since the hearing will be under way and the offending counsel's client will in all probability be prejudiced if his counsel were barred from further representation. However, there

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<sup>7</sup> See Michael Hwang & Jennifer Hon, "A New Approach to Regulating Counsel Conduct in International Arbitration" in *The Evolution and Future of International Arbitration* (Stavros Brekoulakis, Julian DM Lew & Loukas Mistelis eds) (Wolters Kluwer, 2016), featured also in 33 ASA Bulletin 3/2015 (September).

<sup>8</sup> See *Hrvatska Elektroprivreda dd v The Republic of Slovenia* ICSID Case No ARB/05/24; cf *Vorobiev Nikolay v Lush John Frederick Peters* [2010] SGHC 290, where the Singapore High Court restrained an entire law firm from acting for the plaintiff on the grounds that they had earlier acted for the defendants in the same or related matters. See also *Georgian American Alloys, Inc v White & Case LLP* [2014] EWHC 94 (Comm), where the English High Court granted an injunction to restrain an entire law firm from representing a plaintiff on the grounds that the law firm had previously advised a company affiliated to the respondents in a corporate restructuring and that there was a risk of unauthorised use of confidential information. Field J held that the allegedly prejudicial impact of the claimed injunction on the plaintiff was not a relevant consideration when deciding whether to grant the injunction for the purposes of protecting confidential information. See also Lacey Yong, "King & Spalding disqualified from ICC case" *Global Arbitration Review* (23 March 2018) <<https://globalarbitrationreview.com/article/1166830/king-spalding-disqualified-from-icc-case>> (accessed 29 March 2018).

are intermediate steps that can be taken short of expulsion, especially if that counsel is part of a team which has another member who can carry on the hearing so that the offending counsel can continue to participate in the hearing but only to assist his colleague(s) and on condition of silence on his part.<sup>9</sup> One other intermediate step that the tribunal could take is to issue an order that the counsel pay the costs of the additional time caused by his disruptions out of his own pocket.

8 In situation (c), where the tribunal defers its decision on sanctions until after the hearing, a possible solution is for the tribunal to refer the alleged misconduct to a third party to investigate and adjudicate upon the alleged misconduct. However, this may run into problems because the parties may not have agreed to such a procedure, and the tribunal may be in violation of its duty of confidentiality owed to the parties. The recommended solution is therefore for the arbitration institution to:

- (a) promulgate a code of conduct for all counsel appearing in arbitrations administered by that institution;
- (b) amend its rules to oblige the parties to procure their respective counsel to agree to abide by that code of conduct and to authorise the tribunal to refer all complaints of counsel misbehaviour to the arbitration institution in accordance with the code; and
- (c) establish a disciplinary committee of senior arbitration practitioners to investigate and determine the guilt of the offending counsel and the appropriate penalty. Alternatively, the arbitration institution's rules could be amended so that parties would expressly be deemed to have consented to complaints against their lawyers' misconduct

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<sup>9</sup> Take for example, a case of an advocate suffering from undiagnosed bipolar disorder, and acts in a bizarre and incoherent way in the conduct of a hearing. Regardless of fault, most practitioners would agree that the integrity of the process would be impeded by an advocate clearly out of control, and exclusionary or other measures to deal with this situation would be justified. Disciplinary action may even be necessary in the absence of fault on the part of counsel, where he is clearly unable (for reasons beyond his control) to prevent himself from disrupting the proceedings.

to a third party, with power to sanction offending counsel, such as a bar association.

9 This writer's view about the IBA Guidelines on Party Representation 2013 is that they express principles of conduct which should come as no surprise to Singapore-based practitioners, as many of the principles in the Guidelines are already reflected in the Legal Profession (Professional Conduct) Rules 2015 ("PCR") under the Legal Profession Act<sup>10</sup> (or flow as a logical extension of the PCR). However, as stated above, there will inevitably be a debate and concern about the application of Guideline 26.<sup>11</sup>

#### **IV. Time limits/Chess clock**

10 Most tribunals will confer with counsel before the hearing to work out some formula for apportioning time between the parties in the presentation of their respective cases. Normally, sensible counsel on both sides will reach an agreement worked out between themselves, sometimes with the assistance of the tribunal. There is no written law or institutional rule which deals with the question of time allocation between the parties, but underlying the whole hearing process is the "Golden Rule" of arbitration, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which is repeated in most institutional rules (but not in the SIAC Rules, presumably because this principle is already enshrined in the governing arbitral law of Singapore by the incorporation of Article 18 of the Model Law in the First Schedule of the International Arbitration Act<sup>12</sup> ("IAA")).<sup>13</sup> However, Article 18 of the Model Law cannot be taken too literally; otherwise each party could claim an inordinate amount of time to present its case. Equality and the full opportunity to present one's case cannot be equated

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<sup>10</sup> Cap 161, 2009 Rev Ed.

<sup>11</sup> See para 4 above.

<sup>12</sup> Cap 143A, 2002 Rev Ed.

<sup>13</sup> Article 18 of the Model Law provides: "[T]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

with equality of (limitless) time in every case, as certain factors will come into play to determine what would be a reasonable amount of time to allocate to each party.

11 In the following examples, equality of time may not be the fairest solution:

- (a) If one party is calling five witnesses and the other party is only calling one witness, equality would not be the fairest way of allocating time (the situation might be different if one party were calling four witnesses and the other party three).
- (b) If the parties are calling an equal number of witnesses, but one party's witnesses are testifying in a language other than the language of the arbitration, interpretation will be necessary. However, each such witness will by necessity take a longer time than a comparable witness speaking in the language of the arbitration, so the party cross-examining the witnesses who need interpretation will normally ask for, and may (depending on the circumstance) be granted, extra time.
- (c) If the parties are calling an equal number of witnesses but (i) one party's witnesses are giving evidence which is controversial (or in an unresponsive manner) and will take a longer time for cross-examination; and (ii) the other party's witnesses are giving formal or largely uncontested evidence, most tribunals would consider dividing the allocation of time having regard to the relative complexity of the testimony of the different witnesses.

12 The moral is therefore that equality under Article 18 of the Model Law does not automatically call for equality of time in the presentation of each party's case.

13 A strict application of the "Chess Clock" principle would *prima facie* call for equality of time divided between the parties and relatively strict adherence to that allocation of time.<sup>14</sup> In practice, most tribunals use a

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<sup>14</sup> The fullest account of the chess clock procedure for arbitration is found in John Tackaberry QC & Arthur Marriott QC, *Bernstein's Handbook of* (continued on next page)

modified form of Chess Clock after the allocation of time has been agreed, with the following main features:

- (a) The time for presentation of a party's case is counted by adding up all the time taken by a party's lawyer(s) in addressing the tribunal, including oral submissions, and cross-examination of the other party's witnesses, but not answers to questions from the tribunal.
- (b) Once the time allocation is fixed, a party will have freedom to allocate his permitted time as he pleases; that is, his lawyer can take as long or as short a time for cross-examination as he wishes, but his right of presentation of his case will expire at the end of the allotted time even if he is still cross-examining at that moment, subject to any extensions which the tribunal may be prepared to give in exceptional circumstances.
- (c) Time will also be allocated to the tribunal to ask questions and those questions and answers will be taken out of the tribunal's allocated time. Sometimes the tribunal will not pre-allocate any fixed time for its questions, but will simply deduct the time taken by its questions (and answers to such questions) equally between the parties.
- (d) Either the parties or the Tribunal Assistant (if there is one) will keep track of the time used by each party, and the tribunal will inform all parties after the end of each hearing day of the hours used and the hours left.
- (e) During witness conferencing, time will be deducted from a party's time as a result of its examining a witness (irrespective of who proposed the witness, but subject to adjustment upon application in the event of persistent unresponsiveness and translation delays). The time taken for questions raised by the tribunal will be dealt with under the procedures described in (c) above.

## **V. Oral opening statements: What is expected and what works**

14 This is another forensic tool which is not mandated by law or institutional rules, but it is accepted that such statements are normal in international arbitrations, although there are differences of opinion as to how much time should be allocated for this exercise. On the one hand, there are tribunals who believe that an hour from each counsel should suffice, and then the witness evidence should begin.

15 This author takes a different view. The oral Opening Statement is one of the most powerful weapons in an advocate's armoury and, if properly used, can be a case-winner. A good oral Opening Statement should be made as if it were the traditional Closing Statement, drawing all the threads together to present a holistic and as complete an argument as can be made before the cross-examination of witnesses takes place. At that stage, counsel will know his own case thoroughly, with his theory of the case complete, subject only to his witnesses standing up to cross-examination and to the other side's witnesses being shown to be unreliable, or at least irrelevant. He will already have his answers to his opponent's case because all witness statements and documents will have been submitted and studied, and he should be ready to deal with his response to every material point in the other party's case. So he should be taking a fair measure of time to tell the tribunal (a) exactly what his case is, and why his party should be successful, and (b) what is wrong with the other side's case.

16 In this regard, the tribunal will expect that counsel will highlight the key contractual documents, key contractual provisions, and documents crucial to his or her case. In particular, relevant correspondence and other documents should be highlighted to set the context of the theory of the case. He will then advance his theory of the case subject only to the reservation that he may have to modify his theory after all witnesses have been cross-examined. In most cases, this task would take half a day, so the tribunal should, wherever possible, allocate the first day of the hearing entirely to oral Opening Statements, so that counsel can concentrate on that task without being distracted by having to cross-examine on the same day.

17 Oral Opening Statements can be accompanied by audio-visual aids, and usually some directions will be given about the period within which slides and demonstrative exhibits can be submitted.<sup>15</sup> These aids are usually welcomed by the tribunal as they make the message more digestible, and (if properly done) leave a deeper impression on the tribunal than if it simply heard the oral Opening Statements without any written or visual aids.

## **VI. Evidence-in-chief**

### **A. Direct oral examination-in-chief**

18 This is another area which is not usually covered by statute or institutional rules, where the procedure will be based on the discretion of the tribunal. In the vast majority of international arbitrations, the order for filing of witness statements means that there will be little or no direct examination-in-chief. The common exceptions to this practice are set out below:

- (a) When witness statements are filed by way of simultaneous exchange, and one witness wants an opportunity to respond orally to another witness statement which he had not seen when he filed his own statement. Supplementary evidence-in-chief will then usually be allowed, so that the witness' entire oral evidence testimony can be made known to opposing counsel before his or her cross-examination begins.
- (b) When the tribunal wishes to have a "feel" for the witness before he is cross-examined, and to test how much of his witness statement is actually his own work. In such cases, witnesses might be asked supplementary questions as part of his evidence-in-chief, or be allowed to give a short (five to ten minute) summary of his witness statement (especially experts who may need to give a very short tutorial in the principles and assumptions underlying their reports).

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<sup>15</sup> See Michael J Moser, "The 'Pre-Hearing Checklist' – A Technique for Enhancing Efficiency in International Arbitral Proceedings" (2013) 30(2) *Journal of International Arbitration* 155.

### **B. Witness statements**

19 There are usually no mandatory requirements of statute<sup>16</sup> or (usually) institutional rules, and directions will therefore depend on the practice adopted by the tribunal. Typical directions will be that witness statements are to be as full as the witness' intended oral testimony, so that the written statement can be treated as the witness's evidence-in-chief, with the result that each witness is almost immediately subject to cross-examination unless one of the exceptions set out in above<sup>17</sup> is applied by the tribunal.

### **C. How far oral questions are permitted**

20 Article 8.3(g) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("IBA Rules 2010") provides that the tribunal may ask questions of a witness at any time.<sup>18</sup> The tribunal has the right to ask any questions it wishes of witnesses, but an arbitrator needs to know how far he can go in framing such questions, as there is a line between (a) questions asked to clarify the witness's answers or to explore issues not covered in the witness's written statement or cross-examination; and (b) questions which seek to expose flaws or inconsistencies in the witness's previous statements (oral or written). The latter course could lead to serious problems in at least two respects:

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<sup>16</sup> A notable exception is the United Arab Emirates ("UAE") where all witness evidence must be given on oath. See the ruling of the Dubai Court of Cassation of 15 May 2005 in the case of *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* Case No 503/2003, where an award was set aside on the ground that the arbitrator failed to administer the witnesses in accordance with UAE law.

<sup>17</sup> See para 18 above.

<sup>18</sup> See s 167 of the Evidence Act (Cap 97, 1997 Rev Ed) which provides a judge the power to ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant, in order to discover or to obtain proof of relevant facts. This provision is illustrative of accepted forensic practice but does not apply to international arbitrations; see s 2(1) of the Evidence Act.

(i) it could hi-jack the cross-examination of counsel and possibly destroy a carefully planned sequence of questions designed to expose the witness's failings in a certain way by an uninformed cross-examination by the tribunal, and may therefore lead to later complaints that the cross-examining party was unable to present his case;<sup>19</sup> and (ii) it may be construed as the tribunal "descending into the arena" and taking a hostile attitude to a particular witness and thereby giving a reasonable appearance of bias.<sup>20</sup> Additionally, if a hearing is being conducted on a "chess clock" basis, with each party being allocated an equal amount of time, care will have to be taken either to debit the time taken for tribunal questioning equally against both parties or to assign a separate allocation of time to the tribunal.

#### **D. Leading questions**

21 The Evidence Act of Singapore<sup>21</sup> provides in section 2 that Parts I, II and III of that Act will not apply to arbitrations. This effectively means that arbitration is free from the whole of the law of evidence (as the only parts that may apply are the provisions of Part IV of the Evidence Act which deal with the very limited area of "Bankers' Books" evidence). There are therefore no mandatory rules governing leading questions except for the "soft" law of Article 8.2 of the IBA Rules 2010 which provides that "[q]uestions to a witness during direct and redirect testimony may not be *unreasonably* leading" [emphasis added]. In practice, tribunals will pay heed to objections about leading questions,

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<sup>19</sup> Article 18 of the Model Law, which is incorporated into the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

<sup>20</sup> See *Re Shankar Alan* [2007] 1 SLR(R) 85 at [124(b)], in which Sundaresh Menon JC (as he then was) quashed the findings of the Disciplinary Committee of the Law Society of Singapore on the basis that it "failed to discharge its judicial function because it assumed an inquisitorial role at a certain point by descending into the arena in such a manner that impaired its judgment and its ability to fairly evaluate and weigh the evidence and the case as a whole", alongside his finding of bias.

<sup>21</sup> Cap 97, 1997 Rev Ed.

because, while there is a lack of a mandatory rule, tribunals appreciate that evidence which is prompted by a leading question from a friendly source is devalued to a certain extent.

## **VII. Cross-examination, including whether it is necessary to “put” every aspect of the case to a witness**

22. There is no black-letter law governing the conduct of cross-examination, or even whether cross-examination is essential in every case. This is not an accident, as matters of procedure and evidence have traditionally been left to the discretion of the tribunal to lay down *ad hoc* rules and practices on a case-by-case basis. However, rule 25.3 of the SIAC Rules provides that any witness who gives oral evidence may be questioned by each of the parties, their representatives and the tribunal in such manner as the tribunal may determine. So the right to cross-examine is acknowledged in the SIAC Rules. There are also some provisions in the IBA Rules 2010<sup>22</sup> but these may be regarded as “soft” law, although commonly adopted in practice.

23 The unsettled question is whether a tribunal may rule that cross-examination is unnecessary in a particular case as it will not derive much additional assistance from cross-examination. This is a rare practice, and normally only done in a case (if at all) where parties have agreed on a “documents only” arbitration.<sup>23</sup> Nevertheless, based on common law authority on how principles of natural justice are interpreted,<sup>24</sup> it may be

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<sup>22</sup> See the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) Arts 8.1, 8.2 and 8.3.

<sup>23</sup> “Documents only” arbitration cannot usually be forced on the parties if one of them disagrees.

<sup>24</sup> See *University of Ceylon v Fernando* [1960] 1 WLR 223. See also Michael Hwang SC, “Ten Questions Not to Ask in Cross-Examination in International Arbitration” in *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013) at p 394, fn 28, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017).

argued that there are cases where there is clearly no point in having cross-examination,<sup>25</sup> and therefore time and costs can be saved by simply allowing counsel to make submissions on the written material before the tribunal (including written statements).<sup>26</sup> But the general importance of cross-examination is emphasised by Article 4.7 of the IBA Rules 2010, which requires any witness who has given a witness statement for use at a hearing to appear (if requested) for cross-examination, failing which his witness statement will be disregarded by the tribunal unless he had a valid reason for his absence and there are exceptional circumstances which make the tribunal give consideration to his statement.

24 Counsel who are converts from common law litigation often feel constrained to put every aspect of their case to every witness who has any knowledge of those aspects. This is based on their (sometimes imperfect) understanding about the rule in *Browne v Dunn*,<sup>27</sup> ignoring the explanation of that rule by the Court of Appeal in *Seet Melvin v Law Society of Singapore*.<sup>28</sup> Whatever may be the true legal position in a

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<sup>25</sup> For example, where the issues are all contained in the contractual documents and correspondence.

<sup>26</sup> Cf the practice in non-writ actions filed in the Singapore High Court where witnesses are not usually cross-examined on their witness statements, unless the court makes a special order to that effect.

<sup>27</sup> (1893) 6 R 67.

<sup>28</sup> [1995] 2 SLR(R) 186. In *Seet Melvin v Law Society of Singapore* [1995] 2 SLR(R) 186 at [37], the Court of Appeal found that *Browne v Dunn* (1893) 6 R 67 did not lay down any rule prohibiting counsel to attack a witness's credibility in his final submissions simply because he had not cross-examined him. The court recognised the well-entrenched principle in the context of ordinary adversarial proceedings that, if counsel ignores or omits to cross-examine a witness on material points that go against his client's case, they may be taken as acceptance of the truth of that part of the witness's evidence. However, the court expressed doubt as to whether this principle applied equally and without exception to the failure or omission of counsel for an accused person to cross-examine a co-accused. Since *Seet Melvin v Law Society of Singapore* did not involve ordinary adversarial proceedings but involved the exceptional situation where

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common law court, the position in international arbitration is that there is no such strict rule. It is therefore unnecessary for counsel to slavishly “put” to each witness every statement made by that witness which the cross-examining party does not accept. However, regard needs to be paid to Article 18 of the Model Law, in the sense that a party must always be given the right to reply to any accusation against him. If a key witness gives evidence on facts material to the outcome of the case, and his version is not challenged in some way (not necessarily in cross-examination) so as to give his side an opportunity to reply to the challenge, there may be a failure of due process which will make the award impeachable. At the very least, it will enable counsel in closing submissions to make the submission that the unchallenged evidence of his witness(es) was to a certain effect – and such submissions are often noted by the tribunal.

25 At the same time, counsel should focus on asking questions during cross-examination which are relevant to the legal issues at hand and which are helpful to the tribunal in deciding the key issues. He should take pains to avoid the following 21 useless questions in cross-examination, particularly in cases concerning contractual interpretation and breach:<sup>29</sup>

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counsel for the accused failed to cross-examine a co-accused, the court allowed a submission on the credibility of the co-accused, even though he had not been cross-examined at all. See also *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR(R) 326 at [40], where the Court of Appeal emphasised that “the rule in *Browne v Dunn* is not rigid, and it does not mean that every point should be put to a witness”, and that only issues “at the very heart of the matter” must be put to the witness so that they may clarify the matter.

<sup>29</sup> For further discussion on questions to avoid asking during cross-examination, see Michael Hwang SC, “Ten Questions Not to Ask in Cross-Examination in International Arbitration” in *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013) at p 373, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017).

- (1) Questions about the unarticulated intention of witnesses (for example, “What did you mean when you wrote this letter/these minutes?”).
- (2) Questions about the motives of witnesses relating to actions or omissions (for example, “Why did you insert this clause in the agreement?”; “Why did you do/not do something?”).
- (3) Questions about a witness’s interpretation of letters or contractual documents unless it impacted on his subsequent actions (for example, “What does this clause of the contract mean to you?”; “What do you think the writer of this letter meant by paragraph X?”).
- (4) Questions to demonstrate what is or is not in a document (for example, “Where in this document does it say [whatever]?”; “Do you agree that this clause does not say anything about [something]?”; “Look at this document – does it contain any reference to [x]?”).
- (5) Questions for dramatic effect which do not add to the knowledge of the tribunal (for example, “I put it to you that you are not telling the truth” (unless counsel has built up a foundation for this suggestion by previous questioning); “Could you please read out the third paragraph of your letter?”).
- (6) Questions designed to make the witness concede facts in favour of the opposing party which are apparent from the record and are not denied (for example, “Do you agree that you never replied to my client’s letter?”).
- (7) Questions solely aimed at attacking credibility or creating prejudice, that is, having no direct relevance to the issues, but designed to question the witness’s credibility or character by asking him questions on other matters outside the events covered by the existing arbitration.
- (8) Questions that seek to argue a legal issue with a lay witness (for example, “Do you agree that clause X means ...?”; “Do you agree that my client acted lawfully in terminating your employment?”).
- (9) Questions which take a witness through facts and documents with a view to making the witness agree with the other party’s interpretation of a document or characterisation of events, rather

- than the actual acts themselves (for example, “Do you agree that my client behaved reasonably under the circumstances?”).
- (10) Questions which end in “answer ‘yes’ or ‘no’” when the question is not a “yes” or “no” question.
  - (11) Questions designed to “cut them off at the pass” (for example, “confirm that the document that you authored is true.”; “Confirm that you read your witness statement with care before signing it.”; “Confirm that you received legal advice before writing this letter.”) as these are matters which can be assumed, and the tribunal will be sceptical of any witness who chooses to raise these defences as excuses for untruths.
  - (12) Questions where adverbs and adjectives are at the core (for example, “Do you agree that you acted unreasonably in ...?”; “Would you characterise your behaviour as impetuous?”).
  - (13) Questions repeating passages in the witness’s statement and asking him to confirm his belief in them, or how carefully he read the statement before affirming it.
  - (14) Questions as to the witness’s belief or intention at the time he entered into a contract (for example, “What did you expect to obtain from entering into the agreement with ...?”; “Why did you not insert the standard terms of your contract into this contract?”).
  - (15) Questions aimed at getting witness’s explicit confirmation of allegations made by your client and which have not been denied (for example, “Is it correct that X does not deny Y’s position that ...?”).
  - (16) Questions which do not end with a question mark and prove to be more comment or argument than a question, leaving a witness unaware that he is required to respond.
  - (17) Questions on the legal position of the other party which are a matter for counsel, not a witness (for example, “Do you agree with X’s counsel that ...?”).
  - (18) Questions asking a witness about the content of a document not written or (at the material time) read by him.
  - (19) Questions which take the name of the tribunal in vain (for example, “Do you expect the tribunal to believe that ...?”).

- (20) Questions that seek to reconfirm what the law presumes in your favour (that is, “Do you agree that you are bound by what you have signed?”).
- (21) Multiple preparatory questions referring to multiple documents before asking the real question (for example, “first refer to document A and keep it open, now refer to document B and keep it open ... *etc.* Now do you agree in the light of these documents that ...?”).

### VIII. Re-examination

26 Again, there are no mandatory rules governing this procedure. However, the IBA Rules 2010 provide for re-examination<sup>30</sup> and the way in which questions are to be asked.<sup>31</sup>

27 Re-examination is normally conducted on usual civil litigation principles:

- (a) no unreasonably leading questions should be put to witnesses; and
- (b) re-examination is only permitted on matters raised in cross-examination.

28 Sometimes, counsel who presents the witness will explain that he had inadvertently omitted to include a particular piece of information from his witness in the latter’s witness statement or in his supplementary oral evidence-in-chief and that, in the interests of justice, he needs to ask one or two specific questions in order to remedy that deficiency. The objection typically taken by the other counsel will be that the proposed additional question does not arise out of any question asked in cross-examination. The tribunal will usually consider the nature of the question to be asked (and the reasons for not asking them earlier), before ruling on counsel’s request.

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<sup>30</sup> International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) Art 8.3(b).

<sup>31</sup> International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) Art 8.2.

29 In Singapore litigation, such questions (if allowed by the court), would typically be asked through the court; that is, the court will repeat the question that counsel wishes to put, thereby not creating an exception to the principle above,<sup>32</sup> but instead asking that same question itself on behalf of counsel.

30 While this procedure could also be implemented in international arbitration, since no rules of evidence govern re-examination in international arbitration, tribunals usually allow the question to be put directly by re-examining counsel to enable follow-up questions to be also asked directly by cross-examining counsel.

31 On rare occasions, one counsel (especially from a civil law jurisdiction) might ask for a right of re-cross-examination, arguing for the principle of equality of treatment under Article 18 of the Model Law. The practice of only one round of cross-examination without allowing the other counsel a similar right is so deeply entrenched in international arbitration practice that, in this writer's view, it would no longer be possible to attack such practice as violating Article 18 of the Model Law. However, if the chairman or presiding arbitrator is a civilian lawyer, he may be inclined to grant that request.

### **IX. Sequestration of witnesses during the hearing**

32 There is no law or institutional rule or even an article in the IBA Rules 2010 on this subject, but it is nevertheless widely practised. Tribunals will usually inquire from the parties what their wishes are on the sequestration issue. If both parties ask for it, the tribunal will usually grant it. However, if one party wants it but the other does not, the tribunal might decide one way or another. Depending on the particular membership of that tribunal, it may order sequestration on terms which it considers appropriate. For instance, the tribunal might order partial sequestration; that is, for all witnesses testifying on behalf of one party to be sequestered, but not witnesses for the other party; as an order would be based on the premise that the purpose of sequestration is to

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<sup>32</sup> See para 27(b) above.

prevent witnesses on the same side from giving evidence according to what prior witnesses from their side have testified orally, but the same evil is less likely for witnesses on the other side (who would have read the other side's witness statements in advance of the hearing in any event). It would be time-saving if witnesses could simply be referred to an earlier witness's oral evidence, and be asked to comment on it instead of counsel summarising that evidence (which may be made in a contentious manner) before asking for a comment.

33 In any event, even total sequestration will usually be subject to exceptions. The two common exceptions are as follows.

- (a) Expert witnesses are usually allowed to remain in the hearing room throughout the entire proceedings, as they are usually asked to give their expert testimony based on the facts as given to them by their instructing lawyer, and those facts may change in the course of the evidentiary hearing, so they may be asked if their opinions have to be changed in view of new or different facts revealed at the hearing.
- (b) Each individual party is usually accorded the right to be present throughout the hearing. Corporations (who are the usual parties) are typically accorded the right to be present through a designated corporate representative. However, if a personal litigant or designated corporate representative is also a witness of fact, then the tribunal will usually ask that witness to give evidence first when his side is presenting its case. If the counsel calling him decides that this witness needs to go otherwise than first, then that witness will usually be sequestered until he has given evidence (while he is out of the hearing room, his party can designate another corporate representative to attend the hearing).

## **X. Drawing of inferences against a party at a hearing from the non-production of documents or non-attendance of witnesses**

34 Article 4.7 of the IBA Rules 2010 provides that, if a witness whose appearance has been requested<sup>33</sup> fails without a valid reason to appear for testimony at an evidentiary hearing, the tribunal shall disregard any witness statement related to that evidentiary hearing by that witness unless, in exceptional circumstances, the tribunal decides otherwise. In exercising their powers under this Article, tribunals will consider, amongst other things:

- (a) the witness's reasons for non-attendance (for example, being posted overseas by his employer, or being ill, or being threatened with arrest if he appears in the forum);
- (b) the extent of the controversy or otherwise about the witness's assertions in his witness statement;
- (c) the reasons why the witness cannot even attend by video-conferencing; and
- (d) the importance of the witness's assertions in the context of the issues in the arbitration.

35 It is well accepted that a tribunal has the power to draw adverse inferences from a party's failure to produce any documents ordered by the tribunal to be produced. There is little law on what adverse inferences can be drawn in arbitration other than to draw on the experience of litigation<sup>34</sup> which tends to confine such inferences to

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<sup>33</sup> Requests for appearance may be made pursuant to Art 8.1 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).

<sup>34</sup> See s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed). See also *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [50] where the Court of Appeal held:

Whether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case. There is no fixed and immutable rule of law for drawing such inference ... The drawing of an adverse inference, at least in civil cases, should not be used as a mechanism to shore up glaring

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concluding that, if a document which the tribunal believes is relevant and material to the outcome of the case, and which is in the possession of a party who simply refuses to produce it for no acceptable reason, such a document would be adverse to the party withholding production.<sup>35</sup> It is also general practice for tribunals not to make a decision on a request to draw an adverse inference in the course of a hearing, but to leave that as one of the matters to be decided in the final award, as inferences can only be properly drawn in the context of the ultimate important decisions to be made in the final award.

## XI. Evidence by video conferencing

36 With advances in technology, the use of videoconferencing in international arbitration as a tool to ensure efficiency and economy of arbitral proceedings is likely to grow. The giving of evidence by video conferencing is expressly provided for in some arbitral institutional rules and is compatible with several arbitral institutional rules.<sup>36</sup> Article 28(4)

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deficiencies in the opposite party's case, which on its own is unable to meet up to the requisite burden of proof. Rather, the procedure exists in order to render the case of the party against whom the inference is drawn weaker and thus less credible of belief.

See also *Wisniewski v Central Manchester Health Authority* [1998] 1 Lloyd's Rep Med 223 and *Infabrics Ltd v Jaytex Ltd* [1985] FSR 75.

<sup>35</sup> See Arts 9.5 and 9.6 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).

<sup>36</sup> See Art 24(4) of the International Chamber of Commerce Rules of Arbitration 2012 ("ICC Arbitration Rules") which provides that case management conferences "may be conducted through a meeting ... by video conference". Para (f) of the case management techniques in Appendix IV of the ICC Arbitration Rules refers to "using telephone or video conferencing for procedural and other hearings where attendance in person is not essential". See also ICC Commission Report, *Controlling Time and Costs in Arbitration* (Report of the ICC Commission on Arbitration and ADR Task Force on Reducing Time and Costs in Arbitration, 2nd Ed, 2018) at para 71. The ICC Commission Report recommends that tribunals may consider whether certain witnesses can give evidence by video link, so as to

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of the UNCITRAL Arbitration Rules 2013 expressly refers to the tribunal's power to "direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)".<sup>37</sup>

37 The general rule is that witnesses are expected to appear in person at the hearing but, with leave of the tribunal, may give evidence by video conference and even sometimes by Skype.<sup>38</sup> Article 8.1 of the IBA Rules 2010 provides that a witness shall appear in person, unless the tribunal allows the use of video conferencing or similar technology. There is no strong presumption that the preferred method is the giving of oral

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avoid the need to travel to an evidentiary hearing. See also Michael Hwang SC & Anthony Cheah Nicholls, "When Should Video Conferencing Evidence be Allowed?" *Singapore Law Gazette* (September 2012) at p 25.

<sup>37</sup> The term "telecommunication" in Art 28(4) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) ("UNCITRAL Arbitration Rules") is "deliberately broad to ensure that the rule applies when new forms of communication are developed and utilised in arbitration": see David Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, 2nd Ed, 2013) at p 609. A similarly broad term is used in Art 25(4) of the Swiss Rules of International Arbitration 2012: "The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by video conference)."

<sup>38</sup> Order 38 r 1 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that witness evidence should be given in person, in court. This general principle is subject to s 62A(1) of the Singapore Evidence Act (Cap 97, 1997 Rev Ed) which allows a person to:

... give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if—

- (a) the witness is below the age of 16 years;
- (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
- (c) the witness is outside Singapore; or
- (d) the court is satisfied that it is expedient in the interests of justice to do so.

evidence in person if there are justifiable grounds in support of an application to give evidence by video conference.<sup>39</sup>

38 There is some general guidance on when tribunals should allow a witness to give evidence by video conference in international arbitrations.<sup>40</sup> The commentary on the revised text of the IBA Rules 2010 explains that an application for permission for a particular witness to appear by video conference should state the reasons why that particular witness is unable to appear in person and propose a protocol.<sup>41</sup> The tribunal's decision should depend, among other things, on the sufficiency of the reasons given and the ability of

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<sup>39</sup> See *Shokat Mohammed Dalal v The World LLC* Dubai World Tribunal Claim No DWT/0023/2010 where the tribunal “was satisfied that there was no presumption that a claimant ought to attend the trial in person in order to give his evidence”. The tribunal found that a claimant is entitled to invoke the assistance of the tribunal and its procedures in the protection or enforcement of his civil rights; and if he needed to give evidence by video link in order to pursue his claim, then the tribunal should ordinarily make an order under r 29.14 of the Rules of the Dubai World Tribunal 2011, which enables it to do so. Rule 29.14 states that “[t]he Tribunal may allow a witness to give evidence through a video link or by other means”.

<sup>40</sup> See s 62A(2) of the Singapore Evidence Act (Cap 97, 1997 Rev Ed) which provides for factors the court shall have regard to in considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link.

<sup>41</sup> Parties may wish to refer to ss 62A(3)–62A(6) of the Singapore Evidence Act (Cap 97, 1997 Rev Ed) and Annex 3 of Practice Direction 32 (supplementary to Pt 32 of the English Civil Procedure Rules) as a guide to best practices when using video conferencing, making due allowances for any difference between court litigation and international arbitration. See also Pt XV of the Supreme Court Practice Directions 2010 on technologies facilities.

the proposed protocol to maintain equality and fairness among the parties and approximate live testimony.<sup>42</sup>

39 In this writer's view, the considerations that will influence the tribunal's decision will largely be practical rather than doctrinal, and the main question is: "Will the applicant gain an advantage which, in the circumstances of the case, will be unfair?" The tribunal may wish to approach this question by asking itself the following questions.<sup>43</sup>

**A. Does the applicant genuinely believe in the grounds which he advances for why he is unable or unwilling to come to the forum of the hearing?**

40 The tribunal should not entertain an application which is not made in good faith. In practice, it is difficult to make a positive finding of fact against the applicant on this point, especially on the basis of written witness statements only, and the benefit of the doubt is usually given to applicants.

**B. Even if he does, is his belief fanciful?**

41 There must be an objective and subjective basis for the application. The bar will not be a high one as the tribunal may give the benefit of the doubt to the applicant where the expressed fear is of the loss of personal liberty or property.

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<sup>42</sup> See 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, "Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration" (2010) at pp 17–18 <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>> (accessed 30 August 2017).

<sup>43</sup> This list of questions was originally set out in Michael Hwang SC & Anthony Cheah Nicolls, "When Should Video Conferencing Evidence be Allowed?" *Singapore Law Gazette* (September 2012) at p 25. In this article, the authors reviewed English and Singapore case law and discussed the factors which might influence a court's decision to allow witnesses to give testimony by video conferencing.

**C. Do his reasons amount to the furtherance of a valid/legitimate personal interest of the witness?**

42 The tribunal needs to assess whether the reason for a witness's aversion to giving evidence in person should objectively be regarded as a valid reason. It may take into account:

- (a) the quality of the reason (an unattractive reason does not of itself make the reason invalid); and
- (b) whether the applicant is seeking to derive an unfair advantage over the other party or otherwise commit an abuse of process.

**D. How important is the evidence of the witness in relation to the outcome of the critical issues of the case?**

43 The more important the evidence of the witness is, the greater the need to demonstrate that the giving of evidence by video conference will not diminish the tribunal's ability to analyse the witness's testimony. A common objection to the use of video conferencing is that the witness is a key witness (that is, his evidence is critical to the determination of a material issue in the case) and the tribunal (and counsel) must have eye contact with the witness in the course of cross-examination so as to assess the credibility of the witness. This writer takes the view that a witness who appears in person to give testimony gains no inherent advantage because in the hearing room, counsel and the tribunal are usually some distance away from the witness. Video conferencing has the advantage of focusing everyone's attention on the witness, his facial features and reactions are often magnified to a greater extent than in real life (especially if a large high-definition screen is used) and this enhances the tribunal's appreciation of the credibility of the witness under cross-examination. This will address the concerns of counsel who insist on being able to see "the whites of his eyes" of a witness under cross-examination.

**E. What prejudice will be suffered by the opposing party if the witness gives evidence by video conference?**

44 This is an important consideration that must be balanced against the needs or wishes of the witness. The common argument raised by the cross-examining party is about the perceived advantages of cross-examining a witness in person, rather than by video conferencing. However, for the reasons discussed above,<sup>44</sup> the argument that the evidence of the witness in question is critical, and therefore, cross-examination must be in person should not weigh in favour of disallowing video conferencing.

**F. What prejudice will be suffered by the party presenting the witness for video conferencing evidence if the application is not allowed?**

45 This is a vital consideration, especially if the witness is a key party in the action and/or his evidence is critical to the determination of a material issue in the case. If the effect of disallowing such a witness to give evidence by video conference is that he does not give evidence at all, then this will usually be considered to be determinative of any balance of prejudice in favour of the applicant.<sup>45</sup>

**G. What will be the wider consequences of allowing or disallowing the application of the witness, both in terms of public policy and the overall justice of the case at hand?**

46 This is the ultimate determining factor. The tribunal must have the highest regard to a party's ability of presenting his case and ensure that the parties are treated with equality, regardless of how unattractive the reasons for a witness' unwillingness to give evidence in person may be.

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<sup>44</sup> See para 43 above.

<sup>45</sup> See *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637.

47 On a practical note, the tribunal should ensure a satisfactory quality of video transmission and include a backup plan should technological problems arise.<sup>46</sup> Other practical considerations include:

- (a) the witness's ability to share exhibits; and
- (b) ensuring that the witness testifies without conferring with anyone else during testimony or referring to any documents to which the other participants do not have access.<sup>47</sup>

In practice, it is common and indeed prudent for the parties to have a representative at the witness's location of the video conference to ensure that the witness is not being assisted or prompted out of sight of the video cameras.

## **XII. Breach of confidentiality**

48 Sometimes in the course of a hearing, there will be a complaint against an alleged breach of confidentiality. For example, one party leaks information about the case to an external party, especially the media.

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<sup>46</sup> For more details on this subject, see Erik Schafer, "Videoconferencing in Arbitration" (2003) 14(1) ICC Ct Bull 35.

<sup>47</sup> See 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, "Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration" (2010) at pp 17–18 <<http://www.ibanet.org/Document/Default.aspx?DocumentUId=DD240932-0E08-40D4-9866-309A635487C0>> (accessed 30 August 2017). Article 28.3 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) ("UNCITRAL Arbitration Rules") provides that hearings shall be held in camera unless the parties agree otherwise. While this may not import the notion of confidentiality, Art 17.1 of the UNCITRAL Arbitration Rules 2013 empowers the arbitral tribunal to "conduct the arbitration in such manner as it considers appropriate". In international commercial arbitration, the law of the seat may or may not provide for confidentiality. In common law countries, the default rule is that there exists a duty of confidentiality: see *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 and *AAZ v AAZ* [2011] 1 SLR 1093.

The excuse is often to claim that the so-called breach can be justified on grounds of a legitimate exception to the principle of confidentiality. The tribunal will then have to rule on whether there has indeed been a breach or leave that matter for:

- (a) a separate arbitration on that question alone; or
- (b) the curial court to decide.<sup>48</sup>

49 If the complaint is about an on-going breach of confidentiality (for example, by posting information on the hearing on a blog or website), a tribunal is likely to grant an order in the nature of an interim injunction to prevent future breaches. However, if the complaint is about an isolated breach, and a final remedy such as damages or a non-financial relief is sought, the tribunal is likely to leave the issue to be decided by another body with jurisdiction over such breach.

50 There are four different scenarios that an arbitration may encounter if it is seated in Singapore. Each scenario would entail a different confidentiality regime.

- (a) If the arbitration is *ad hoc* and the parties fail to adopt rules on confidentiality, the common law in Singapore would fill the gap and impose an obligation of confidentiality on the parties. This obligation is not absolute and there are exceptions to this obligation, but the scope of these exceptions has not been exhaustively identified and the Singapore courts would approach

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<sup>48</sup> The leading Singapore authority on the consequences of breach of confidentiality in the course of arbitration is *AAV v AAZ* [2011] 1 SLR 1093 (affirmed by the Court of Appeal without a written judgment). See this author's commentary on the implication of this case in "A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the Singapore High Court in *AAV v AAZ*" in *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013) at p 209, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017).

each case by considering the established categories and taking into account the particular circumstances of the case: *AAV v AAZ*.<sup>49</sup>

- (b) If the arbitration is *ad hoc* and the parties adopt the UNCITRAL Arbitration Rules 2010, the starting point would be Article 28(3), which provides that “[h]earings shall be held in camera unless the parties agree otherwise”. The question is whether this amounts to a provision which imposes a general obligation of confidentiality, and in this regard there is evidence to suggest that the answer is in the negative and that all Article 28(3) does is to make express provision for the privacy of the hearing.<sup>50</sup> So it is likely that the party seeking the protection of a confidentiality regime would have to rely on Article 17(1), under which the tribunal is empowered to “conduct the arbitration in such manner as it considers appropriate”, and request the court to make a procedural order of confidentiality. However, if no such procedural order is made, the default obligation of confidentiality under Singapore common law would apply in accordance with the principles espoused in *AAV v AAZ*.<sup>51</sup>
- (c) If the arbitration is governed by the SIAC Rules, the applicable confidentiality regime would be set out in those rules. In the SIAC Rules 2016, this regime is set out in Rule 39, which provides *inter alia* that, unless the parties agree otherwise, a party, an arbitrator, and any party appointed by the tribunal shall at all times treat the award and all matters relating to the proceedings as confidential, including the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings

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<sup>49</sup> [2011] 1 SLR 1093, following *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184.

<sup>50</sup> For example, the International Law Association 2010 report on “Confidentiality in International Arbitration” summarises the regime under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) as follows: “Limited – these address the privacy of the hearings and the confidentiality of the award, but not confidentiality more generally.”

<sup>51</sup> See n 50 above.

and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excluding any matter that is otherwise in the public domain.

- (d) If the parties replace or supplement the above scenarios with a customised regime agreed between the parties and encompassed in a consent procedural order, the applicable confidentiality regime would be that agreed regime.<sup>52</sup>

51 If any of the four scenarios lead to proceedings before a Singapore court under the IAA, section 22 of the IAA provides that the court proceedings shall, on the application of any party to the proceedings, be heard otherwise than in open court.<sup>53</sup> Section 23(4) of the IAA further provides that, if the proceedings are heard otherwise than in open court and the court considers the judgment to be of major legal interest, the

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<sup>52</sup> See Michael Hwang SC & Nicholas Thio, “A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-Governing Code” in *Selected Essays on International arbitration* (Singapore International Arbitration Centre, 2013) at p 159, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017). To overcome the problem of defining the exceptions to the common law obligation of confidentiality, the authors propose a model procedural order on confidentiality for the parties to consider, tailor and ultimately agree upon.

<sup>53</sup> It is important to note that “otherwise than in open court” is not synonymous with “in camera”. The latter phrase has no universal definition, and in practice, is largely used for criminal and matrimonial proceedings. The precise rules that govern what may be reported or disclosed about cases held “in camera” usually depend on specific legislation rather than interpreting the precise requirement and limits of the Latin term. For example, O 42 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that judgments pronounced or delivered following proceedings heard in camera shall not be made available for public inspection unless permitted by the court, and on such terms as it may impose. See also *AAV v AAZ* [2010] SGHC 350; s 10 of the Family Justice Act 2014 (Act 27 of 2014); r 671 of the Family Justice Rules 2014 (S 813/2014) and s 8 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

court shall direct the publication of reports of the judgment in law reports; but if any party reasonably wishes to conceal any matter, the court shall give directions as to the action to be taken to conceal that matter in those reports, and, if this is insufficient to conceal the matter, direct that no report shall be published for a period not exceeding ten years as it considers appropriate.

### **XIII. Expert evidence**

#### **A. *The taking of expert evidence in arbitrations: “Hot tubbing”***

52 While there is nothing in the IAA or Model Law about party-appointed experts, Rule 25.3 of the SIAC Rules, which establishes the right of the opposing party to cross-examine any witness who gives oral evidence, extends to expert (as well as fact) witnesses. Article 5 of the IBA Rules 2010 spells out several sub-rules dealing with the evidence of party-appointed experts. These sub-rules spell out in some detail what must be contained in an expert report and, in particular, provide for the tribunal in its discretion to direct a meeting of opposing experts to try and reach agreement on contested issues in their respective reports and they shall record in writing:

- (a) any such issues on which they reach agreement;
- (b) any remaining areas of disagreement; and
- (c) the reasons for such disagreement.

53 In practice, this procedure of the experts’ meeting can and should be refined by the adoption of the equivalent of a Redfern Schedule<sup>54</sup> for

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<sup>54</sup> The Redfern Schedule (originally devised by Alan Redfern) is a schedule of document production in the form of a chart containing the following four columns: First Column: identification of the document(s) or categories of documents that have been requested; Second Column: short description of the reasons for each request; Third Column: summary of the objections by the other party to the production of the document(s) or categories of documents requested; and Fourth Column: left blank for the decision of the arbitral tribunal on each request.

the outstanding issues where disagreement remains. The schedule should be divided into three columns:

- (a) the first column to set out the issue in question;
- (b) the second column to set out Expert A's views and why Expert B's views are wrong;
- (c) the third column to set out Expert B's views and why Expert A's views are wrong.

54 Witness conferencing is not addressed in the IAA or the SIAC Rules but Article 5.4 of the IBA Rules 2010 specifically permits expert witness conferencing which is normally only used between experts in the same discipline opining on common issues in dispute.<sup>55</sup> There is now also court recognition of the value of witness conferencing for experts,<sup>56</sup> otherwise known as "hot tubbing". This process usually involves the active participation of the tribunal in the discussion with the experts.<sup>57</sup> An experienced tribunal will usually lead the questioning before cross-examination takes place, and the tribunal will take the experts through each topic, and try and understand their respective views and arguments why the other expert is wrong, and allow both experts to address each other and respond to each other's comments. After this process has been exhausted, counsel may cross-examine the witnesses in case they

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<sup>55</sup> Article 5.4 of the International Bar Association Rules on the Taking of Evidence in International Arbitrations (2010) provides: "The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore."

<sup>56</sup> See O 40A rr 5 and 6 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed).

<sup>57</sup> *Cf*s 167 of the Evidence Act (Cap 97, 1997 Rev Ed) which provides for a judge's power to ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant, in order to discover or to obtain proof of relevant facts.

think that some other areas need more exploring. In doing so, the tribunal will normally allow each counsel to make use of his own expert to respond to any answer given by the opposing expert in cross-examination. There is therefore no need to have re-direct examination of these experts, as the re-examination will already have taken place during the cross-examination.<sup>58</sup> In order for this procedure to work well, however, there must be one or more meetings between the experts in the same discipline before the hearing. The purpose of the meeting is to settle a Redfern Schedule containing:

- (a) a list of relevant issues that need to be decided by the tribunal;
- (b) a summary of the views of each expert on each issue with a cross-reference to where those views are to be found in fuller form in their respective reports; and
- (c) if and to the extent the experts disagree on any issue, a succinct statement of why they disagree.

This will enable the tribunal to quickly grasp what the key issues are and where the experts differ, which will then provide a solid platform from which to conduct witness conferencing.

### **B. Tribunal appointed experts**

55 This is provided for in rule 26 of the SIAC Rules as well as Article 6 of the IBA Rules 2010. Although there is a comprehensive regime for such experts, in practice they are rarely appointed by tribunals composed mainly of common law arbitrators. There is simply no strong tradition of

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<sup>58</sup> A short description of the witness conferencing process is found in this author's essay on "Witness Conferencing and Party Autonomy" in *Selected Essays on International Arbitration* (Singapore International Arbitration Centre, 2013) at p 403, available for complimentary download at [http://www.mhwang.com/Selected\\_Essays\\_on\\_International\\_Arbitration\\_\(2013\).pdf](http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf) (accessed 30 August 2017). See also Michael Hwang SC, "Witness Conferencing" in *The 2008 Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration* (James McKay ed) (Legal Media Group, 2008) <[http://www.arbitration-icca.org/media/0/12232964943740/witness\\_conferencing.pdf](http://www.arbitration-icca.org/media/0/12232964943740/witness_conferencing.pdf)> (accessed 30 August 2017).

use of such experts in common law courts, and hence not in common law arbitrations. The main reason why this is not a popular method is the difficulty of the tribunal to:

- (a) choose the expert when it may have little knowledge of the area of expertise so as to know who are reliable experts to act, as well as to choose between alternative experts proposed by the different parties; and
- (b) settle the terms of reference of the expert, which will again require co-operation between the parties to define the issues in dispute.

### **C. Use by tribunals of their own expertise**

56 This is simply not allowed because it would violate the principle of allowing each party a full opportunity to answer the case he has to meet.<sup>59</sup> If a party does not know what the case formulated by the tribunal is, he cannot prepare an answer to that case and there will be a failure of due process.<sup>60</sup>

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<sup>59</sup> Model Law Art 18. See Jeffery Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) at p 936, para 12.11.1: “Each party’s right to appoint their own expert could be considered a fundamental right in the context of being heard.”

<sup>60</sup> See Gary B Born, *International Commercial Arbitration* vol 3 (Wolters Kluwer, 2nd Ed, 2014) at pp 3245–3253. The author discusses annulment of awards where: (a) tribunals rest their decision on factual materials or a legal theory not advanced by the parties; and (b) tribunals consider material outside the record, such as relying on evidence derived from the tribunal’s own investigations, without providing a party an opportunity to be heard. See also Fouchard, *Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 704, para 1290, where the authors discuss a Paris Court of Appeal decision finding that, where the tribunal considers that it has sufficient information to make its decision, its refusal to order an appointment of an expert does not contravene due process rights.

## XIV. End of hearing

### A. Close of evidence

57 Rule 32.1 of the SIAC Rules provides that the tribunal *shall*, as promptly as possible, after consulting with the parties and upon being satisfied that the parties have no further relevant and material evidence to produce or submission to make with respect to the matters to be decided in the award, declare the proceedings closed. However, the tribunal may, on its own motion or upon application of a party but before any award is made, re-open the proceedings. The purpose of this provision is presumably to fix some defined moment of time after which both parties will know that they can no longer address the tribunal on any matter concerning the merits of the case.<sup>61</sup> However, this seems to be only a rule of convenience rather than a measure to protect due process as such. Notwithstanding the use of the word “shall”, the better view is that this is a facilitative rather than a mandatory measure in the sense that failure to comply with it will not render the award impeachable.<sup>62</sup>

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<sup>61</sup> See John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd Ed, 2018) at p 258: “The closure of the proceedings prevents an endless stream of submissions or new documents from the parties.”

<sup>62</sup> See Art 27 of the International Chamber of Commerce Rules of Arbitration 2012. See also Jacob Grierson & Annet van Hooff, *Arbitrating under the 2012 ICC Rules* (Wolters Kluwer, 2012) at p 210:

The closing of the proceedings has more of a symbolic than a real importance. In most cases, the arbitral tribunal will already have ruled that new evidence may not be introduced after certain cut-off dates, as explained in Chapter 20(II)(A) above. Accordingly, the closing of the proceedings will not actually change much, particularly given that Article 27 of the 2012 ICC Rules allows the arbitral tribunal to derogate from the rule against the introduction of new evidence.

See also Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce, 2012) at p 285 (“Article 27 is designed to mark the closure of the evidentiary and submissions phase, after which point no party may make a submission

*(continued on next page)*

### **B. Post-hearing memorials**

58 It is customary for parties to submit Written Closing Statements or (the same thing) Post-Hearing Memorials or Briefs, but this is simply a creature of habit rather than a prescribed document. Most counsels want the opportunity to make a final address to the tribunal to wrap up their whole case but, in contemporary practice, some tribunals feel that a general submission of unlimited scope may lead to repetition of the Opening Written Statements, and prove too cumbersome for the tribunal to find the real assistance that counsel can provide. If counsel have already made their oral Opening Statements in the way suggested above,<sup>63</sup> their Written Closing Statements should only address the question: in what way has my theory of the case changed in the light of the evidence presented at the hearing? Alternatively, the tribunal may decide that the issues of fact and law have been sufficiently argued in the earlier pre-hearing briefs, and they can understand the evidence, but need guidance and assistance from counsel on specific questions. In such situations, the tribunal can (and often does) direct that (a) there be no general Written Closing Statements but, (b) counsel should wait after the hearing for the tribunal to issue a list of specific questions to answer, and to respond accordingly.

59 It is also common for tribunals to impose page limits for Written Closing Statements or Memorials, especially those which are responsive to earlier ones. Directions may also be given about how exhibits, extracts from transcripts and authorities are to be cited or exhibited.

## **XV. Conclusion**

60 The hearing requires both counsel and the tribunal to be alive to all the issues discussed above, so that inadvertent breaches of the rules of

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without the arbitral tribunal's authorisation") and at p 287 ("The closing of the proceedings therefore serves as a cut-off. However, the arbitral tribunal has discretion to request or authorise additional submissions by reopening the proceedings if it sees fit").

<sup>63</sup> See paras 14–17 above.

procedural fairness do not occur. It is therefore appropriate for all the parties to be alert to any potential breaches. The tribunal will want to ensure that no grounds for setting aside will arise from any act or omission on its part. Counsel who thinks his client will win the case will also have an interest in avoiding any procedural errors on the part of the tribunal and would do well to point out any such errors to allow them to be corrected so as to prevent an otherwise favourable award from being eventually set aside. Even counsel who thinks his client is likely to lose the case on the merits will want to note any failings in due process and to make his objection promptly to avoid the prospect of being deemed to have waived any such breach.<sup>64</sup>

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<sup>64</sup> See Art 4 of the Model Law in the First Schedule to the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed).

### Background to Essay 13

This is the revised and updated text of an essay that was published in my first volume of essays. It originated from the Neil Kaplan Lecture which I delivered in Hong Kong in 2008. It explored a subject which had not been extensively explored in the literature, especially on a comparative level. After its publication, I was approached to update the essay as Neil wanted to publish a collection of all the Neil Kaplan Lectures. I therefore took this opportunity to substantially rewrite and update the original essay, and it now reflects the law as of 2018 in the major common law countries (I have not had time to update the position in other countries, however).

I have also written a companion essay in my original volume, which is entitled “A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-governing Code”, to assist parties in discussing with an arbitral tribunal the question of how to establish a protocol on confidentiality suited to the circumstances of their particular case. Nathan D O’Malley identified it as a precedent of international value, kindly named it the “Hwang Model Procedural Order on Confidentiality” after me and attached it as an appendix to his work *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law, 2012). Recently, he informed me that he is about to publish a second edition of his work and asked if he could still retain my Model Order as an appendix for his second edition. I readily agreed and gave him my latest version, which has been slightly modified to reflect my experience of working with my original version.

This essay will be published as a chapter in a forthcoming book entitled *International Arbitration: Issues, Perspectives and Practice* (Hong Kong International Arbitration Centre ed) (Kluwer Law International, 2019).

*I wish to extend my thanks to Kluwer Law International for kindly granting me permission to republish this essay in this book.*

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## DEFINING THE INDEFINABLE: PRACTICAL PROBLEMS OF CONFIDENTIALITY IN ARBITRATION\*

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This Article seeks to provide a comprehensive review of the international law on confidentiality in arbitration, both in terms of theory and in practice, by examining national legislation and the rules of the various institutions. This Article argues that the problem is not in defining confidentiality but in defining the exceptions to the duty of confidentiality where such a duty is recognised. In practice, it is difficult to come up with a comprehensive formula for, or list of, all the exceptions to the obligation of confidentiality. The New Zealand Arbitration Act 1996 (2007 Amendment) is the most comprehensive and recent attempt to codify the exceptions to the duty of confidentiality. Nonetheless, even as the New Zealand Arbitration Act 1996 recognises, no code can be fully comprehensive, and there must be room for an independent third party (either the tribunal or the curial court) to rule on permitted exceptions to the obligation of confidentiality.

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\* This is an expanded and updated version of the Kaplan Lecture delivered by the first author in Hong Kong on 17 November 2008.

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## **I. Introduction**

1 It is a particular pleasure to deliver the second Kaplan lecture in Hong Kong in honour of Neil Kaplan, whom I have known for some 15 years. No one needs reminding that Neil is internationally recognised as one of the super-arbitrators of the world. We also know that, quite apart from his personal career, he has also devoted much of his time over the years to building up the cause of international arbitration, both in Hong Kong and the world, by his judgments in the Hong Kong High Court, his chairmanship of the Hong Kong International Arbitration Centre (“HKIAC”), and then later on the world stage as President of the Chartered Institute of Arbitrators. More than any other person, he put Hong Kong on the world map of arbitration and led the way for Hong Kong to be recognised, not only for having a fine arbitration institution, but also for having many fine practitioners in international arbitration. This perception has established Hong Kong as Asia’s leading centre for international arbitration (although Singapore may have something to say about that in the near future). But Neil has also unselfishly nurtured neophytes into the world of international arbitration, and I am one of those neophytes whom he mentored and assisted over the years. He opened many doors for me and helped me with advice and encouragement to enable me to mutate from a litigator to an arbitrator, and his example is one that I intend to follow in terms of putting back what I have got out of this world of international arbitration.

## **II. The problems of defining the duty**

2 It is not always realised that the definition of the scope of the duty of confidentiality is a major problem. This is why so few definitions at the legislative and institutional levels have been attempted, and why the existing definitions are not completely successful. But practitioners who

do attempt to find a contractual definition quickly find out how difficult a mutually acceptable solution is to achieve, which is why, in practice, there are few model clauses available.

3 In common law countries, attempts have been made to define the duty through the courts, mainly through the device of the implied term, but these attempts have run into conceptual difficulties, although they have provided valuable insights into the nature and scope of the problem.

### **III. To whom does the duty extend?**

4 A helpful starting point is to ask: who must know about the arbitration? Once this is ascertained, then the duty of confidentiality can be imposed on such persons. It should be uncontroversial that the persons who are entitled to know about the arbitration (and all its aspects) are the parties, their counsel, the tribunal and the administering institution (if any).

5 But problems start immediately when we go beyond this inner circle, starting with the position of witnesses, actual and potential. Are they entitled to be briefed on all the facts and documents relating to the arbitration or only to the extent necessary for them to assist in their function as witnesses? If the latter, who decides on the boundaries of the permitted disclosures? Some institutional rules introduce the role of a confidentiality advisor,<sup>1</sup> but this imposition is not without its flaws.<sup>2</sup> And what about persons who are being considered as witnesses but have not yet agreed to do so? How far is it permissible to show them confidential documents after the commencement of the arbitration? These are not questions to which case law, legislation or institutional rules have yet given any answer.

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<sup>1</sup> World Intellectual Property Organization Arbitration Rules (2014) Art 54; IBA Rules on the Taking of Evidence in International Arbitration (2010) Art 3(8).

<sup>2</sup> See *Confidential and Restricted Access Information in International Arbitration* (Elliot Geisinger ed) (JurisNet, 2016) at pp 65–69.

#### **IV. To what information and documents does the duty extend?**

6 Another starting point is to ask: what information and documents does the duty of confidentiality protect? We look first at:

- (a) the existence of the arbitration; and
- (b) the decision of the tribunal.

7 Should either of these facts be confidential? In the latter case, should the contents of the award (as opposed to its outcome) be confidential as well? Again, existing law and rules do not give a clear or uniform solution. In *Hassneh Insurance Co of Israel v Steuart J Mew*<sup>3</sup> (“*Hassneh Insurance*”), Colman J (delivering judgment in the English Commercial Court) made several distinctions between the reasoned award and other documents in the arbitration and held that, as a matter of business efficacy, an exception is to be implied into the arbitration agreement removing an award and its reasons from the obligation of confidentiality.<sup>4</sup> On a broader view, while not all institutional rules treat the existence of an arbitration as confidential, most impose a duty of confidentiality over the contents of an award.<sup>5</sup>

8 We then move on to the more difficult question of whether the duty extends to documents which will be used or referred to in the course of the arbitration. And here we begin to receive some assistance from the courts. Case law has given some protection for the confidentiality of documents generated in the course of the arbitration

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<sup>3</sup> [1993] 2 QB 243.

<sup>4</sup> *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 QB 243 at 249.

<sup>5</sup> For the first author’s scorecard on the protection of confidentiality in arbitral institutions, see the table at para 85 below.

not otherwise in the public domain.<sup>6</sup> The starting point for an examination of the Commonwealth position on confidentiality is the decision of the English Court of Appeal in *Emmott v Michael Wilson & Partners Ltd*<sup>7</sup> (“*Emmott*”), where the court made the following pronouncements on the obligations of the parties.

9 Lawrence Collins LJ stipulated:<sup>8</sup>

An implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.

10 Likewise, Thomas LJ stated:<sup>9</sup>

A specific obligation of confidentiality in relation to documents produced by each party to the arbitration under the process of disclosure applicable by the procedural law of arbitrations conducted in England and Wales. This is analogous to that imposed by the courts of England and Wales in proceedings before them. As between the parties, all such documents are covered by the obligation of confidentiality.

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<sup>6</sup> For example, pleadings, witness statements, submissions, transcripts and documents disclosed by the other party. See, for example, *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd’s Rep 243; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314; *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 and *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184.

<sup>7</sup> [2008] Bus LR 1361; [2008] EWCA Civ 184.

<sup>8</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [81].

<sup>9</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [129].

11 It is important to note that there are at least three classes of documents:

- (a) documents which are inherently confidential;
- (b) documents which are disclosed by parties for purposes of the arbitration, whether voluntarily or pursuant to tribunal orders for production; and
- (c) the award.

**A. *Different considerations apply to each of these classes***

12 In the case of inherently confidential documents,<sup>10</sup> they will attract the same protection within the arbitration as they do outside it, that is, they will not depend on any doctrine of arbitral confidentiality for that protection.<sup>11</sup>

13 In the case of documents disclosed by the parties, they will have the protection afforded to similar documents in litigation (sometimes known as the “Riddick principle”),<sup>12</sup> which means that they may not be disclosed without the permission of the other party or the tribunal.

14 The confidentiality of awards depends on what the applicable institutional rules provide. *Ad hoc* arbitrations will depend on the

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<sup>10</sup> For example, those containing proprietary commercial information.

<sup>11</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [79] and [81].

<sup>12</sup> Derived from *Riddick v Thames Board Mills Ltd* [1977] QB 881. However, there is some doubt whether the Riddick principle applies in arbitration as it does to litigation. See Quentin Loh SC & Edwin Lee, *Confidentiality in Arbitration: How Far Does It Extend?* (Academy Publishing, 2007) at paras 14.10–14.13.

applicable *ad hoc* rules,<sup>13</sup> and the applicable arbitral law, but this is rarely likely to have any express provision governing confidentiality.<sup>14</sup>

## V. What is the juridical basis of the duty?

15 After some differences in judicial opinion within the English courts, a definitive statement has now emerged from the English Court of Appeal in *Emmott*,<sup>15</sup> which seems to have settled the juridical basis for the duty, at least for common law countries (excluding the US). Judicial opinion in other parts of the world remains unsettled. *Emmott* has laid down the following principles:

- (a) The obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.
- (b) This obligation is a substantive rule of law masquerading as an implied term.
- (c) It imposes an obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration.

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<sup>13</sup> Usually the United Nations Commission on International Trade Law Arbitration Rules GA Res 65/22, UN GAOR 65th Sess (2010) (“UNCITRAL Arbitration Rules”) is the applicable *ad hoc* rules applied in the case of international arbitrations; and the UNCITRAL Arbitration Rules do not provide for confidentiality except for hearings to be held in camera unless the parties agree otherwise (see Art 25(4)) and the publication of the award (see Art 32(5)).

<sup>14</sup> See, for example, ss 22–23 of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) and ss 2D–2E of the Hong Kong Arbitration Ordinance (1997). Sections 2D–2E have been repealed by the Hong Kong Arbitration Ordinance (2011) (Repealed 17 of 2010 s 109).

<sup>15</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184.

- (d) The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in question; the limits of the obligation are still in the process of development on a case-by-case basis.
- (e) The principal cases in which disclosure will be permissible are where:
  - (i) there is consent (express or implied) of the parties;
  - (ii) there is an order or leave of the court;
  - (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
  - (iv) the public interest or the interests of justice require disclosure.

## **VI. Difficulties in the absolute nature of confidentiality**

16 Whatever may be the juridical basis of the duty, it is clear that the duty cannot be an absolute one. Several practical situations immediately come to mind which call for exceptions to the duty.

### **A. Enforcement actions**

17 Clearly, the winning party in an arbitration must be allowed to disclose the contents of the award if it has to proceed with enforcement action to obtain its rights under the award.

18 As mentioned above, Colman J in *Hassneh Insurance* considered that an award (and its reasons) was, as a starting point, subject to a duty of confidentiality, even though the award identified the parties' respective rights and obligations, and was at least potentially a public document for the purposes of supervision by the courts or enforcement

in them.<sup>16</sup> However, Colman J held that the implied duty of confidentiality was subject to the following exceptions:<sup>17</sup>

- (a) Disclosure of the award (including its reasons) was permitted where it was reasonably necessary for the protection of an arbitrating party's rights *vis-à-vis* a third party.
- (b) An arbitrating party could bring the award and reasons into court for the purpose of invoking the supervisory jurisdiction of the court over arbitration awards and for the purpose of enforcement of the award itself.

19 Potter LJ in *Ali Shipping Corp v Shipyard Trogir*<sup>18</sup> ("*Ali Shipping*") disagreed with Colman J's characterisation of confidentiality as an implied term based on custom or business efficacy. Instead, he held that confidentiality arose as a matter of law,<sup>19</sup> thereby casting doubt on the jurisprudential validity of the holding in *Hassneh Insurance*. However, this holding is, nonetheless, still valid as it is not inconsistent with the pronouncements of the Court of Appeal in *Emmott*.

### **B. Parallel actions**

20 A problem emerges where there are different arbitrations involving one or more of the same parties in the same or related disputes. Where the tribunal is the same in different arbitrations between the same parties, there should be no practical difficulty in migrating information about the first arbitration into the second arbitration. Where the tribunal is different, some theoretical and practical difficulties are likely to be encountered. Although the parties may be the same, the choice of a different tribunal may be due to the wish to keep the two arbitrations separate and discrete from each other, precisely to prevent the

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<sup>16</sup> *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243 at 248.

<sup>17</sup> *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243 at 249.

<sup>18</sup> [1999] 1 WLR 314.

<sup>19</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at [40].

migration of information which may be relevant in one arbitration but would be viewed as irrelevant or prejudicial to the outcome of the second arbitration. And where the parties are completely different, the difficulties could become even greater.

21 These difficulties typically arise in construction cases, where there are likely to be separate arbitrations between employer and main contractor on the one hand, and between main contractor and subcontractor on the other. They also frequently arise in reinsurance cases where there is one arbitration between the primary insurer and the insured, and another arbitration between the primary insurer and the reinsurers.

22 The source of the problem is the general lack of power to consolidate two arbitrations,<sup>20</sup> which is generally viewed as a deficiency

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<sup>20</sup> One exception is s 2 of Schedule 2 to the Hong Kong Arbitration Ordinance (2011), which allows the court to consolidate two or more arbitration proceedings in certain circumstances, *eg*, a common question of law or fact arises in both or all of the arbitrations (s 2(1)(a)). There are other institutional rules that provide for the consolidation of arbitrations. Article 19(1) of the China International Economic and Trade Arbitration Commission (“CIETAC”) Rules (2014) allows CIETAC to consolidate two or more pending arbitrations into a single arbitration, where (a) it is requested by a party and all the parties agree; or (b) CIETAC believes it is necessary and all the parties agree. Article 22 of the China Maritime Arbitration Commission Arbitration Rules (2004) also provides that the arbitral tribunal may, upon the agreement made in writing by both parties, consolidate two or more than two cases of which the subject matters are the same or related to each other. Under Art 10 of the International Chamber of Commerce (“ICC”) Rules (entry into force 1 March 2017), the ICC Court may consolidate two or more arbitration proceedings in circumstances including where (a) the parties have agreed; or (b) all of the claims in the arbitration are made under the same arbitration agreement. Other exceptions include Art 22.1(h) of the London Court of International Arbitration Rules (effective 1 October 2014), rr 7 and 8 of the Arbitration Rules of the Singapore International Arbitration Centre (2016) and Art 28 of the Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 November 2013), all of which allow joinder of third

*(continued on next page)*

in the arbitral process that is an inevitable consequence of the principle of the consensual basis of arbitral jurisdiction.

23 All these difficulties were canvassed in a quartet of English cases.

24 In *Dolling-Baker v Merrett*<sup>21</sup> (“*Dolling-Baker*”), the plaintiff representative underwriter claimed against the first defendant (a representative underwriter for two Lloyd’s syndicates) for sums of money allegedly due under an aggregate excess of loss reinsurance effected through the second defendants, the placing brokers for that reinsurance. The first defendant sought to avoid the reinsurance policy on grounds of non-disclosure. The plaintiff claimed, in the alternative, against the second defendant for negligence. There had been an earlier arbitration involving a similar type of reinsurance in which the first defendant was representative underwriter and the second defendants were placing brokers, and where the first defendant also sought to avoid the reinsurance policies on grounds of non-disclosure (“Turner arbitration”). In that arbitration, the arbitrator had declared that the reinsurance was invalid, and so the first defendant had succeeded in avoiding liability in the Turner arbitration. In *Dolling-Baker*, the plaintiff wanted disclosure of documents in the Turner arbitration, which included, amongst other things, transcript evidence and the award itself (“Turner documents”). The Turner documents were in the possession, custody and control of both the first and second defendants. The plaintiff failed to obtain discovery on the ground that they were not relevant to the issues in the current action and that even if they were, the production of the Turner documents for inspection was not necessary for disposing fairly of the issues. The first defendant also succeeded in obtaining an injunction against the second defendant from disclosing those documents used in the Turner arbitration. Parker LJ, in the English Court of Appeal, held that there was an implied obligation of

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parties with their consent but not necessarily the consent of all the existing parties.

<sup>21</sup> [1990] 1 WLR 1205.

confidentiality arising out of the nature of arbitration itself. He considered that:<sup>22</sup>

As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.

25 In *Hassneh Insurance*, the plaintiff reinsurers sought an injunction to restrain disclosures by the defendant reassured of certain documents engendered in the course of an arbitration between the plaintiffs and the defendant. The defendant was reinsured by the plaintiffs under various reinsurance contracts, and the placing brokers were CE Heath & Co. The defendant had commenced the arbitration against the plaintiffs claiming to recover under those reinsurance contracts. The plaintiffs raised various defences, which included non-disclosure and misrepresentation. The defendant also sought to make a claim against their placing brokers in court (because there was no arbitration agreement between them), in case the defendant failed against the reinsurers. The defendant, however, lost its arbitration against the plaintiffs in an interim arbitral award issued by the tribunal. Hence, the defendant sought to proceed against the placing brokers, claiming on the basis of negligence and breach of duty as placing brokers. The defendant therefore wanted to disclose to the placing brokers the interim award and the reasons for that award. The plaintiffs were content that the defendant should disclose the interim award to the placing brokers and the reasons as referred to in the interim award. However, the plaintiffs objected to the disclosure of the reasons or the disclosure of any other documents (such

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<sup>22</sup> *Dolling-Baker v Merrett* [1990] 1 WLR 1205 at 1213.

as pleadings, witness statements or transcripts), and sought an injunction to restrain such disclosure on the basis that the disclosure would be a breach of confidence by the defendant. Colman J held that the implied duty of confidentiality in arbitration applied to documents generated in the course of the arbitration (for example, pleadings, witness statements, transcripts and submissions) and documents disclosed during the arbitral process. However, as discussed above, the implied duty of confidentiality was subject to the exception that the disclosure of the reasoned award was reasonably necessary for the protection of the arbitrating party's rights *vis-à-vis* a third party, so that to disclose it would not be a breach of the duty of confidence. Colman J cited the English Court of Appeal case of *Tournier v National Provincial and Union Bank of England*<sup>23</sup> ("*Tournier*") as the basis for this qualification to the implied duty of confidentiality. In *Tournier*, Bankes LJ set out the following four qualifications to a bank's duty of confidentiality:

- (a) where disclosure is under compulsion of law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; and
- (d) where the disclosure is made by the express or implied consent of the customer.

26 In *Hassneh Insurance*, Colman J found that the disclosure of the reasoned award was reasonably necessary for the defendant to establish his causes of action against the placing brokers. However, Colman J did not extend the exception to the other documents generated or disclosed in the course of the arbitration, as they were merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly, Colman J held that the qualification to the duty of confidentiality based on the reasonable necessity for the protection of an arbitrating party's rights against a third party could not be expected to apply to such documents.

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<sup>23</sup> [1924] 1 KB 461.

27 In *Insurance Co v Lloyd's Syndicate*,<sup>24</sup> the defendant reassured commenced arbitration against the plaintiffs as lead underwriters under a contract of reinsurance. The plaintiffs had contended that they were entitled to avoid the contract of reinsurance on the grounds of non-disclosure, or alternatively that the plaintiffs were not liable under the policy wording to indemnify the defendant against a particular class of risks. Subsequently, the syndicate of five other reinsurers all asserted that they were not bound to indemnify the reassured against such risks. The arbitral tribunal later issued an interim award in favour of the defendant reassured, which then sought to disclose the award to the five other reinsurers in order to persuade them to accept liability. The plaintiffs applied for an injunction to restrain the defendant reassured from disclosing the interim award. In granting the injunction, Colman J applied the reasonable necessity test which he had laid out in *Hassneh Insurance*<sup>25</sup> and found that, although the disclosure of the award and reasons might have a persuasive effect on the syndicate of the five other reinsurers, their disclosure would be irrelevant to founding the basis of any cause of action by the defendant reassured against the reinsurers, as they were not bound by the arbitration agreement between the plaintiffs and defendant. Accordingly, Colman J held that the interim award was not a necessary element to the establishment of the defendant's legal rights against the five following reinsurers, and the defendant reassured would be in breach of an implied duty of confidentiality if it were to disclose the interim award to those five reinsurers.

28 In contrast to the reinsurance cases discussed above, *London & Leeds Estates Ltd v Paribas Ltd (No 2)*<sup>26</sup> ("*London & Leeds*") raises the question of whether the parties in an arbitration owe any duty of confidentiality to an expert witness in an arbitration where the witness was found to have given evidence that was inconsistent with the evidence that he had given in previous arbitrations. *London & Leeds*

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<sup>24</sup> [1995] 1 Lloyd's Rep 272.

<sup>25</sup> See *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243 at 275.

<sup>26</sup> [1995] 1 EGLR 102.

arose out of a rent review arbitration between the plaintiff landlord and the defendant tenant. The landlord retained an expert valuer (“Expert”) who gave evidence on the office rental market in London’s West End relevant to the review date of April 1991. The Expert was also involved in two previous arbitrations (the “Euston Tower arbitration” and “Delta Point arbitration”) in which the Expert had given contrary expert evidence on behalf of the tenants. Counsel for the defendant tenant in this arbitration had also been counsel for the tenant in the Euston Tower arbitration, and had cross-examined the Expert on the evidence he had given in the Euston Tower arbitration. The defendant’s expert in this arbitration was the arbitrator in the Delta Point arbitration, but he had completed and published his award, and the only ancillary matters left outstanding were costs and interest. Subsequently, the defendant tenant issued subpoenas addressed to the Expert relating to his Euston Tower and Delta Point proofs (witness statements), and to the defendant’s expert relating to the Expert’s Delta Point proof. The plaintiff landlord and Expert applied by separate summons to set aside the subpoenas addressed to the Expert and the defendant’s expert. By the hearing of the present case, the defendant’s expert had complied with the subpoena addressed to him. It was not disputed that the parties to the Euston Tower and Delta Point arbitrations owed each other a duty of confidence and privacy in respect of the arbitration and the evidence given during the arbitration. Mance J held that the plaintiff landlord had no *locus standi* in the matter as it was not a party to any confidential relationship involving the information sought by the subpoenas. However, Mance J held that the Expert had *locus standi* to object to the subpoenas as he was owed a duty of confidentiality by the parties to the Euston Tower and Delta Point arbitrations in respect of his evidence. The issue before Mance J was whether it was necessary for the fair disposal of the action or for the saving of costs for the duty of confidentiality to be overridden. Mance J held that where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance J therefore concluded that the duty of confidentiality which

attaches to the proof in the Euston Tower arbitration was overridden in the interest of the fair disposal of the proceedings.

## **VII. How have the courts dealt with exceptions?**

29 Legislatures and arbitral institutions have generally recognised the difficulty of enacting a comprehensive code of exceptions or a formula for creating exceptions. Hence, exceptions have been introduced into the common law by incremental additions.

### **A. Public interest**

30 The nature of the arbitration may give the public a legitimate interest in certain aspects of the arbitration. In *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*<sup>27</sup> (“*Esso Australia*”), the arbitration concerned a dispute over a proposed increase in the price of natural gas supplied by the appellant vendors to two public utilities, the Gas and Fuel Corporation of Victoria (“GFC”) and the State Electricity Commission of Victoria (“SEC”), allegedly due to the imposition of a new tax on gas. GFC and SEC had entered into separate sales agreements with the appellants. Both the GFC sales agreement and SEC sales agreement contained a provision which required the appellants to provide GFC and SEC as buyers of the gas with details of the calculations on the basis of which an increase or decrease in the price of gas was derived. The appellants did not provide the details of the calculations to GFC and SEC. The appellants later commenced arbitrations pursuant to the arbitration clauses in the GFC and SEC sales agreements respectively. Subsequently, the Minister for Energy and Minerals brought an action against the appellants, as well as GFC and SEC, seeking a declaration that any information disclosed in the arbitration was not subject to any duty of confidentiality. By way of counterclaim, the appellants sought declarations, based on implied terms, that each arbitration was to be

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<sup>27</sup> [1995] 128 ALR 391. This case was followed by the Supreme Court of New South Wales in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662.

conducted in private and the documents or information supplied in the arbitration were subject to a duty of confidentiality. Both GFC and SEC brought a cross-claim against the appellants seeking declarations in the same terms as the declarations sought by the minister. The claims for confidentiality arose from the appellants' response to requests by the minister, GFC and SEC for details of the calculations on which the appellants' claims for price increases were based. The appellants had declined to give details unless GFC and SEC entered into agreements that they would not disclose the information to anyone else, including the minister, the Executive Government and the people of Victoria. Mason CJ, delivering the judgment of the majority in the High Court of Australia, considered that there was a distinction between privacy and the duty of confidentiality, and that it was clear that complete confidentiality of the proceedings in an arbitration could not be achieved.<sup>28</sup> Mason CJ held that, while an arbitration proceeding was private, confidentiality was not an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. To that extent, Mason CJ therefore rejected the English approach to the obligation of confidentiality as an implied term. Nonetheless, Mason CJ was prepared to accept that there was, similar to the obligation of confidentiality which attaches to documents obtained on disclosure in judicial proceedings, an obligation of confidentiality that attached to documents which a party was compelled to produce pursuant to a direction by the arbitrator.<sup>29</sup> That obligation was, however, necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. The subject matter of the arbitration also affected the public's interest in knowing how the cost of their utilities bills was derived, and this might well have been a factor influencing the decision of the High Court of Australia. Likewise, Robertson J in the New

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<sup>28</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 400 and 401.

<sup>29</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 404.

Zealand case of *Television New Zealand Ltd v Langley Productions Ltd*<sup>30</sup> (“*Television New Zealand*”) found that the public interest in knowing how much a well-known TV personality was paid was additional justification for not suppressing reporting of the court hearing of the appeal from the arbitration hearing.

31 This feature is particularly prevalent in International Centre for Settlement of Investment Disputes (“ICSID”) arbitrations, where there is clearly a public interest in any arbitration by an investor against a government, especially if the claim is for a large sum of damages. This explains why it is commonplace for investment arbitrations to be relatively freely reported; awards are rarely secret, and commonly find their way into the public domain.<sup>31</sup>

### **B. Where the matter has come to court**

32 An arbitration claim often comes to court for, among other things, the enforcement or setting aside of the arbitral award, and the issue is whether the implied obligation of confidentiality in the arbitration proceeding extends to the court proceedings. While parties may have agreed to arbitrate confidentially and privately, this cannot dictate the

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<sup>30</sup> [2000] NZLR 250.

<sup>31</sup> The International Centre for Settlement of Investment Disputes (“ICSID”) must promptly publish the legal reasoning of ICSID awards regardless of the publication of the award as a whole. See Rule 48(4) of the ICSID Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) (“ICSID Arbitration Rules”); Article 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) requires consent of the parties for the publication of the award in its entirety. The Secretary-General of the ICSID arranges for publication of an award in an appropriate form with a view to furthering the development of international law in relation to investments. See Reg 22 of the ICSID Administrative and Financial Regulations (amended 10 April 2006). Rule 37(2) of the ICSID Arbitration Rules allows the submission of *amicus* briefs by third parties: ICSID awards, <[www.investmentclaims.com](http://www.investmentclaims.com)> (accessed 10 May 2013).

position in respect of arbitration claims that are brought before the courts. One countervailing factor that militates against the extension of the implied obligation of confidentiality to court proceedings is the principle of open justice.

33 For instance, under rule 62.10 of the English Civil Procedure Rules 1998<sup>32</sup> (“CPR”), the English courts have the discretion to order an arbitration claim to be heard in public or in private. Further, rule 62.10<sup>33</sup> excludes the application of the ordinary rule under rule 39.2 of the CPR, under which hearings are to be held in public unless the court decides that there is a special reason based on confidentiality to hold the hearing in private. Under rule 62.10(3), apart from applications for the determination of a preliminary point of law under section 45 of the English Arbitration Act 1996,<sup>34</sup> or an appeal under section 69 of the English Arbitration Act 1996 on a question of law arising out of an award, all other arbitration claims are heard in private.

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<sup>32</sup> SI 1998 No 3132, with amendments up to 27 November 2017.

<sup>33</sup> Rule 62.10 of the Civil Procedure Rules (SI 1998 No 3132) reads as follows:

- (1) The court may order that an arbitration claim be heard either in public or in private.
- (2) Rule 39.2 does not apply.
- (3) Subject to any order made under paragraph (1):
  - (a) the determination of:
    - (i) a preliminary point of law under section 45 of the 1996 Act; or
    - (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and
  - (b) all other arbitration claims will be heard in private.
- (4) Paragraph (3)(a) does not apply to —
  - (a) the preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or
  - (b) an application for permission to appeal under section 69(2)(b).

<sup>34</sup> c 23.

34 In *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*,<sup>35</sup> the English Court of Appeal considered the effect of rule 62.10 of the CPR, as well as its implications on the publication of court judgments on arbitration claims. In an arbitration in London, Bankers Trust Co (“BTC”) was successful against one party but not against two other parties, one of which was the government and the other a department of the city of Moscow (“Moscow”). BTC proceeded to challenge the arbitral award under section 68 of the 1996 Act on the ground of serious irregularity, which was eventually dismissed. The arbitration took place in private and the arbitral award was published only to the parties. While BTC’s application was also heard in private as it fell within rule 62.10(3)(b) of the CPR, the judge omitted to mark the judgment as “private” when it was handed down. Lawtel, an online law reporting service, obtained a copy of the judgment in good faith and summarised it. The summary was later sent to Lawtel’s (approximately 15,000) e-mail subscribers with a link to the full judgment. After the mistake was discovered, the full judgment was deleted, but the e-mail summaries remained on the computers of Lawtel’s e-mail subscribers. Prior to this, however, the existence of a dispute between the parties (not the subject matter), the identities of the parties and the existence of BTC’s application in court had already been freely mentioned to the press by the parties. As the respondent wanted the general investment community to know that the allegations of financial default against them had been the subject of detailed consideration in arbitration, the respondent applied to the court for an order for general publication of

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<sup>35</sup> [2004] 3 WLR 533. See also *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532, a case concerning an application to set aside a freezing order that had been granted pursuant to s 44 of the English Arbitration Act 1996 (c 23) in support of an intended International Chamber of Commerce arbitration. The application for setting aside fell under r 62.10 of the Civil Procedure Rules (SI 1998 No 3132) (“CPR”), which provided that such an application should be heard in private unless the court ordered that the hearing be in public. As the freezing order had received considerable publicity, Walker J decided pursuant to r 62.10 that the hearing on the application for setting aside should be in public save for those aspects of the matter which were confidential.

the full judgment or, alternatively, a summary of the judgment. The lower court held that the judgment on the section 68 application should remain private and that neither it nor Lawtel's summary should be available for publication. Moscow appealed to the Court of Appeal on the basis that either the full judgment should be made available, or the Lawtel summary should be available either for general publication or limited publication to specified financial institutions.

35 In dismissing the appeal against the order refusing publication of the judgment, the English Court of Appeal held that the parties' wish for confidentiality and privacy should outweigh the public interest in public hearings. However, the Court of Appeal added that the court retained a supervisory role under the English Arbitration Act 1996, and the court had to be ready to hear representations from either party for the hearing to continue in public or, where appropriate, to raise that possibility itself.

36 The Court of Appeal, however, allowed the appeal in respect of the Lawtel summary, and held that Moscow could publish the Lawtel summary for general circulation since it did not disclose any sensitive or confidential information, and there were no other grounds to preclude its publication.

37 Significantly, the Court of Appeal held that rule 62.10(3)(b) of the CPR, in providing for arbitration claims to be heard in private, represented only the starting point of the analysis, and could easily give way to a public hearing. The court further held that, even though a hearing might have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this could be done without disclosing significant confidential information.

38 Mance LJ considered various factors which were relevant to whether a judgment should be given in public:<sup>36</sup>

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<sup>36</sup> *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] 3 WLR 533 at 555.

The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under section 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity ... Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners.

39 A similar position has been taken in New Zealand concerning the treatment of arbitral awards in enforcement or challenge proceedings in the courts. In *Television New Zealand v Langley Productions*,<sup>37</sup> disputes arose out of interrelated contracts between:

- (a) Television New Zealand Ltd (“TVNZ”), a state-owned enterprise;
- (b) Langley Productions; and
- (c) one of its newsreaders, H,

and litigation ensued. TVNZ sought to keep the court file confidential, but Langley Productions and H sought the opposite. There was an arbitration clause in the contract between TVNZ and Langley Productions but not in the contract between TVNZ and H. The parties eventually agreed to submit their disputes to arbitration. The arbitration agreement contained a specific confidentiality clause expressing itself subject to section 14(2) of the New Zealand Arbitration Act 1996. After the award was rendered, TVNZ applied to the High Court to appeal against the decision of the arbitrator and Langley Productions applied to enforce the award. TVNZ then applied for an order that the confidentiality provisions no longer apply, and Langley Productions and H opposed the application. Robertson J held that the confidentiality provisions in the arbitration no longer applied, as “the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to

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<sup>37</sup> [2000] NZLR 250.

processes for enforcement or challenge in the High Court”.<sup>38</sup> He also noted that the parties specifically chose to allow for the right of appeal, and that one party had sought to register the award and enforce it in the High Court. Robertson J concluded that once either of those steps occurred, the principles applicable to the High Court hearings would determine the question of access and public knowledge. If the cloak of confidentiality in private dispute resolution necessarily applied to subsequent proceedings in the High Court, then this would require a clear and unambiguous determination of Parliament. Accordingly, Robertson J held that the arbitral award should be available for public scrutiny and without any impediment being created by the confidentiality clause in the TVNZ-Langley Productions contract, and that the proceedings to dispose of certain matters would also take place in public.

### ***C. Consent of the parties (pre/post dispute: Implied?)***

40 The consent of the parties to public disclosure of the existence of the arbitration (as well as arbitration-related information) is another exception to the implied obligation of confidentiality. For instance, the consent of the parties can be written into the substantive agreement between the parties, or given after a dispute has arisen in a post-dispute arbitration agreement. The implied consent of the parties can arise from the parties’ conduct after a dispute has arisen. One example of this is where an arbitrating party applies to the court for the removal of an arbitrator, in which case that arbitrating party implicitly gives consent to the challenged arbitrator to disclose matters concerning the arbitration to the court. A further question that arises in this context is whether an application to the court arising out of an arbitration without an arbitrating party asking for those proceedings to be held in camera (assuming such provisions exist in the relevant national court), amounts to a consent to public disclosure of all facts and documents put before the court.

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<sup>38</sup> *Television New Zealand v Langley Productions* [2000] NZLR 250 at [38].

#### **D. By compulsion of law**

41 Statutory provisions may override any obligation of confidentiality that parties may have provided for in an arbitration agreement and compel disclosure of arbitration-related documents. Anti-money laundering legislation, for instance, imposes a duty of disclosure on a person who suspects that a transaction may involve property that, directly or indirectly, represents the proceeds of crime. In Singapore, the relevant anti-money laundering legislation is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act<sup>39</sup> (“SCA”). Section 39(1) of the SCA<sup>40</sup> imposes a duty of disclosure on a person who knows or has reasonable grounds to suspect that certain property may represent the proceeds of, or is used in connection with, drug trafficking or other criminal conduct. However, section 39(6) of the SCA<sup>41</sup> excuses a person from any breach of any restriction upon

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<sup>39</sup> Cap 65A, 2000 Rev Ed.

<sup>40</sup> Section 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) reads as follows:

Where a person knows or has reasonable grounds to suspect that any property:

- (a) in whole or in part, directly or indirectly, represents the proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.

<sup>41</sup> Section 39(6) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) reads as follows:

*(continued on next page)*

disclosure that is imposed by law or contract, and bars any claim for loss arising out of such disclosure.<sup>42</sup> Likewise, any police or public authority may have statutory power to demand production of documents and there is no privilege attached to documents submitted in arbitration.

### **E. With leave of court**

42 Although various cases have recognised the disclosure of arbitration-related documents with leave of court as an exception to the obligation of confidentiality,<sup>43</sup> the question remains as to whether or not a court or tribunal order for disclosure overrides the obligation of confidentiality.<sup>44</sup>

43 In *Hassneh Insurance*, Colman J advised on the disclosure of arbitration documents subject to an obligation of confidentiality as follows:

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Where a person discloses in good faith to a Suspicious Transaction Reporting Officer

(a) his knowledge or suspicion of the matters referred to in subsection (1)(a), (b) or (c); or

(b) any information or other matter on which that knowledge or suspicion is based,

the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.

<sup>42</sup> Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 39(1).

<sup>43</sup> See *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327 and *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [107].

<sup>44</sup> See, eg, Robert Merkin, *Arbitration Law* (Informa, Looseleaf, 1991) (April 2013 – 1st Ed – Service Issue 64) at para 17.32, where Merkin expresses the view that “[i]t has nevertheless been doubted whether these exceptions actually exist, in that the cases in which disclosure has been permitted following an order or permission of the court rest upon either the need to protect a party’s legitimate interest or the interests of justice”.

If a party is put in a 'potentially extremely hazardous' position and cannot decide whether to disclose documents as in doing so he may therefore be in breach of his duty of confidentiality to the opposite party to the arbitration or be accused of failing to disclose a relevant document in his possession which would be necessary for fairly disposing of the litigation, he should first write to his opposite party in the arbitration inviting consent to disclose; if this is not forthcoming, he should decline to let the third party inspect the same without first obtaining an order of court under O 24 r 11 of the Rules of Court.

44 However, the English Court of Appeal in *Emmott* expressed the view that the court did not have a general power to order or give permission for disclosure of arbitration-related documents when an arbitration is underway. Thomas LJ considered that leave of the court was a matter which arises in circumstances where the court is deciding the issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party) or in circumstances where the arbitration has come to an end. Thomas LJ further considered that:<sup>45</sup>

It is difficult to see readily how it is consistent with the principles in the 1996 Act that there is to be an implied term which requires resort to the court during the currency of the arbitration for the court to determine these issues as between the parties to the arbitration ... I cannot accept that the implied term of confidentiality should be formulated to confer by this means jurisdiction on the court; it would be contrary to the ethos and policy of the Act.

45 Collins LJ in *Emmott* expressed similar sentiments:<sup>46</sup>

It does not follow from the fact that a court refers to the possibility of an exception for the order or leave of the court in a case where it has the power to make the order or give leave ... the court has a

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<sup>45</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [124].

<sup>46</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [87].

general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies.

46 These remarks are problematical because they seem to preclude the intervention of an independent third party to resolve difficulties in defining the scope and extent of exceptions to confidentiality. However, this problem will be addressed in the conclusion below.

***F. Disclosure for protecting legitimate interests of an arbitrating party***

47 The disclosure of arbitration documents for the protection of the legitimate interests of an arbitrating party is clearly a potentially very wide exception. The enforcement of an arbitrating party's rights under an earlier arbitration award would certainly be a disclosure for protecting the legitimate interests of the winning party. Alternatively, a party may wish to disclose an arbitration award to adduce evidence of a position that was taken by an arbitrating party in an earlier arbitration so as to raise issue estoppel. In *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Company of Zurich*<sup>47</sup> ("AEGIS"), a case arising out of two separate arbitrations concerning European Reinsurance's ("European Re") obligation to indemnify AEGIS under a reinsurance agreement, European Re sought to refer to the arbitration award obtained from the first arbitration in the second arbitration on the basis that the same dispute had been raised on the pleadings in the second arbitration between the same parties. The tribunals for both the first and second arbitrations were different. As there was an express confidentiality agreement between the parties that had been entered into in the course of the first arbitration, AEGIS contended that the award in the first arbitration should not be disclosed to the tribunal in the second arbitration because it would breach the confidentiality of the first arbitration. Subsequently, AEGIS obtained an *ex parte* injunction against European Re in order to stop European Re from referring to the award from the first arbitration, thereby

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<sup>47</sup> [2003] 1 WLR 1041.

precluding European Re from raising a plea of issue estoppel in the second arbitration. European Re applied unsuccessfully to discharge the injunction. European Re then appealed successfully to the Court of Appeal of Bermuda and discharged the injunction. AEGIS appealed to the Privy Council and sought to reinstate the injunction to restrain European Re from disclosing the arbitral award in the first arbitration to any third party, including the tribunal in the second arbitration. The issue before the Privy Council was whether, on its proper construction, a confidentiality agreement that the parties had entered into in the first arbitration precluded reliance on the arbitral award in the second arbitration.

48 In dismissing AEGIS's appeal, the Privy Council held that the confidentiality agreement between the parties did not preclude reliance on the arbitral award in the first arbitration. The Privy Council was of the view that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same issue and that confidentiality was immaterial. In that context, the Privy Council considered that issue estoppel was "a species of the enforcement of the rights given by the award just as much as it would be a cause of action estoppel" even though it was a rule of evidence rather than a mechanism for enforcement as such.<sup>48</sup>

49 There is a requirement of reasonable necessity in the application of this exception for disclosure in the protection of the legitimate interests of an arbitrating party. In *Ali Shipping*, Potter LJ framed this requirement as follows: "disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party".<sup>49</sup>

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<sup>48</sup> *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at [15].

<sup>49</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

50 However, Potter LJ also added that:<sup>50</sup>

In this context, that means reasonably necessary for the establishment of an arbitrating party's legal rights *vis-à-vis* a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.

51 In *Ali Shipping*, Potter LJ noted the comments of Colman J in *Hassneh Insurance* that it was not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be "merely helpful, as distinct from necessary, for the protection of such rights", but went on to qualify the concept of reasonable necessity as he considered that the court should take a rounded view.<sup>51</sup>

52 Potter LJ stated that:<sup>52</sup>

When the concept of reasonable 'necessity' comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the court's approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

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<sup>50</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327. See also *Glidepath BV v Thompson (No 2)* [2005] 1 CLC 1090 at [25], in which the court held that a non-party to an arbitration agreement who applies for access to arbitration-related documents on a court file must show that access to the arbitration-related documents is (a) reasonably necessary to protect or establish the legal rights of the third party; or (b) in the interests of justice.

<sup>51</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

<sup>52</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

53 One question that arises from Potter LJ's observations above is whether the protection of the legitimate interests of an arbitrating party is only confined to the protection of that arbitrating party's legitimate interests *vis-à-vis* a third party. Notably, in *Emmott*, the Court of Appeal did not appear to confine the protection of the legitimate interests of an arbitrating party *vis-à-vis* a third party only.

54 Thomas LJ did not state that a third party was necessary to establish this exception: "Use can, however, be made [of arbitration documents] if it is reasonably necessary to protect the legitimate private interests of a party."<sup>53</sup>

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<sup>53</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 ("*Emmott*") at [132(iii)]. Collins LJ expressed the same view in *Emmott* at [107]: "where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party".

*Emmott* was applied in *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837. In this case, the claimant applied for permission to rely on documents used in arbitration proceedings for the purposes of an unlawful means conspiracy claim. The High Court held that this was a case which fell within the third and fourth recognised situations set out in *Emmott* where disclosure of arbitration documents would be permissible. The High Court held that the claimant had a legitimate interest in pursuing the claim in unlawful means conspiracy, which on the face of the pleading, was an arguable claim. It was a claim which they could not pursue properly, possibly not at all, unless they had access to the materials from the arbitration. This was because it relied to a considerable extent on the detail of the arbitration and this in itself justified an order for the claimants to obtain the arbitration material for the purpose of pursuing that claim. In any event, the High Court found (at [14]) that this was a case in which the interests of justice clearly required disclosure:

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### **G. Where the interests of justice/the public interest require it**

55 If a party has given inconsistent evidence in two separate arbitrations, it is clear that the interests of justice (sometimes called public interest) would require disclosure of arbitration documents in spite of any obligation of confidentiality. In *London & Leeds*,<sup>54</sup> it was found that an expert valuer in an arbitration had given contrary expert evidence in two previous arbitrations. As discussed above,<sup>55</sup> Mance LJ held that where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance LJ therefore held that the duty of confidentiality that the parties in the two previous arbitrations owed to the expert valuer in respect of his evidence in those arbitrations was overridden in the interests of the fair disposal of the proceedings.

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... not just because otherwise the claimants would be precluded from making what is otherwise an arguable claim, but also because whilst the court is not currently concerned with the detail of those claims and their merits, in circumstances where there is, at least on the face of the material before the court, an arguable case of unlawful actions, unlawful conduct, having taken place, that the court should not allow confidentiality of arbitration materials in any sense to stifle the ability to bring to light wrongdoing of one kind or another.

The High Court therefore ordered the disclosure of the written pleadings and submissions in the arbitration, all the disclosure in the arbitration, the witness statements, the experts' reports, the inter-solicitor correspondence, the correspondence with the tribunal, transcripts of the hearings, written opening and closing submissions, the award and the reasons. The High Court also referred to *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 and held that the court judgment itself should be public because there was no confidential information that was going to be disclosed.

<sup>54</sup> *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.

<sup>55</sup> *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.

56 It is useful to note that there is an issue of whether the interests of justice is an exception in itself, or whether it is part of a wider public interest. The English courts appear to be divided in their opinion on this. The public interest exception was expressly recognised by Mance LJ in *London & Leeds*,<sup>56</sup> and also by Thomas LJ in *Emmott*.<sup>57</sup> However, Potter LJ in *Ali Shipping* preferred the “interests of justice” which he considered to be narrower than the “public interest” exception.<sup>58</sup> Likewise, Collins LJ in *Emmott* expressly recognised the interests of justice exception, but only tentatively recognised the public interest exception.<sup>59</sup>

57 Like the legitimate interests exception, there also seems to be a reasonable necessity requirement for the public interest exception, in that disclosure of arbitration documents subject to an obligation of confidentiality should go no further than is reasonably necessary to achieve the purpose of that public interest in disclosure.<sup>60</sup>

#### **H. Where there is an obligation of disclosure**

58 Corporations owe an obligation of disclosure to various stakeholders who would, according to conventional theory, be strangers to the arbitration, but who certainly have a legitimate interest in the progress and outcome of the arbitration. Such stakeholders include:

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<sup>56</sup> *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 at 109.

<sup>57</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [130].

<sup>58</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327 and 328. See n 53 where the High Court in *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837 at [14] found it was in the “interests of justice” to require disclosure to bring to light “wrongdoing of one kind or another”.

<sup>59</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 at [107].

<sup>60</sup> *Pharaon v Bank of Credit and Commerce International SA* [1998] 4 All ER 455, *per* Rattee J.

- (a) shareholders;
- (b) bondholders;
- (c) beneficiaries of trust corporations;
- (d) any stock exchange or professional body to which an arbitrating party belongs;
- (e) joint venture partners or anyone covered by the *uberrimae fidei* principle;
- (f) a potential new shareholder acquirer conducting due diligence; and
- (g) insurers under an indemnity policy covering the subject matter of the arbitration.

59 Likewise, insurance and reinsurance companies may owe obligations of disclosure to each other. Parties who are in contracts with back-to-back obligations may also be subject to an obligation of disclosure.

### ***I. Everyday situations***

60 The authorities do not discuss everyday situations which would most certainly be exceptions to the obligation of confidentiality, but one can conceive of a myriad of such everyday situations. Some examples of these situations include:

- (a) discussing an arbitration with members of the family (after swearing them to secrecy);
- (b) discussing an arbitration with lawyers in the same firm to check for conflicts;
- (c) discussing an arbitration with potential arbitrators;
- (d) disclosing details of an arbitration to an immigration office in a visa application.

### ***J. Where disclosure is made to professional or other advisers and persons assisting in the conduct of the arbitration***

61 Where the disclosure of arbitration documents is made to professional or other advisers and persons assisting in the conduct of the arbitration, this should be treated as a legitimate exception to the obligation of confidentiality. Any disclosure to lawyers who are not

involved in the arbitration should not be a problem because lawyers are subject to legal professional privilege in any case. Any disclosure made to persons assisting in the conduct of the arbitration should also be an exception to the obligation of confidentiality. Such persons include:

- (a) potential witnesses, both factual and expert;
- (b) private investigators;
- (c) executives or in-house counsel of affiliate companies;
- (d) secretaries and personal assistants to persons working on the arbitration even if not employees of the arbitrating party (*eg*, from related or affiliated companies); and
- (e) independent providers of business services (transcribers, interpreters, photocopiers, hotel business centres, couriers).

### **VIII. The problems of drafting**

62 It is clear that there are a myriad number of exceptions to the obligation of confidentiality, some of which have been expressly recognised by the courts. The reservations of the Privy Council in *AEGIS* to adopting Potter LJ's approach in *Ali Shipping* of characterising a duty of confidentiality as an implied term, and then to formulate exceptions to which it would be subject,<sup>61</sup> clearly highlight the problems of drafting appropriate national legislation or arbitral rules to provide for some form of confidentiality in arbitration. In delivering the advice of the Privy Council in *AEGIS*, Lord Hobhouse aptly pointed out that formulating exceptions to the obligation of confidentiality runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality.<sup>62</sup>

63 The drafters of the English Arbitration Act 1996 were fully aware of the numerous exceptions and qualifications to the obligation of confidentiality and the consequent difficulty of drafting provisions to

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<sup>61</sup> *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 326 and 327.

<sup>62</sup> *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1050.

govern confidentiality in arbitration. In the English Departmental Advisory Committee Report of February 1996 on the draft Arbitration Bill (“DAC Report”), it was considered that the privacy and confidentiality in arbitrations was one area of law which was better left to the common law to evolve. The DAC Report noted that:<sup>63</sup>

Given these exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue. Far from solving a difficulty, the DAC was firmly of the view that it would create new ones. Indeed, even if acceptable statutory guidelines could be formulated, there would remain the difficulty of fixing and enforcing sanctions for non-compliance.

64 The New Zealand Law Commission expressed similar views regarding the inadequacy of the previous section 14 of the New Zealand Arbitration Act 1996<sup>64</sup> and its failure to deal with the many exceptions to the obligation of confidentiality.<sup>65</sup> Bruce Robertson J led the New Zealand Law Commission in drafting its report on the amendments to

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<sup>63</sup> Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) at para 17.

<sup>64</sup> The previous section 14 of the New Zealand Arbitration Act 1996 (1996 No 99) read as follows:

14. Disclosure of information relating to arbitral proceedings and awards prohibited

(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection

(a) If the publication, disclosure, or communication is contemplated by this Act; or

(b) To a professional or other adviser of any of the parties.

<sup>65</sup> New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83) (February 2003).

the New Zealand Arbitration Act (“Robertson Report”) and the Robertson Report made the following observations on the previous section 14 of the New Zealand Arbitration Act 1996:<sup>66</sup>

Section 14, however, arguably contains flaws: First, the exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary. In England, for example, cases have recognised exceptions to their common law rule, which may not be contemplated under section 14. Second, it is arguable that no statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.

## **IX. How has national legislation dealt with the obligation of confidentiality?**

### **A. UNCITRAL Model Law and rules**

65 The UNCITRAL Model Law on International Commercial Arbitration<sup>67</sup> does not say anything about confidentiality.<sup>68</sup> Likewise, the UNCITRAL

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<sup>66</sup> New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83) (February 2003) at para 5.

<sup>67</sup> UN Doc A/40/17; UN Doc A/61/17, Annex I (21 June 1985; amended 7 July 2006).

<sup>68</sup> See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005) at para 11-005:

The case, decided by the High Court of Australia, of *Esso v Plowman* sparked the international discussion on whether the requirement of confidentiality of the arbitral proceedings was adequately protected. The only international text to refer to the issue are the UNCITRAL Arbitration Rules; the Model Law does not deal with the issue and only few national laws make provision for protecting confidentiality of the proceedings. Parties to international commercial arbitration were becoming ‘increasingly concerned over the absence of any rules in respect of confidentiality’, and further study of the issues was thought to be a good idea. However, despite the Secretariat suggesting a solution in the form of a model legislative provision, the delegates,

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Arbitration Rules do not provide for confidentiality, apart from the award, which may be made public only with the consent of both parties.<sup>69</sup>

66 The UNCITRAL Notes for Organizing Arbitral Proceedings (2012) make the following points:<sup>70</sup>

- (a) There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case.

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although holding UNCITRAL to be the right body for attending to this issue, saw only a small likelihood of ‘achieving anything more than a rule to the effect that “arbitration is confidential except where disclosure is required by law”’. Accordingly, the topic was at first accorded low priority by the commission, the Working Group however later expressed more interest here.

See also UNCITRAL, Report of the United Nations Commission on International Trade Law on the work of its thirty-second session (UN Doc A/54/17) (Vienna, 17 May–4 June 1999) at para 359:

Some support was given to the topic [of confidentiality] as one of priority. In support of that view, it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rules in respect of confidentiality. It was felt that it would be useful to study the issues, which were becoming increasingly difficult and thorny. Another view was that, although the topic would merit study, it was not one that should be given high priority by the Commission, because of the absence of any viable solutions. It seemed to some that there was little likelihood of achieving anything more than a rule to the effect that ‘arbitration is confidential except where disclosure is required by law’. The prevailing view was that, albeit interesting, the topic was not of high priority.

See also *Report of the Working Group on Arbitration on the work of its thirty-second session* (UN Doc A/CN.9/468) (Vienna, 20–31 March 2000) at para 112, in which interest in “the duty of confidentiality, with regard to both arbitration and conciliation” was expressed by the Working Group.

<sup>69</sup> United Nations Commission on International Trade Law Arbitration Rules, GA Res 65/22, UN GAOR 65th Sess (2010) Art 32(5).

<sup>70</sup> United Nations Commission on International Trade Law Notes for Organizing Arbitral Proceedings (2012) at para 31.

- (b) Parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality.
- (c) Participants in an arbitration might not have the same understanding as regards to the extent of confidentiality that is expected.

67 The UNCITRAL Notes for Organizing Arbitral Proceedings (2016) maintain the point that there is no uniform approach in domestic laws or arbitration rules regarding the extent to which participants in an arbitration are under a duty to maintain the confidentiality of information relating to the arbitral proceedings.<sup>71</sup>

### **B. Hong Kong**

68 The Hong Kong Arbitration Ordinance (1997) has been repealed by section 109 of Order No 17 of 2010 and replaced by the Hong Kong Arbitration Ordinance (2011). The Hong Kong Arbitration Ordinance (2011) replaces the confidentiality provisions in sections 2D and 2E of the Hong Kong Arbitration Ordinance (1997) with sections 16 and 17, respectively.

69 Under the Hong Kong Arbitration Ordinance (1997), a party could, by virtue of sections 2D and 2E, respectively, apply for court proceedings concerning arbitration to be heard otherwise than in open court under section 2D and restrict the reporting of such proceedings.<sup>72</sup> Under

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<sup>71</sup> United Nations Commission on International Trade Law Notes for Organizing Arbitral Proceedings (2016) at para 50.

<sup>72</sup> Section 2D of the Hong Kong Arbitration Ordinance (1997) read as follows: "Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court." The Hong Kong Arbitration Ordinance (2011) came into force on 1 June 2011, replacing the old Arbitration Ordinance (1997). Section 2D has been repealed by section 16 of the Hong Kong Arbitration Ordinance (2011). Section 16 reads as follows:

(1) Subject to subsection (2), proceedings under this Ordinance in the court are to be heard otherwise than in open court.

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(2) The court may order those proceedings to be heard in open court—

(a) on the application of any party; or

(b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.

(3) An order of the court under subsection (2) is not subject to appeal.

Section 2E of the Hong Kong Arbitration Ordinance (1997) reads as follows:

2E. Restrictions on reporting of proceedings heard otherwise than in open court

(1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court.

(2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published unless:

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall:

(a) give directions as to the action that shall be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after

*(continued on next page)*

section 16 of the Hong Kong Arbitration Ordinance (2011), arbitration court proceedings will be heard in closed court proceedings.<sup>73</sup> However,

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the end of such period, not exceeding 10 years, as it considers appropriate.

Section 2E has been repealed by section 17 of the Hong Kong Arbitration Ordinance (2011). Section 17 of the Hong Kong Arbitration Ordinance (2011) now reads as follows:

- (1) This section applies to proceedings under this Ordinance in the court heard otherwise than in open court ('closed court proceedings').
- (2) A court in which closed court proceedings are being heard must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (3) A court must not make a direction permitting information to be published unless—
  - (a) all parties agree that the information may be published; or
  - (b) the court is satisfied that the information, if published, would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential.
- (4) Despite subsection (3), if—
  - (a) a court gives a judgment in respect of closed court proceedings; and
  - (b) the court considers that judgment to be of major legal interest, the court must direct that reports of the judgment may be published in law reports and professional publications.
- (5) If a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party—
  - (a) make a direction as to the action to be taken to conceal that matter in those reports; and
  - (b) if the court considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that the report may not be published until after the end of a period, not exceeding 10 years, that the court may direct.
- (6) A direction of the court under this section is not subject to appeal.

<sup>73</sup> Hong Kong Arbitration Ordinance (2011) s 16(2) (see n 72). *Cf* s 14F of the New Zealand Arbitration Act 1996 (1 March 2017 Reprint), which

the court may make an order for proceedings to be heard in open court on the application of any party or if it is satisfied that the proceedings ought to be heard in open court,<sup>74</sup> and such an order is not subject to appeal. Apart from this significant amendment, the Hong Kong Arbitration Ordinance (2011) retains the wording of sections 2D and 2E in clauses 16(2), and clauses 17(1) to 17(4) respectively.

70 Sections 17(5) and 17(6) of the Hong Kong Arbitration Ordinance (2011) allow a party to apply for any matter in court reports to be concealed as well as for a blanket prohibition on the publishing of a

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provides that proceedings must be conducted in public except in certain circumstances. Section 14F of the New Zealand Arbitration Act 1996 states:

14F Court proceedings under Act must be conducted in public except in certain circumstances

(1) A court must conduct proceedings under this Act in public unless the court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A court may make an order under subsection (1)—

(a) on the application of any party to the proceedings; and

(b) only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

(3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.

(4) In this section and sections 14G to 14I,—  
court

(a) means any court that has jurisdiction in regard to the matter in question; and

(b) includes the High Court and the Court of Appeal; but

(c) does not include an arbitral tribunal

*proceedings* includes all matters brought before the court under this Act (for example, an application to enforce an arbitral award).

<sup>74</sup> Hong Kong Arbitration Ordinance (2011) s 16(2).

report for a period of up to ten years.<sup>75</sup> Section 18 of the Hong Kong Arbitration Ordinance (2011)<sup>76</sup> adopts section 14 of the New Zealand

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<sup>75</sup> *Department of Justice, Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007) cl 17(5) and 17(6) are not in the current s 2E of the Hong Kong Arbitration Ordinance (2011), and read as follows:

(5) Where a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that he was such a party), the court shall:

(a) make a direction as to the action to be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that no report is to be published until after the end of such period as it may direct, not exceeding 10 years.

(6) A direction of the court under this section shall be subject to no appeal.

Section 17 of the Hong Kong Arbitration Ordinance (2011) restricts the reporting of proceedings heard otherwise than in open court (“closed court proceedings”). Sections 17(5) and 17(6) read as follows:

(5) If a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party—

(a) make a direction as to the action to be taken to conceal that matter in those reports; and

(b) if the court considers that a report published in accordance with the direction made under paragraph (a) of a period, not exceeding 10 years, that the court may direct.

(6) A direction of the court under this section is not subject to appeal.

<sup>76</sup> *Department of Justice, Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007) (“draft Arbitration Bill”) at cl 18 reads as follows:

18. Disclosure of information relating to arbitral proceedings and awards prohibited

(1) Unless otherwise agreed by the parties, a party shall not publish, disclose or communicate any information relating to:

*(continued on next page)*

Arbitration Act 1996 (despite criticisms made of it in the Robertson Report), but adds section 18(2)(b) to allow publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law. Section 18(2) permits the disclosure of information relating to arbitral proceedings and award made in those proceedings in three situations, namely:

(a) the protection of a legal right in any legal proceedings before a judicial authority, whether in or outside of Hong Kong, including

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(a) the arbitral proceedings under the arbitration agreement;  
or

(b) an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party:

(a) if the publication, disclosure or communication is contemplated by this Ordinance;

(b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make such publication, disclosure or communication; or

(c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

The proposed cl 18(2)(a) in the draft Arbitration Bill was not adopted. Instead, s 18(2)(a) of the Hong Kong Arbitration Ordinance (2011) states as follows:

Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—

(a) if the publication, disclosure or communication is made—

(i) to protect or pursue a legal right or interest of the party;  
or

(ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Hong Kong.

Section 18(2)(b) was also added to cover the publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law to any government body, regulatory body, court or tribunal.

the enforcement or challenge of an award made in arbitral proceedings;<sup>77</sup>

- (b) the fulfilment of an obligation imposed by law to “any government body, regulatory body, court or tribunal”;<sup>78</sup> and
- (c) where the publication, disclosure or communication is made to “a professional or any other adviser” of any of the parties.<sup>79</sup>

### **C. New Zealand**

71 As discussed above, the previous section 14 of the New Zealand Arbitration Act 1996 was criticised in the February 2003 Robertson Report.<sup>80</sup> The main criticisms were as follows:

- (a) Exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary.
- (b) No statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.
- (c) The previous section 14 did not address the concept of open justice in the context of arbitrations that result in subsequent proceedings for challenge or enforcement in the courts.<sup>81</sup>

72 In response to the criticisms of the previous section 14 of the Arbitration Act 1996, the New Zealand Law Commission’s recommendations in the Robertson Report were as follows:

- (a) The hearing should take place in private.
- (b) Subject to (c) to (d) below, the arbitral tribunal and the parties to the arbitration agreement should not disclose

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<sup>77</sup> Hong Kong Arbitration Ordinance (2011) s 18(2)(a).

<sup>78</sup> Hong Kong Arbitration Ordinance (2011) s 18(2)(b).

<sup>79</sup> Hong Kong Arbitration Ordinance (2011) s 18(2)(c).

<sup>80</sup> New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83) (February 2003).

<sup>81</sup> See, for example, *Television New Zealand v Langley Productions* [2000] NZLR 250.

- pleadings, evidence, discovered documents or the award arising from the arbitration.
- (c) The requirement is subject to disclosure when compelled by court order or subpoena, or to a professional or other adviser of any of the parties.
  - (d) The arbitrating parties may apply to the arbitral tribunal for an order that they be permitted to disclose information otherwise protected by the implied term. Such an order should only be made:
    - (i) after the arbitral tribunal has heard from the arbitrating parties; and
    - (ii) if the arbitral tribunal is satisfied that:
      - (A) such an order is necessary to enable the party applying for disclosure to comply with any statutory, contractual or regulatory requirement; and
      - (B) disclosure of the information would have been required if no dispute had arisen or the dispute had been resolved by private means (for example, negotiation or mediation) other than arbitration.
  - (e) If the mandate of the arbitral tribunal has expired, the application referred to in paragraph (d) would be made to the High Court (which would apply the same criteria as the arbitral tribunal).
  - (f) If the application is declined by an arbitral tribunal, then there would be an automatic right of appeal to the High Court. There is no appeal where the application is made at first instance to the High Court.

73 Sections 14A to 14I of the Arbitration Act 1996 (introduced with effect from 18 October 2007) therefore addressed the above recommendations by the New Zealand Law Commission in the Robertson Report. These provisions read as follows:

- 14A Arbitral proceedings must be private  
An arbitral tribunal must conduct the arbitral proceedings in private.

14B Arbitration agreements deemed to prohibit disclosure of confidential information

- (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.
- (2) Subsection (1) is subject to section 14C.

14C Limits on prohibition on disclosure of confidential information in section 14B

A party or an arbitral tribunal may disclose confidential information—

- (a) to a professional or other adviser of any of the parties; or
- (b) if both of the following matters apply:
  - (i) the disclosure is necessary—
    - (A) to ensure that a party has a full opportunity to present the party's case, as required under Article 18 of Schedule 1 [of Model Law];<sup>82</sup> or
    - (B) for the establishment or protection of a party's legal rights in relation to a third party; or
    - (C) for the making and prosecution of an application to a court under this Act; and
  - (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
- (c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
- (d) if both of the following matters apply:
  - (i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and

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<sup>82</sup> Article 18 of Schedule 1 to the New Zealand Arbitration Act 1996 on the equal treatment of parties is the same as Article 18 of the UNCITRAL Model Law on International Commercial Arbitration 2006 (UN Doc A/40/17; UN Doc A/61/17) Annex I (21 June 1985; amended 7 July 2006) and reads: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

- (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure);  
or
- (e) if the disclosure is in accordance with an order made by—
  - (i) an arbitral tribunal under section 14D; or
  - (ii) the High Court under section 14E.

14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances

- (1) This section applies if—
  - (a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d); and
  - (b) at least one of the parties agrees to refer that question to the arbitral tribunal concerned.
- (2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

14E High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality

- (1) The High Court may make an order allowing a party to disclose any confidential information—
  - (a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with Article 32 of Schedule 1 [that is, termination of proceedings]; or
  - (b) on an appeal by that party, after an order under section 14D(2) allowing that party to disclose the confidential information has been refused by an arbitral tribunal.
- (2) The High Court may make an order under subsection (1) only if—
  - (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations

that render it desirable in the public interest for the confidential information to be disclosed; and

(b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).

(3) The High Court may make an order prohibiting a party (party A) from disclosing confidential information on an appeal by another party (party B) who unsuccessfully opposed an application by party A for an order under section 14D(2) allowing party A to disclose confidential information.

(4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard.

(5) The High Court may make an order under this section—

(a) unconditionally; or

(b) subject to any conditions it thinks fit.

(6) To avoid doubt, the High Court may, in imposing any conditions under subsection (5)(b), include a condition that the order ceases to have effect at a specified stage of the appeal proceedings.

(7) The decision of the High Court under this section is final.

14F Court proceedings under Act must be conducted in public except in certain circumstances

(1) A court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A court may make an order under subsection (1)—

(a) on the application of any party to the proceedings; and

(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

(3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.

(4) In this section and sections 14G to 14I,—  
court —

(a) means any court that has jurisdiction in regard to the matter in question; and

(b) includes the High Court and the Court of Appeal; but

(c) does not include an arbitral tribunal

*proceedings* — includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

14G Applicant must state nature of, and reasons for seeking, order to conduct Court proceedings in private

An applicant for an order under section 14F must state in the application—

- (a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and
- (b) the applicant's reasons for seeking the order.

14H Matters that Court must consider in determining application for order to conduct Court proceedings in private

In determining an application for an order under section 14F, the Court must consider all of the following matters:

- (a) the open justice principle; and
- (b) the privacy and confidentiality of arbitral proceedings; and
- (c) any other public interest considerations; and
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant under section 14G(b).

14I Effect of order to conduct Court proceedings in private

- (1) If an order is made under section 14F,—
  - (a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and
  - (b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings.
- (2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.

74 On 9 March 2017, the Arbitration Amendment Bill 2017 was introduced to amend the Arbitration Act 1996.<sup>83</sup> The Bill proposes to

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<sup>83</sup> The Arbitration Amendment Bill 2017 has not been enacted as at the date of 21 December 2017.

amend section 14F to remove the existing presumption that court proceedings relating to arbitration will be held in public and will be reported. If the Bill is passed, the amendment would institute a rebuttable presumption, with the effect that court proceedings relating to arbitration would be required to be heard otherwise than in open court, and thereby bringing the New Zealand Arbitration Act 1996 closer in line with the standard of protection accorded by the Model Law.<sup>84</sup> The proposed revision of section 14F reads:<sup>85</sup>

- (1) A court must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (2) A court must make directions permitting information to be published in law reports and professional publications if—
  - (a) all parties agree that the information may be published and the court is satisfied that the information if published would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential; or
  - (b) the court considers that such a judgment is of major legal interest.
- (3) If any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party, make a direction as to the action to be taken to conceal that matter in those reports, and may direct that the report may not be published until after the end of a period (being not more than 10 years) that the court may direct.

75 Section 2 of New Zealand Arbitration Act 1996 provides a broad definition of “confidential information” for determining the scope of confidentiality under the Act by describing confidential information as “information that relates to the arbitral proceedings or to an award made in those proceedings” and by providing a non-exhaustive list of items that would be necessarily included in the definition. The proposed revision to section 14F does not appear to be constrained by the

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<sup>84</sup> Arbitration Amendment Bill (Member’s Bill), No 245-1, Explanatory note.

<sup>85</sup> Arbitration Amendment Bill (Member’s Bill), No 245-1, cl 5.

definition in section 2. Rather, the proposed revision, which does not employ the term “confidential information”, appears to invite the parties and courts to reconsider the permissible scope of confidentiality under the Act by determining:

- (a) what information may be unreasonable for a party to wish to remain confidential, despite an agreement of all the parties to the contrary; and,
- (b) the types of judgment that would be of “major legal interest”.

#### **D. Singapore**

76 Section 22 of the Singapore International Arbitration Act (“IAA”)<sup>86</sup> allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court. Section 23 of the IAA<sup>87</sup> restricts

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<sup>86</sup> Section 22 of the International Arbitration Act of Singapore (Cap 143A, 2002 Rev Ed) reads as follows: “Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.”

<sup>87</sup> Section 23 of the International Arbitration Act of Singapore (Cap 143A, 2002 Rev Ed) reads as follows:

- (1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.
- (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.
- (3) A court shall not give a direction under subsection (2) permitting information to be published unless:
  - (a) all parties to the proceedings agree that such information may be published; or
  - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

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reporting of proceedings heard otherwise than in open court. The Singapore position set out in sections 22 and 23 of the IAA is now different from the Hong Kong position following the enactment of sections 16 and 17 of the Hong Kong Arbitration Ordinance (2011),<sup>88</sup> in that Singapore makes arbitral proceedings private only upon application whereas arbitral proceedings in Hong Kong are private until an application is made. In *BBW v BBX*,<sup>89</sup> the High Court of Singapore held that section 23 of the IAA was not a provision under which a party could obtain an order to seal court documents and records or withhold access by third parties to those documents and records, and that the power to grant a sealing order under the IAA must be exercised in respect of an application that fell under section 22 of the IAA.<sup>90</sup> Nonetheless, the High Court of Singapore held that it has an inherent power to grant a sealing order,<sup>91</sup> which in the arbitration context is exercised by weighing the principle of open justice against the need to preserve confidentiality in arbitration. *AZT v AZV*,<sup>92</sup> an earlier case that was referred to in *BBW v*

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- (4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall:
- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
  - (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

<sup>88</sup> Cap 609.

<sup>89</sup> *BBW v BBX* [2016] 5 SLR 755.

<sup>90</sup> For a non-exclusive list of proceedings that would fall under section 22 of the IAA, see *BBW v BBX* [2016] 5 SLR 755 at [7].

<sup>91</sup> *BBW v BBX* [2016] 5 SLR 755 at [27].

<sup>92</sup> [2012] 3 SLR 794.

*BBX*, elaborated on the interests to be balanced in granting a sealing order:<sup>93</sup>

... there is a more fundamental principle that prevails over that of open justice, *ie*, that the chief object of courts of justice is to ensure that justice is done, the principle of publicity must yield in the appropriate cases where to sit in public would destroy the subject matter of the dispute ...

77 Where the subject matter of the dispute was “purely commercial”, with nothing to suggest that there was any countervailing and legitimate public interest weighing in favour of disclosure, and no reason to compromise the confidentiality of the arbitration and related proceedings which had been bargained for or agreed to by the parties, the court would exercise its inherent power to seal the documents.<sup>94</sup>

78 One unresolved question in Singapore is whether a party is considered to have waived confidentiality if no application is made for a sealing order, so that all court proceedings can be reported and the party is then released from all obligations of confidentiality. Some arbitration cases heard in the courts are reported without disclosure of parties’ names,<sup>95</sup> while other case reports identify the parties’ names.<sup>96</sup> Should the rules of confidentiality be different for these two kinds of cases?

79 Australia, Sweden and the US are three important countries where confidentiality is not recognised as a legal incident of arbitration unless parties expressly provide for it.

### ***E. Australia***

80 Historically, Australia had no national legislation on confidentiality, and the governing rule was derived from the decision of the High Court

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<sup>93</sup> *AZT v AZV*[2012] 3 SLR 794 at [9].

<sup>94</sup> *AZT v AZV*[2012] 3 SLR 794 at [19].

<sup>95</sup> See, *eg*, *VV v VW*[2008] 2 SLR(R) 929.

<sup>96</sup> See, *eg*, *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945.

of Australia in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*<sup>97</sup> (“*Esso Australia*”) which declared that there was no general rule of confidentiality except for a rule of privacy in arbitration hearings. The High Court of Australia also held that the privacy attaching to an arbitration was just an incident of the subject matter of the agreement to arbitrate rather than a term to be implied into the arbitration agreement.<sup>98</sup> Presently, the International Arbitration Act 1974 of Australia institutes a confidentiality regime for international arbitrations while the uniform Commercial Arbitration Acts, which are uniform across all Australian States,<sup>99</sup> impose the applicable rules of confidentiality in respect of domestic arbitrations. The International Arbitration Act 1974 incorporates almost all the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration.<sup>100</sup> However, and in contrast with Singapore, Hong Kong and New Zealand, it remains silent on the question of whether court proceedings relating to arbitration are to be heard in public or in private.<sup>101</sup>

81 Before 13 October 2015,<sup>102</sup> the duties of confidentiality in respect of domestic arbitrations applied on an opt-out basis, while the rules of confidentiality under the International Arbitration Act 1974 were structured to apply only where the parties agreed, that is, on an opt-in

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<sup>97</sup> [1995] 128 ALR 391.

<sup>98</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 401.

<sup>99</sup> Australian Centre for International Commercial Arbitration (“ACICA”) <https://acica.org.au/commercial-arbitration-acts/> (accessed October 2018).

<sup>100</sup> Luke Nottage & James Morrison, “Accessing and Assessing Australia’s International Arbitration Act” (2017) 34(6) *Journal of International Arbitration* 963.

<sup>101</sup> Luke Nottage & James Morrison, “Accessing and Assessing Australia’s International Arbitration Act” (2017) 34(6) *Journal of International Arbitration* 963.

<sup>102</sup> The date on which the International Arbitration Act 1974 came into effect.

basis.<sup>103</sup> Section 23C of the Civil Law and Justice (Omnibus Amendments) Act 2015<sup>104</sup> restructured the confidentiality regime under the International Arbitration Act 1974 to apply on an opt-out rather than opt-in basis,<sup>105</sup> thereby aligning the applicable rules in international arbitration and domestic arbitration,<sup>106</sup> and effectively reversing the effect of the decision of the High Court of Australia in *Esso Australia*.<sup>107</sup> The opt-out confidentiality provisions in the International Arbitration Act 1974 will not apply where parties have agreed to apply the UNCITRAL Transparency Rules in Treaty-Based Investor-State Arbitration.<sup>108</sup>

## F. Sweden

82 In *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*<sup>109</sup> (better known as the “*Bulbank*” case), the Swedish Supreme Court held that there is no implied duty of confidentiality in private arbitrations.

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<sup>103</sup> Luke Nottage & James Morrison, “Accessing and Assessing Australia’s International Arbitration Act” (2017) 34(6) *Journal of International Arbitration* 963.

<sup>104</sup> Civil Law and Justice (Omnibus Amendments) Act 2015 (Act No 20 of 2015) (Australia) cl 61.

<sup>105</sup> International Arbitration Act 1974 (Act No 136 of 1974) (Australia) s 22(2).

<sup>106</sup> Luke Nottage & James Morrison, “Accessing and Assessing Australia’s International Arbitration Act” (2017) 34(6) *Journal of International Arbitration* 963.

<sup>107</sup> Ashurst, “International Arbitration Update: Parliament passes changes to international arbitration laws” (17 September 2015) <<https://www.ashurst.com/en/news-and-insights/legal-updates/parliament-passes-changes-to-international-arbitration-laws/>> (accessed 25 August 2017).

<sup>108</sup> Luke Nottage & James Morrison, “Accessing and Assessing Australia’s International Arbitration Act” (2017) 34(6) *Journal of International Arbitration* 963.

<sup>109</sup> Case T-1881-99. The Swedish Arbitration Act (SFS 1999:116) entered into force in 1999, replacing the 1929 Arbitration Act which does not contain any provisions regarding *confidentiality*.

Accordingly, there are only two ways to safeguard confidentiality of arbitration proceedings under Swedish law:

- (a) expressly contract for confidentiality; or
- (b) adopt arbitration rules that expressly provide for confidentiality.

### **G. United States**

83 Likewise, the US does not recognise confidentiality as a general rule.<sup>110</sup>

### **H. Dubai International Financial Centre**

84 Section 14 of the Dubai International Financial Centre (“DIFC”) Arbitration Law<sup>111</sup> does not provide for any release from the obligation

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<sup>110</sup> *United States v Panhandle Eastern Corp* 118 FRD 346 (D Del, 1988). See also *Contship Container-lines Ltd v PPG Industries Inc* 2003 US Dist LEXIS 6857. *Cf Derrick Walker v Craig Kirin Gore* 2008 US Dist LEXIS 84297, in which the court held that the court file relating to the action between the parties for breach of contract and tort was to remain under seal pending the decision of the court on whether or not to compel arbitration, as the parties had agreed to arbitration on the basis that the terms of their agreements (which contained provisions imposing confidentiality) remained confidential. The Federal Arbitration Act, codified at 9 USC §§ 1–16, does not provide for the confidentiality of arbitration proceedings or the documents and information exchanged by parties in them. In *Trustmark Insurance Co v John Hancock Life Insurance Co*, No 09 C 3959, 2010 US Dist LEXIS 4698 (ND Ill, 21 January 2010), the court upheld an agreement that required all “Arbitration Information” such as correspondence, oral discussions, and other information exchanged in the proceedings, to be kept confidential even after the proceedings end. However, absent such an agreement, parties cannot expect that documents exchanged during the arbitration proceedings will be protected.

<sup>111</sup> Section 14 of the Dubai International Financial Centre (“DIFC”) Arbitration Law (DIFC Law No 1 of 2008) reads as follows: “Unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be  
(continued on next page)

of confidentiality in arbitration, and does not envisage any further exceptions other than by an order of the DIFC Courts. It is therefore open to the DIFC Courts to interpret the general exception of the order of court as allowing the DIFC Courts to determine each application for leave under section 14 according to the circumstances and merits of each case, enabling the jurisprudence of exceptions to confidentiality to be incrementally developed by case law, rather than relying only on the established precedents.

### **X. How have institutional rules dealt with the obligation of confidentiality?**

85 In a paper published in 2005,<sup>112</sup> the first author advanced the argument that the common law debate about confidentiality was less important than it seemed because in practice, most arbitrations were institutional, and most institutions gave some kind of protection of confidentiality. The first author made an analysis of 12 institutions as to the extent to which they protected confidentiality, and highlighted six aspects of confidentiality:

- (a) whether the rules provided for general confidentiality;
- (b) whether the rules provided for non-disclosure of existence of arbitration;
- (c) whether the rules provided for confidentiality to extend to documents used or generated in the arbitration;
- (d) whether the tribunal was bound by confidentiality;
- (e) whether witnesses were bound by confidentiality; and
- (f) whether confidentiality extended to the award.

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kept confidential, except where disclosure is required by an order of the DIFC Court.”

<sup>112</sup> Michael Hwang SC & Lee May Ling, “Confidentiality in Arbitration: The Criteria Adopted by Institutions” (2005) 2 *Singapore Institute of Arbitrators Newsletter* 3.

Institution	General Confidentiality	Existence of arbitration	Documents used or generated	Arbitrator	Witnesses	Award
LCIA (2014)	✓		✓	✓		✓
ICC (2017)	? (upon request of any party)	? (upon request of any party)	? (upon request of any party)	? (upon request of any party)	? (upon request of any party)	? (upon request of any party)
UNCITRAL (as revised in 2010)						✓
ICSID (2006)				✓		✓
SWISS (2012)	✓		✓	✓		✓
AAA (2013)						
ICDR (2014)	✓	? ("all matters relating to the arbitration")		✓	? ("tribunal may make orders")	✓
SIAC (2016)	✓	✓	✓	✓ ✓		✓
KLRC (2017)	✓	✓	✓	✓	✓	✓
BANI	✓		✓	✓		✓
CIETAC (2014)	✓	? ("any substantive or procedural matters relating to the case")	? ("any substantive or procedural matters relating to the case")	✓	? ("other relevant persons")	
JCAA (2015)	✓	? ("facts related to arbitration cases or facts learned through arbitration cases")	? ("facts related to arbitration cases or facts learned through arbitration cases")	✓ ✓		
WIPO (2014)	✓	✓	✓ ("documentary evidence")	✓	✓	✓

HKIAC (2013)	✓	✓ any information relating to the arbitration or an award made in the arbitration)	? (any information relating to the arbitration or an award made in the arbitration)	✓	✓	✓
ACICA (2016)	✓	✓	✓	✓	✓ ("the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party")	✓

The figure above shows the first author's scorecard on the protection of confidentiality of the 15 institutions as of October 2017.

86 Based on the scorecard in the figure above, most institutions have rules to cover three or four of the first author's designated aspects of confidentiality and virtually all institutions recognised confidentiality in some way. Since the author's first analysis in 2005, in which the champion was the World Intellectual Property Organization ("WIPO"), with rules<sup>113</sup> covering five out of six aspects, because it handles mainly intellectual property disputes and disputants in such cases value confidentiality. The Australian Centre for International Commercial Arbitration ("ACICA") and the Kuala Lumpur Regional Centre for Arbitration ("KLRC") have caught up to definitively cover all six aspects of confidentiality.

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<sup>113</sup> World Intellectual Property Organization Arbitration Rules (effective 1 October 2002).

### **A. International Chamber of Commerce**

87 Surprisingly, the International Chamber of Commerce (“ICC”) Rules of Arbitration (“ICC Arbitration Rules”) say little about confidentiality. The reason is that drafters found it too difficult when they drafted the 1988 rules and the position remained the same when the 1998 rules were drafted.<sup>114</sup> This was partly due to the problem of agreeing on exceptions and partly because the ICC Arbitration Rules are meant for use in many countries, so it was difficult to devise a rule which would not conflict with national arbitration laws. Another problem was the lack of sanctions available.

88 However, there are some provisions in the ICC Arbitration Rules 2017 that address privacy and confidentiality (to a very limited extent).

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<sup>114</sup> The Arbitration Commission decided against amending the International Chamber of Commerce (“ICC”) Rules of Arbitration 1998 (entry into force 1 January 1998) (“1998 ICC Arbitration Rules”) to impose a duty of confidentiality in relation to ICC arbitrations because it considered that confidentiality was a matter for the parties to agree upon. See Jacob Grierson & Annet van Hooft, *Arbitrating under the 2012 ICC Rules* (Kluwer Law International, 2012) at pp 14–15. This is in line with the amendments to Art 22(3) of the ICC Rules of Arbitration 2012 (entry into force 1 January 2012) which provided that “upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information”. According to the Secretariat of the ICC International Court of Arbitration, “the Rules take a more flexible and tailored approach, leaving the matter for the parties or the arbitral tribunal to address in light of the specific circumstances of the case”: Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC, 2012) at para 3-807. This is more extensive than Article 20(7) of the 1998 ICC Arbitration Rules which only provided that the arbitral tribunal “may take measures for protecting trade secrets and confidential information”. Article 22(3) does not apply to the confidentiality obligations of the court and its Secretariat. However, Article 1 of Appendix II provides that the court and its Secretariat will keep confidential all information and documents received in relation to an arbitration.

Article 22(3) of the ICC Arbitration Rules 2017 allow the tribunal to make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration, and to take measures to protect trade secrets and confidential information. Further, the internal rules of the International Court of Arbitration of the ICC prevent disclosure of its proceedings.<sup>115</sup> However, *United States v Panhandle Eastern Corp*<sup>116</sup> (“*Panhandle*”) held that these rules were neither binding on the parties nor the tribunal. Hence, the court in *Panhandle* refused to deny discovery of documents which had been filed in an ICC arbitration in a separate court action.

89 Although the ICC does not have express rules about confidentiality, in practice, the ICC pays great attention to confidentiality and warns its arbitrators to observe confidentiality when they are appointed. In addition, the ICC publishes sanitised accounts of their awards but will not do so if the parties object.<sup>117</sup>

### ***B. International Centre for Settlement of Investment Disputes***

90 There is no express recognition of confidentiality in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,<sup>118</sup> but the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) require the tribunal to respect confidentiality.<sup>119</sup> While the publication of the award as a whole remains

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<sup>115</sup> International Chamber of Commerce Rules of Arbitration (entry into force 1 March 2017) App II.

<sup>116</sup> *United States v Panhandle Eastern Corp* 118 FRD 346 (1988).

<sup>117</sup> It is the Secretariat’s usual practice not to release a sanitised award for publication less than three years after the case in which it was rendered was closed: Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC, 2012) at para 3-1236.

<sup>118</sup> 575 UNTS 159 (18 March 1965; entry into force 14 October 1966).

<sup>119</sup> International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) r 6.

subject to the consent of the parties,<sup>120</sup> ICSID must promptly publish excerpts of the legal reasoning of an ICSID award regardless of whether the award is published as a whole.<sup>121</sup> The Secretary-General arranges for the publication of the award in an appropriate form with a view to furthering the development of international law in relation to investments.<sup>122</sup> In practice, ICSID arbitrations are widely publicised because of a great public interest in arbitrations against governments.<sup>123</sup>

### **C. World Intellectual Property Organization**

91 As mentioned above, the WIPO Arbitration Rules expressly provide for five out of six aspects of the first author's scorecard on confidentiality.<sup>124</sup> Although there is no rule expressing the principle of confidentiality, given the five aspects of confidentiality that the WIPO Arbitration Rules already cover,<sup>125</sup> it could be argued that the general principle of confidentiality underpins all the Rules.

### **D. Singapore International Arbitration Centre**

92 In Singapore, the Arbitration Rules of the Singapore International Arbitration Centre (2016) ("SIAC Rules") have, since its third edition of the rules, which was relied on in the earlier version of this lecture, expanded its already detailed institutional rule on confidentiality to allow

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<sup>120</sup> See also Art 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966), which requires consent of parties for publication of the award.

<sup>121</sup> International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) r 48(4).

<sup>122</sup> International Centre for Settlement of Investment Disputes Administrative and Financial Regulations (amended 10 April 2006) reg 22.

<sup>123</sup> See, *eg*, [www.investmentclaims.com](http://www.investmentclaims.com) (accessed 10 May 2013) for awards.

<sup>124</sup> See the table at para 85 above.

<sup>125</sup> See, *eg*, Arts 73–76 of the World Intellectual Property Organization Arbitration Rules (effective 1 October 2002).

for release from confidentiality by an order by the tribunal.<sup>126</sup> However, unlike the KLRCA (2017), WIPO (2014) and ACICA (2016), which

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<sup>126</sup> Rule 34 of the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2007) reads as follows:

Rule 34: Confidentiality

34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.

34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
- b. for the purpose of making an application to the courts of any State to enforce or challenge the award;
- c. pursuant to the order or a subpoena issued by a court of competent jurisdiction;
- d. to a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
- e. in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
- f. in compliance with the request or requirement of any regulatory body or other authority.

34.3 In this Rule, 'matters relating to the proceedings' means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings or the award arising from the proceedings but excludes any matter that is otherwise in the public domain.

Rule 39 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 2016) reads as follows:

Rule 39: Confidentiality

39.1 Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the

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arguably satisfy all six aspects of the comparative table above, the SIAC Rules 2016 do not extend the obligation of confidentiality to bind witnesses, thereby exposing parties who do not make express provision for it in their arbitration agreement to the possibility of information being leaked by witnesses in the arbitral proceedings.

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proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.

- 39.2 Unless otherwise agreed by the parties, a party or any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall not, without the prior written consent of the parties, disclose to a third party any such matter except:
- a. for the purpose of making an application to any competent court of any State to enforce or challenge the Award;
  - b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
  - c. for the purpose of pursuing or enforcing a legal right or claim;
  - d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority;
  - e. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties; or
  - f. for the purpose of any application under Rule 7 or Rule 8 of these Rules.
- 39.3 In Rule 39.1, 'matters relating to the proceedings' includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain.
- 39.4 The Tribunal has the power to take appropriate measures, including issuing an order or Award for sanctions or costs, if a party breaches the provisions of this Rule.

### **E. Hong Kong International Arbitration Centre**

93 Since the last publication of this lecture, the HKIAC Administered Arbitration Rules (“HKIAC Rules”) were revised in 2013.<sup>127</sup> As with Article 39 of the 2008 HKIAC Rules, Article 42 of the 2013 HKIAC Rules expressly provides for five out of six aspects of the first author’s scorecard on confidentiality, and provides that deliberations of the tribunal are confidential.<sup>128</sup> Under Article 39 of the 2008 HKIAC Rules,

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<sup>127</sup> The HKIAC Administered Arbitration Rules is distinct from HKIAC’s Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules (effective 1 January 2015). The latter set of procedures was adopted for use by parties who seek the benefits of an administered arbitration while maintaining the flexibility afforded by the UNCITRAL Arbitration Rules, and applies where an arbitration agreement effectively provides that the parties shall be referred to arbitration administered by HKIAC under the UNCITRAL Rules.

<sup>128</sup> Article 42 of the Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 November 2013) reads as follows:

42.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:

- (a) the arbitration under the arbitration agreement(s); or
- (b) an award made in the arbitration.

42.2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 3, expert, witness, secretary of the arbitral tribunal and HKIAC.

42.3 The provisions in Article 42.1 do not prevent the publication, disclosure or communication of information referred to in Article 42.1 by a party:

- (a) (i) to protect or pursue a legal right or interest of the party; or
- (ii) to enforce or challenge the award referred to in Article 42.1; in legal proceedings before a court or other judicial authority;
- (b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or

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the duty of confidentiality was imposed on the parties, arbitrators, tribunal-appointed experts, secretary to the tribunal, and the HKIAC. Article 42 of the 2013 HKIAC Rules expanded the scope of confidentiality by imposing the duty on experts and witnesses.<sup>129</sup> The removal of the

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(c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert.

42.4 The deliberations of the arbitral tribunal are confidential.

42.5 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

(a) a request for publication is addressed to HKIAC;

(b) all references to the parties' names are deleted; and

no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.

<sup>129</sup> Article 39 of the Hong Kong International Arbitration Centre ("HKIAC") Administered Arbitration Rules (effective 1 September 2008) imposed the duty of confidentiality on tribunal-appointed experts but not party-appointed experts, and did not impose the duty of confidentiality on witnesses. Article 39 of the Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 September 2008) reads as follows:

39.1 Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all matters and documents relating to the arbitral proceedings, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards and orders not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal or regulatory duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the HKIAC Secretariat and Council.

39.2 The deliberations of the arbitral tribunal are confidential.

39.3 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

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adjectival qualifier, “tribunal-appointed”, from “expert” arguably expands the scope of confidentiality to impose it on party-appointed experts as well. Article 42 of the 2013 HKIAC Rules no longer specifies that the existence of the arbitral proceedings is to be kept confidential. In addition, the reference to “documents relating to the arbitral proceedings” which expressly covers documents used or generated in the arbitral proceedings has been removed. Instead, the revised rules only refer to “any information” relating to the arbitration. This broader reference to “any information” arguably includes all documents relating to the arbitration including the existence of the proceedings, as well as correspondence, written statements and evidence. Article 26 of the 1993 HKIAC Domestic Arbitration Rules provided for confidentiality,<sup>130</sup>

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- (a) a request for publication is addressed to the HKIAC Secretariat;
  - (b) all references to the parties’ names are deleted; and
  - (c) no party objects to such publication within the time limit fixed for that purpose by the HKIAC Secretariat. In the case of an objection, the award shall not be published.

<sup>130</sup> Article 26 of the Hong Kong International Arbitration Centre (“HKIAC”) Domestic Arbitration Rules (1 April 1993) reads as follows: “No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration.” Article 26 of the 2012 HKIAC Domestic Arbitration Rules, which came into effect on 2 April 2012, reads as follows: “Subject to the provisions of Section 18 of the Ordinance and these Rules, no information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration.” Section 18 of the Hong Kong Arbitration Ordinance (2011) reads as follows:

- 18(1) Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to—
  - (a) the arbitral proceedings under the arbitration agreement; or
  - (b) an award made in those arbitral proceedings.
- (2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—
  - (a) if the publication, disclosure or communication is made—

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but the commentary on that provision in the HKIAC Revised Guide to Arbitration under the 1993 Domestic Arbitration Rules suggested that Article 26 follows the position in *Esso Australia*.<sup>131</sup> In other words, apart from the confidentiality which attaches to particular documents or classes of documents, there is no implied obligation of confidentiality.<sup>132</sup> The HKIAC Domestic Arbitration Rules were revised in 2012, and Article 26 clarified the scope of confidentiality by making it subject to the provisions of the Hong Kong Ordinance. In 2014, the HKIAC Domestic Arbitration Rules were revised again, and the 2014 HKIAC Domestic Arbitration Rules removed the obligation of confidentiality from its provisions altogether. As such, in Hong Kong, confidentiality in arbitrations conducted under the HKIAC Domestic Arbitration Rules is regulated by the arbitral law of Hong Kong.

## **XI. What are the possible sanctions or consequences of breach of confidentiality?**

94 If there is an established rule of confidentiality applicable to an arbitration and there is a breach of that rule, what are the possible

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- (i) to protect or pursue a legal right or interest of the party; or
  - (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Hong Kong;
  - (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
  - (c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

<sup>131</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391.

<sup>132</sup> With the incorporation of s 18 of the Hong Kong Arbitration Ordinance (2011) into Art 26 of the Hong Kong International Arbitration Centre Domestic Arbitration Rules (2012), there is now an implied obligation of confidentiality unless the parties agree otherwise.

sanctions and consequences that may arise? Sanctions against breach of confidentiality are not easy to devise. A tribunal can issue an injunction against future breaches of confidentiality, but if the horse has bolted from the stable, such an injunction appears to be of limited value if arbitration information has been disclosed.

95 What about the consequences of past breaches? If confidentiality is considered a contractual right, then there can be a suit for damages for breach, but damages for breach of confidentiality (whether nominal or substantial) are difficult to establish (unless a liquidated damages clause is used, but the difficulties of drafting such a clause would require a separate Article to explain). In Singapore, an application can be made to court for an injunction to prevent future breaches and the court can impose sanctions for such breaches (at least if the party is within the jurisdiction of the court). A further question is whether an injured party can claim repudiatory breach of contract and terminate the arbitration proceedings. However, this is rare in practice because the consequence would be that a case would have to be tried in court with no confidentiality at all.

## **XII. A model confidentiality clause?**

96 One example of what may be a model confidentiality clause is set out in Robert Merkin and Julian Critchlow, *Arbitration Forms and Precedents*,<sup>133</sup> paragraph 1G.1.1 of which reads:

1G.1.1. Arbitration Clause providing for confidentiality

Neither party shall disclose to any third party the existence, nature, content or outcome of any arbitration, or purported arbitration, brought in respect of this Agreement. Neither shall any party disclose to any third party:

- (i) Any document prepared or procured in the course of or otherwise for the purpose of the arbitration.

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<sup>133</sup> Robert Merkin & Julian Critchlow, *Arbitration Forms and Precedents* (Informa Legal Publishing, Looseleaf, 2000, updated to August 2002).

- (ii) Any document prepared or procured by the other party and received in the course of or otherwise for the purpose of the arbitration.
- (iii) Any document received directly or indirectly from the Tribunal or any court of competent jurisdiction including, but not limited to, any direction, order or award.

Save insofar as may be necessary for the purpose of conducting the Arbitration itself, or making any application to a court of competent jurisdiction in respect of the arbitration, or for the enforcement of any order or award of the Tribunal, or of any order or judgment of the Court, or as may be required to comply with any lawful authority.

97 If this model confidentiality clause is compared to some of the provisions on confidentiality in sections 14A to 14I of the New Zealand Arbitration Act 1996, it is clear that there can be no universal confidentiality clause that can comprehensively cover the exceptions to confidentiality. For example, the criteria for the disclosure of confidential information where it is necessary for the purpose of conducting the arbitration are not set out in this confidentiality clause, but section 14C(b) of the New Zealand Arbitration Act 1996 describes circumstances where disclosure of confidential information is necessary and adds that the disclosure must at the same time be “what is reasonably required” to serve those circumstances. The model confidentiality clause also fails to provide the arbitral tribunal with the discretion to allow disclosure of confidential information in certain circumstances similar to that in section 14D of the New Zealand Arbitration Act 1996, so that the tribunal may deal with the questions concerning the disclosure of confidential information before a party applies to court for an order. In short, it is virtually impossible for a contractual confidentiality clause to be drafted so as to encompass all of the possible exceptions (including those mentioned earlier as everyday situations), and not take into account unforeseen situations where justice or expediency would require an exception to be allowed. This makes the intervention of a third party arbiter essential.

### **XIII. Conclusion**

98 The authors' conclusions are therefore as follows.

- (a) We need to clear our minds when addressing the question of confidentiality in arbitration to understand the different facets of that concept in order to understand the difficulty in defining the rules and the exceptions to those rules.
- (b) The most promising attempt to establish a complete code of confidentiality is the current New Zealand model, but it is still an imperfect code.
- (c) The Robertson Report itself acknowledged that it was not able to provide for all the exceptions to confidentiality in section 14C, and the committee did not think it desirable or practical to set out a detailed code. In short, the most recent authoritative investigation into the problem of confidentiality has conceded that it is not possible to provide a comprehensive list of all the exceptions to confidentiality. It follows from this that the categories of exceptions are never closed.
- (d) It also follows that all the existing statutory provisions and institutional rules providing for confidentiality are imperfect.
- (e) Nevertheless, the New Zealand approach has introduced a practical solution to the problem of the constant discovery of new classes (as well as the modification of accepted exceptions) to suit the circumstances of the particular case. This solution is to allow the tribunal to determine on an *ad hoc* basis whether or not there should be an exception to the principle of confidentiality and the exact scope of that exception tailored to the case in question. The guidelines developed in the New Zealand legislation for the exercise of the tribunal's decision are useful in identifying the common situations where exceptions will be recognised. However, there should be residual discretion reserved to the tribunal to permit exceptions to confidentiality where the justice of the case requires or where it is otherwise appropriate to do so. This will allow the statutory exceptions to be extended or restricted or otherwise modified by individual tribunals. In short, there cannot be a "one-size-fits-all" definition of the rule or its exceptions.

- (f) Where the tribunal cannot perform this function (*eg*, after it has become *functus officio*) then that function should be performed by the appropriate curial court.
- (g) It may be thought that the remarks of Thomas and Collins, LJJ, quoted earlier, about the lack of jurisdiction of a court to determine whether an exception to confidentiality exists and applies could be an impediment to developing the proposed solutions. However, these remarks:
  - (i) only apply to the English Arbitration Act 1996;
  - (ii) only apply to preclude such jurisdiction as an implied term; and
  - (iii) do not therefore preclude an express adoption of an independent third party to resolve difficulties in identifying and defining the exceptions to confidentiality.

#### **A. *How then should the problem be approached for the future?***

##### *(a) Legislation*

99 The New Zealand legislation remains the most comprehensive amongst national statutes that provide for arbitration. However, while it is certainly desirable to have a clear definition of the general rule and a list of the more commonly accepted exceptions to that rule, legislators should not make the mistake of locking in the concept of confidentiality by a fixed list of exceptions.

##### *(b) Contractual solutions*

100 As a general rule, it would be too much to expect the contractual parties to draft an arbitration clause that can address all the concerns outlined in this article. The difficulties of defining the rule and its exceptions are by now well-known and, given that the arbitration clause is often a “midnight clause” (*ie*, added in at the end of the contractual negotiations when neither party would like to spend much time on it), it would be more likely than not that a confidentiality clause would create more problems than it solved because of insufficient definition of the exceptions (or worse still, not providing for any exceptions) so that

legitimate breaches of confidentiality would apparently be prohibited by the arbitration clause.

(c) *Institutional rules*

101 In general, arbitrating parties have solved the problem of confidentiality (at least in part) by adopting institutional rules, and most institutional rules provide for confidentiality to a greater or lesser extent, with many institutions having revised their rules to incorporate more elaborate provisions in the last ten years. But we have demonstrated above that none of the institutional rules are perfect and indeed can create problems where the exceptions are insufficiently or imperfectly defined, leading to difficulties for one or both parties in protecting their legitimate interests because of the apparent inflexibility of those institutional rules.

(d) *Model clauses*

102 The only medium-term solution which might address the problems set out above<sup>134</sup> would be for a major arbitration research institution (such as UNCITRAL, the ICC Commission or the Chartered Institute or the International Council for Commercial Arbitration) to develop a model law or a model clause for adoption by arbitration institutions or contracting parties. This could be based on the New Zealand model, adapted in the way suggested in conclusions (a) and (f)<sup>135</sup> above.

**B. *What should parties do in the meantime?***

103 Until there is a change in the applicable laws, contractual provisions or institutional rules governing confidentiality, we suggest that the way forward for tribunals and parties to minimise the problems of confidentiality could be as follows:

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<sup>134</sup> See paras 100 and 101 above.

<sup>135</sup> See para 98 above.

- (a) The specific needs of confidentiality should be addressed at an early directions meeting by parties and/or the tribunal of its own motion and an order (ideally a consent order) be issued laying out the parameters of confidentiality applicable to the particular arbitration.
  - (b) The order should provide for a blanket rule of confidentiality but allow parties to apply to the tribunal for an exception to or modification of that rule depending on the circumstances of the case, with a fallback to the court should the tribunal be unable to act (that is, adapting sections 14A to 14I of the New Zealand Act as appropriate).
  - (c) This would in effect allow the tribunal to work as a common law court to develop sensible and fair exceptions to the blanket rule.
  - (d) If institutional rules are already applicable to that tribunal, those rules should be modified by a consent order (which is the only way that those rules could be so modified) so that the tribunal will have the residual power set out above.<sup>136</sup>
  - (e) Ultimately, the solution would be truly *ad hoc*, but the strength of the solution is that it will allow the parties and tribunals to cope appropriately with the myriad situations (many of which are unforeseeable) which will inevitably arise and which will need to be accommodated so as to override confidentiality to a greater or lesser extent.
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<sup>136</sup> See para 100 above.

### **Afternote to Essay 13**

Since the delivery of this lecture in 2008, I have written two more essays with another co-author, Nicholas Thio, on the subject of confidentiality in arbitration. Both essays are based on the discussion in the 2008 lecture. A number of developments have also occurred in England since the English Court of Appeal case of *Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 (“*Emmott*”), which was a key case in my 2008 lecture. This afternote will outline the major points of these essays and case law developments so as to apprise the reader of the latest trends in the law and practice of confidentiality in international arbitration.

#### ***Essay I***

The first essay is titled “A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-governing Code” (2012) 29(2) *Journal of International Arbitration* 137 (“A Proposed MPO”) and it followed hot on the heels of my 2008 lecture.

In my 2008 lecture, I suggested that a major arbitration research institution such as UNCITRAL should develop a model confidentiality clause for adoption by arbitration institutions or contracting parties that would grant the tribunal a residual discretion “to determine on an *ad hoc* basis whether or not there should be an exception to the principle of confidentiality and the exact scope of that exception tailored to the case in question”. In A Proposed MPO, my co-author Nicholas Thio and I, realising that institutions have their own priorities for arbitration reform, reclaimed the project to formulate and propose a model procedural order on confidentiality of our own, for the consideration of interested members of the international arbitration fraternity (“MPO”). The MPO has gained some acceptance in the arbitration universe, and Nathan D O’Malley in his book *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law, 2012) has kindly included this procedural order as an appendix under the title “Hwang

Model Procedural Order on Confidentiality”. I reproduce the MPO in full below, and will briefly explain its provisions in this postscript.

**Model procedural order**

(1) Except as the parties expressly agree in writing (whether in the arbitration agreement or otherwise) or leave is given by the Arbitral Tribunal, the parties undertake to keep confidential all Confidential Information. [Additionally, the provisions of this Procedural Order shall continue in force notwithstanding the termination of the arbitration.]

(2) In this Procedural Order, “Confidential Information” is defined as information that relates to the proceedings or to an award made in the proceedings and includes:

- (a) the existence of the proceedings;
- (b) the statement of claim, statement of defence, and all other pleadings, submissions, and statements;
- (c) any evidence (whether documentary or other) supplied to the Arbitral Tribunal;
- (d) any notes made by the Arbitral Tribunal of oral evidence or submissions given before the Arbitral Tribunal;
- (e) any transcript of oral evidence or submissions given before the Arbitral Tribunal;
- (f) any rulings of the Arbitral Tribunal; and
- (g) any award of the Arbitral Tribunal,

but excludes any matter that is otherwise in the public domain.

(3) Subject to (4) below, a party may disclose Confidential Information—

- (a) for the purpose of making an application to any competent court of any State to recognise, enforce or challenge the award;
- (b) pursuant to the order of, or a subpoena issued, by a court of competent jurisdiction;
- (c) for the purpose of pursuing or enforcing a legal right or defending a claim;
- (d) where disclosure is made to a third party for the purpose of satisfying any legal obligation of disclosure owed (under any applicable law) to that third party;
- (e) in compliance with the request or requirement of any competent regulatory body or other authority;

- (f) where disclosure is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present its case and the disclosure is no more than reasonable for that purpose (which may include disclosure to legal and other professional advisers as well as potential witnesses and other persons assisting in the preparation of the case);
  - (g) if a party wishes to disclose information or documents already in that party's possession prior to the commencement of the arbitration;
  - (h) with the consent of all the other parties to the arbitration; or
  - (i) pursuant to an order by the Arbitral Tribunal on application by a party with proper notice to the other parties.
- (4) Before a party discloses Confidential Information as authorised in (3) above, that party must provide to the other party/parties seven (7) days' prior written notice of its intention to disclose, giving:
- (a) written details of the Confidential Information to be disclosed;
  - (b) the party/parties to whom disclosure is intended to be made; and
  - (c) the reasons for the disclosure.

Provided that, where the disclosure of Confidential Information is sought to be made pursuant to (3)(f) above, the information to be furnished to the other party need only contain a general description of the Confidential Information sought to be disclosed and the classes of persons of persons to whom description is to be made (without identification of those persons). The disclosing party must use its best endeavours to obtain an undertaking of confidentiality, given in favour of the party opposing disclosure, from any individual or entity to whom disclosure of any Confidential Information may be made. The terms of such undertaking shall be agreed in advance of such disclosure by the party opposing disclosure (who shall not be entitled to the names of the parties to whom disclosure is to be made). If there is a dispute in relation to the terms of the undertaking, this shall be referred to the Arbitral Tribunal for determination. If no such undertaking of confidentiality can be obtained, seven (7) days' notice shall be given to all other parties identifying the individual or entity concerned. If any objection is raised by any other party within the period of notice, the matter

shall be referred to the Arbitral Tribunal to determine the extent of the Confidential Information that may be disclosed and any other steps that should be taken to preserve confidentiality.

Provided always that all the requirements of this clause (4) shall not apply in the following situations:

- (a) where disclosure of Confidential Information is made pursuant to 3(a) above; or
  - (b) where the party seeking to disclose Confidential Information obtains the written consent (both to the particulars and extent of Confidential Information which is sought to be disclosed) of all other parties to the arbitration to do so.
- (5) If the other party/parties object(s) to disclosure pursuant to (4) above within the period of seven (7) days, no disclosure may be made until the issue has been resolved by the Arbitral Tribunal in the manner set out in (6) below.
- (6) If a question arises in the arbitral proceedings as to whether any Confidential Information should be disclosed, and at least one of the parties requests for the Arbitral Tribunal to determine that question, the Arbitral Tribunal, after giving each of the parties an opportunity to be heard, may in its discretion make or refuse to make an order allowing all or any of the parties to disclose Confidential Information.
- (7) After the Arbitral Tribunal has become *functus officio*, its functions under this Procedural Order shall be exercised by the appropriate supervisory court at the seat of the arbitration.
- (8) These orders shall replace the provisions of Rule \*\* of [the applicable institutional rules].
- (9) The Arbitral Tribunal has the power to take appropriate measures including making an order to pay damages or costs if a party breaches any of the provisions of this Procedural Order.

The idea behind the MPO is that the tribunal will present the MPO to the parties and discuss it with them, ideally after the close of pleadings when the issues are known and the parties have had the chance to consider which aspects of the arbitration need to remain confidential. The tribunal will then make such modifications to the MPO as the case may require before issuing it as a procedural order in the arbitration proceedings to establish the applicable confidentiality regime.

Clause 1 of the MPO imposes a general duty on the parties to keep confidential all “Confidential Information” (a definition of which is provided by clause 2). Clause 3 sets out the exceptions to this general duty, the majority of which are adapted from established categories in English case law as well as key provisions in national legislation and arbitration institutional rules. In particular, clause 3(i) sets out the residual power of the arbitral tribunal to grant permission to disclose confidential information on an *ad hoc* basis after considering the respective positions of the parties on the issue. This addresses the issue that the categories of exceptions to the duty of confidentiality are never closed, and that provision should be made for an arbitral tribunal to consider each application on a case-by-case basis. The procedure for the invocation of clause 3(i) is set out in clause 6.

Clauses 4 and 5 provide for a “notification” safeguard, to the effect that the disclosing party would be required to give notice to (and allow the other party to) object before the matter is argued before the arbitral tribunal. Clause 4 specifically provides that this requirement does not extend to:

- (a) disclosure pursuant to clause 3(a) (since any party would be legally entitled to do so without giving notice) and
- (b) disclosure where the disclosing party has obtained the written consent of all other parties.

Where disclosure is sought to be made under clause 3(f), clause 4 provides that the party seeking to make disclosure would be required to use its best endeavours to obtain an undertaking of confidentiality from the individual or entity receiving the confidential information.

The adoption of clause 7 requires the consent of the parties, because it is essentially a forum selection clause that confers jurisdiction on the courts at the seat of the arbitration to adjudicate disputes related to confidentiality. If clause 7 is adopted, the courts at the seat of arbitration are likely to accept jurisdiction over any application brought before them, and the courts elsewhere are likely to decline jurisdiction over any application brought before them. If clause 7 is not adopted, and the seat of arbitration is in England or Singapore, the courts at the seat of arbitration would apply the law of confidentiality at common law (and

not the provisions in the MPO), because the common law obligation of confidentiality would continue to subsist even after the termination of the arbitration. But if the application is made to the courts elsewhere, there is no certainty that those courts would continue to recognise and uphold the obligation of confidentiality since the laws of that country may not even provide for confidentiality in arbitration in the first place. In such a case, to preserve confidentiality after the termination of the arbitration, the arbitral tribunal should enshrine the confidentiality order in its award, as that would enable it to be enforced pursuant to Article III of the New York Convention.

Clause 8 provides for the replacement of any arbitration institutional rules on confidentiality which would otherwise be applicable to the arbitration. The purpose of clause 8 is to guard against a dispute in the event that the orders contained within the MPO are inconsistent with the rules of the arbitral institution selected by the parties. In other words, it would be preferable to start with a clean slate since the MPO is intended to be comprehensive. Finally, clause 9 describes those powers of the arbitral tribunal which are already extant in law to sanction a breach of the provisions of the MPO.

## ***Essay II***

The second essay is titled “A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the Singapore High Court in *AAV v AAZ*” (2012) 28(2) *Arbitration International* 225. As the title suggests, it is an extended case note on the Singapore High Court decision of *AAV v AAZ* [2011] 1 SLR 1093, which is the only decision in Singapore to have considered the common law position of the implied obligation of confidentiality in arbitration in such detail.

The facts were as follows. The plaintiffs were employees of a wholly-owned subsidiary of the defendant. After the plaintiffs resigned from the subsidiary, the defendant sold its subsidiary’s third-party distributorship division to the plaintiffs under a sale and purchase agreement (“SPA”). The plaintiffs rejoined the subsidiary soon after the SPA was signed. This led the defendant to believe that the plaintiffs had conspired to depress

the subsidiary's net asset value. In 1998, the defendant commenced proceedings against the plaintiffs on grounds including fraudulent misrepresentation and conspiracy. During these proceedings, the parties agreed, by way of a consent order ("Consent Order"), to refer the dispute to arbitration seated in Singapore. This arbitration duly proceeded and the tribunal issued a partial award on liability ("Partial Award"), finding the plaintiffs liable for breach of fiduciary duty, fraudulent misrepresentation and conspiracy. The plaintiffs commenced an originating motion ("OM") to set aside the Partial Award on the ground of apparent bias demonstrated by the sole arbitrator, but were unsuccessful.

Sometime during the arbitration, the defendant also made a report to the Commercial Affairs Department of Singapore, an agency tasked with the investigation of commercial and financial crimes ("CAD"), disclosing documents relating to the arbitration to the CAD. The plaintiffs learned about this disclosure, and commenced proceedings against the defendant. The plaintiffs argued that the arbitration agreement contained a condition of confidentiality, which the defendant had breached in repudiation of the arbitration agreement when it made the disclosure.

The High Court (Chan Seng Onn J) found that there was no such express condition in the arbitration agreement, so the next step was for the High Court to examine if there was an implied condition of confidentiality.

The High Court acknowledged that there existed an implied obligation of confidentiality. In the course of identifying this obligation, the High Court made two general points about the implied obligation of confidentiality in arbitration, after surveying the English cases of *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243, *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 and *Emmott*.

- (i) **The juridical basis of the implied obligation of confidentiality.** The obligation of confidentiality was not an implied term based on custom or the officious bystander test. It was a general principle of arbitration law developed through the *common law*. This meant that the obligation of confidentiality in arbitration would apply to

arbitrations seated in Singapore in the absence of agreement between the parties on confidentiality.

- (ii) **The court's approach of identifying exceptions.** An examination by the courts of the exceptions to confidentiality "would probably still begin with a reference to the established categories, taking into account the context and circumstances of the case, including the nature of the document(s) sought to be disclosed, to whom disclosure is sought to be made, and for what purpose" (at [64]). This contextual approach was necessitated by the fact that "the scope and nature of its exceptions have not been exhaustively and precisely identified" (at [59]).

The High Court proceeded to apply the contextual approach to consider if the facts of the case fell within the exception of "public interest". The High Court took the view that the disclosure to the appropriate authorities where there is *reasonable suspicion* of criminal conduct is "an exception to the obligation of confidentiality which can be broadly categorised as falling within the public interest" (at [72]). Applying this test, the High Court found that the defendant had "ample legitimate grounds to make a complaint based on the arbitrator's finding in the partial award that the plaintiffs had committed ... dishonest and fraudulent acts" (at [81]). Accordingly, the disclosure to the CAD fell within the exception of "public interest" and the obligation of confidentiality did not apply to proscribe this disclosure. That the defendant had motives, improper or otherwise, was immaterial in the context of disclosure to the relevant public authorities.

The High Court noted in the alternative that the plaintiff and the defendant failed to apply under section 22 of the Singapore International Arbitration Act (Cap 143A, 1995 Rev Ed) ("IAA") for the proceedings to be heard *in camera* when the plaintiff commenced the OM to set aside the Partial Award. Thus, "what really happened when the plaintiffs chose to commence the OM and the defendant defended it with neither side making an application under section 22 of the IAA, was that the parties agreed that confidentiality would be lifted over the OM documents" (at [128]). As a result, the parties had "effectively agreed by their conduct ... that confidentiality would be waived in respect of the [documents disclosed in the OM]" (at [128]). Accordingly, the High

Court found as a further ground “that the parties agreed by their conduct not to insist on confidentiality in the arbitration from the time the OM was commenced, and that the plaintiffs did not then again assert their right to confidentiality until the commencement of the present suit”, a situation of mutual waiver which “would also fall within the category of exceptions to confidentiality based on consent” (at [137]). The High Court’s decision was appealed to the Court of Appeal, which dismissed the appeal without stating its reasons.

The analysis of the High Court illustrates the operation of its contextual approach to the exercise of identifying and applying the exceptions to the general duty of confidentiality. Rather than consider the exception of “public interest” in the abstract, the High Court paid great attention to the fact that *AAV v AAZ* involved a disclosure to the CAD (which was the relevant authority) as opposed to a disclosure to the public *at large*. Armed with this information of fact, the High Court held that improper motives on the part of the disclosing party was immaterial, and that the justification of disclosure to public authorities operated as an *exception* such that the burden of proof fell on the party claiming a breach of confidentiality to prove that the exception did not apply (justifications of disclosure to the public would have operated as a *defence* in the opinion of the High Court, so as to place the burden on the disclosing party to exonerate himself). Indeed, the High Court took pains to stress that the decision in *AAV v AAZ* ought not to be regarded as establishing a general public interest exception to confidentiality, observing that the “development of other aspects of public interest exceptions will have to be considered as appropriate cases arise” (at [72]).

### ***English developments post-Emmott***

The first case is *John Milsom v Mukhtar Ablyazov* [2011] EWHC 955 (Ch) (“*Milsom*”) and it was decided by the English High Court (Chancery Division) in April 2011. That case concerned an application by the court-appointed receivers of certain assets of the defendant for the production by the defendant of specified classes of documents produced in arbitration proceedings in which companies beneficially owned by the defendant participated. The defendant had been involved in heavy

litigation brought by JSC BTA Bank, headquartered in Kazakhstan, of which he was formerly the chairman. The bank alleged that the defendant had misapplied its funds, and successfully obtained a worldwide freezing order against the defendant. An order of receivership was obtained in support of that freezing order as the court found that the defendant had the intention to make it difficult for the bank to enforce the freezing order and might use the corporate structure by which his assets were held to breach the freezing order. The issue in this case was whether a temporary undertaking by the receivers not to disclose any of the documents sought to any third party without seven working days' notice to the defendant's solicitors (specifying the information or documents intended to be disclosed) ought to be discharged. The defendant argued that the notice regime ought to be made permanent on the grounds that, *inter alia*, his rights to confidentiality in the arbitration process would be undermined if such order was not made. Briggs J began by referring to Collins LJ's speech in *Emmott*, which discussed the limits of the obligation of confidentiality in arbitration, including its exceptions. Briggs J noted (*Milsom* at [30]) that "arbitration confidentiality or privacy is not absolute" and that its preservation was only the "starting point and may be overridden where either the public interest or ... the interests of justice require". Based on the factual situation before the court, his Lordship rejected (*Milsom* at [32]) the defendant's argument and held that the "interests of justice would be better served by the effective preservation by the receivers of [the defendant's] assets". It is apparent from the judgment that his Lordship did not consider the defendant's proposed notice regime to be an appropriate form of restriction to impose on the receivers in the particular circumstances of the case (*Milsom* at [37]):

The getting in and preservation of, or of the value of, complex commercial assets such as those that are the subject of this receivership demands on occasion speed, flexibility and the need in unpredictable circumstances to take steps requiring the use of disclosed information which would, to use Mr Miles QC's word, be hamstrung if attended by a prior requirement either to give [the defendant] notice or to apply to the court on every occasion where the need for that use should arise. The need to use the information may arise, for example, in the middle of a meeting or when the

Receivers are pursuing enquiries abroad. The proposed restriction is, quite simply, completely impracticable.

The second case is *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837 (Comm) and it was decided by the Queen's Bench Division (Commercial Court) in December 2012. A vessel owner loaned a vessel to a German company called GMB. In turn, GMB loaned the vessel to Westwood. Due to certain circumstances, Westwood loaned it back to GMB in a sub-charter. GMB later purported to terminate the sub-charter, and Westwood brought a claim against GMB for breach of the sub-charter. The dispute proceeded to arbitration and the arbitrators issued an award. Westwood applied for leave to rely on the documents in the arbitration to support a claim in the Commercial Court against certain third parties for unlawful means conspiracy to damage Westwood. Westwood relied on the basis that one of the exceptions in *Emmott* to the obligation of confidentiality applied. Flaux J held that the case fell within the exception of "reasonably necessary for the protection of the legitimate interests of an arbitrating party". Westwood had a legitimate interest in pursuing the claim in unlawful means conspiracy which was an arguable claim on the face of the pleading, and which could not be pursued properly without access to the materials from the arbitration. In the alternative, the case fell within the exception of "interests of justice required disclosure", not just because Westwood would otherwise be precluded from making an arguable claim, but also because "whilst the court is not currently concerned with the detail of those claims and their merits, in circumstances where there is, at least on the face of the material before the court, an arguable case of unlawful actions, unlawful conduct, having taken place, that the court should not allow confidentiality of arbitration materials in any sense to stifle the ability to bring to light wrongdoing of one kind or another" (at [14]). Hence the judge ordered the disclosure of materials from the arbitration.

The final case is *Sarah Lynette Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch) and it was decided by the English High Court (Chancery Division) in February 2015. The claimant was a partner at a law firm, S. A dispute arose between the claimant and S and the matter proceeded to arbitration. During the arbitral proceedings, S produced a list of

documents which contained personal emails from the claimant's work email account in S. The claimant found out that these emails were obtained by S's counsel in the arbitration without her permission, and brought an action in the courts against S's counsel for misuse of private information and breach of confidence.

The claimant's Particulars of Claim alleged that:

- (A) the accessing of the e-mails in the email account was unnecessary and disproportionate, and
- (B) the personal e-mails that were disclosed in the arbitration proceedings could have been obtained by other means.

To determine whether access was disproportionate and whether the emails could have been obtained by other means, it would have been necessary to enquire what had been disclosed and why. There was therefore a possibility that the personal emails would eventually be disclosed in the court proceedings. Given this possibility, the defendant applied for a stay of proceedings and argued that the court should not exercise its jurisdiction until the claimant obtained a ruling from the arbitrator (or the court) that the matters raised by the court proceedings would not amount to a breach of arbitral confidence.

In his judgment, Proudman J echoed the dicta of Collins LJ in *Emmott* that, as a rule of substantive law, arbitration proceedings were private and confidential to the parties. Accordingly, the claimant owed a general duty of confidentiality to S, and the defendant owed a similar duty to the claimant and S (although it was not a party to the arbitration agreement). At the same time, Proudman J noted that confidentiality was not absolute and there were circumstances in which a party could rely on confidential matters arising from the arbitration proceedings.

Proudman J then went on to hold that the claimant was not required to seek the permission of the arbitrator or the court before commencing proceedings against the defendant. A reading of Proudman J's judgment suggests that he had two reasons for his view. First, when Collins LJ was setting out the four exceptions to the duty of confidentiality in *Emmott*, he separated the "leave of the court" exception from the "protection of an arbitrating party's legitimate interests" exception. This

showed that it was envisaged that there could be circumstances in which the party seeking disclosure did not need to obtain advance permission from the *court*. Second, Thomas LJ decided in *Emmott* that issues of confidentiality were to be decided by the arbitral tribunal alone. However, Thomas LJ also was of the view this restriction would only apply if those issues arose between the parties to the arbitration agreement. This was not the case here, as the claimant was suing the defendant, who was not a party to the arbitration. Hence, there was also no question of whether the claimant needed to obtain permission from the *arbitrator*.

Proudman J noted in passing that the defendant was in a cleft stick. The defendant was allowed to defend itself, but the defendant could not know how far it was permitted to do so without breaching its duty of confidentiality. The defendant could not apply to the arbitrator for clarification, because it was not a party to the arbitration agreement. The arbitrator also could not possibly tell at this stage whether a defence formulated by the defendant would breach arbitral confidentiality, because the terms of the defendant's stay application were widely drawn. In view of this state of affairs, Proudman J suggested that the only proper way out for the parties was for the defendant to apply to the court for an order as to what it could or could not do, joining both parties in the arbitration to the application.

These cases show that the law of arbitral confidentiality will continue to develop with further clarification of the scope of the doctrine, especially in the area of exceptions.

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## Background to Essay 14

This is the current version of a talk I have given in different countries on different occasions over the last few years. It has grown out of my earlier essay on “Corruption in Law and Reality” which was published in my previous volume of essays, and which led to several invitations to speak at international conferences on this topic. This in turn led me to develop an aspect of the subject, namely the arbitral tribunal’s specific role in investigating corruption on its own initiative.

The first time I delivered this lecture was in London some time in 2014. After the end of my lecture, a questioner stood up and asked: “And when should the tribunal take the initiative in investigating corruption if the parties do not raise that question?” My spontaneous answer was: “Arbitrators are like watchdogs, not bloodhounds. Their job is not to go around sniffing for signs of corruption simply because they sense that there may be evidence of it in the case. But if there comes a point when the evidence starts to give off a stench which is impossible to ignore, then the arbitrators should start to press the parties to answer certain questions which demand answers, without which the tribunal may find itself assisting corruption or covering it up.” When the proceedings of the conference were reported by the Global Arbitration Review in its next issue, there was a cover picture which showed a pair of – you guessed it – bloodhounds!

In order to give some real-life examples of the dilemmas that arbitrators face when confronted with possible corruption, I had to narrate some war stories (with suitable anonymisation), since, owing to the confidential nature of arbitration, there were not likely to be reported examples, except from court reports of enforcement cases. But there is one startling example from the world of investment treaty arbitration in the case of *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, which narrates in great detail how a tribunal actively initiated an investigative inquiry into possible corruption by ordering certain documents to be produced and certain witnesses to give evidence, and ultimately concluding that there had indeed been corruption.

At a lecture in London in 2017, I (again) made a presentation on this topic to a very sophisticated and experienced audience of practitioners. I highlighted this case and was surprised to find that the majority of the audience did not approve of the tribunal's actions in this case. One senior QC expressed the view that it threatened the neutrality of the tribunal and was a first step on a slippery slope to the tribunal becoming a full inquisitorial body. Another senior lawyer noted that this was an investment treaty case and observed that different considerations might apply in such an environment, where issues of public policy had to be taken into account. However, in a normal commercial arbitration, he felt that the actions of this tribunal should not be repeated, notwithstanding the ultimate result. So the jury remains out on this controversial topic.

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## INVESTIGATION INTO CORRUPTION ON THE INITIATIVE OF THE TRIBUNAL\*

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Michael HWANG SC†

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1 Common law arbitrators (and I believe other arbitrators from common law countries) will not hesitate to deal with corruption issues *sua sponte* where the issue surfaces clearly. Applying the International

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\* Notes for a talk held at the 4th ICC MENA Conference on International Arbitration in Dubai (12 April 2016).

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Arbitration Act of Singapore, all Singapore seated tribunals have the same powers to award relief as the Singapore High Court, which would have no hesitation in raising corruption issues in a court case before it.

2 However, tribunals are not often assisted by the parties, who are generally nervous about raising the issue of corruption, unless they are Indonesian parties. From my experience, Indonesians seem to have no hesitation or fear of raising corruption as an issue in their arbitrations – perhaps because it is so endemic in their society that a great proportion of business deals will involve corruption at some level or other. There is also the factual reality that it is easier to allege corruption where the alleged participant in the corruption is actually in jail for another corruption offence. There are two reasons why allegations of corruption may be more freely made in Indonesia:

- (a) it is strong circumstantial evidence of a propensity to be corrupt;
- (b) it is much easier to make allegations against someone who is unable to be summoned to give evidence, since few international arbitrations are actually held in Indonesia. In the absence of these factors, parties from other jurisdictions tend to be more cautious.

3 Parties are also nervous of leading evidence which the tribunal may reasonably construe as signs or red flags of corruption because they simply want to avoid going into that space, given that in any corruption scenario where a bribe has actually been given, both parties will in most countries be guilty of corruption.

4 There is also the problem of professional ethical dilemmas. While we would all like to think the best of our fellow practitioners, the reality is that there are often various creative methods that can be employed to avoid suggestions of corruption. For example, I once sat on a tribunal where the dispute was about the sale of a company. The operative clause before us provided that out of a sale price of US\$50m, US\$10m would be held back by the purchaser pending the satisfaction of a condition – the condition being the result of what, we suspected, was a bribe. A lawyer who is keen to hide a commission for bribery could structure the deal to say that the purchase price for the shares was \$40m, but that, if, within a certain period, the condition were to be fulfilled, the price would be increased to \$50m. This type of clause is not uncommon

in M&A transactions as a solution to problems of pricing when the vendor insists on hidden value in the company, and the buyer is not prepared to pay for the hidden value unless and until that value is unlocked. Accordingly, on its face such a clause would not obviously reflect a corrupt transaction. Hence, by clever drafting, it may be possible to disguise corrupt payments.

5 So, it is often the tribunal's decision to raise the issue of corruption. When such an issue is raised, parties are usually unenthusiastic about seriously pleading and arguing corruption and leading evidence to demonstrate corruption. Partly this is because there is often no direct evidence to be led (other than "he said/but she said" oral evidence without corroboration either oral or written). And partly because the person who actually gave the bribe (whether spontaneously or under pressure from the bribe) or instructed his agent to pay bribes will not usually want to testify to his participation in this illegal transaction. It is only where there has been a change in management, and the new man in charge of the company can come forth and denounce the activities of his predecessor that there will be some aggressive pursuit of the corruption factor.

6 There are two views about *sua sponte* investigations:

- (a) Enquiring into corruption and ruling on its consequence may be *ultra petita* if such issues are not raised by the parties, and the award could be at risk of being set aside<sup>1</sup> or refused enforcement.<sup>2</sup>
- (b) But turning a blind eye to corruption may also result in annulment if it amounts to endorsing corruption, especially if the transaction breaches AML legislation, but also if the offending acts provide a legitimate basis for challenging the award pursuant to the public policy provisions in Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law.

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<sup>1</sup> United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("UNCITRAL Model Law") Art 34(2)(a)(iii).

<sup>2</sup> UNCITRAL Model Law Art 36(1)(a)(iii).

7 My view, expressed at GAR Live London in May 2014, tends towards the latter. Tribunals are watchdogs not bloodhounds – we don't go sniffing around but when a stench emerges which is too pungent to ignore we need to make appropriate inquiries. And when we do feel compelled to inquire further into plausible is of the corruption, we cannot play Sherlock Holmes and launch into as independent investigation of our own, but have to allow (even direct) parties to define the parameters of such an inquiry and then present the case for and against a specific finding of corruption.

8 The *ultra petita* objection should not be overstated. While an award may be challenged under Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the UNCITRAL Model Law on the basis that the tribunal has “deal[t] with a dispute not contemplated by or not falling within the terms of the submission to arbitration”, the courts have usually construed this clause narrowly. The trend that emerges from the case law is that the tribunal will not be regarded as having exceeded its authority so long as the matters determined or the evidence relied upon in its award are relevant to resolution of the dispute submitted to the tribunal. Some examples include the English High Court decision of *Minmetals Germany GmbH v Ferco Steel Ltd*<sup>3</sup> and the Singapore Court of Appeal decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) PBK*,<sup>4</sup> to name but a few. This position also finds support in the academic

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<sup>3</sup> [1999] 1 All ER 315, where the respondent resisted enforcement on the basis that the tribunal had exceeded its mandate by quantifying the claimant's loss according to findings made in separate arbitration proceedings, which neither claimant nor respondent had raised or submitted as evidence in their arbitration. Colman J dismissed this argument, reasoning that a tribunal acts within its mandate so long as it relies on evidence which is relevant to the resolution of the dispute submitted for determination by the parties, even if such evidence had not been raised by either party.

<sup>4</sup> [2011] 4 SLR 305, where the Singapore Court of Appeal observed that, in determining whether a tribunal exceeds its mandate in considering and deciding a particular matter, its relevance to the issues submitted by the parties to the tribunal for resolution is the key ingredient to be considered.

literature with respected commentators, such as Gary Born and Fouchard Gaillard Goldman, expressing similar views.<sup>5</sup>

9 Corrupt dealings by one or both parties can have a dispositive impact on the enforceability of claims submitted to the tribunal, typically going towards the validity of the contract. In such cases, it stands to reason that consideration of issues of corruption falls well within the tribunal's mandate, even if neither party raises corruption as part of its claim or defence and the tribunal conducts its own investigations into corruption *sua sponte*. In other words, the propriety of parties' conduct must necessarily be considered by the tribunal as *part and parcel of its mandate* to determine, pursuant to the governing law, the parties' claims, defences and counterclaims; which therefore renders the existence of corrupt dealings by the parties a relevant matter for the tribunal to investigate and determine of its own accord. As put by Richard Kreindler:<sup>6</sup>

[I]llegality contentions going to the nullity of the main contract ... even if initiated by the tribunal itself, should normally be deemed to 'fall within the terms of the submission to arbitration' ... [as] it has a core relevance to ... public policy ... [and] should be seen as necessarily falling within the terms of virtually any submission to arbitration ... [A] tribunal-initiated investigation of illegality is not tantamount to *ultra petita* [as] [t]he tribunal comes to a legal conclusion as to the validity of the main contract, the claims under that contract ... or the unmeritoriousness of the claims due to the

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<sup>5</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014); *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999).

<sup>6</sup> Richard Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" in *International Commercial Arbitration: Important Contemporary Questions* (Albert Jan van den Berg gen ed) (International Council for Commercial Arbitration Congress Series No 11, London, 2002) (Kluwer Law International, 2003) at pp 252–253; see also Richard Kreindler, "Public Policy and Corruption in International Arbitration: A Perspective for Russian Related Disputes" (2006) 72(3) *Arbitration* 236 at 245–246.

invalidity of the contract ... The Tribunal's decision following on such self-initiated investigation can 'fit' into the claims and ... defences already made.

10 The upshot of all this is that a tribunal-led investigation into illegality will only be *ultra petita* where the suspected or manifest illegality is *irrelevant* to the matters that were put before it. For example, under English law, bribery that goes towards the procurement of a contract (as opposed to bribery as the object of the contract) does not have the effect of rendering it void, as was made clear in the recent English Commercial Court decision of *National Iranian Oil Co v Crescent Petroleum Co International Ltd*.<sup>7</sup> Applying what I have just said, this particular form of corruption does not go to the validity of the contract and hence is irrelevant to the matters before the tribunal. The tribunal should therefore not pursue it.

11 Otherwise, so long as due process is observed, arbitrators are entitled (and may even be obliged) to inquire into corruption and compel the production of evidence or the submission of arguments if the parties refuse to be forthcoming and make the relevant ruling on the basis of such inquiry. In practice, I try and bring the matter to the surface by informing parties of the basis for my suspicions of corruption, so that the parties are forced to address it, but if both parties refuse to pursue the issue of corruption despite the tribunal's entreaties, it would take a bold tribunal which would then be prepared to pursue that issue unless the evidence of corruption is already on the record and the tribunal can pass judgment without further investigation.

12 However, one prominent example of a tribunal tackling the issue of corruption head-on is the International Centre for Settlement of Investment Disputes ("ICSID") case of *Metal Tech Ltd v Republic of Uzbekistan*<sup>8</sup> ("*Metal Tech v Uzbekistan (2013)*"). Neither party raised corruption but tribunal did so on its own initiative. Claimant had paid US\$4m for consulting services when total value of project was US\$20m. The tribunal ordered the parties to produce additional information and

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<sup>7</sup> [2016] EWHC 510.

<sup>8</sup> ICSID Case No ARB/10/3 (4 October 2013).

documents under Article 43 of the ICSID Convention. The ultimate finding was that these payments were corruption under Uzbek law and the claimant's BIT claim was dismissed since it only protected investments implemented in accordance with laws and regulations of host state. But the tribunal also acknowledged that the Uzbek authorities' conduct in accepting or soliciting bribes was also to blame. Therefore, each party was ordered to pay its own costs.

13 Amidst the call to vigilance, a note of caution is in order, and for that I return to the analogy of the watchdog and the bloodhound. A tribunal should remain *en garde* to the possibility of corruption without taking upon itself the role of ferreting it out. A *laissez-faire* attitude that closes its eyes to all evidence of corruption is as undesirable as an over-zealous approach to detecting corruption, which will bog down arbitral proceedings with unnecessary demands for information and explanation, at the expense of parties who are likely to be innocent of wrongdoing. A proportionate approach is required, and that is precisely where the flexibility of arbitration comes to the fore.

## **I. An indirect approach?**

14 I have mentioned the *Metal Tech v Uzbekistan (2013)* arbitration as an example where a tribunal chose to tackle the issue of corruption head on. In practice, common law arbitrators (and I suspect those from other jurisdictions as well) may prefer to try and find other ways of dealing with the corruption factor (if they are reasonably available) because of concerns about the necessary standard of proof to make a finding of corruption (particularly where there is lack of written or oral non-hearsay evidence). This is not necessarily a bad thing, and I will demonstrate examples of this through the use of two case studies.

### **A. Case Study No 1**

15 I was sitting as sole arbitrator in an *ad hoc* arbitration in Singapore. The dispute was between a major engineering company from a common law country and its local agent in a country in South Asia where the company was bidding for project work. The claim was not

particularly interesting, involving a claim by the agent company for unpaid commission and damages for wrongful termination of its contract of engagement on vague grounds. The agent company was clearly a shell, and effectively the alter ego of its controller, Mr X. When Mr X came into the witness box, I reviewed his company's contract and said to him:

Mr X, I notice that your terms of remuneration are 2.5% of the value of any contract that might be secured by your principal (*i.e.*, the Respondent). However, your company's duties under the contract seem to be confined to research activities and general advisory services, the extent of which are not specified, and you are not involved in procurement or negotiation of contracts, so there seems no link between what your company does and how it is remunerated. So it seems that your company is very well paid for doing not very much.

16 Mr X immediately took umbrage at this, and responded (and I can remember clearly his first six words, the rest I paraphrase. His first six words were:

I move the corridors of power. [I think he meant that he moved IN the corridors of power.]

I personally know the Prime Minister and half his Cabinet, as well as all the decision makers in the awarding of major project engineering jobs in this country. And in reality I do a lot of negotiations on behalf of my principal to try and secure contracts for it, and because I know all the people who matter, I am usually successful in this task.

17 I then turned to counsel for the respondent and gently suggested that, in the light of this evidence he might consider amending his Defence. There was some embarrassed coughing from his side of the table, but he promised to consider the matter overnight.

18 The next morning, respondent's counsel proceeded to apply for leave to amend his Defence to plead that the contract was unenforceable as it violated public policy, which I granted. He then asked to continue his cross examination of Mr X from the previous day. However, when counsel started to suggest that Mr X had used under-the-table tactics to secure contracts for the respondent, Mr X (who had probably realised overnight that he had been over-zealous in explaining what he really did

for his principal) then proceeded to explain that he had never paid a bribe to secure a contract. Indeed, he had been fighting on the side of right and justice, because in the last big project tender exercise, his principal had actually submitted the lowest tender but its bid had been disqualified, so he had to do a lot of work to get his principal back in the race. The fact was that the officer in charge of the tender had been bribed by the second highest tenderer, and Mr X had to use all of his contacts and influence to put the tender exercise back on the straight and narrow track in order that the rightful tenderer (his principal, the respondent) won the tender. The work he had done included:

- (a) getting the competing tenderer disqualified;
- (b) countering media propaganda which had led to his principal's disqualification in the first place;
- (c) neutralising (his word) investigations by a government agency into his principal as a result of the propaganda generated by the competing tenderer; and
- (d) warding off under-the-table demands from the person in charge of awarding the tender.

19 No other evidence was led by the respondent on its amended defence, and no witness came on its behalf to say in terms that Mr X's company had been engaged on the specific basis that he was to use bribes or any other illegal means to secure contracts for the respondent.

20 At the end of the day, there was no factual basis for me to make a finding of corruption, and I awarded the claimant its claim for unpaid commission and damages for wrongful termination. However, I was able to reduce its claim for damages for wrongful termination of the agency contract, which was based on the agent's estimate of the future contracts which would be secured by its principal, thus entitling the agent to its commission. I reasoned in the award that, because the percentage of commission had to be renegotiated in the second half of the contract period, I found that the disagreements between the parties which had already surfaced and led to the wrongful termination meant that, had the contract carried on, it was likely that the parties would not have agreed on the rate of commission and that issue would have to be resolved by arbitration. I further reasoned that, based on the literal

wording of the duties of the agent, the arbitrator (who was probably not going to be me) would not think it appropriate to fix the remuneration at the same level because of the relative lack of legal obligations imposed on the agent, and therefore reduced the claim for loss of future income by a considerable margin. Finally, I also reasoned that the claimant company was a shell, and only had access to the services of the Mr X to the extent that he was willing to do so (as there was no evidence of any contract of employment between him and the claimant). Hence, the claim for damages was also contingent on his continued willingness to act on behalf of the claimant in its dealings with the respondent. Accordingly, the claim had to be further reduced to allow for the possibility of loss of the services of Mr X to the claimant.

21 There was an unexpected sequel to this case. When the respondent failed or refused to pay the award sum, the claimant took my award to the respondent's home country (which I remind you is a common law country) and tried to enforce it in its courts. The respondent in turn pleaded corruption and applied for leave from the court to seek discovery of further documents from the claimant to prove the fact of corruption. Surprisingly, in an oral *ex tempore* judgment, the judge made an order allowing discovery, and suspended the enforcement proceedings. However, the claimant discovered that the respondent had assets in Singapore and proceeded to register its award in Singapore and levy execution on those assets, and so by passed the roadblock in the respondent's home country.

### **B. Case Study No 2**

22 I was a member of a 3-member International Commercial Court ("ICC") tribunal sitting in Singapore arbitrating a dispute between a North African party and a South Asian party. The seat was Singapore and the governing law was English law. In 2004, the North African party had acquired all the shares in Company X carrying on business in a South Asian country from its owner (also a South Asian company) under a Shares Sales and Purchase Agreement ("SSPA"). The nature of its business was selling mobile phones and providing telco services to support the phones. The market for mobile phones in the South Asian

country was underdeveloped, and purchaser badly wanted Company X's current allocation of bandwidth from the telco authorities to be increased as this would enable more mobile phones to be sold by Company X.

23 The SSPA provided that, out of the sale price of US\$50m, US\$10m would be held back by the purchaser pending the satisfaction of the following condition:

[A]llocation and assignment by the then current [telco regulator] in the name of Company X of 10mHz in the 1800mHz bandwidth necessary to rollout Company X's network based on the attached Company's network based on the attached business projections prepared by the purchaser.

(The factual background was the Company X had, at the time of completion only 5Hz in the 900mHz bandwidth, and it was essential for the purchaser's ambitions to increase its subscriber base to 250,000 which could only be done with greater spectrum in bandwidth.)

24 Completion took place in 2004, and in 2005, Company X (by now fully owned and operated by the purchaser) was allocated 7.5mHz of frequency in the 1800mHz bandwidth by the telco regulator. Up to 2008, the telco regulator had allocated bandwidth to mobile phone operators without levying any significant charges. From 2008, the telco regulator informed all mobile phone operators that allocation of frequencies in the 1800mHz bandwidth would be subject to the regulator's new payment methodology. At the end of 2008, pursuant to this new payment methodology, the regulator assigned Company X an additional 2.6mHz in the 1800mHz bandwidth (which brought its frequency to just over 10mHz) but Company X had to pay over US\$30m for this allocation. So the purchaser eventually did (through Company X) get his 10mHz of additional spectrum, but it cost him US\$30m.

25 The issue before the tribunal was whether the vendor of the shares was entitled to the retention sum of US\$10m as, on its interpretation of the relevant clause, the condition precedent for release of the retention sum had been fulfilled, since the additional 10mHz bandwidth had been obtained by Company X (despite the purchaser having in effect paid for

the fee charged of over US\$30m). The purchaser's defence was as follows:

- (a) There was an implied term requiring the vendor to procure within a reasonable time (which the purchaser defined as 6 to 12 months from the completion date in 2004) the allocation of the 10MHz frequency.
- (b) Because this was not done by 2005 the vendor was in breach of this implied term, causing the purchaser substantial loss, including the payment of over US\$30m for the additional spectrum of 10 MHz.

26 The vendor's response to this defence was:

- (a) There was no implied term as alleged since all the traditional elements of an implied term were not fulfilled.
- (b) Further, no such term could be implied because both parties knew that the allocation of frequency and the determination of fees payable for such allocation under national laws could only be determined by the telco regulator.
- (c) In any event, the implied term would contravene the laws and public policies of both England and the South Asian country.

27 These were the final positions taken by the parties. However, the issue whether or not the alleged implied term was illegal and/or against public policy only emerged halfway through the case. Up to that point, the implied term argument had proceeded on traditional lines, mainly based on an analysis of the principles laid down in *A-G of Belize v Belize Telecom*.<sup>9</sup> However, the tribunal then raised the question whether such an implied term might violate public policy and even be illegal, because such an implied term seem to be based on the assumption that the vendor (or to be precise its chairman), who still had close connections to key personnel in the telco regulator, would be able to secure the additional spectrum of 10MHz bandwidth by his efforts. The tribunal asked counsel for the purchaser to consider whether or not the inference could be drawn that the vendor's chairman was expected to

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<sup>9</sup> [2009] 1 WLR 1988.

use his personal relationship with members of the telco regulator to influence them to grant Company X the additional bandwidth. The tribunal also asked for the telco law of the South Asian country to be reviewed to see what were the relevant provisions governing the allocation of bandwidth.

28 Again there was some nervous coughing from both sides, but the next day counsel for the vendor applied for leave to amend its defence to the counterclaim to plead illegality and/or breach of public policy. He had traced the telco legislation, which provided that the decision to allocate bandwidth had to be taken after a formal application process had been undertaken by the regulator, which was required to allocate additional spectrum only on the basis of the merits of the application. Accordingly, he submitted that the implied term was illegal as what the purchaser was in effect saying was that it was expecting the vendor (through its chairman) to persuade the relevant officers of the regulator to act otherwise than in accordance with their statutory duty, citing the well-known decision of Phillips J in *Lemenda Trading v African Middle East Petroleum*.<sup>10</sup> Hence the issues of public policy and illegality came squarely before the tribunal.

29 The tribunal's decision was this. It did not make a direct finding on the issues of public policy and illegality. Instead, it analysed the overall factual matrix and concluded that the totality of that factual matrix showed that there could be no implication that the vendor would procure the allocation of the additional spectrum of 10MHz. Applying the officious bystander test, the officious bystander would not automatically say that the vendor had undertaken the burden of guaranteeing that it could obtain approval from the telco regulator, since that approval could only be granted on the basis of objective criteria and in accordance with law.

30 So what the tribunal effectively did was to apply the public policy/illegality factor to deny a defence which, if allowed, may have

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<sup>10</sup> [1988] 1 QB 448.

meant the enforcement of a corrupt transaction, but it chose to do so indirectly instead of facing the issue head on.

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### Background to Essay 15

This is a question that is among the hot topics constantly discussed at international conferences. I take a relatively sanguine view of the present situation and, when invited to contribute to a special issue of a legal journal on the subject of costs in international arbitration, I took the opportunity to pen a short essay on the subject. Ironically, proponents of measures to curb the so-called higher costs in international arbitration are now looking to adopt or mimic measures used by national courts to control costs, such as costs caps or costs budgets, when they have not been convincingly demonstrated to have reduced court costs significantly.

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## HOW MAY THE QUANTUM OF LEGAL COSTS CLAIMED BY A WINNING PARTY BE CONTROLLED?

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Michael HWANG SC

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1 It is fashionable in the current climate to debate issues that centre on the question: how do we control the spiralling time and cost that now

engulf international arbitration? In my view, this question is wrongly put. First, costs are basically a function of time – the more time a lawyer takes the more he charges. So, to the extent that the question has any validity, the focus should really be on the (arguably) excessive time that international arbitration now typically takes. If this problem is solved, then logically the costs problem will also be solved. Second, we need to go back one step, and realise that the time taken in pursuing or defending an international arbitration is almost always linked to the monetary amounts at stake. The greater the stakes, the harder the lawyers will fight to leave no stone unturned, and the respondent is therefore likely to be raising as many arguable issues that it possibly can to deny liability, with a consequential expenditure of energy and effort from the claimant to rebut those issues. Third, the greater the number of issues, the greater the time taken to canvass those issues and therefore the greater the amount of costs incurred to see the arbitration through to its end.

2 Many analyses of the question put in the first sentence of this paper are therefore misguided when the root cause of excessive time and cost is value, which leads to complexity of issues, which in turn leads to excessive of time, which in turn results in excessive costs.

3 But the real thrust of this paper is to argue as follows:

- (a) We must first define what costs are the problem – the costs payable as between the winning party and its own lawyer (what common law litigators call “Solicitor and Own Client costs”)? Or (perhaps more relevant) the costs claimable by the winning party against the losing party (“Recoverable Costs”).
- (b) If Recoverable Costs are the real concern, then those interested in the future of international arbitration should focus their attention on how to control those costs to the extent that they now seem unreasonable.
- (c) Recoverable Costs could be controlled by tribunals exercising a greater degree of investigation and evaluation of Recoverable Costs claimed by the winning party and/or imposing limits of the amount of Recoverable Costs by criteria other than the actual time and effort taken by the winning party’s lawyers.

- (d) Alternatively, institutions could fix a scale for Recoverable Costs based on the total value of the claims and counterclaims.

### **I. Investigation, evaluation and limiting of Recoverable Costs by a tribunal**

4 Tribunals in general do not spend much time in analysing and challenging estimates of Recoverable Costs and expenses claimed by the parties. This is for the reasons set out below:

- (a) Relatively few arbitrators were litigation lawyers before becoming arbitrators, and therefore have little (if any) idea of how a bill is taxed (or assessed) in a national court or what are the market rates allowed by national courts for Recoverable Costs. Accordingly, they have little appetite for a detailed review of a law firm's bill of costs.
- (b) Even lawyers from a litigation background may not be sufficiently familiar with court processes for review of lawyers' bills, especially those of lawyers from different countries to their own. Most senior litigation lawyers would rely on a critical review of another law firm's bill by assigning that task to a senior associate who in turn will rely on the wisdom of an experienced billing clerk in their own firm. Such lawyers often only commence their career as an arbitrator when they have left their old firm, and start their own boutique practices. Such practices are unlikely to have the inclination or budget to engage a full-time employee simply to review other law firms' bills of costs.

5 It is widely acknowledged that, whatever the defects may be in the present state of arbitral willingness to undertake more detailed investigation of the winning party's claims for legal costs, it is not the function of a tribunal to undertake an exercise mimicking taxation or assessment by a national court. On the other hand, where a tribunal deals with claims for Recoverable Costs running into the millions of dollars by a cursory discussion of the costs claims with virtually no analysis of the reasonableness of those claims, the losing party is going to be deeply dissatisfied with the process where the amount of Recoverable Costs claimed would justify a second arbitration just to

decide the reasonableness of such costs. There is therefore a legitimacy issue here – users of arbitration (including lawyers for the parties concerned) will lose confidence in the arbitral process if they decide ultimately that arbitration has been substituted by arbitrariness.

6 What then should be a tribunal's duty? The first practical aid it can summon to make its task easier should be to call for detailed costs submissions from both parties before its decision on liability is published. So, a tribunal should normally call for such submissions after the close of the evidentiary hearing from both sides at a time when neither party knows who has won on liability. Under such circumstances, the amounts submitted are likely to be more "honest" than if the winning party were asked to submit its claim on costs after the decision on liability has been announced in its favour. The next step is for the tribunal to compare the two sets of costs submissions. By way of example, assuming that the ultimate winning party claims Recoverable Costs of \$1.5m and the ultimate losing party claims Recoverable Costs of \$1m, all things being equal (that is, there are no factors which would add or subtract from the normal principle of costs following the event), the tribunal would be likely to conclude that the winner's reasonable claim for Recoverable Costs should be at least \$1m (since that is the amount claimed by the loser). The only issue then is for the tribunal to decide whether the winner should be entitled to the extra \$500,000 difference. This difference could be justified by the extra work the winning party may have had to undertake in order to win the case on liability, or the tribunal may decide that the difference of \$500,000 cannot be fully justified. In the latter case, it would award a sum of between \$1m to \$1.5m rather than the full sum claimed.

7 However, the above process may not always be possible or fair. An alternative method if the costs submissions are only called for after the decision on liability is for the tribunal to work diligently at trying to understand how the dynamics of preparation for the case worked for the legal team for the winning party, so as to understand whether the amount claimed is reasonable.

8 Towards this end, the tribunal must first start with the basics:

- (a) What was the value of the claim?
- (b) What level of difficulty and complexity did this case present as a whole?
- (c) Was the law firm chosen to run the case a reasonable choice having regard to its value and complexity, or should the party have chosen a firm with lower chargeout rates?
- (d) What hours were spent on doing what and by which lawyer?
- (e) What were the reasonable market chargeout rates of the lawyers concerned? (It would help to ask for chargeout rates of comparable law firms.)
- (f) What was the volume of documents generated for the Hearing Bundle?
- (g) How much legal research was reasonably required for the case?
- (h) How many witness statements were filed by both parties, and how many and how long were the written submissions? Was there “over-lawyering” in this case?
- (i) Were there interlocutory applications? If so, how complex were they, and who won them?

9 To the basics must be added the tribunal’s assessment of the overall difficulty of the case as a whole compared to other cases within the personal experience of the tribunal to arrive at a moderating factor in relation to the raw data<sup>1</sup> above.

10 The tribunal should then determine, in the light of the factors analysed above, whether the total number of hours spent by all the lawyers were approximately right, especially in terms of the distribution of the workload, so that lawyers with lower chargeout rates would be working on tasks that required investment of manpower rather than brainpower – that is, assigning first or second year lawyers to tedious and time-demanding but relatively simple activities such as document production, rather than partners or senior associates.

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<sup>1</sup> See para 8 above.

11 Once the reasonable number of hours for this case has been determined by the tribunal, it may then calculate the number of reasonable hours logged by the chargeout rate determined by the tribunal to be appropriate for the job in hand. Following this, the tribunal could then multiply the reasonable hours charged by each lawyer concerned on the various tasks that the team would have had to undertake by the reasonable chargeout rates of each such lawyer.

12 This may not be a perfect method, but at least there is some rigour in the methodology, as winning parties' claims are not accepted or rejected wholesale, but the tribunal may, after determining:

- (a) the value and complexity of the claims; and
- (b) the manner in which the case was actually run,

come to an overall decision on the appropriate quantum of costs awardable.

13 Also included in this exercise would be the expenses claimed by the winning party. Again, some rigour needs to be injected into the review process, giving the losing party full opportunity to demand inspection of relevant documentation in support of such expenses, and determining whether all the expenses claimed were actually expended or referable to the case at hand; and if so, whether such expenses were of a reasonable nature (for example, charging alcoholic beverages as part of the cost of meals incurred by lawyers and experts in the course of work).

14 A refinement of the proposals above would be to introduce some system of costs capping by the tribunal in consultation with the parties. This could broadly follow the example of English courts, which have introduced a process of "costs management" (sometimes called "costs budgeting") where a case has a Case Management Conference held at an early stage of the proceedings. The parties have to submit an estimate of their Recoverable Costs on the "standard" basis – meaning that the figure for Recoverable Costs already gives allowance for the difference between the full amount of costs the law firm expects to bill its client (now known as the "Indemnity" basis) and the (lower) Recoverable Costs which are being claimed from the losing party. The court will then, on the basis of the information available, moderate those estimates and

set a cap which would be the default cap; unless one party is able to persuade the court at a later stage that justifiable unanticipated work had reasonably been done, thereby warranting a raising of the cap. If a party believes that justifiable costs are being incurred over the cap by a certain percentage, it should give notice of this ahead of the time when significant increases are incurred, so as to put the other side on notice to enable it to consider whether it needs to recalibrate its own legal expenditure accordingly. However, this process is relatively new in the English courts, and will likely produce many arguments in arbitration, as counsel and tribunals (especially those with no experience of the English courts' practice) attempt to create realistic estimates of costs in advance.<sup>2</sup> The English courts have already indicated that their attitude is that the costs budget is to ensure not only that costs are reasonable but also proportionate to what is at stake in the proceedings. That approach may well be taken on board by tribunals.

15 A variant of the methods described above is for tribunals to make an order at an early stage of the arbitration that there will be an absolute limitation on Recoverable Costs. This is different from costs estimate or budgets, which are only indicative of the tribunal's ultimate order on Recoverable Costs at the end of the day; while an order of limitation of Recoverable Costs will operate as such with immediate effect unless subsequently varied. However, such orders or variations thereof should only be made after adequate notice has been given to the parties so that they can reconsider their legal plan of work and expenditure accordingly for the future. Tribunals are unlikely to adopt this regime of limitation on Recoverable Costs unless there is specific statutory authority under the law of the seat for a tribunal to impose such a limit. Such statutory authority already exists in Australia, England and Hong Kong, and some track record may well emerge from these jurisdictions in due course.

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<sup>2</sup> The fact that there are so many complaints about legal costs is probably indicative of how often law firms are unable to match their final bills with their estimates.

## **II. Institutional fixing of scale fees for party and party costs**

16 What other proposals can be made to increase the tribunal's role in controlling costs? There will inevitably be inconsistencies between the costs findings of different tribunals, especially as there is little awareness of the amount of costs awarded by other tribunals in comparable cases. The confidentiality of awards precludes the dissemination of information about costs awards although a really diligent tribunal might try trawling through the International Chamber of Commerce ("ICC") Dispute Resolution Library for redacted awards rendered by ICC tribunals but will possibly be disappointed by the lack of discussion of costs principles in those awards (and in most redacted cases the actual amounts awarded are omitted). Colin Ong and Michael O'Reilly have done a great service in their book *Costs in International Arbitration*<sup>3</sup> by publishing a schedule of costs awards in treaty arbitration cases in the Appendix to their book, which give some guidance to tribunal practices in such cases. However, there is no equivalent to what is available to litigation lawyers in the High Court of Singapore when they go for review of their costs claims by the Registrar of the Court. Singapore lawyers will have access to a representative list of previous awards by the Registrar on costs claims in a schedule, which collates, not only the costs awarded, but also selected information concerning the cases such as number of hearing days, number of witnesses, number of issues of fact and law, nature of issues (indicating complexity) – all of which information enhance their precedential value and ensure some consistency in costs awards.

17 It is therefore necessary to look for new methods of controlling costs which will be transparent and fair.

18 I therefore propose that transparency and fairness is best achieved by introducing a fixed scale of Recoverable Costs which will be the default amount awarded subject to final review by the tribunal. One possible regime would be as follows:

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<sup>3</sup> Colin Ong & Michael Patrick O'Reilly, *Costs in International Arbitration* (LexisNexis, 2013).

- (a) All arbitration institutions which already have a fixed scale for arbitrators' fees should be able to formulate another scale for reasonable Recoverable Costs according to the value of the claims. If the institution is capable of creating a scale of reasonable arbitrators' fees according to the value of the claims, it can likewise create a scale of reasonable fees for counsel which is intended to be passed onto the losing party (that is, Recoverable Costs).
- (b) The scale will be subject to adjustment, either at the end of the hearing in the Final Award (if the assessment is to be made by the tribunal), or after the publication of the Final Award (if the assessment is to be made by the institution).
- (c) The scale fixed by the institution would therefore be a benchmark fee which would be capable of adjustment upwards or downwards. The fee would be adjusted downwards if a case is settled before the hearing with some attention to the saving in percentage terms of the work done to the date of settlement *versus* the estimated work which would have been done had the case been pursued to the stage of the Final Award. The benchmark could be adjusted upwards if exceptional difficulties arose so as to involve unforeseeable additional time and effort in running the case to its ultimate conclusion.
- (d) I have no concluded view of whether the tribunal or institution would be a better body to make adjustments to the benchmark. However, while tribunals might have a closer feel of the intensity of the work done and the complexity of the issues, they may also lack the experience of assessing counsel's costs in a contested environment, particularly at the international level. Accordingly, it might be thought that using an institution to adjust the benchmark would ultimately achieve greater legitimacy because the institution would be better able to achieve consistency between costs awards in different cases.
- (e) There is already a version of the regime proposed above in practice in Singapore. Section 21 of the International Arbitration Act provides:<sup>4</sup>

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<sup>4</sup> Cap 143A, 2002 Rev Ed.

### **Taxation of costs**

**21.**—(1) Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable by the Registrar of the Singapore International Arbitration Centre (referred to in this section as the Registrar).

(2) Unless the fees of the arbitral tribunal have been fixed by a written agreement or such agreement has provided for determination of the fees by a person or an institution agreed to by the parties, any party to the arbitration may require that such fees be taxed by the Registrar.

(3) A certificate signed by the Registrar on the amount of costs or fees taxed shall form part of the award of the arbitral tribunal.

(4) The Chief Justice may, if he thinks fit, by notification published in the *Gazette*, appoint any other person to exercise the powers of the Registrar under this section.

- (f) Accordingly, what happens in Singapore-seated arbitrations is that, unless parties agree to let the tribunal (or any other person or institution) decide the recoverable legal costs of the parties, the winning party will have to prepare a Bill of Costs (with no specific prescribed form or particulars). Such bill will be referred to the Registrar of the Singapore International Arbitration Centre (who is a different person from the Registrar of the High Court referred to above) for taxation. What this means is that an external review and assessment of the reasonableness of the costs claimed in that Bill of Costs will be conducted. However, this procedure starts with no assumed figure for a reasonable amount of Recoverable Costs because there will have not been any costs budget fixed by the tribunal during the course of the arbitration. The result is somewhat similar to Bills of Costs which are presented by litigation counsel to the High Court of Singapore for taxation based on what counsel can persuade the Registrar (taxing master) to approve as reasonable costs in the context of the case as a whole.
- (g) While this may not be a perfect solution to the present complaints about the present situation, I believe that it is certainly a better

solution than what is currently available. It is time to begin discussion and debate about the processes which can tackle the issue of Recoverable Costs with a view to achieving the twin goals of transparency and fairness.

### **III. What about the costs of the winning party which are over the amount of Recoverable Costs payable by the losing party?**

19 As indicated above, my view is that the international arbitration community should only be concerned about moderating and reducing the amount of Recoverable Costs, especially when they become disproportionate to what is at stake in any particular arbitration. But there will always be parties who take the view that they absolutely need to win the arbitration at any cost. In those cases, the question of proportionality does not govern the legal strategy of that party, and its instructions to its lawyers will be “Damn the costs (which we will get back at least in substantial part from the other party) – just win the case”. This policy will result in a “take-every-point” and “leave-no-stone unturned” approach by the lawyers.

20 In my view, this is not an approach that needs alleviation by the international arbitration community. It is not our concern to interfere with the legal marketplace by prescribing or even exhorting lawyers what fees to charge their own clients. If there is any suggestion of overcharging, that is a matter for the client to negotiate with its lawyers; or if unpleasantly surprised by its legal bills after the end of the case, to raise the subject of overcharging with the bar association or other body having jurisdiction over the professional conduct of the law firm. Our concern is only to protect losing parties from having to pay Recoverable Costs which might exceed objective standards of what would be reasonable and proportionate. And that is where my thoughts on this subject end.

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## Background to Essay 16

This essay arose when I was asked to write a piece for inclusion in the *Liber Amicorum* for Michael Pryles, the former president of the Singapore International Arbitration Centre (“SIAC”) Court of Arbitration. As SIAC had been the publisher of my first book of essays, and Michael had spoken at my launch of the essays (albeit by video), I could not deny the request to show my appreciation for a close friend of long standing. I chose a topic that was deliberately provocative, to try to demonstrate that the concept of admissibility is of relatively little importance as a legal concept in international commercial arbitration, and is only of importance in investment treaty arbitration in distinguishing jurisdictional objections from other non-jurisdictional objections.

This essay was originally published as a chapter in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Neil Kaplan & Michael Moser eds) (Kluwer Law International, 2018).

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## THE CHIMERA OF ADMISSIBILITY IN INTERNATIONAL ARBITRATION – AND WHY WE NEED TO STOP CHASING IT

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## I. Introduction

1 Admissibility is a chameleonic term with different usages in different contexts.<sup>1</sup> In the Rules of Arbitration of the International Chamber of Commerce, “admissibility” refers to the admissibility of a *challenge* of an arbitrator on the ground of lack of impartiality or independence.<sup>2</sup> In common law countries, “admissibility” denotes the admissibility of *evidence* in court.<sup>3</sup> Over the last few decades, a new usage of admissibility has emerged in investment treaty arbitration, whereby admissibility is used to refer to the admissibility of a *claim* before an arbitral tribunal. This usage has become one of the most energetically debated issues in international arbitration today.

2 The growing understanding in investment treaty arbitration is that an arbitral tribunal may dismiss or stay the arbitral proceedings if a party objects to the admissibility of the claim and the tribunal is satisfied that the claim is inadmissible.<sup>4</sup> But before the tribunal determines

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<sup>1</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 28.

<sup>2</sup> International Chamber of Commerce Rules of Arbitration 2017 (“ICC Arbitration Rules 2017”), Art 14.

<sup>3</sup> Some common law countries have also codified the rules of admissibility of evidence. For example, see the Singapore Evidence Act (Cap 97, 1997 Rev Ed).

<sup>4</sup> See generally L Gouiffès & M Ordonez, “Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?” (2015) 31(1) *Arbitration* (continued on next page)

admissibility, it must first be satisfied that the objecting party has made an objection to admissibility as opposed to jurisdiction. In this regard, the conventional wisdom is that there is a distinction between these two concepts. Jurisdiction refers to the power of the tribunal to hear the claim, while admissibility refers to whether it is appropriate for the tribunal to hear the claim, notwithstanding that the tribunal has jurisdiction.<sup>5</sup> To determine if an objection relates to jurisdiction or to admissibility, the critical test is whether the objection is attacking the tribunal or the claim (“‘tribunal *versus* claim’ test”).<sup>6</sup> If it is attacking the *tribunal*, it is an objection to jurisdiction, and the tribunal must proceed to consider if the tribunal has jurisdiction on the facts of the case. If it is attacking the claim, it is an objection to admissibility, and the tribunal must go on to determine if the claim is admissible on the facts.

3 Proponents of the concept of admissibility of claims admit that a finding of lack of jurisdiction and a finding of inadmissibility lead to the same result, which is that the tribunal withholds itself from examining the merits of the claim.<sup>7</sup> They acknowledge that classifying objections

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*International* 107 and Andrew Newcombe, “The Question of Admissibility of Claims in Investment Treaty Arbitration” *Kluwer Arbitration Blog*, (3 February 2010).

<sup>5</sup> *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Hightet [2000] at para 58.

<sup>6</sup> J Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at p 616.

<sup>7</sup> F Santacroce, “Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterisation of Preliminary Issues in International Arbitration” (2017) 33(1) *Arbitration International* 1 at 2. A lack of jurisdiction prevents the tribunal from deciding all issues, including admissibility: see D Williams, “Jurisdiction and Admissibility” in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at p 919; C Santulli, *Droit du contentieux international* (Montchrestien, 2005) at para 255 and F Santacroce, “Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should

*(continued on next page)*

under jurisdiction or admissibility would appear pointless if the facts lead to the same outcome either way. However, they argue that the distinction between the two concepts is significant for at least the following three reasons. First, a tribunal can review its jurisdiction *proprio motu*, but not the admissibility of a claim.<sup>8</sup> Second, a tribunal which finds it lacks jurisdiction is obliged to dismiss the case while a tribunal which finds the claim is inadmissible is permitted to stay the proceedings.<sup>9</sup> Third and most important, an award may be annulled by the relevant controlling authority on the basis of lack of jurisdiction, but not on the basis of inadmissibility of the claim.<sup>10</sup> A decision that the tribunal has jurisdiction to hear the case is therefore reviewable while a decision that the claim is admissible is not.

4 Our views in the light of the discussion above are as follows:

- (a) The starting point is that the reviewability of a tribunal's decision depends on whether or not the objection is jurisdictional. A tribunal which wishes to classify the objections of an objecting party should do so according to this distinction. So the only question which the tribunal should be asking itself is whether the objection, if factually proven, would impinge upon the *consent* of the objecting party to arbitrate, so as to amount to a jurisdictional objection. For this purpose, the "tribunal *versus* claim" test is an inadequate test, because it does not tell us *how* to identify if an objection is targeting the tribunal or the claim. We should discard the test and open our minds to alternative methods which may be better at

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Govern Characterisation of Preliminary Issues in International Arbitration" (2017) 33(1) *Arbitration International* 1 at 2.

<sup>8</sup> Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) at pp 141–142.

<sup>9</sup> F Santacroce, "Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterisation of Preliminary Issues in International Arbitration" (2017) 33(1) *Arbitration International* 1 at 2.

<sup>10</sup> J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at p 603.

identifying if consent is affected. For example, if the State respondent argues that a precondition in its offer to arbitrate in the bilateral investment treaty (“BIT”) has not been fulfilled, the better method would be for the tribunal to *interpret the offer to arbitrate* to determine if the State respondent intended the precondition to be a *condition to its consent* to arbitrate, so as to impose an obstacle to the tribunal’s jurisdiction pending its fulfilment.

- (b) If the tribunal forms the view that the objection is jurisdictional, the body of rules which concern jurisdiction will apply<sup>11</sup> and the tribunal must go on to determine if it has jurisdiction on the facts of the case in accordance with those rules. On the other hand, if the tribunal forms the view that the objection is *not* jurisdictional, but relates to the procedure of the arbitration, the applicable legal rule will be the provision which confers on the tribunal the discretion to conduct the proceedings in such manner as it considers appropriate,<sup>12</sup> including the power to stay or dismiss the

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<sup>11</sup> For International Centre for Settlement of Investment Disputes (“ICSID”) arbitrations, the applicable rules are r 41 of the ICSID Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) (“ICSID Arbitration Rules 2006”) and Arts 25 and 41 of the ICSID Convention. For United Nations Commission on International Trade Law (“UNCITRAL”) arbitrations, the applicable rule is Art 23 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) (“UNCITRAL Arbitration Rules 2013”). Similar provisions appear in other arbitral institutional rules: see r 28 of the Arbitration Rules of the Singapore International Arbitration Centre (2016) (“SIAC Rules 2016”); r 25 of the Investment Arbitration Rules of the SIAC (“SIAC IA Rules”) (January 2017); Art 23 of the London Court of International Arbitration Rules of Arbitration 2014 (“LCIA Rules 2014”); Art 19 of the Hong Kong International Arbitration Centre (“HKIAC”) Administered Arbitration Rules 2013 and Art 23 of the Permanent Court of Arbitration (“PCA”) Arbitration Rules 2012. See also Art 16 of the UNCITRAL Model Law on International Commercial Arbitration 2006 (“Model Law”).

<sup>12</sup> For International Centre for Settlement of Investment Disputes (“ICSID”) arbitrations, the applicable rule is r 19 of the ICSID Arbitration Rules 2006

proceedings where the circumstances warrant such a course of action. So if the objection is not jurisdictional and it relates to the procedure of the arbitration, the tribunal has the discretion to stay or dismiss the proceedings if it finds that there are sufficient reasons to do so.

- (c) In reality, a decision on what proponents call “admissibility” is simply one such decision on the procedure of the arbitration taken by the tribunal in the exercise of its discretion over the procedure of the arbitration. When tribunals determine “admissibility”, they take into account the same factors of procedural fairness and efficiency which tribunals take into account when making any other procedural decision during the course of the arbitration in the exercise of their discretion. Even the International Court of Justice (“ICJ”), whose Rules of Court recognise the concept of admissibility, makes its decisions on admissibility on the basis of considerations of procedural fairness and efficiency. So the real question which needs to be asked is whether there is any pressing need to carve out a class of procedural decisions to call them decisions on “admissibility”. Framed as such, the question must be answered in the negative, because there is nothing to be gained from inventing labels. The legal rules which apply to investment treaty arbitral proceedings do not even refer to the concept of admissibility of claims, so there is good reason not to import the concept into the realm of investment treaty arbitration.
- (d) Tribunals in investment treaty arbitration should therefore stop the chase for the chimera of admissibility and disentangle themselves from this unhelpful label. Tribunals should only bear in mind that

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read with Art 44 of the ICSID Convention. For UNCITRAL arbitrations, the applicable rule is Art 17(1) of the UNCITRAL Arbitration Rules 2013. Similar provisions appear in the rules of other arbitration institutions: see Art 23 of the Stockholm Chamber of Commerce (“SCC”) Arbitration Rules 2017; Art 22 of the ICC Arbitration Rules 2017; r 19.1 of the SIAC Rules 2016; r 16.1 of the SIAC IA Rules 2017; Art 14.5 of the LCIA Rules 2014; Art 13.1 of the HKIAC Administered Arbitration Rules 2013 and Art 17(1) of the PCA Arbitration Rules 2012. See also Art 19(2) of the Model Law.

they have the power to stay or dismiss the proceedings if the non-jurisdictional objection relates to the procedure of the arbitration. The discussion above applies equally to commercial arbitration, so tribunals in this field should also resist the temptation to adopt this label. We are relieved to note that tribunals in commercial arbitration have avoided picking up the phrase of “admissibility of claims” so far.

- (e) There is another misconception which tribunals in general need to avoid, and to explain this point we must call upon the following example for assistance. A party raises an objection which amounts to a substantive defence, such as an exemption clause, a restricted remedies clause or an illegality clause. The party says, “my objection will be dispositive of the whole case or a significant part of the case if the tribunal rules in my favour, so please take the shortcut and hear my objection in advance of the evidentiary hearing”.<sup>13</sup> The tribunal deliberates if the objection can be tried as a stand-alone issue with no or minimal factual disputes, so that it can be disposed of in a relatively short time with the benefit of saving time and costs for the arbitration. The tribunal accepts that it can be so tried and arranges to hear the objection ahead of the evidentiary hearing. The tribunal hears the objection, rules in favour of the objecting party and dismisses the proceedings. This decision is sometimes described by lawyers as a decision on “admissibility”. They call it a decision on admissibility, because they understand it to refer to any decision which takes the shortcut to dispose of the arbitration at an early stage and avoid the scenic route of running through all the possible defences. This is a mistake, because the decision is properly speaking a decision on the

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<sup>13</sup> In some cases, this request is framed as a request for early dismissal, as provided for in certain arbitration institutional rules. See, for example, r 29 of the SIAC Rules 2016, r 26 of the SIAC IA Rules 2017 and r 41(5) of the ICSID Arbitration Rules 2006. Common law countries provide similar rules for court proceedings: see, for example, O 14 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed) and Pt 24 of the English Civil Procedure Rules (SI 1998 No 3132).

*merits* of the case, which the tribunal exercised its case management discretion<sup>14</sup> to hear at a *preliminary stage*<sup>15</sup> on the basis that the objection would dispose of the arbitration altogether or significantly reduce the matters to be argued at the evidentiary hearing if the objection were to be tried in advance. A decision on a substantive issue must be regarded as a decision on the merits, even if it is taken at a preliminary stage.

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- <sup>14</sup> This discretion has already been referred to in para 4(b) above (see also n 12). The tribunal has the discretion to take the shortcut and hear the issue as a preliminary matter, or reserve the issue for the main evidentiary hearing, because the shortcut is essentially a case management decision for the tribunal. The position is similar in the field of jurisdictional challenges. Here, although most national laws (and certainly Model Law countries) require tribunals to hear a challenge to jurisdiction and make a ruling on that challenge, Art 16(3) of the Model Law allows a tribunal to rule on a challenge to jurisdiction either as a preliminary question or in an award on the merits. A challenge on the ground of lack of jurisdiction may therefore be tried ahead of the evidentiary hearing, or alternatively joined to and heard together with the merits at the evidentiary hearing. In common law countries, there are similar provisions which confer broad discretionary powers on courts over case management, which allow courts to decide if there are any issues which can suitably be tried as preliminary issues: O 33 r 2 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed) and Pt 3.1(2) of the English Civil Procedure Rules (SI 1998 No 3132). For cases before the English Commercial Court, see para D8.8 of the *Commercial Court Guide* (HM Courts and Tribunals Service, 10th Ed, 2017). See also A Colman, V Lyon & P Hopkins, *The Practice and Procedure of the Commercial Court* (Informa, 6th Ed, 2008) at p 87: “The parties should, in advance of the case management conference, consider whether there are any issues which can usefully be isolated and tried as preliminary issues.” See also section 8 of the *Technology and Construction Court Guide* (HM Courts and Tribunals Service, 2nd Ed, 2014); and paras 21.27–21.28 of the *Chancery Guide* (HM Courts and Tribunals Service, February 2016).
- <sup>15</sup> This point has similarly been made by J Paulsson, “Jurisdiction and Admissibility” (G Aksen *et al* eds) in *Global Reflections on International law, Commerce and Dispute Resolution* (ICC Publishing, 2005) at p 607.

5 The remainder of this chapter will be structured as follows. In section II below, we look at the sphere of investment treaty arbitration, focusing on arbitration in the International Centre for Settlement of Investment Disputes (“ICSID”). We identify that the ICSID Convention and Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) do not make reference to a separate concept of admissibility of claims. We then look at how the concept of admissibility came to be endorsed as a separate concept by a substantial number of ICSID tribunals, despite the fact that the ICSID Convention does not recognise the concept. We then argue that tribunals should simply be concerned with whether or not the objection is jurisdictional, and that the “tribunal *versus* claim” test is inadequate for this purpose. To argue this, we use the example of the objection which complains of the non-fulfilment of preconditions in the State respondent’s offer to arbitrate. We chose to use an example rather than to make the argument in the abstract, because we considered that this approach will better facilitate the understanding of the reader. In section III below, we look at the sphere of ICJ proceedings, identifying that the ICJ Rules of Court expressly recognise the concept of admissibility of claims. We examine how the ICJ has understood and applied this concept, demonstrating that the ICJ understands admissibility to involve the weighing of considerations of procedural fairness and efficiency, having regard to the interests of the parties and the judicial function of the ICJ.

## **II. International Centre for Settlement of Investment Disputes arbitration**

### **A. *Legal framework***

6 The ICSID Convention furnishes three sets of rules in relation to jurisdiction. First, it defines the jurisdiction of the ICSID. Article 25(1) of the ICSID Convention provides that the jurisdiction of the ICSID “shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to

the Centre". The effect of Article 25(1) is to impose three jurisdictional requirements:<sup>16</sup>

- (a) ***Jurisdiction razione materiae***: There must be a *legal dispute arising directly out of an investment*.
- (b) ***Jurisdiction razione personae***: The parties to the dispute must consist of a *Contracting State on the one hand and a national of another Contracting State on the other*.
- (c) **Consent**: The parties to the dispute must have consented in writing to submit the dispute to the ICSID.<sup>17</sup> Consent is established if:
  - (i) the parties enter into an investment agreement containing a compromissory clause<sup>18</sup> or
  - (ii) the host State offers to submit the dispute through arbitration in legislation or a bilateral or multilateral investment treaty and the investor accepts the offer.<sup>19</sup>

7 Second, the ICSID Convention lays down a procedure for parties to challenge the jurisdiction of the ICSID before the tribunal.<sup>20</sup> Article 41(1) decrees that the tribunal "shall be the judge of its own competence".

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<sup>16</sup> D Williams, "Jurisdiction and Admissibility" in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at p 871.

<sup>17</sup> D Williams, "Jurisdiction and Admissibility" in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at p 871.

<sup>18</sup> C Schreuer, "Consent to Arbitration" in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at pp 832–833.

<sup>19</sup> C Schreuer, "Consent to Arbitration" in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at pp 833–851. The author considers (at pp 851–855) also the possibility of consent under Most-Favoured-Nation Clauses.

<sup>20</sup> Outside the ICSID regime, for arbitrations seated in countries which adopt the UNCITRAL Model Law, Art 16(3) of the Model Law provides a procedure for a party to appeal to the supervisory court against a positive jurisdictional ruling by the tribunal.

Article 41(2) states that the tribunal shall decide any objection by a party that the dispute is not within the ICSID's jurisdiction, or for other reasons is not within the tribunal's competence,<sup>21</sup> and that the tribunal shall decide "whether to deal with it as a preliminary question or to join it to the merits of the dispute".<sup>22</sup>

8 Third, the ICSID Convention provides a procedure for the annulment of an award for want of jurisdiction. Article 52(1) enables a party to

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<sup>21</sup> The ICSID Convention does not define "competence": *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 245 and V Heiskanen, "Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration" (2013) ICSID Review 1 at 1. Nor does academic literature shed much light on its meaning. C Schreuer *et al* argue that jurisdiction refers to the requirements set out in Art 25 of the ICSID Convention, while competence refers to the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*. C Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 531. Heiskanen contends that jurisdiction is a general concept which refers to the tribunal's jurisdictional field *ratione temporis, personae* or *materiae*, while competence is a specific concept which refers to the tribunal's competence in a particular case: V Heiskanen, "Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration" (2013) ICSID Review 1 at 5–6. None of these elucidations are enlightening: see Paulsson's comments in J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at pp 604 and 608. The better view is that jurisdiction and competence are one and the same: see G Zeiler, "Jurisdiction, Competence and Admissibility of Claims in ICSID Arbitration" in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C Binder *et al* eds) (Oxford University Press, 2009). This accords with the practice by tribunals of using "jurisdiction" and "competence" interchangeably: see C Schreuer, "Consent to Arbitration" in *The Oxford Handbook of International Investment Law* (P Muchlinski, F Ortino & C Schreuer eds) (Oxford University Press, 2008) at p 532.

<sup>22</sup> The general provisions of Art 41 are supplemented by r 41 of the ICSID Arbitration Rules 2006.

request for the annulment of an award on the ground that “the Tribunal has manifestly exceeded its powers”.<sup>23</sup>

9 On the other hand, the term “admissibility” does not appear anywhere in the ICSID Convention or the ICSID Arbitration Rules.<sup>24</sup> There is no definition of admissibility,<sup>25</sup> no procedure for a party to object to admissibility,<sup>26</sup> and no procedure for a party to make a request

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<sup>23</sup> The ground of “manifest excess of powers” includes the situation where a tribunal exceeds its jurisdiction and where the tribunal fails to exercise a jurisdiction it does have: C Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 938. The situation is the same outside the ICSID regime for arbitrations seated in Model Law countries. Articles 34(2)(a)(i) and 34(2)(a)(iii) of the Model Law enable a party to apply for the setting aside of an award on the basis of excess of jurisdiction.

<sup>24</sup> There is also no mention of admissibility of claims in the Model Law or in the rules of any arbitration institution in the world. Nor is there any such mention in the UNCITRAL Arbitration Rules: see *Methanex Corp v United States of America* UNCITRAL, Partial Award (7 August 2002) at [107].

<sup>25</sup> C Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 86; V Heiskanen, “*Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*” (2013) *ICSID Review* 1 at 2; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at para 126; *Içkale Insaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (8 March 2016) at para 8 and *Ambiente Ufficio SpA v The Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) at para 572.

<sup>26</sup> As argued in n 21 *above*, the ICSID Convention only provides a challenge procedure for jurisdiction and competence, which are to be regarded as one and the same. Consistent with this position, we do not agree with the assertion in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) at para 52; *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility  
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for the annulment of an award on the ground of inadmissibility of the claim.<sup>27</sup>

### **B. The experience of ICSID tribunals: Overview**

10 The absence of the term “admissibility” did not stop many States respondents from taking their chances. As early as the 1990s, States respondents began to label a number of their objections as “admissibility objections” when making jurisdictional objections pursuant to rule 41 of the ICSID Arbitration Rules.<sup>28</sup> When the tribunals encountered these objections, they responded in several different ways. Some tribunals used the terms “jurisdiction” and “admissibility” interchangeably in their decisions, suggesting that they were oblivious to the distinction between

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(18 April 2008) at para 112 and *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 245 that Art 41 covers objections to admissibility as well.

<sup>27</sup> As discussed in n 23, the ICSID Convention provides for the ground of “manifest excess of powers”, which enables the committee to review a decision on jurisdiction. There is no mention in C Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) of the ability of the committee to review a decision on “admissibility” under this ground. See, for example, *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 247(ii). We therefore disagree with the tribunal’s view in *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at para 117 and *Consorzio Groupement L.E.S.I. – DIPENTA v People’s Democratic Republic of Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005) at section II, para 2, that Art 52 enables the committee to review a decision on admissibility.

<sup>28</sup> In some instances, the parties would agree at the end of the jurisdictional hearing that the decision would cover both admissibility and jurisdictional objections: see for example, *Consorzio Groupement L.E.S.I. – DIPENTA v People’s Democratic Republic of Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005) at section II, para 1; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at para 59.

the two terms or were determined to avoid a debate on the distinction.<sup>29</sup> Others doubted the relevance of the term “admissibility” in the ICSID regime, but relented to using it in the remaining parts of their decisions.<sup>30</sup> But there was a third group of tribunals which believed that there was a distinction between “admissibility” and jurisdiction, and that the respondent could raise objections to “admissibility”, notwithstanding the absence of the term “admissibility” in the ICSID Convention and the

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<sup>29</sup> *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) at para 196; *Camuzzi International SA v The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005) at paras 96–98; *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16 (11 May 2005) at paras 107–109 (unusually, in *Camuzzi* and *Sempra*, it was the claimant which classified the issue as going to admissibility which should be decided at the merits phase). In *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at para 87, the tribunal simply examined Pakistan’s objections without distinguishing between admissibility and jurisdictional objections.

<sup>30</sup> *Enron Corp and Ponderosa Assets, LP v The Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) at para 33: “The distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence.” *CMS Gas Transmission Co v The Republic of Argentina*, ICSID Case No ARB/1/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at para 41: “The arguments that the parties have put forth involve a number of questions of admissibility and jurisdiction. The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence.” In *Ioan Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) at para 63, the tribunal recognised that the helpfulness of the distinction in the ICSID regime was often disputed. In *Pan American Energy LLC and BP Argentina Exploration Co v The Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) at para 54, the tribunal recognised that the distinction was “somewhat controversial”.

Arbitration Rules. These were the tribunals which proceeded to evaluate the respondent's classification, or, where the respondent failed to classify its objections, to classify the respondent's objections for themselves.<sup>31</sup>

11 As a result, a wide variety of objections were classified as objections to "admissibility". These included objections to the tribunal hearing the claim in the light of a dispute resolution clause in the contract between the parties providing for domestic litigation;<sup>32</sup> objections to the tribunal hearing multiple claimants in one proceeding;<sup>33</sup>

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<sup>31</sup> *Ioan Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) at para 53; *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 231; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at para 94; *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) at para 77.

<sup>32</sup> See for example *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at para 154.

<sup>33</sup> See for example *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 492. In *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), an objection to "admissibility" was made on the basis that the claim constituted an "abuse of process". The tribunal did not expressly state that "abuse of process" was a ground for inadmissibility, but it appeared to accept this principle when it reasoned that there was no abuse of process on the facts: see paras 154–158. A Newcombe considers that "abuse of process" is a ground for inadmissibility and that a tribunal may dismiss the proceedings on this basis: see A Newcombe, "Investor Misconduct and Investment Treaty Arbitration: Mapping the Terrain" *Kluwer Arbitration Blog* (25 January 2010). He considers that the following cases support this position: *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008); *Robert Azinian, Kenneth Davitian and Ellen Baca v The*  
*(continued on next page)*

and objections to the tribunal hearing a counterclaim on the ground that it did not arise directly out of the subject matter of the dispute, as required by Article 46 of the ICSID Convention and rule 40 of the ICSID Arbitration Rules.<sup>34</sup> Of these objections, there was one objection which generated a disproportionate level of controversy, which we shall elaborate on in the following passages. That objection related to the non-fulfilment of preconditions in the dispute resolution clause of the relevant BIT prior to the commencement of the arbitration, which we shall call the “BIT precondition objection”.

### ***C. Experience of ICSID tribunals: The bilateral investment treaty precondition objection***

12 As discussed, the jurisdiction of the ICSID is established by the written consent of the investor and the host State to submit the dispute to the ICSID. The consent of the parties is usually established when the host State makes a standing offer in the dispute resolution clause of a BIT to submit to ICSID arbitration, and the investor accepts that offer by making a Request for Arbitration pursuant to Article 36 of the ICSID Convention. In some BITs, the dispute resolution clause contains a straightforward offer, so consent is readily established when the investor accepts the offer. In other BITs, the offer is less straightforward, because the clause may specify preconditions to the offer. If the investor does not fulfil those preconditions and goes on to make a Request for Arbitration, the question that arises is whether the non-fulfilment defeats the jurisdiction of the tribunal, so as to require the tribunal to dismiss the claim. This is a highly contentious issue over

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*United Mexican States*, ICSID Case No ARB(AF)/97/2, Award (1 November 1999) and *World Duty Free Company Ltd v The Republic of Korea*, ICSID Case No ARB/00/7, Award (4 October 2006).

<sup>34</sup> *Antoine Goetz v Republic of Burundi*, ICSID Case No ARB/01/2, Award (21 June 2012) at para 283. For a commentary on the case, see A Steingruber, “*Antoine Goetz v Republic of Burundi*: Consent and Arbitral Tribunal Competence to Hear Counterclaims in Treaty-based ICSID Arbitrations” (2013) 28(2) ICSID Review 291.

which tribunals are deeply divided.<sup>35</sup> The situation has been described by two commentators as a “dismal swamp”.<sup>36</sup>

(a) *Story of the swamp*

13 In the earliest cases on this matter,<sup>37</sup> the reasoning of the tribunals was generally sparse. In *Técnicas Medioambientales TECMED SA v The United Mexican States*,<sup>38</sup> the tribunal took the view that the claimant’s failure to submit a claim within three years of receiving notice of the alleged violation of the BIT (as required by the dispute resolution clause) did not go to jurisdiction.<sup>39</sup> In *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*,<sup>40</sup> the tribunal took the view that the precondition of a twelve-month consultation period was “directory and procedural rather than as mandatory and jurisdictional in nature”.<sup>41</sup> In *Enron Corp and Ponderosa Assets LP v The Argentine Republic*,<sup>42</sup> the tribunal took the view that the precondition of a six-month negotiation

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<sup>35</sup> *Ambiente Ufficio SpA v The Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) at para 571; D Williams, “Jurisdiction and Admissibility” (P Muchlinski, F Ortino & C Schreuer eds) in *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 919.

<sup>36</sup> G Born & M Šćekić, “Pre-Arbitration Procedural Requirements: ‘A Dismal Swamp’” in *Practising Virtue: Inside International Arbitration* (D Caron *et al* eds) (Oxford University Press, 2015) at p 227.

<sup>37</sup> There were also non-ICSID investment treaty arbitration cases which considered this issue in the late 1990s and early 2000s. See for example *Ethyl Corp v The Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998) and *Ronald Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001).

<sup>38</sup> ICSID Case No ARB(AF)/00/2, Award (29 May 2003).

<sup>39</sup> ICSID Case No ARB(AF)/00/2, Award (29 May 2003) at para 73.

<sup>40</sup> ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003).

<sup>41</sup> ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) at para 184.

<sup>42</sup> ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004).

period was “very much a jurisdictional one”, such that non-compliance “would result in a determination of lack of jurisdiction”.<sup>43</sup> None of these tribunals provided reasons for their views.

14 The trend was not an absolute one, as there were several cases in which tribunals fervently sought to justify their views. In *Emilio Agustín Maffezini v The Kingdom of Spain*<sup>44</sup> (“*Maffezini*”), Article X(2) of the Argentina-Spain BIT provided that, if the dispute “cannot be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made”. Article X(3)(a) went on to say that the dispute:

may be submitted to international arbitration in any of the following circumstances:

a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated.

The tribunal held that the claimant’s failure to submit the case to the Spanish courts deprived the ICSID of jurisdiction for two reasons. First, it was likely that the States parties to the BIT wanted to give their courts an opportunity to vindicate the international obligations guaranteed in the BIT, albeit within a prescribed time limit (“purposive argument”).<sup>45</sup> Second, to interpret Article X(2) in any other way would deprive the Article of its meaning (“*effet utile* argument”).<sup>46</sup>

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<sup>43</sup> ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) at para 88.

<sup>44</sup> ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

<sup>45</sup> *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) at para 36.

<sup>46</sup> *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) (continued on next page)

15 Another tribunal which endeavoured to justify its view was the tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*<sup>47</sup> (“*Bayindir*”). Article VII of the Turkey-Pakistan BIT provided that:

1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, *shall be notified in writing*, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party *shall endeavour to settle the disputes by consultations and negotiations* in good faith.

2. *If these disputes cannot be settled in this way within six months* following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:

- (a) the International Centre for Settlement of Investment Disputes (ICSID) set up by the ‘Convention on Settlement of Investment Disputes Between States and nationals of other States’; [in case both Parties become signatories of this Convention]

...

Provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.

[emphasis added]

16 The tribunal held that the notice requirement did not constitute a prerequisite to jurisdiction, because requiring the claimant to file a new Request for Arbitration and restarting the proceeding would benefit no one.<sup>48</sup> Moreover, since Pakistan made no proposal to engage in

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2000) at para 36. The formalism and purposive arguments would be applied by the tribunal in the later case of *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010) at paras 314–315.

<sup>47</sup> ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005).

<sup>48</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at para 100.

negotiations with the claimant, it would be formalistic and would not serve to protect the legitimate interests of the parties to prevent the commencement of arbitration proceedings until six months later.<sup>49</sup> Hence, the failure to allow the six-month waiting period to elapse did not deprive the tribunal of jurisdiction.<sup>50</sup> The tribunal's understanding was therefore that a precondition would not go to jurisdiction if it were to be formalistic in the circumstances to insist on compliance ("formalism argument").

17 The common characteristic of *Maffezini* and *Bayindir* is that the tribunals provided reasons for their views but did not go further to provide a wider framework for tribunals to apply to determine if a precondition went to jurisdiction. They did not contemplate the larger issue of *how* a tribunal could ascertain if the non-fulfilment of a precondition would deprive the ICSID of jurisdiction. This gap in academic literature did not last for long, however, because in 2005, an influential essay was published by Jan Paulsson, who argued that the way forward was for tribunals to characterise the issue as one of jurisdiction or admissibility.<sup>51</sup> If the respondent's objection took aim at the *tribunal*, it amounted to an objection to jurisdiction; but if it took aim at the *claim*, it amounted to an objection to admissibility.<sup>52</sup> In the

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<sup>49</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at para 102.

<sup>50</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at para 95. The tribunal hinted a similar reasoning in *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) at para 184.

<sup>51</sup> J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005).

<sup>52</sup> J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at pp 614–617.

context of preconditions, the suggestion by Paulsson would have therefore been that tribunals should decide if the non-fulfilment amounted to an attack against the *claim* or the *tribunal*. If it attacked the claim, it should be regarded as an admissibility issue, and should not be seen as an obstacle to the tribunal's jurisdiction. Paulsson concluded:<sup>53</sup>

Following this lodestar will make it easy to classify objections in many cases, and should make it easier in all. Timeliness issues, or conditions precedent such as participating in a conciliation attempt, pose no problem. The same goes for contentions of extinctive prescription; waiver of claims; mootness; or absence of a legal dispute or of an indispensable third party. There is even less difficulty with issues of ripeness à *la SGS v Philippines*.

18 Paulsson's essay would catapult into the arbitration universe and provide ICSID tribunals a ready-made lodestar to determine the consequences of non-fulfilment of preconditions. But like most novel ideas, the lodestar did not gain immediate traction, and it took some time before it permeated the vocabulary of the investment treaty arbitration community. In *Telefónica SA v The Argentine Republic*,<sup>54</sup> the tribunal used the two terms interchangeably, when it held that "inadmissibility of the claim would result in the Tribunal's temporary lack of jurisdiction, that is until the condition of the Claimant having submitted its claims to the courts of Argentina as the host State and not having obtained a decision on the merits within eighteen months would

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<sup>53</sup> J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at p 616. Newcombe also takes the view that "laches – or unwarranted delay in making a claim – might appropriately be viewed as a bar to the admissibility of a claim": see A Newcombe, "The Question of Admissibility of Claims in Investment Treaty Arbitration" *Kluwer Arbitration Blog* (3 February 2010).

<sup>54</sup> ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006).

not had been satisfied”.<sup>55</sup> In *TSA Spectrum de Argentina SA v Argentine Republic*,<sup>56</sup> the tribunal rehashed the formalism argument in *Bayindir* to argue that only three of the eighteen-month domestic litigation period remained at the time of the tribunal’s decision, such that it would be highly formalistic to reject the claim for want of jurisdiction.<sup>57</sup>

19 In another case, *Wintershall Aktiengesellschaft v Argentine Republic*<sup>58</sup> (“*Wintershall*”), the tribunal reasoned that Article 10(2) of the Argentina-Germany BIT imposed an *obligation* as opposed to an *option* to submit to domestic courts, so it could not be described as a “mere defect of form”.<sup>59</sup> Even if it was procedural, the tribunal said that procedural obstacles could go to jurisdiction if they were so worded.<sup>60</sup> Previous ICSID decisions which dealt with waiting periods for consultation or negotiation were irrelevant, because the present case involved a *domestic litigation* waiting period.<sup>61</sup> On the facts, the dispute resolution clause was worded in such a way that the respondent’s consent to ICSID Arbitration was conditioned upon a claimant first submitting his dispute to submit to the Argentine courts. *Wintershall* did not discuss Paulsson’s essay, and it displayed an acute sensitivity to the wording of the dispute resolution clause. The importance of this text-sensitive approach will be highlighted below.<sup>62</sup>

20 If *Wintershall* avoided pronouncing on the nature of preconditions of consultation and negotiation, *Murphy Exploration and Production Co*

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<sup>55</sup> ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) at para 93.

<sup>56</sup> ICSID Case No ARB/05/5, Award (19 December 2008).

<sup>57</sup> ICSID Case No ARB/05/5, Award (19 December 2008) at para 112.

<sup>58</sup> ICSID Case No ARB/04/14, Award (8 December 2008).

<sup>59</sup> ICSID Case No ARB/04/14, Award (8 December 2008) at para 139.

<sup>60</sup> *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) at para 143.

<sup>61</sup> *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) at paras 146–153.

<sup>62</sup> The textual argument was also employed by in *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) at paras 89–91.

*International v Republic of Ecuador*<sup>63</sup> (“*Murphy*”) tackled the issue head-on. The tribunal ruled in *Murphy* that the stipulated requirement of consultation and negotiation did not go to jurisdiction, because it did not constitute a “procedural rule” as it was a mandatory rule which *obliged* the parties to endeavour to negotiate.<sup>64</sup> The decision of the tribunal suggests that it understood the test to be whether the precondition was a “procedural” or “mandatory” one, with only the latter going to jurisdiction.<sup>65</sup> This is an odd distinction, because all procedural rules are “mandatory” in some sense as well. A procedural rule which requires a man to queue up for a movie ticket if he wishes to purchase one is a rule which *mandates* him in a limited sense to join the queue. It may not be a “full” mandatory rule in the sense that it obliges him to queue for the ticket *irrespective* of whether he wishes to purchase the ticket, but it is mandatory in the sense that it obliges him to queue *if* he wishes to purchase the ticket.

21 Be that as it may, the influence of Paulsson’s essay manifested itself in 2011, when two well-known cases arose for decision. In *Abaclat v The Argentine Republic*,<sup>66</sup> the tribunal ruled by a majority that the negotiation and domestic litigation waiting periods went to admissibility rather than jurisdiction, because they conditioned the *implementation* of

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<sup>63</sup> ICSID Case No ARB/08/4, Award on Jurisdiction (15 December 2010).

<sup>64</sup> *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction (15 December 2010) at para 149.

<sup>65</sup> This test has unfortunately gained some acceptance in the arbitration universe since. See for instance: *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) at para 91; *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J Christopher Thomas QC (7 October 2011) at para 42 and *Ambiente Ufficio SpA v The Argentine Republic*, ICSID Case No ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez (2 May 2013) at para 416.

<sup>66</sup> ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

the host State's consent as opposed to the host State's consent *per se*.<sup>67</sup> In *Hochtief AG v The Argentine Republic*<sup>68</sup> (“*Hochtief*”), the tribunal held by a majority that the condition of an 18 month waiting period for domestic litigation was “a condition relating to the manner in which the right to have recourse to arbitration must be exercised – as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal”.<sup>69</sup> An inspection of the decisions in both cases reveals that neither tribunal sought to justify its position further.<sup>70</sup> So the all-important question arises: how did these tribunals reach their positions at all?

(b) *Moral of the story*

22 In our view, the tribunals reached their positions *by applying the test in Paulsson's essay*.<sup>71</sup> And because there was no guidance in academic literature as to *when* an objection targets the claim or the tribunal, the tribunals had to apply their instincts to make that determination. In the circumstances, instinct advised that the objection

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<sup>67</sup> ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) at para 496.

<sup>68</sup> ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011).

<sup>69</sup> ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) at para 96.

<sup>70</sup> The lack of supporting reasons in the majority decision of *Abaclat* was noted by Georges Abi-Saab in his dissenting opinion: see *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Dissenting Opinion of Georges Abi-Saab (28 October 2011) at paras 21–22. The lack of supporting reasons in the majority decision of *Hochtief* was noted by the tribunal in *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at para 113.

<sup>71</sup> Samuel Wordsworth likewise considers that the majority's approach “appears consistent with Jan Paulsson's often-cited article on jurisdiction and admissibility”: see S Wordsworth, “*Abaclat v Argentine Republic*: Jurisdiction, Admissibility and Pre-conditions to Arbitration” (2012) 27(2) ICSID Review 255 at 257.

targeted the claim, so the tribunals ruled that the issue concerned admissibility as opposed to jurisdiction. But this is hardly a satisfactory form of decision-making, because it involves a veiled reliance on instinct which is sheltered from scrutiny as opposed to express reasoning. The main problem with the “tribunal *versus* claim” test is that it is an ambiguous touchstone which opens the backdoor for surreptitious decision-making. It does not tell us *how* to identify if an objection is really targeting the tribunal or the claim.<sup>72</sup>

23 But there is another more fundamental objection, which is that tribunals should not even be classifying issues under “jurisdiction” and “admissibility” in the first place. Tribunals should simply be concerned with whether or not the issue is *jurisdictional*, since this is the yardstick on which the reviewability of the tribunal’s decision hinges.<sup>73</sup> To determine if an objection is jurisdictional, we should discard the “tribunal *versus* claim” test and go back to the first principle that jurisdiction is grounded upon the consent of the parties. If the State respondent imposes a condition to its consent, the condition must be satisfied, otherwise there is no consent and accordingly no jurisdiction. So the real question that needs to be asked is: *does the precondition in the dispute resolution clause amount to a condition to the State’s consent?*

24 The answer to this question depends on an interpretation of the dispute resolution clause. And to interpret the clause, we must apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, because the clause is located in a treaty. Article 31(1) provides that:

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<sup>72</sup> This point has similarly been expressed by L Velarde Saffer & J Lim, “Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone Between Jurisdiction and Admissibility” (2014) 8(1) *Dispute Resolution International* 85 at 90–91. The authors showed how the “tribunal *versus* claim” test could reasonably be applied to reach conflicting results on the same matter.

<sup>73</sup> See the discussion at paras 6–9 above, which highlights the rules in the ICSID Convention and Arbitral Rules as well as the rules in the Model Law in n 23 above which enable a party to request for the annulment of an award on the basis of lack of jurisdiction but not on the basis of inadmissibility of the claim.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

So we need to look at the *ordinary meaning* of the clause in the light of its *context, object and purpose* to determine if the States parties to the BIT intended the precondition to be a condition to their consent to arbitrate.<sup>74</sup> We should not rack our brains over whether the objection is directed against the claim or the tribunal. We should not agonise over whether the precondition is procedural, aspirational or mandatory in nature. We should only examine if the State has made that precondition a *condition* to its consent, by looking at the language of and context surrounding the dispute resolution clause to divine the true intentions of the parties to the BIT. That is the only enquiry that matters.

25 There is nothing radical about our proposed approach. A similar approach has been advocated by Gary Born and Marija Šcekic in a book chapter in 2015.<sup>75</sup> The ICJ has endorsed a similar approach in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*<sup>76</sup> and applied the approach in *Application of the International Convention on the*

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<sup>74</sup> One contextual factor that should be taken into consideration is Article 26 of the ICSID Convention: “A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

<sup>75</sup> G Born & M Šcekic, “Pre-Arbitration Procedural Requirements: ‘A Dismal Swamp’” in *Practising Virtue: Inside International Arbitration* (D Caron *et al* eds) (Oxford University Press, 2015) at p 246: “In characterising contractual procedural requirements, the better view is that the character of such requirements depends on the intentions of the parties with regard to specific issues (for example, allocation of competence, time at which procedural requirement must be satisfied) ... Characterising a particular procedural requirement depends ultimately on an interpretation of the parties’ contractual language and intentions.”

<sup>76</sup> (Jurisdiction and Admissibility) [2006] ICJ Rep 6 at 39, para 88.

*Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation).*<sup>77</sup>

26 There are also several indicators to suggest that ICSID tribunals post-*Hochtief* are veering towards this approach. In the first place, tribunals have begun to query the usefulness of admissibility in the ICSID regime:

(a) *Daimler Financial Services AG v Argentine Republic*.<sup>78</sup>

*[A]dmissibility analyses patterned on domestic court practices have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In the domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand the jurisdiction of domestic courts. Rather, they serve to streamline courts' dockets by striking out matters which, though within the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question. All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional.* [emphasis added]

(b) *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*<sup>79</sup> (“*Urbaser v Argentina*”):

It is contended that jurisdiction is an element pertaining to the tribunal and not of a claim. Conversely, admissibility is an element of a claim but not one that pertains to a tribunal. Jurisdiction is fixed by treaty and cannot be altered by the parties to the dispute ... *Developing such categories may have*

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<sup>77</sup> (Preliminary Objections)[2011] ICJ Rep 70 at 125–130, paras 132–147. Even the minority applied the same approach in this case: see the Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja at 145–155, paras 14–38.

<sup>78</sup> ICSID Case No ARB/05/1, Award (22 August 2012) at paras 192–193.

<sup>79</sup> ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at paras 112–113.

*theoretical appeal but adds nothing to the interpretation of the provisions on dispute resolution of BITs. [emphasis added]*

27 In the second place, tribunals have started to endorse this approach. In *Urbaser v Argentina*, the tribunal emphasised the importance of interpretation, ruling that “even if such categories [of jurisdiction and admissibility] were to be adopted, which appears to be an extremely delicate proposition as a matter of comparative law, the question whether a particular legal issue falls in one and not the other is contingent on the meaning of the relevant provisions of the BIT. This latter consideration is all that matters”.<sup>80</sup> In *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*,<sup>81</sup> the tribunal remarked that “[w]hether the domestic litigation requirement relates to jurisdiction or, rather, to admissibility or procedure depends on the interpretation of Article 10 of the BIT, based on the interpretative rules of the VCLT”.<sup>82</sup>

28 In the third place, tribunals have started to apply this approach, by discussing the ordinary meaning, object and purpose of the dispute resolution clause in question to determine if the precondition in the clause amounted to a condition to the State’s consent. For instance, in *Urbaser v Argentina*, the tribunal discussed the relevant factors which influenced its view on the correct interpretation of the dispute resolution

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<sup>80</sup> ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at para 112. See also para 125:

If the applicable provision on dispute resolution qualifies such condition as a requirement to be complied with before the tribunal can affirm its jurisdiction, the provision then must also pertain to jurisdiction. No theoretical assumption can remove from that condition its jurisdictional character merely by qualifying it pursuant to a legal fiction a condition of admissibility with the effect that any form of non-compliance could be waived or cured by acquiescence.

<sup>81</sup> ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) at para 138.

<sup>82</sup> ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) at para 138.

clause.<sup>83</sup> It ultimately reasoned that the “the clear wording of the relevant provisions of [the dispute resolution clause] and the equally lucid suggestion as to its purpose that respondent has advanced (to which claimants did not object *per se*), lead to the conclusion that resort to domestic courts is a precondition to be met before resorting to international arbitration”.<sup>84</sup>

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<sup>83</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at paras 130–149.

<sup>84</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at para 130. For other cases, see *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) at paras 180–183; *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) at paras 70–72 and *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013) at paras 6.2.6–6.2.9 and 6.3.12. In another context, an ICSID tribunal applied this interpretative approach to determine if the dispute resolution clause in the UK-Indonesia BIT (which provided that a State party “shall assent” to a request by an investor of the other State party to submit to the ICSID for arbitration) contained a standing offer of ICSID arbitration. Indonesia argued that it did not because the “shall assent” clause did not provide for “automatic” consent; the State had to perform a further act after the submission of a request by the investor for consent to be established. The tribunal applied an interpretative approach to hold that the dispute resolution clause contained a standing offer to arbitrate. See *Churchill Mining plc v Republic of Indonesia*, ICSID Case Nos ARB/12/14 and ARB/12/40, Decision on Jurisdiction (24 February 2014) at paras 149–239.

29 Finally, as one tribunal has pointed out,<sup>85</sup> even Paulsson himself has conceded that preconditions could go to jurisdiction if they were so worded. Paulsson wrote:<sup>86</sup>

If an ephemeral arbitral tribunal is established under a treaty which contains requirements as to ... their prior exhaustion of local remedies, the claims as such are perhaps subject to no impediment but the forum seized is lacking one of the elements required to give it life in the first place. For such a tribunal these are matters of jurisdiction.

30 At the time of writing this chapter, the authors note that there has been at least one tribunal since *Hochtief* which has not applied this approach. That case is *Içkale infaat Ltd Sirketi v Turkmenistan*<sup>87</sup> ("*Içkale*"), in which the tribunal failed to consider the ordinary meaning, object and purpose of the dispute resolution clause when holding by a majority that the domestic litigation requirement conditioned the host State's consent.<sup>88</sup> According to the tribunal, the clause not only established the consent of the State parties to arbitrate, but also set out the procedure that an investor had to follow before it could invoke the State's consent to arbitrate.<sup>89</sup> The clause did not condition the consent but only conditioned the investor's right to invoke that consent.<sup>90</sup> Hence, the tribunal concluded that the precondition went to admissibility as

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<sup>85</sup> *Kılıç Infaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013) at para 6.3.8. See also *Içkale Infaat Limited Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (8 March 2016) at para 10.

<sup>86</sup> J Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International law, Commerce and Dispute Resolution* (G Aksen *et al* eds) (ICC Publishing, 2005) at p 616.

<sup>87</sup> ICSID Case No ARB/10/24, Award (8 March 2016).

<sup>88</sup> ICSID Case No ARB/10/24, Award (8 March 2016) at para 240.

<sup>89</sup> *Içkale Infaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) at para 241.

<sup>90</sup> *Içkale Infaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) at para 244.

opposed to jurisdiction.<sup>91</sup> No reasons were given to justify the tribunal's position.<sup>92</sup> In fact, the parties were already in agreement that the precondition went to jurisdiction.<sup>93</sup> The *Içkale* decision is problematic because its interpretation directly contradicts a previous interpretation by another ICSID tribunal of the same dispute resolution clause.<sup>94</sup> Philippe QC, the dissenting arbitrator in *Içkale*, has rightly criticised the majority approach.<sup>95</sup> It is hoped that our approach will contribute to the elucidation of this difficult issue of preconditions, as well as the correct approach to be followed by tribunals more generally to distinguishing between jurisdictional and non-jurisdictional issues, so as to reduce the number of incidences of tribunals falling prey to the alluring but ultimately deficient simplicity of the “tribunal *versus* claim” test.

### III. International Court of Justice Proceedings

31 We have argued in section II above that tribunals which wish to classify objections should do so according to whether or not the objection is jurisdictional. The touchstone for this classification is whether the objection, if factually proven, would impinge upon the consent of the objecting party to arbitrate. In the context of the BIT precondition objection, this touchstone takes the form of the specific enquiry of whether the States parties to the BIT intended the

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<sup>91</sup> *Içkale Insaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) at para 247.

<sup>92</sup> As noted by Philippe Sands QC in *Içkale Insaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (8 March 2016) at para 6.

<sup>93</sup> *Içkale Insaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) at para 239.

<sup>94</sup> See *Kılıç Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013) at para 6.3.15.

<sup>95</sup> *Içkale Insaat Ltd Sirketi v Turkmenistan*, ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (8 March 2016) at paras 3–11.

precondition to be a condition to their consent to arbitrate on a true interpretation of the dispute resolution clause.

32 What are the applicable legal rules when the tribunal forms a view on the nature of the objection? If the tribunal forms the view that the objection is *jurisdictional*, the body of rules which relate to jurisdiction will apply<sup>96</sup> and the tribunal must proceed to determine if it has jurisdiction on the facts of the case in accordance with those rules. If the tribunal forms the view that the objection is *not jurisdictional*, but that it relates to the procedure of the arbitration, the applicable legal rules to the arbitral proceedings will usually confer on the tribunal the discretion to conduct the proceedings in such manner as it deems appropriate.<sup>97</sup> This includes the power to stay or even dismiss the proceedings in

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<sup>96</sup> For ICSID arbitrations, the applicable rules are found in r 41 of the ICSID Arbitration Rules 2006 and Arts 25 and 41 of the ICSID Convention. For UNCITRAL arbitrations, the applicable rules are located in Art 23 of the UNCITRAL Arbitration Rules 2013. Similar provisions appear in the rules of other arbitral institutions: see r 28 of the SIAC Arbitration Rules 2016; r 25 of the SIAC Investment Arbitration Rules 2017; Art 23 of the LCIA Arbitration Rules 2014; Art 19 of the HKIAC Administered Arbitration Rules 2013 and Art 23 of the PCA Arbitration Rules 2012. See also Art 16 of the Model Law.

<sup>97</sup> In the ICSID regime, the applicable legal rule is r 19 of the ICSID Arbitration Rules 2006 read with Art 44 of the ICSID Convention. Outside the ICSID regime, there are numerous arbitration institutions whose rules confer such a discretion: see Art 22 of the ICC Arbitration Rules 2017; r 19.1 of the SIAC Arbitration Rules 2016; r 16.1 of the SIAC Investment Arbitration Rules 2017; Art 14.5 of the LCIA Arbitration Rules 2014; Art 13.1 of the HKIAC Administered Arbitration Rules 2013 and Art 17(1) of the PCA Arbitration Rules 2012. *Ad hoc* arbitration rules also confer such a discretion: see Art 17(1) of the UNCITRAL Arbitration Rules 2013. Even Art 19(2) of the Model Law confers such a discretion on the tribunal in the absence of any agreement by the parties on the procedure to be followed.

appropriate circumstances.<sup>98</sup> So if the non-jurisdictional objection relates to the procedure of the arbitration, the tribunal may stay or dismiss the proceedings if the circumstances require it to do so.

33 A decision on “admissibility” is therefore a decision on the procedure of the arbitration taken by the tribunal in the exercise of its discretion over case management. When tribunals determine “admissibility”, they take into consideration the same factors of procedural fairness and efficiency which tribunals take into account when making any other procedural decision during the course of the arbitration in the exercise of their discretion. In the absence of any reason to the contrary, we do not consider that there is any need to carve out a class of procedural decisions to call them decisions on “admissibility”.<sup>99</sup> Indeed, admissibility is not a recognised concept in most legal rules which may apply to the arbitration.<sup>100</sup> Even the ICJ, whose Rules of Court refer to “admissibility”, makes its decisions on admissibility on the basis of considerations of procedural fairness and efficiency, illustrating the procedural and discretionary character of decisions on “admissibility”. The ICJ’s

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<sup>98</sup> *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at para 173.

<sup>99</sup> This view is shared by *Giovanni Alemanni v The Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) at para 259:

The question that remains therefore is whether there exist other conditions, over and above these more strictly ‘jurisdictional’ ones, that can properly be invoked before an ICSID tribunal as grounds for it to decline to hear a case, even though the case falls within its ‘jurisdiction’. Whether any such ought usefully to be given the label of ‘admissibility’ is open to question. The term, as Schreuer points out, is not used either in the Convention itself or in the Rules.

<sup>100</sup> For example, ICSID Convention and ICSID Arbitration Rules for ICSID cases, UNCITRAL Arbitration Rules for UNCITRAL cases, *etc.* The authors are only aware of three arbitral institutions whose rules refer to the “admissibility of claims”. Those rules are the SIAC Investment Arbitration Rules 2017 (see rr 25.2 and 26.1), the ICDR International Arbitration Rules 2014 (see Art 19(3)) and the SCC Arbitration Rules 2017 (see Art 39(2)).

approach towards admissibility will now be further discussed in the passages below.

### **A. Legal framework**

34 The Statute of the International Court of Justice defines the jurisdiction of the ICJ<sup>101</sup> but does not recognise a separate concept of admissibility. However, Article 79(1) of the Rules of Court of the ICJ recognises admissibility as a distinct concept from jurisdiction:<sup>102</sup>

Any objection by the respondent to *the jurisdiction of the Court* or to *the admissibility of the application*, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party's first pleading. [emphasis added]

### **B. International Court of Justice's understanding of admissibility**

35 What then is the ICJ's understanding of the concept of admissibility? The ICJ has a vague understanding of the concept of admissibility.<sup>103</sup> Its expressed understanding is that "[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless *there are reasons why the Court*

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<sup>101</sup> Statute of the International Court of Justice, Art 36.

<sup>102</sup> Rules of Court (1978) (International Court of Justice) Art 79(1).

<sup>103</sup> S Rosenne, *The Law and Practice of the International Court 1920–2005* vol II (Brill, 4th Ed, 2006) at p 848: "Neither the case law nor the writings of publicists display any certainty or unanimity over the categorisation of preliminary objections. All that can be deduced from experience is that it is an individual matter to be appreciated in the light of all the circumstances of each case."

*should not proceed to an examination of the merits* [emphasis added].<sup>104</sup>

36 What reasons does the ICJ accept as valid? The ICJ has never attempted to state the reasons it accepts as valid exhaustively. However, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*,<sup>105</sup> the ICJ said that such reasons are:<sup>106</sup>

[O]ften of such a nature that the matter should be resolved *in limine litis*, for example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim.

In *Certain Phosphate Lands in Nauru (Nauru v Australia)*<sup>107</sup> (“*Phosphate Lands*”), the ICJ also recognised that delay was another possible valid reason, when it said that “even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible”.<sup>108</sup> The ICJ has yet to accept other reasons

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<sup>104</sup> *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, (Judgment) [2003] ICJ Rep 161 at 177, [29]. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412 at 456, [120], where the ICJ explained that an objection to admissibility essentially “consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein”.

<sup>105</sup> (Preliminary Objections) [2008] ICJ Rep 412.

<sup>106</sup> (Preliminary Objections) [2008] ICJ Rep 412 at 456, [120].

<sup>107</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240.

<sup>108</sup> Although the ICJ inserted a crucial caveat: “It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.” *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) (continued on next page)

expressly beyond those stated above,<sup>109</sup> so bringing the threads together, we can conclude that the ICJ has accepted at least the following reasons as valid in principle thus far:

- (a) Mootness
- (b) Delay
- (c) Agreement of parties to use another method of pacific settlement
- (d) Non-compliance with rules of nationality of claim
- (e) Failure to exhaust local remedies

37 Is there a common thread which runs through these grounds? The answer in our view is yes. Let us look at each of these grounds in further detail.

38 In respect of mootness, the ICJ's jurisprudence shows that the ICJ will not exercise its jurisdiction if it considers that the dispute has been rendered academic by virtue of the development in the circumstances of

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Objections) [1992] ICJ Rep 240 at 253–254, [32]. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 at 267, [295] and *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12 at 37–38, [44].

<sup>109</sup> Tomuschat lists the following grounds as valid grounds of inadmissibility: (a) substantiation of subject matter of application; (b) abuse of process; (c) power of representation; (d) waiver; and (e) lack of *locus standi*: C Tomuschat, “Article 36” in *The Statute of the International Court of Justice: A Commentary* (A Zimmerman *et al* eds) (Oxford University Press, 2nd Ed, 2012) at pp 700–705. However, a preliminary survey of the International Court of Justice (“ICJ”) cases relied upon by Tomuschat does not support this view. In most of these cases, the ICJ found that the objections had no factual basis, and did not expressly affirm that the objections would have been valid had they been factually supported. In particular, the case of *South West Africa (Second Phase)* [1966] ICJ Rep 6 at 42–43, [74]–[76], does not support the conclusion that *locus standi* regarding the subject matter of the claim is a recognised ground for inadmissibility, because although the ICJ entertained the possibility that the issue went to admissibility, it did not definitively decide the matter.

the case.<sup>110</sup> The chief reason for this is that, having regard to its judicial function to resolve disputes between States, it would not be a proper discharge of the ICJ's duties if the circumstances render adjudication devoid of purpose.<sup>111</sup> Two cases illustrate this point. In *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections)<sup>112</sup> ("*Northern Cameroons*"), the Republic of Cameroon sought a declaration from the ICJ that the UK violated the Trusteeship Agreement as the administration authority of the Northern Cameroons. The ICJ held that a declaration would be of little practical value, since the General Assembly had passed a resolution endorsing the plebiscites and deciding to terminate the Trusteeship Agreement (which Cameroons specifically emphasised it was not asking the ICJ to review) and Northern Cameroons had joined Nigeria.<sup>113</sup> Hence, the ICJ found that the circumstances rendered adjudication devoid of purpose, and that it would be inconsistent with the judicial function of the ICJ to proceed to

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<sup>110</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 35: "The Court does not find it necessary to pronounce an opinion on these points which, in so far as concerns the operation or administration of the Trusteeship for the Northern Cameroons, can have only an academic interest since that Trusteeship is no longer in existence, and no determination reached by the court could be given effect to by the former Administering Authority."

<sup>111</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 38: "The Court must discharge the duty to which it has already called attention – the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion be a proper discharge of its duties."

<sup>112</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15.

<sup>113</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 33.

examine the merits.<sup>114</sup> The ICJ accordingly found that it could not adjudicate upon the merits of Cameroon's claim.<sup>115</sup> In *Nuclear Tests (Australia v France)*<sup>116</sup> and *Nuclear Tests (New Zealand v France)*<sup>117</sup> (collectively, the "*Nuclear Tests* cases"), Australia and New Zealand brought claims against France seeking a declaration that France's carrying out of atmospheric nuclear weapon tests contravened international law and an order against France to desist. The ICJ reasoned that, since France had given a legal undertaking to refrain from carrying out the tests, and since the objective of New Zealand and Australia had always been to bring about the termination of the tests, the objective had been fulfilled and the dispute had disappeared.<sup>118</sup> Hence, the ICJ found that the claims no longer had any object and the ICJ was not called upon to give a decision thereon.<sup>119</sup>

39 In respect of delay, the ICJ's case law indicates that the ICJ is primarily concerned with whether the party's delay to bring (or add) a claim would result in prejudice. This attitude can be seen most visibly in *Phosphate Lands*.<sup>120</sup> In this case, Nauru brought a claim against Australia regarding the rehabilitation of certain phosphate lands. Australia argued that Nauru achieved independence in 1968 but did not bring the claim until 20 years later. Accordingly, the claim was not submitted within a

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<sup>114</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 38.

<sup>115</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 at 38.

<sup>116</sup> (Judgment) [1974] ICJ Rep 253.

<sup>117</sup> (Judgment) [1974] ICJ Rep 457.

<sup>118</sup> *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253 at 270–272, [55]–[59]; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457 at 476–477, [58]–[62].

<sup>119</sup> *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253 at 270–272, [55]–[59]; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457 at 476–477, [58]–[62].

<sup>120</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240.

reasonable time and was inadmissible.<sup>121</sup> The court rejected Australia's claim on the basis that that Nauru did in fact raise the issue with Australia on several occasions prior to initiating ICJ proceedings.<sup>122</sup> In these circumstances, the claim was not rendered inadmissible by passage of time.<sup>123</sup> Crucially, the ICJ added after this that "[n]evertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it *will in no way cause prejudice to Australia* with regard to both the establishment of the facts and the determination of the content of the applicable law" [emphasis added].<sup>124</sup> By making this statement, the ICJ was suggesting that, if it later found that the delay prejudiced the opponent party, the ICJ would refuse to adjudicate over the claim. This demonstrates that the target concern of the ICJ in situations of delay is whether upholding the admissibility of the claim, notwithstanding the party's delay, would lead to unwanted prejudice to the other party.<sup>125</sup>

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<sup>121</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 253, [31].

<sup>122</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 254–255, [33]–[36].

<sup>123</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 254–255, [36].

<sup>124</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 254–255, [36]. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 at 267, [295] where the ICJ held that, in the circumstances, "the long period of time between the events at stake during the Mobutu régime and the filing of Uganda's counter-claims has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997".

<sup>125</sup> The situation considered in this paragraph concerns the delay to bring a claim *at all*. Another type of situation of delay which may arise is when a party brings an additional claim in the later course of the proceedings which was not included in the original application. The International Court of Justice ("ICJ") has encountered such scenarios and has ruled that a new claim which cannot be considered as included in the original claim *in substance* would be inadmissible: *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 265–266, [65];

(continued on next page)

40 In respect of agreement to use another method of pacific settlement, the ICJ has not elaborated on what this ground entails. However, Tomuschat argues that this refers to the situation where, “notwithstanding the general consent of the parties to dispute settlement by the Court, some other method applies in view of the specific case at hand”.<sup>126</sup> Tomuschat continues to say that “[a]mong the relevant clauses providing for other dispute settlement mechanisms one

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*Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432 at 448, [29]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659 at 695, [108]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 at 656, [39]. And for the new claim to be included in the original claim in substance, it must have been implicit in the application or must arise directly out of the question which is the subject matter of that application: *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 266, [67]. In these cases, the ICJ took into account Art 40(1) of the Statute of the International Court of Justice (which requires cases brought before the ICJ to indicate the subject of the dispute) and Art 38(2) of the Rules of Court (which requires the application to specify the precise nature of the claim) to reach this proposition, but more significantly it extracted the underlying value of these provisions, which is that they were “essential from the point of view of legal security and the good administration of justice”: *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 at 267, [69]; See also *Société Commerciale de Belgique* (Judgment) [1939] PCIJ Rep, Series A/B No 78 at 173. These broad considerations are closely related to the consideration of prejudice, evidencing that the ICJ in this second scenario is also guided by factors of procedural fairness between the parties. Similar principles guide the ICJ when it is determining if a counterclaim fails to satisfy the “direct connection” requirement in Article 80 of the Rules of Court, so as to be inadmissible: see for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Order) [1997] ICJ Rep 243 at 257–258, [30]–[31].

<sup>126</sup> C Tomuschat, “Article 36” in *The Statute of the International Court of Justice: A Commentary* (A Zimmerman *et al* eds) (Oxford University Press, 2nd Ed, 2012) at p 701.

may mention Art 55 of the European Convention on Human Rights as well as Art 344 of the Treaty of the Functioning of the European Union.”<sup>127</sup> In other words, Tomuschat had in mind the situation where the parties have submitted, *in addition* to the compulsory jurisdiction of the ICJ, to another dispute resolution mechanism in relation to a specific area of international law, resulting in a jurisdictional overlap. In our view, although there is no institutional hierarchy under general international law to rank international courts,<sup>128</sup> we agree with Tomuschat that the ICJ may legitimately hold a claim to be “inadmissible” on the basis of a concern about the appropriateness of it exercising jurisdiction over a matter for which the parties have specifically selected another form of dispute resolution. The parties are likely to have intended the specific forum to be their first port of call, so it is only consistent with the judicial function of the ICJ to decline to exercise jurisdiction to give effect to this intention, even if the parties have yet to initiate the proceedings in the alternative forum.

41 The analysis of the three grounds above indicates that, when the ICJ is addressing the “admissibility” of the claim, it is not applying some abstract or highbrow concept of admissibility to the facts. Rather, the ICJ is simply exercising its ordinary powers over the conduct of the proceedings, having regard to its judicial function as well as to the interests of the parties in the fairness of the procedure and the final objective of resolving the dispute between the parties. So, whether there is delay, mootness or another applicable dispute resolution mechanism, the ICJ only has the following considerations in mind: what is procedurally fair between the parties, and how does the ICJ’s judicial function require it to respond? This will invariably involve a careful balancing exercise of all the relevant factors that may arise from the particular facts and circumstances of the case. But there is nothing

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<sup>127</sup> C Tomuschat, “Article 36” in *The Statute of the International Court of Justice: A Commentary* (A Zimmerman *et al* eds) (Oxford University Press, 2nd Ed, 2012) at p 701.

<sup>128</sup> *Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo* (‘*Celebici Case*’) (Appeal Judgment) IT-96-21-A, A Ch (20 February 2001) at 9, para 24.

mysterious about this exercise, and nothing novel about the ICJ's approach. The ICJ is simply doing what a judicial body ordinarily does and is required to do.

42 What about the grounds of “nationality of claim” and “exhaustion of local remedies”? Do they have any bearing on our analysis above? The jurisprudence of the ICJ indicates that these two grounds are not of general application.<sup>129</sup> Rather, they refer to the rules of customary international law which specifically apply when a State seeks to exercise diplomatic protection. The background is that there is a motley of customary international legal rules which concern the legal obligations owed by one State to another in respect of the treatment of nationals.<sup>130</sup> And if a State wants to invoke the responsibility of another State for injuring its nationals, it must first comply with the rules of nationality

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<sup>129</sup> J Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) at p 701: “the nationality of claims and exhaustion of local remedies rules were specifically developed in the context of diplomatic protection”.

<sup>130</sup> *Mavrommatis Palestine Concessions* (Judgment No 2) [1924] PCIJ Series A No 2, 12:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

This body of rules includes the rules of customary international law on the expulsion of aliens, which are still in the process of development: International Law Commission, *Report of the International Law Commission on the Work of its 66th Session* (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10 (“ILC Report”) at p 18. This is why the Draft Articles on the Expulsion of Aliens of 2014 “involve both the codification and the progressive development of fundamental rules on the expulsion of aliens”: *ILC Report* at p 2.

of claims<sup>131</sup> and exhaustion of local remedies<sup>132</sup> under customary international law.<sup>133</sup> So, when a State exercises diplomatic protection by instituting proceedings in the ICJ, and the ICJ rules that the claim is inadmissible because the applicant State has not complied with these rules, the ICJ is merely applying the rules of customary international law to the dispute in accordance with its judicial function.<sup>134</sup> In other words, it is applying a *specific* concept of admissibility to the facts, unlike the balancing exercise involved in the first three grounds (which does not involve the application of a specific concept of admissibility). But that is only because customary international law has bestowed these rules upon the ICJ for the ICJ to apply when it comes to diplomatic protection. There are no such customary international legal rules for the first three grounds. So, in the absence of specific rules of law to give flesh to the bones of admissibility, the point remains that decisions of admissibility are decisions on procedure undertaken by the ICJ in the exercise its discretion over the conduct of the proceedings. The ICJ has no secret formula to determine if it should exercise its discretion or not. All it does is take into account the usual factors of procedural fairness and efficiency in the light of its judicial function, based on the particular facts and circumstances of the case.

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<sup>131</sup> *Panevezys-Saldutiskis Railway* (Judgment) [1939] PCIJ Rep Series A/B No 76, 16; *Nottebohm Case (second phase)* (Judgment) [1955] ICJ Rep 4 at 13. Otherwise, the claim is inadmissible: *Nottebohm Case (second phase)* (Judgment) [1955] ICJ Rep 4 at 16–17.

<sup>132</sup> *Elettronica Sicula SpA (ELSI)* (Judgment) [1989] ICJ Rep 15 at 42, [50]; *Interhandel Case* (Judgment) [1959] ICJ Rep 6 at 27. Otherwise, the claim is inadmissible: *Elettronica Sicula SpA (ELSI)* (Judgment) [1989] ICJ Rep 15 at 46, [59]; *Interhandel Case* (Judgment) [1959] ICJ Rep 6 at 26.

<sup>133</sup> Note however that the rules on nationality of claims and exhaustion of local remedies are currently undergoing a codification process. See the Draft Articles on Diplomatic Protection of 2006 and the discussion of these Articles in International Law Commission, “Report of the International Law Commission on the Work of its 58th Session” (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10 at pp 13–94.

<sup>134</sup> *Nottebohm Case (second phase)* (Judgment) [1955] ICJ Rep 4 at 17.

#### IV. Conclusion

43 Our conclusions in the light of the above as follows:

- (a) In certain quarters of the international arbitration community, there are growing calls for the acceptance of a separate concept of admissibility in investment treaty arbitration and international arbitration more generally.
- (b) Our view is that these calls should not be heeded. A decision on admissibility is nothing more than a decision on the procedure of the arbitration undertaken by the tribunal in the exercise of its discretion, as ordinarily provided for in the legal rules which apply to the arbitral proceedings. There is no clear reason to mark out these decisions as decisions on “admissibility”. On the contrary, the term “admissibility” does not appear in the legal rules which apply to the arbitral proceedings. The concept of admissibility of claims in international arbitration is therefore a chimera which we need to stop chasing.
- (c) We can discard the label of “admissibility” and still have a clear understanding of the legal principles in play. The following statements accurately describe the legal principles without making reference to the term “admissibility”:
  - (i) The reviewability of a tribunal’s decision depends on whether or not the objection is jurisdictional.
  - (ii) A tribunal that wishes to classify the objections of an objecting party should do so according to this distinction.
  - (iii) So the only question which the tribunal should be asking itself is whether or not the objection, if factually proven, would impinge upon the *consent* of the objecting party to the arbitration, so as to amount to a jurisdictional objection.
  - (iv) How to identify if consent is affected will depend on the type of objection at issue. For instance, if the objection is a BIT precondition objection, the best way to identify if consent is affected is to interpret the host State’s offer to arbitrate in the dispute resolution clause to determine if the State intended the precondition to be a condition to its consent to arbitrate.

- (v) If the tribunal forms the view that the objection is jurisdictional, the tribunal will have to go on to determine if it has jurisdiction on the facts of the case in accordance with the applicable rules on jurisdiction.
  - (vi) If the tribunal forms the opposite view that the objection is not jurisdictional, and that it concerns the procedure of the arbitration, the tribunal will have the discretion to stay or dismiss the proceedings where the circumstances require such a course of action, by virtue of the legal rules applicable to the proceedings which confer such a discretion.
  - (vii) The implication of the above is that the tribunal's ability to dismiss the proceedings extends not only to jurisdictional objections, but also to non-jurisdictional objections regarding the conduct of the arbitration.
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### Background to Essay 17

Following the establishment of the Asian Business Law Institute (“ABLI”) in Singapore in 2016, various persons and bodies were tasked to carry out the mission of the ABLI in promoting the convergence and harmonisation of national laws in Asia. In pursuance of this mission, Singapore Management University organised a conference in 2016 to discuss various areas where convergence of national laws had been achieved to a significant degree, and to identify which other areas of law were suitable for study on more harmonisation and convergence.

I was asked to present a paper on the extent to which the law of international arbitration had been the subject of convergence, and I was happy to contribute to this study. It soon became clear that this area was a strong candidate to be the model for other legal areas to follow. In this regard, much of this convergence can be attributed to (a) the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by 159 states as at the latest count in mid-2018, and (b) the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by 80 states in a total of 111 jurisdictions.

This essay will be published as a chapter in a forthcoming book entitled *Convergence of Commercial Laws in Asia: Methods and Drivers* (Gary Low & Maartje de Visser eds) (Cambridge University Press, forthcoming).

*I wish to extend my thanks to Cambridge University Press for kindly granting me permission to republish this essay in this book.*

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**NEW YORK CONVENTION AND THE UNITED NATIONS  
COMMISSION ON INTERNATIONAL TRADE LAW MODEL LAW  
ON INTERNATIONAL COMMERCIAL ARBITRATION:  
EXISTING MODELS FOR LEGAL CONVERGENCE IN ASIA?\***

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## **I. Brief historical background of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration**

1 Globalisation has seen an evolution in the business world, such that “international arbitration does not stay within national borders”.<sup>1</sup> A number of questions arise when disputes occur between corporations in two different countries to be settled by arbitration in a third country. First, if a dispute arises, and one of the parties refuses to arbitrate, where is such an arbitration agreement to be enforced? Second, which court will have such jurisdiction? Third, if there is an arbitration that leads to an award of damages and costs, how is that award to be enforced against the losing party if the losing party refuses to voluntarily implement the award? Fourth, again, which court has such jurisdiction?

2 It was in these circumstances that various international rules, treaties and conventions were enacted. The position at common law already allowed (and continues to allow) for the recognition by each common law court of any foreign arbitral award, on the basis that the action to enforce the award is an action on the award and not on the contract to which the award gives effect, nor on a foreign judgment.<sup>2</sup> In

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<sup>1</sup> Nigel Blackaby & Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015).

<sup>2</sup> Paul Torremans & James J Fawcett, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 15th Ed, 2017) ch 18, (continued on next page)

spite of this position at common law, these international rules, treaties and conventions serve a different purpose, “linking national laws together and providing (as far as possible) a system of worldwide enforcement, both of arbitration agreements and of arbitral awards”.<sup>3</sup>

3 Out of these international rules, treaties and conventions, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (with amendments as adopted in 2006) (“UNCITRAL Model Law”) are widely recognised as the “cornerstones of international arbitration”.<sup>4</sup>

4 This essay will be divided into two parts. First, we will discuss the success of the New York Convention which has been adopted by 156 countries. Second, we will look at the success of the UNCITRAL Model Law which has been adopted by 73 countries and 103 jurisdictions (and still counting).

## **II. Success of the New York Convention**

5 The New York Convention replaced the 1927 Geneva Convention and the 1923 Geneva Protocol.<sup>5</sup> It is said to constitute a substantial improvement from the Geneva Convention and Geneva Protocol because the New York Convention provides for a simpler and more effective method of obtaining recognition and enforcement of foreign awards,

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at pp 667–669. For the award to be enforceable, it must, like a foreign judgment, be final and conclusive.

<sup>3</sup> Nigel Blackaby & Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 6.

<sup>4</sup> Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 61.

<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“New York Convention”) Art VII(2).

and gives much wider effect to the validity of arbitration agreements.<sup>6</sup> It was prepared by the United Nations in 1958 prior to the establishment of the UNCITRAL in 1969 and seeks to achieve two goals:<sup>7</sup>

- (a) To provide common legislative standards to ensure that agreements to arbitrate are respected; and
- (b) To provide common legislative standards to ensure that foreign and non-domestic arbitral awards will be recognised and enforced.

6 The New York Convention has been largely successful in creating common legislative standards in the international arbitration system to promote the recognition and enforcement of arbitral agreements and awards. In 1998, 20 years after the New York Convention entered into force, efforts by the late Pieter Sanders and Albert Jan van den Berg to collate judicial developments revealed that courts already exhibit a “pro-enforcement” bias,<sup>8</sup> consistent with the aims of the New York Convention.

7 The New York Convention is also recognised to have significantly reinforced the concept of legal certainty in international arbitration.<sup>9</sup> As a convention that sets a minimum standard for international arbitration, it provides a minimum degree of legal certainty in arbitration, which is necessary for the stability of business transactions that have an international dimension. Also, it ensures that foreign arbitral awards can be recognised and enforced even outside the State in which those awards are pronounced, preventing vulnerability of a State’s traders and

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<sup>6</sup> Nigel Blackaby & Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 617.

<sup>7</sup> Official UNCITRAL website [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>8</sup> Albert Jan van den Berg, “Striving for uniform interpretation” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations, 1999) at p 41.

<sup>9</sup> Emilio J Cardenas, “Benefits of membership” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations, 1999) at pp 14–15.

enterprises when they do business on an international scale. These qualities of the New York Convention comport with UNCITRAL's object of promoting harmonisation and unification of the law of international trade by promoting ways and means of ensuring a uniform interpretation and application of international conventions and laws.<sup>10</sup>

8 To date, the New York Convention has been ratified by 159 States<sup>11</sup> and is commonly eulogised as “the single most important pillar on which the edifice of international arbitration rests” and as a convention that “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law”.<sup>12</sup> This could be attributed to the advantages of ratifying the New York Convention described above. To this extent, the New York Convention appears to be suitable as a model for legal convergence in international arbitration.

### **III. Non-uniformity of New York Convention and its analysis**

#### **A. Non-uniformity of the New York Convention**

9 Despite its widespread acceptance, the New York Convention is commonly criticised for lacking a modernised, efficient, and universal enforcement procedure.

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<sup>10</sup> Official UNCITRAL website <https://www.uncitral.org/>.

<sup>11</sup> Official UNCITRAL website, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (accessed 1 June 2018).

<sup>12</sup> Nigel Blackaby & Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 617; citing J Gillis Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) *American Review of International Arbitration* 91 at 93 and Michael John Mustill, “Arbitration: History and Background” (1989) 6(2) *Journal of International Arbitration* 43 at 49. See also Stephen M Schwebel, “A Celebration of the United Nations’ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1996) 12 *Arbitration International* 823.

10 One common argument is that the recognition and enforceability of foreign arbitral awards is largely subject to where the seat of arbitration is located. Article V(1)(e) of the New York Convention provides that recognition and enforcement of a foreign arbitral award may be refused if the award has been “set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”.<sup>13</sup> This makes it possible for courts to refuse to recognise or enforce foreign awards if they have been set aside by the courts in the country where they were rendered. The implication of this is that the reliability of an award is subject to the local peculiarities where the award was rendered, which is inconsistent with the aim of the New York Convention to harmonise the legal regime of international transactions.

11 Additionally, the written form requirement of the arbitration agreement under Article II(2) of the New York Convention is generally regarded as too stringent. Article II(1) provides that the New York Convention only recognises an “agreement in writing”, and this phrase is clarified to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.<sup>14</sup> On a plain reading, it appears that the arbitration agreement must be in written form. In light of modern advancements in telecommunications, a broader reading of “in writing” should be applied by the courts to find that there is a valid arbitration agreement as long as there is *consensus ad idem* between the parties. Otherwise, many arbitration agreements would not be recognised as valid under the New York Convention. This would be contrary to the purpose of the New York Convention to ensure that agreements to arbitrate are respected.

12 Also, there are shortcomings regarding the procedure for enforcement of a foreign arbitral award. At present, such enforcement largely depends on the country where enforcement of the award is sought. Depending on the country, a number of differences will arise.

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<sup>13</sup> New York Convention Art V(1)(e).

<sup>14</sup> New York Convention Arts II(1) and II(2). The New York Convention was of course drafted before the age of electronic communications.

- (a) First, there will be a different number of courts that may adjudicate on a request for enforcement.
- (b) Second, the limitation period for enforcement differs between countries. For instance, that in China is six months after the award, while that in the Netherlands is 20 years.<sup>15</sup>
- (c) Third, the applicability of the New York Convention depends on two reservations – the “reciprocity” reservation and the “commercial” reservation.<sup>16</sup> To date, only 74 out of 156 State parties to the New York Convention have adopted the “reciprocity” reservation,<sup>17</sup> meaning that only these 74 States restrict themselves to applying the New York Convention to awards rendered in other States when such other States are also parties to the Convention. This is to be contrasted with the common law position, in which any foreign arbitral award is enforceable by each common law court based on an action on the award at common law.<sup>18</sup> As for the second reservation on “commercial” legal relationships, relationships that are regarded as “commercial” by one State may not necessarily be so regarded by others.<sup>19</sup> It is important to note that whilst the New York Convention is silent on

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<sup>15</sup> Albert Jan van den Berg “Striving for uniform interpretation” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations, 1999) at p 42.

<sup>16</sup> New York Convention Arts I(3) and XIV.

<sup>17</sup> New York Convention website <http://www.newyorkconvention.org/countries>.

<sup>18</sup> Paul Torremans & James J Fawcett, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 15th Ed, 2017) ch 18, at pp 667–669. See also *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9.

<sup>19</sup> See *Indian Organic Chemical Ltd v Subsidiary 1 (US), Subsidiary 2 (US), and Chemtex Fibres Inc (Parent Co) (US)* (1979) IV YBCA 271 (agreement is not commercial “under the law in force in India”). See also *Union of India v Lief Hoegh Co (Norway)* (1984) IX YBCA 405 (“commerce” is a word of the largest import; disagreed with *Indian Organic v Chemtex*).

the definition of “commercial”,<sup>20</sup> the UNCITRAL Model Law clarifies this in Article 1(1) of the UNCITRAL Model Law.<sup>21</sup> Hence, this might lead to the conclusion that States that ratified the New York Convention but did not adopt the UNCITRAL Model Law will still have the leeway to interpret “commercial” in the manner they deem fit.

13 To this end, it may be argued that these shortcomings of the New York Convention reduce its effectiveness as a modern model for legal convergence. First, since State parties to the New York Convention may recognise and enforce arbitral agreements and foreign arbitral awards to varying degrees, the commonality of the legislative standards prescribed by the New York Convention may not be completely achieved in practice. Second, the recognition of such shortcomings have given birth to a Hypothetical Draft Convention<sup>22</sup> to stimulate reflection on the subject, and the adoption of such a convention would possibly render the New York Convention obsolete.<sup>23</sup>

### ***B. Analysis of non-uniformity of the New York Convention***

14 Nevertheless, such non-uniformity is arguably not inconsistent with the spirit of the New York Convention. The New York Convention

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<sup>20</sup> Pursuant to Article I(3) of the New York Convention (“It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”), the New York Convention allows “commercial” to be interpreted in accordance with the national law of the State making such reservation.

<sup>21</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (“UNCITRAL Model Law”) Art 1(1), fn 2.

<sup>22</sup> Albert Jan van den Berg, “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, Text of Draft Convention” *AJB/Rev06/29-May-2008*.

<sup>23</sup> The chances of such an amended Convention is at present unlikely.

merely serves as a minimum standard<sup>24</sup> and gives room for States to adopt alternative interpretations of the provisions in the Convention. Ultimately, the purported inconsistencies in interpretation and application mentioned above do not depart from the purpose of the New York Convention.

15 In spite of criticisms against the Convention and calls for its modernisation, it has been noted that no convention since 1958 has had the same impact as that of the New York Convention,<sup>25</sup> and that the New York Convention still remains “the cornerstone of international arbitration”.<sup>26</sup> To date, there is no record of any nation denouncing the New York Convention pursuant to Article XIII of the Convention. Diversity is not divergence,<sup>27</sup> and countries are allowed variance in their rules for enforcement. This is also reflected in Article VII(1) of the New York Convention, which will be further elaborated on in the reasons we are about to set out. Hence, it is submitted that the New York Convention is a suitable model for legal convergence for the reasons set out below.

16 With regard to the Draft Convention put forward by Albert Jan van den Berg, Emmanuel Gaillard is of the view that there is “no need, no danger and no hope”.<sup>28</sup>

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<sup>24</sup> Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016).

<sup>25</sup> See Julian D M Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003). See also Nigel Blackaby & Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 61.

<sup>26</sup> UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations, 2016).

<sup>27</sup> See Pieter Sanders, “Unity and Diversity in the Adoption of the Model Law” (1995) 11(1) *Arbitration International* 1.

<sup>28</sup> Emmanuel Gaillard, “The Urgency of Not Revising the New York Convention” in *50 Years of the New York Convention* (ICCA Congress Series No 14, Dublin, 2008) (Kluwer Law International, 2009) at p 690.

(a) *There is no real need to revise the New York Convention*

(i) The shortcomings of Article V(1)(e) may be circumvented

17 Article V(1)(e) of the New York Convention provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

...

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

18 Jan Paulsson has recognised that the power conferred on courts by virtue of Article V(1)(e) of the New York Convention poses an “obvious danger to the harmonisation of the legal regime of international transactions”.<sup>29</sup> To this, he suggested three solutions.

19 The first solution is to ignore Article V(1)(e) entirely, on the basis that the Convention allows (or even mandates) each country under Article VII to adopt a more liberal regime in favour of enforcement.<sup>30</sup> This solution completely displaces the control function of the enforcement jurisdiction or jurisdictions, meaning that the judge in the enforcement

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<sup>29</sup> Jan Paulsson, “Awards Set Aside at the Place of Arbitration” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations, 1999) at p 25.

<sup>30</sup> *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (OTV) (1994) Rev Arb 327 (award was enforced by Cour d’Appel even though it was set aside in the country in which it was rendered; that is, Switzerland); *In Re Chromalloy Aeroservices and the Arab Republic of Egypt* 939 F Supp 906 (DC Cir, 1996) (US court-enforced award rendered in Egypt even though it was set aside in Egyptian court); *Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Mnogutia Est Epices* [2007] Rev Arb 507 (French courts enforced an award set aside in England); *Corporación Mexicana De Mantenimiento Integral, S De RL De CV v Pemex-Exploración Y Producción* No 13-4022, 2016 US App LEXIS 13991 (2nd Cir, 2016) (US District Court enforced a Mexican award despite being set aside at the seat of arbitration).

jurisdiction would not be required nor entitled to give any weight to what a foreign court may have done to an award, as long as the award meets the criteria of the enforcement jurisdiction. This would encourage enforcement of foreign arbitral awards despite local peculiarities.

20 The second solution is to understand that some countries cannot be relied upon to apply international standards, and to recognise that the most important trading countries abide by the contemporary international consensus – hence there is no need for concern. However, this creates a class of “trustworthy” countries, which by its very nature goes against the notion of legal convergence.

21 The third solution is to recognise that Article V of the New York Convention is discretionary through its use of the word “may” rather than “shall”. Thus, courts also have the discretion to accept enforcement, even when an award has been annulled in the place where it was rendered. This solution is also consistent with Article VII of the New York Convention, which provides that the New York Convention does not “deprive any party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon”. In fact, this was the case in the *Hilmarton*<sup>31</sup> and *Chromalloy*<sup>32</sup> decisions. In the former, the Paris Court of Appeal enforced an award rendered in Geneva even though it was set aside by the Court of Justice of the Canton of Geneva. In the latter, the District Court for the District of Columbia enforced an award rendered in Egypt even though it was set aside by the Cairo Court of Appeal.

22 The question would then be how this discretion should be exercised. Jan Paulsson was of the view that the enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards. This

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<sup>31</sup> *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* (1994) Rev Arb 327.

<sup>32</sup> *In Re Chromalloy Aeroservices and the Arab Republic of Egypt* 939 F Supp 906 (DC Cir, 1996).

interpretation would make the New York Convention a suitable model for legal convergence.

- (ii) Courts already adopt a liberal interpretation of the “in writing” requirement

23 Articles II(1) and II(2) of the New York Convention provide:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

24 In practice, there is a widespread trend to apply the “in writing” requirement under Articles II(1) and II(2) of the New York Convention liberally.<sup>33</sup> This is reflected in Article 7 of the UNCITRAL Model Law, which broadens the definition of “in writing” to suit modern circumstances.<sup>34</sup> Such an intention is also reflected in numerous national arbitration laws.<sup>35</sup> Hence, while it would be helpful to make it clear that the term “in writing” covers all means of communication which can be evidenced by text, it may not be necessary to do so.

25 The UNCITRAL Model Law further provides (at Article 2A) that “regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith” in interpreting the UNCITRAL Model Law. This is indicative of

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<sup>33</sup> International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention* (International Council for Commercial Arbitration, 2011).

<sup>34</sup> UNCITRAL Model Law Art 7.

<sup>35</sup> European Convention on International Commercial Arbitration 1961 Art I(2)(a); Swiss Federal Act on Private International Law 1987 (as amended until 1 July 2014) Art 178.

UNCITRAL's intention to afford a broad interpretation of "in writing", which should inform both the UNCITRAL Model Law and the New York Convention, so that the phrase would be consistent with the modern liberal approach adopted by many States today. An inflexible application of the New York Convention's writing requirement would contradict the current and widespread business usages and be contrary to the pro-enforcement thrust of the Convention. The current view is that an arbitration agreement will be valid as long as there is a meeting of the minds between the parties in that the offer to arbitrate has been accepted.

26 Hence, criticisms of the New York Convention premised on its archaic "in writing" requirement do not render the New York Convention an unsuitable model for legal convergence.

(iii) There may be more to lose than gain in embarking upon a revision process

27 As mentioned above, the fact that the language of the Convention is sometimes outdated or could be fine-tuned does not warrant a revision of the Convention, because this would have a broad-brush impact on all 156 State parties.

28 Emmanuel Gaillard is also of the view that the revision of the New York Convention would not solve the pertinent issues raised by the New York Convention. As for the issue of recurring instances of bias in favour of local companies by the courts in certain jurisdictions at the place of enforcement, a rewording of the New York Convention will not hinder the court from taking advantage of the broad "public policy" exception under Article V(2)(b) to achieve the same result. As for the issue of States that lose in arbitrations and never satisfy the award, these difficulties are unrelated to the New York Convention but are instead a result of the State's ability to invoke its immunity from execution to resist enforcement. Thus, it would be ineffective and indeed disruptive to allow a revision of the New York Convention, at least for these specific reasons.

- (iv) There is no danger in leaving the current Convention untouched

29 Moreover, there is no danger in leaving the New York Convention unrevised because the New York Convention sets only a minimum standard.<sup>36</sup> States are free to recognise and enforce foreign arbitral awards more liberally, so long as they do not fall below the standard required of them under the New York Convention. Examples of States that exercise such discretion include France and the United States.<sup>37</sup> They may also fall back on the common law position on recognition and enforcement of foreign arbitral awards, or on converted judgments. Thus, the Convention merely serves as a safety net and will do no harm even if it is not used.

30 It is also important to note the roles of the authoritative bodies behind the New York Convention – the International Council for Commercial Arbitration (“ICCA”) and UNCITRAL. ICCA aims to “promot[e] the use and improv[e] the processes of arbitration, conciliation and other forms of resolving international commercial

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<sup>36</sup> New York Convention Art VII. See Albert Jan van den Berg, “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, Explanatory Note” AJB/Rev06/29-May-2008; Julian D M Lew, Loukas A Mistelis & Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) and Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016).

<sup>37</sup> For example, *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (OTV) (1994) Rev Arb 327 (award was enforced by Cour d’Appel even though it was set aside in the country in which it was rendered, *ie*, Switzerland); *Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Mnogutia Est Epices* [2007] Rev Arb 507 (French courts enforced an award set aside in England) and *Corporación Mexicana De Mantenimiento Integral, S De RL De CV v Pemex-Exploración Y Producción* No 13-4022, 2016 US App LEXIS 13991 (2d Cir, 2016) (United States District Court enforced a Mexican award despite being set aside at the seat of arbitration).

disputes”.<sup>38</sup> UNCITRAL aims to “further the progressive harmonisation and unification of the law of international trade”.<sup>39</sup> Given the express aims of these authoritative bodies to harmonise and improve the New York Convention, State parties to the New York Convention need not be concerned that leaving the New York Convention unrevised would result in stagnation of the development of international arbitration.

31 Therefore, to the extent that States have ratified the New York Convention, the development of arbitration will never deteriorate. Indeed, to date, there is no record of any nation denouncing the New York Convention pursuant to Article XIII. This may be contrasted with several States’ denunciation of the International Centre for Settlement of Investment Disputes (“ICSID”) Convention pursuant to Article 71 of the ICSID Convention. Examples of such States include Indonesia, Bolivia and Ecuador.<sup>40</sup> Hence, leaving the New York Convention unrevised will not result in grave repercussions. The New York Convention is unlikely to be revised, and will remain relevant as a model for legal convergence.

(v) There is no hope to achieve a better instrument than the existing Convention

32 Additionally, the pro-arbitration bias of most of the 156 State parties, coupled with the dramatic development of arbitrations based on investment protection treaties, has led to States developing a defendant’s mind-set. As of 12 April 2016, 161 States have signed the ICSID Convention, while 153 States have ratified the ICSID Convention.<sup>41</sup> Thus, it is unlikely that they would be willing to enhance the

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<sup>38</sup> Official International Council for Commercial Arbitration website [www.arbitration-icca.org/about.html](http://www.arbitration-icca.org/about.html).

<sup>39</sup> Official United Nations Commission on International Trade Law website <https://www.uncitral.org/>.

<sup>40</sup> Christoph Schreuer, “Denunciation of the ICSID Convention and Consent to Arbitration” in *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) at pp 353–368.

<sup>41</sup> Official International Centre for Settlement of Investment Disputes website <https://icsid.worldbank.org/en/>.

effectiveness of the enforcement process, given that they are increasingly in a position of having to resist enforcement of awards. By extension, it would be unlikely that there will be a majority in the UN General Assembly to agree to any changes to the New York Convention.

33 Since revision of the New York Convention is both unnecessary, disruptive, and improbable, the New York Convention is unlikely to change from what it currently is – a laudable international convention that has largely succeeded in harmonising the recognition and enforcement of foreign arbitral awards today.

#### **IV. Success of the UNCITRAL Model Law on International Commercial Arbitration**

34 After the New York Convention came into force in 1958, UNCITRAL was established by the United Nations General Assembly in 1966.<sup>42</sup> UNCITRAL then prepared a Model Law with the purpose of improving the overall framework of international commercial arbitration.<sup>43</sup> As the Introduction to the UNCITRAL 2012 Digest of Case Law on the Model Law explains, the “form of a Model Law was chosen as the vehicle for harmonisation and modernisation in view of the flexibility it provides to States in preparing new arbitration laws”.<sup>44</sup> The UNCITRAL Model Law was designed to be compatible with the New York Convention,<sup>45</sup> and was adopted by UNCITRAL on 21 June 1985. Together, they are viewed as a “unified legal framework for the fair and

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<sup>42</sup> United Nations, General Assembly Resolution 2205(XXI) of 17 December 1966, Establishment of the United Nations Commission on International Trade Law.

<sup>43</sup> Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) at p 9.

<sup>44</sup> United Nations, *UNCITRAL 2012 Digest of Case Law on the Model Law of International Commercial Arbitration* (United Nations, 2012).

<sup>45</sup> Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) at p 9.

efficient settlement of disputes arising in international commercial relations”.<sup>46</sup>

35 To date, the UNCITRAL Model Law has been adopted by 80 States and 111 jurisdictions.<sup>47</sup> According to Professor Gary Bell, these include 38 countries or jurisdictions in the Asia-Pacific.<sup>48</sup> There have been some deviations in interpretation and application of the provisions in the UNCITRAL Model Law, which will be further elaborated on below. However, having compared 22 versions of adoptions of the UNCITRAL Model Law by nations all around the world (as of 2005), the late Pieter Sanders concluded that:<sup>49</sup>

[T]he success of the Model Law as a whole may be seen in the fact that there is no one particular Article which generally has been deviated from. Nor has this been the case with additions ... there is no particular addition which has been generally made.

Hence, the UNCITRAL Model Law may also be a suitable model for legal convergence in Asia and elsewhere.

## **V. Non-uniformity of the UNCITRAL Model Law and its analysis**

### **A. Non-uniformity of the UNCITRAL Model Law**

36 The non-uniformity of the UNCITRAL Model Law is reflected in areas where States have adopted the Model Law differently, as well as in additional add-ons that some States have adopted.

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<sup>46</sup> Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) at p 6.

<sup>47</sup> The number of States which have adopted UNCITRAL Model Law may be found at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985\\_Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html) (accessed 1 June 2018).

<sup>48</sup> Gary F Bell, *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* (Cambridge University Press, 2018) at p 1.

<sup>49</sup> Pieter Sanders, “Unity and Diversity in the Adoption of the Model Law” (1995) 11(1) *Arbitration International* 1.

(a) *Definition of public policy in Article 34(2)(b)(ii) of the UNCITRAL Model Law*

37 Article 34 is arguably one of the most important provisions in the Model Law as it is this Article which details the limits of a court's intervention with an arbitral award.

38 Under Article 34(2)(b)(ii), an arbitral award may be set aside by the court if the award is in conflict with the public policy of the enforcing State. This "public policy" requirement also appears in Article 36 of the UNCITRAL Model Law and Article V(2)(b) of the New York Convention.

39 Australia was the first country to insert provisions referring explicitly to fraud and corruption. These provisions were inserted via the Australian International Arbitration Amendment Act 1989 as follows:

Without limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:

- (a) The making of the award was induced or affected by fraud or corruption; or
- (b) A breach of the rules of natural justice occurred in connection with the making of the award.

40 This was subsequently adopted by New Zealand, Singapore and Malaysia with minor changes to the text that do not appear to be significant. However, this was not followed by Hong Kong and Canada.

(a) Article 34(6) of the New Zealand Arbitration Act 1996 is an extension to the provision on breach of natural justice because it states that for the purposes of that Act, a breach of natural justice can be a ground for setting aside not just if it occurs "in connection with the making of the award" but also if there is a breach of natural justice generally "during the arbitration proceedings".

- (b) Section 37(2) of the Malaysian Arbitration Act 2005<sup>50</sup> leaves out the phrase “for the avoidance of doubt”, but likewise elaborates on public policy.
- (c) Section 24 of the Singapore International Arbitration Act<sup>51</sup> frames fraud and corruption as additional grounds for setting aside. This could possibly reflect Singapore’s hard stance against fraud or corruption.

41 Since the UNCITRAL Model Law leaves open the issue of what constitutes “public policy”, and this subsection does not limit the generality of Article 34(2)(b)(ii), it is evident that this subsection is not exhaustive, and the additions serve as clarifications rather than detracting from the UNCITRAL Model Law. Each State is free to determine what constitutes “public policy”, and so this cannot be said to be a deviation from the UNCITRAL Model Law.

*(b) The parties’ right to present their case under Article 18 of the  
UNCITRAL Model Law*

42 Article 18 of the UNCITRAL Model Law states that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

43 This has given rise to concerns that the phrase “full opportunity” is too extreme and may not accurately describe the appropriate balance to be drawn between efficiency and due process. Some counsel may also attempt to argue that the requirement of a “full opportunity” is higher than that of reasonableness.<sup>52</sup>

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<sup>50</sup> Act 646.

<sup>51</sup> Cap 143A, 2002 Rev Ed.

<sup>52</sup> This appears to have been attempted by the applicant in a setting aside proceeding in Hong Kong (*Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424), though it was rejected by Saunders J, who held that “full opportunity” under the UNCITRAL Model Law and “reasonable opportunity” under the International Chamber of Commerce

44 Accordingly, Hong Kong and Australia amended the text of Article 18 of the UNCITRAL Model Law in the relevant provision in their own arbitration statute by replacing “full opportunity” with “reasonable opportunity”.

45 Properly viewed, however, these changes may not be as significant as they first appear. As Holtzmann and Neuhaus explain:<sup>53</sup>

[T]he terms ‘equality’ and ‘full opportunity’ are to be interpreted reasonably in regulating the procedural aspects of the arbitration. While ... the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party ...

46 Hence, while Hong Kong and Australia have amended the text of the Model Law, the result is undeniably consistent with the spirit of the Model Law. It is also notable that other States, such as Singapore and South Korea, did not see the need to make any amendments to the text of Article 18 and adopted it wholesale.

### (c) *Confidentiality provisions*

47 The UNCITRAL Model Law is notably silent on the issue of confidentiality, leaving the position up to each Member State. The confidentiality provisions may be in relation to the arbitration in general, or to the court proceedings arising out of arbitration. Unsurprisingly, the approach taken has differed from country to country.

48 Most arbitration statutes do not expressly touch on the general confidentiality of the arbitration.<sup>54</sup> In the circumstances, unless there are express provisions in a country’s national arbitration law, it usually falls

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Rules of Arbitration (“ICC Arbitration Rules”) was a distinction without a difference.

<sup>53</sup> Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) at p 551.

<sup>54</sup> For example, England, Singapore, China, Japan, Indonesia, India.

to the courts to decide whether or not this should be implied. For instance, Singapore, following the English position, has recognised an implied undertaking of confidentiality in arbitral proceedings.<sup>55</sup>

49 Prior to the 2010 Amendments, Australian legislation, too, was silent about the confidentiality of arbitration, although the Australian courts chose not to recognise such an implied undertaking in the interests of transparency.<sup>56</sup> However, this decision was not well-received. Amendments were thus introduced in 2010 to provide for an “opt-in” confidentiality regime.<sup>57</sup> This was supplemented by legislative amendments in 2016, which essentially changed the default position from “opt-in” to “opt-out”. This is also the position in Hong Kong, where section 18 of the Hong Kong Arbitration Ordinance<sup>58</sup> provides:

Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to – (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those arbitral proceedings.

50 Australia, Hong Kong, New Zealand and, to a lesser extent, the Dubai International Financial Centre (“DIFC”) have introduced comprehensive confidentiality provisions in their respective legislations. Evidently, various States take different approaches in their amendments to the UNCITRAL Model Law when it comes to confidentiality. However, continuing the trend that has been observed previously, this does not detract from the spirit of the UNCITRAL Model Law. The UNCITRAL Model Law is deliberately silent on confidentiality, which has given individual States the freedom to chart their own course.

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<sup>55</sup> *International Coal Pte Ltd v Kristle Trading Ltd* [2008] SGHC 182.

<sup>56</sup> *Esso Australia Resources Ltd v Plowman* [1995] HCA 19 (court held that even if a contract provided for confidentiality, this was subject to the public interest, and in certain cases could be overridden if there was a sufficiently strong need for transparency).

<sup>57</sup> International Arbitration Act 1974 (Australia) ss 23C–23G.

<sup>58</sup> Cap 609.

(d) *Immunity of arbitrators*

51 The UNCITRAL Model Law is silent regarding the immunity of arbitrators. However, the Singapore International Arbitration Act provides for the immunity of arbitrators for certain situations at sections 25 and 25A:

- 25.** An arbitrator shall not be liable for —
- (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and
  - (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.

**25A.**—(1) The appointing authority, or an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator, shall not be liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(2) The appointing authority, or an arbitral or other institution or person by whom an arbitrator is appointed or nominated, shall not be liable, by reason only of having appointed or nominated him, for anything done or omitted by the arbitrator, his employees or agents in the discharge or purported discharge of his functions as arbitrator.

52 Singapore is not the only country which has provided for immunity of arbitrators. This is also the case in Hong Kong and the UK, for instance.

- (a) Section 104 of the Hong Kong Arbitration Ordinance provides that an arbitral tribunal or mediator is liable in law for an act done or omitted to be done “only if it is proved that the act was done or omitted to be done dishonestly”.
- (b) Section 29 of the English Arbitration Act 1996<sup>59</sup> provides that “an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith”.

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<sup>59</sup> c 23.

53 This is also reflected in various arbitration rules:

(a) Article 43.1 of the Hong Kong International Arbitration Centre (“HKIAC”) Administered Arbitration Rules 2013:

None of the Council of HKIAC nor any committee, sub-committee or other body or person specifically designated by it to perform the functions referred to in these Rules, nor the Secretary General of HKIAC or other staff members of the Secretariat of HKIAC, the arbitral tribunal, any Emergency Arbitrator, tribunal-appointed expert or secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, *save where such act was done or omitted to be done dishonestly*. [emphasis added]

(b) Article 31.1 of the London Court of International Arbitration (“LCIA”) Arbitration Rules 2014:

None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, *save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law*. [emphasis added]

(c) Article 40 of the ICC Arbitration Rules 2012:

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, *except to the extent such limitation of liability is prohibited by applicable law*. [emphasis added]

54 These add-ons cannot be said to be a deviation from the UNCITRAL Model Law, but rather an appreciation of modern needs in international

arbitration that the drafters of the 1985 UNCITRAL Model Law could not possibly have contemplated at the time of drafting.

(e) *Other add-ons*

55 Other add-ons to the UNCITRAL Model Law include sections 20 and 21 of the Singapore International Arbitration Act, which provide for an award of interest on awards and taxation of costs directed by an award respectively. The UNCITRAL Model Law is silent on these points.

56 Also, sections 16 and 17 of the Singapore International Arbitration Act provide that an arbitrator may act as a conciliator. This is also the case in sections 32 and 33 of the Hong Kong Arbitration Ordinance, which provides that an arbitrator may act as a mediator.

57 Again, these additions merely address modern needs, and cannot be said to be a deviation from the Model Law.

**B. *Analysis of non-uniformity of the UNCITRAL Model Law***

58 As can be seen from the examples above, while it is possible to identify certain areas where States have differed in their implementation of the UNCITRAL Model Law, these differences tend not to be significant in the sense that they typically do not depart from the overall thrust of the UNCITRAL Model Law. Furthermore, while there were differences in implementation of the UNCITRAL Model Law, many of these differences were subsequently amended for greater clarity.

59 The UNCITRAL Model Law is a form of “soft law” and is only a foundation for a comprehensive arbitration law. Hence, additions and relatively minor omissions are permissible, expected and not inconsistent with convergence.

60 Of course, keeping deviations to a minimum is often a matter of national self-interest. States have often sought to rely on the legitimising effect of the Model Law, which creates a strong incentive to avoid significant deviations from the UNCITRAL Model Law in order to benefit to the fullest extent.

61 In Singapore, Chan Leng Sun has written that “Singapore adopted the Model Law in 1994 because it was an internationally accepted model. Singapore believed that it must adopt a world view of international arbitration if it were to be an international arbitration centre”.<sup>60</sup>

62 In South Korea, the learned authors of “Arbitration in Korea”,<sup>61</sup> in their introduction, noted that “the [Korean] Arbitration Act substantially adopts the language and structure of the Model Law, and has served to promote international arbitration in Korea and to support international arbitrations abroad”.

63 In Hong Kong, a Law Commission Paper on the Arbitration Practices Adopted by Hong Kong’s Major Competitors, specifically included “extent of adherence to Model Law” as one of the factors in its comparison table, highlighting the significance of association with the UNCITRAL Model Law.

64 Even in countries such as Indonesia which are not currently adopters of the UNCITRAL Model Law, the importance of the UNCITRAL Model Law as a basis for international commercial arbitration is increasingly being recognised. For instance, in Indonesia, Hussey Umbar, then Vice Chairman of the Board (and now Chairman) and Arbitrator at the Indonesian National Board of Arbitration said that:<sup>62</sup>

There is indeed an urgent need for Indonesia to consider to perceive the application of the Model Law by reviewing and adjusting the current law with respect to international arbitration. This will attract parties of diverse nationalities in the cross border trade and foreign investment to arbitrate in Indonesia. It will also benefit Indonesia in promoting the country as one of the attractive venues for international arbitration.

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<sup>60</sup> Chan Leng Sun, *Overview of the International Arbitration Act*, available at the Singapore Chamber of Maritime Arbitration website [https://www.scma.org.sg/pdf/rules\\_iaa.pdf](https://www.scma.org.sg/pdf/rules_iaa.pdf) (accessed 1 June 2018).

<sup>61</sup> *Arbitration in Korea* (a pamphlet published by Shin & Kim) at p 4.

<sup>62</sup> Indonesia Arbitration Quarterly Newsletter No 12/2013, Q&A section.

65 Indeed, as UNCITRAL commented, “as a rule, relatively few deviations from this [the Model Law] have been made by States adopting enacting legislation, suggesting that the procedures it establishes are widely accepted and understood as forming a coherent basis for international commercial arbitration”.<sup>63</sup> Since the UNCITRAL Model Law, unlike the New York Convention, is not a treaty obligation, States that adopt it are free to amend it to suit their own requirements, and this cannot be seen to hinder its suitability as a model for legal convergence.

66 What Asia needs now is for the big Asian countries missing from the UNCITRAL Model Law family to sign up. These countries include China, India, Indonesia and the Middle East. The UNCITRAL Model Law will be an effective model for legal convergence in Asia when more countries in Asia adopt the UNCITRAL Model Law. However, there is no guarantee that all Model Law countries will interpret the articles in the same way because challenges against an arbitral award has been decided in different ways.

## **VI. Concluding remarks**

67 As noted by Julian D M Lew QC, Loukas A Mistelis and Stefan M Kroll, “the New York Convention constitutes the backbone of the international regime for the enforcement of foreign awards”.<sup>64</sup> Indeed, the New York Convention is to be lauded for having provided a minimum standard for international arbitration applicable to all State parties, in spite of the difficulties of achieving perfect convergence in a world with various local peculiarities.

68 By building on the New York Convention, the UNCITRAL Model Law is also prominently viewed as the “gold standard” in international arbitration. It has been said that “as a rule, relatively few deviations

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<sup>63</sup> United Nations, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (United Nations, 2013).

<sup>64</sup> Julian D M Lew, Loukas A Mistelis & Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 693.

from [the UNCITRAL Model Law] have been made by States adopting enacting legislation, suggesting that the procedures it establishes are widely accepted and understood as forming a coherent basis for international commercial arbitration”.<sup>65</sup>

69 Thus, given the difficulties of achieving perfect convergence, the New York Convention and the UNCITRAL Model Law should be seen as exemplary documents that have largely succeeded in their goal to harmonise and improve arbitration laws. To the extent that more States ratify the New York Convention and adopt the UNCITRAL Model Law, they are rightfully viewed as suitable models for legal convergence in today’s modernised and globalised world.

## **VII. Addendum: A further obstacle to the concept of legal convergence?**

70 Recent developments indicate that there may be small hurdles to the concept of legal convergence in the interpretation of the UNCITRAL Model Law. In particular, three cases from three Model Law countries in Asia have shown different approaches as to the interpretation of Article 34(3) of the UNCITRAL Model Law, which provides for the time limit for an application to set aside an arbitral award.

71 Under Article 34(3), an application for setting aside an arbitral award “may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal”. The question then is whether the time limit under Article 34(3) is absolute, or whether national courts have the discretion to hear and determine an application that is made out of time.

72 In Singapore, this question was considered by the Singapore High Court in the 2003 case of *ABC Co v XYZ Co Ltd*,<sup>66</sup> where it was held

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<sup>65</sup> United Nations, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (United Nations, 2013) at para 41.

<sup>66</sup> [2003] SGHC 107.

that the time limit under Article 34(3) was absolute. The Singapore High Court held that the words “may not” under Article 34(3) must be interpreted as “cannot”, as it was clear that the intention was to limit the time during which an award could be challenged. The Singapore High Court reasoned that Article 34 was drafted as an all-encompassing, and the only basis for challenging an award in court. Therefore, if Article 34 did not provide for any extension of the time period, it followed that the court had not been conferred with the power to extend time. Judith Prakash J’s decision was approved by a later Singapore High Court decision, *viz*, *PT Pukuafu Indah v Newmont Indonesia Ltd*.<sup>67</sup>

73 By contrast, the courts in Malaysia and Hong Kong have taken a different view of the matter. In Malaysia, the Malaysian Court of Appeal in the 2011 case of *Government of Lao People’s Democratic Republic v Thai-Lao Lignite Co Ltd and Hongsa Lignite Co Ltd*,<sup>68</sup> held that it had unfettered discretion to grant an extension of time to set aside an arbitral award, even though the Malaysian Arbitration Act 2005<sup>69</sup> had *prima facie* accepted the UNCITRAL Model Law. The Malaysian Court of Appeal reasoned that Article 34 related only to the substantive application to set aside an award and said nothing in relation to the procedural question on the extension of time for an application to set aside an award. Further, there was no express provision in the Malaysian Arbitration Act that excluded the powers of the court to extend time in appropriate cases. On the contrary, the relevant procedural rules in Malaysia supported the position that the court was empowered to grant an extension of time for an application to set aside an award in appropriate circumstances.

74 In Hong Kong, the Court of First Instance of Hong Kong in the 2016 case of *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd*<sup>70</sup> also held that it had jurisdiction and discretion to extend the time limit for an

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<sup>67</sup> [2012] SGHC 187.

<sup>68</sup> Civil Appeal No: W-02(NCC)-1287-2011.

<sup>69</sup> Act 646.

<sup>70</sup> [2016] HKEC 2128.

application to set aside an arbitral award under Article 34(3). The Court of First Instance of Hong Kong relied on the jurisprudence in relation to Article 34(2) of the UNCITRAL Model Law, where the word “may” had been held to mean that the court had the discretion whether or not to set aside or refuse enforcement of an award, even when a ground had been established. The Court of First Instance of Hong Kong found that when “may not” as used in Article 34(3) was read in the context and in conjunction with Article 34(2), the discretionary element as found in Article 34(2) would be retained and extended to Article 34(3). Further, the Court of First Instance of Hong Kong reasoned that, as the time limit under Article 34(3) was procedural, the court had the jurisdiction and discretion to extend such time, and to regulate such proceedings before it.

75 From the foregoing observations, it can be seen that three major Model Law countries in Asia have diverged in an important point of interpretation. There is little doubt that further cases from the same (or even other) jurisdictions on this legal issue will be forthcoming in the not too distant future. It will then be interesting to see whether these courts will harmonise their respective interpretations of Article 34(3), or will continue to maintain their own respective national interpretations based on their local legislation.

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### Background to Essay 18

This is the second essay Aloysius Chang and I have written on the same case involving Sanum Investments Ltd and the government of the Lao People's Democratic Republic, which is a precedent-setting case – it being the first investment treaty case seated in Singapore which has been reviewed in the Singapore courts. The first case was before the High Court (*Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322), resulting in a judgment released in 2015, which attracted much attention from legal commentators. Aloysius and I thought that it was important that there should be a commentary from the Singapore point of view on this groundbreaking case, and wrote such a commentary (see Michael Hwang & Aloysius Chang, “*Government of the Lao People's Democratic Republic v Sanum Investments Ltd: A Tale of Two Letters*” (2015) 30(3) *ICSID Review – Foreign Investment Law Journal* 506–524).

Then came the appeal to the Court of Appeal which reversed the High Court judgment (*Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536), and Aloysius and I naturally felt obliged to complete our commentary on the ultimate outcome of this case with a further essay, which has been published in a recent edition of the *ICSID Review – Foreign Investment Law Journal*. It is believed that there are several other related arbitrations which continue to be heard in Singapore, so there may yet be more commentaries to be written if those arbitration awards also come to the Singapore courts for review.

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**OF FORKS AND DEAD ENDS:**  
***SANUM INVESTMENTS LTD v GOVERNMENT OF THE LAO***  
***PEOPLE'S DEMOCRATIC REPUBLIC***

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Michael HWANG\* and Aloysius CHANG†

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**I. Introduction**

1 In an appeal brought before the Singapore Court of Appeal<sup>1</sup> against the decision of the Singapore High Court to set aside an arbitral Award on jurisdiction under the United Nations Commission on International

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<sup>1</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536.

Trade Law (“UNCITRAL”) Arbitration Rules, the Court of Appeal reversed the lower court’s decision, holding that the bilateral investment treaty (“BIT”) in question did extend to the investor’s home State.<sup>2</sup> The appeal represented a rare and important opportunity for Singapore’s apex court to rule definitively on several issues surrounding the municipal review of investment treaty arbitral awards and the interpretation of a BIT to which Singapore is not a party. The Court of Appeal was evidently sensitive to the importance of its decision, as shown by the constitution of a rare five-judge bench and the appointing of two international law experts (J Christopher Thomas QC, and Locknie Hsu) as *amici curiae*. The appeal turned on the admission and consideration of two diplomatic letters as well as the scope of the treaty’s dispute resolution clause, which had thrown up several legal issues with far-reaching consequences that required clarification from the Court of Appeal. Those issues and the Court’s treatment of them form the subject of this case comment.

2 This case comment will first provide a summary of the facts and findings of the Court of Appeal. It will then be followed by a discussion of the mechanics of municipal review of arbitral awards, as the judgment has given rise to issues concerning jurisdiction and justiciability, the standard of review and evidential matters. The case comment will then move on to discussing treaty interpretation issues in the context of investment treaty arbitration that were brought to the fore by the judgment, in particular:

- (a) the use of subsequent agreements in treaty interpretation under public international law, which has, in the context of investment treaty disputes, revealed an inherent tension between the interpretative authority of the treaty parties and of international courts and tribunals, and
- (b) the interpretation of dispute resolution clauses on the “amount of compensation” in investment treaties, on which the Court of Appeal favoured a broad approach, primarily due to a fork-in-the-road

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<sup>2</sup> *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322.

provision that, under a narrow approach, would have led an investor on the apparent path to arbitration towards a dead end.

## II. Background facts

3 The background facts to the dispute that was submitted for arbitration have been fully canvassed in our previous comment.<sup>3</sup> In essence, Sanum Investments Limited (“Sanum”), which was incorporated in the Macau Special Administrative Region of China (“Macau”), made certain investments in the gaming and hospitality industry in the Lao People’s Democratic Republic through a joint venture with a Laotian entity. Disputes subsequently arose between the government of the Lao People’s Democratic Republic (“Laos”) and the Laotian entity, leading to Sanum initiating arbitral proceedings against Laos by a Notice of Arbitration dated 14 August 2012, pursuant to the Agreement between the Government of the People’s Republic of China and the Government of the Lao People’s Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments dated 31 January 1993<sup>4</sup> (“PRC–Laos BIT”), alleging, *inter alia*, that Laos had expropriated the benefits from Sanum’s capital investment by imposing unfair and discriminatory taxes. A Singapore-seated tribunal (the “Tribunal”) was thereafter constituted under the 2010 UNCITRAL Arbitration Rules.<sup>5</sup> Laos subsequently disputed the jurisdiction of the Tribunal by arguing, *inter alia*, that the PRC–Laos BIT did not apply to Macau. On 13 December 2012, the Tribunal delivered its Award on Jurisdiction,

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<sup>3</sup> See Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506.

<sup>4</sup> Agreement between the Government of the People’s Republic of China and the Government of the Lao People’s Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments dated 31 January 1993 (Signed on 31 January 1993; entered into force 1 June 1993) (“PRC–Laos BIT”).

<sup>5</sup> Arbitration Rules of the United Nations Commission on International Trade Law (1976) (“UNCITRAL Arbitration Rules”).

holding that the PRC–Laos BIT applied to Macau and that it had the jurisdiction to arbitrate Sanum’s expropriation claims under Article 8(3) of the PRC–Laos BIT.<sup>6</sup>

4 The Singapore courts were thereafter involved as the court of curial review. On 10 January 2014, Laos filed an application to refer the issue of jurisdiction to the Singapore High Court under section 10 of the International Arbitration Act<sup>7</sup> (“IAA”). On 19 January 2014, Laos filed another application requesting the admission of two diplomatic letters (Notes Verbales) sent in January 2014 (collectively, the “2014 Letters”), one sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos (“2014 Laos Letter”) and the other sent in reply to the Laos Letter by the PRC Embassy (“2014 PRC Letter”), both of which set out the view that the PRC–Laos BIT did not apply to Macau.<sup>8</sup> The 2014 Letters were only obtained after the Tribunal had handed down the Award and were therefore not available for the Tribunal’s consideration.

5 The Singapore High Court judge, Edmund Leow JC, set aside the Award on the basis that the PRC–Laos BIT did not extend to Macau, thereby rendering the Tribunal without jurisdiction over the dispute.<sup>9</sup>

6 The application involved five issues – three preliminary and two substantive:

Preliminary issues

- (a) whether the present application raised only issues of international law that were non-justiciable (the *justiciability issue*);
- (b) whether the standard of review of the award under section 10 of the IAA should be *de novo* (the *standard of review issue*); and

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<sup>6</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic*, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013).

<sup>7</sup> Cap 143A, 2002 Rev Ed.

<sup>8</sup> *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [40].

<sup>9</sup> *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [40].

- (c) whether the 2014 Letters should be admitted as fresh evidence in the application (the *2014 Letters issue*).

Substantive issues

- (d) whether the PRC–Laos BIT applied to Macau (the *Macau issue*); and  
(e) whether Sanum's expropriation claims fell within the scope of Article 8(3) of the PRC–Laos BIT (*arbitration clause issue*).

7 In his judgment, the judge ruled affirmatively on all three preliminary issues but held in the negative on both substantive issues.

8 On 20 July 2015, Sanum appealed against the judge's decision to the Court of Appeal. Prior to the hearing of the appeal, Laos sought to admit into evidence two further diplomatic letters obtained in 2015 ("2015 Letters"), one sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane ("2015 Laos Letter") and the other sent from the PRC Ministry of Foreign Affairs ("2015 PRC Letter"), which had the effect of confirming the authenticity of the 2014 PRC Letter. The question of whether the 2015 Letters ought to be admitted therefore formed a separate issue (*2015 Letters issue*) to be decided by the court.

### **III. Decision of the Court**

9 The Court of Appeal reversed the judge's decision and held that the Tribunal did have jurisdiction to hear Sanum's expropriation claims. In summary, the Court held that:

- (a) the application to review the arbitral Award involved justiciable questions of law;  
(b) the standard of review under section 10 of the IAA was *de novo*;  
(c) the 2014 Letters were not admissible;  
(d) the 2015 Letters were admissible;  
(e) the PRC–Laos BIT applied to Macau; and  
(f) Sanum's expropriation claims fell within the scope of Article 8(3) of the PRC–Laos BIT.

### **A. Justiciability issue**

10 On the justiciability issue, the judge had held that the application was justiciable before the Singapore courts on the basis that the application under section 10(3)(a) of the IAA did not involve non-justiciable questions of pure international law, with treaty interpretation being a realm that was justiciable by a Singapore court insofar as the court was asked to interpret the nature and scope of the treaty in order to give effect to the parties' rights and duties under a domestic statute. While the judge's finding on the justiciability issue went uncontested in the appeal, the Court of Appeal nonetheless set out its views on the issue on an *obiter* basis. The Court essentially agreed with the judge, opining that the High Court was not only competent to consider these issues but was, in the circumstances, obliged to do so.<sup>10</sup> In the Court's view, since the parties had designated Singapore as the seat of the arbitration, the necessary consequence was that the IAA applied to govern the arbitration, which in turn required the High Court to consider issues such as the Tribunal's jurisdiction.<sup>11</sup> The fact that the jurisdiction issue required the High Court to interpret a BIT to which Singapore was not a party could not, in the Court's view, displace the Court's obligation to provide an answer.<sup>12</sup>

### **B. Standard of review issue**

11 On the standard of review issue, the judge held that the standard of review under section 10 of the IAA (and Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (Model

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<sup>10</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [38].

<sup>11</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [38].

<sup>12</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [38].

Law))<sup>13</sup> was *de novo*. On appeal, Sanum accepted the *de novo* standard but, nonetheless, maintained that the judge should have adopted a restrained approach by according deference and regard to the Tribunal's findings, especially when those findings "arose in an investor–State arbitration concerning the application of principles of public international law".<sup>14</sup>

12 The Court held that the standard of review under section 10 of the IAA was *de novo*, stating that there was no basis for deference to be accorded to the Tribunal's findings once it is accepted that the standard of review was *de novo*.<sup>15</sup> Further, the Court held that the standard should be *de novo*; while the Court stated that it would consider what the Tribunal has said on account of its persuasive value, it held that it was not bound to accept or take into account the Tribunal's findings on the matter. The Court observed that this was consistent with *PT First Media TBK v Astro Nusantara International BV*,<sup>16</sup> in which the Court endorsed the view that the Tribunal's own view of its jurisdiction "has no legal or evidential value before a court that has to determine that question".<sup>17</sup> The Court, however, added that this did not mean that the Tribunal's findings ought to be disregarded or that a full rehearing of all the evidence was required; rather, it simply meant that the court was at liberty to consider the material before it, "unfettered by any principle

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<sup>13</sup> United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UN Doc A/40/17; UN Doc A/61/17, Annex I) (21 June 1985; amended 7 July 2006) ("UNCITRAL Model Law").

<sup>14</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [40].

<sup>15</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41].

<sup>16</sup> *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372.

<sup>17</sup> *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [162]–[163], citing *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [30], *per* Lord Mance JSC.

limiting its fact-finding abilities”,<sup>18</sup> with the cogency and quality of the Tribunal’s reasoning, rather than their standing or eminence, that would factor in the evaluation of the matter.<sup>19</sup>

### C. 2014 Letters issue

13 On the 2014 Letters issue, the judge had held that the admission of fresh evidence in a section 10 IAA application was governed by the *Ladd v Marshall* principles (“*Ladd test*”),<sup>20</sup> as modified in *Lassiter Ann Masters v To Keng Lam*<sup>21</sup> (“*Lassiter test*”). Under the *Ladd test*, fresh evidence may be admitted in appellate cases only if:

- (a) the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) the evidence must be such that, if given, it would probably have an important influence on the result of the case (though it need not be decisive); and
- (c) the evidence must be such as is presumably to be believed or, in other words, must be apparently credible (though it need not be incontrovertible).<sup>22</sup>

The *Lassiter test* relaxes the first condition of the *Ladd test* so that the party seeking to admit the evidence need only demonstrate “sufficiently strong reasons” why the evidence was not adduced at the lower court’s hearing.<sup>23</sup> The judge held that Laos had satisfied the *Lassiter test* requirements and, therefore, admitted them into evidence.

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<sup>18</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [43], citing *AQZ v ARA* [2015] 2 SLR 972 at [57].

<sup>19</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [44].

<sup>20</sup> *Ladd v Marshall* [1954] 1 WLR 1489. See also *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 at [17].

<sup>21</sup> [2004] 2 SLR(R) 392.

<sup>22</sup> *Ladd v Marshall* [1954] 1 WLR 1489 at 1491.

<sup>23</sup> *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392 at [24].

14 On appeal, the issue appeared initially to concern whether the relevant test had been correctly applied,<sup>24</sup> but it subsequently shifted towards the question of whether the 2014 Letters should have been admitted into evidence on account of the critical date doctrine under public international law,<sup>25</sup> which renders evidence that came into being only after the dispute had arisen and is self-serving and intended by the party putting it forward to improve its position in the arbitration as being of little (if any) weight.<sup>26</sup> The critical date had been determined by the Court to be the date on which the dispute had crystallised, which was 14 August 2012, when the arbitration proceedings were initiated,<sup>27</sup> while the pre-existing legal position was held to be that the PRC–Laos BIT did, under State succession rules under public international law, apply to Macau.<sup>28</sup>

15 Sanum argued that the 2014 Letters should be excluded altogether on the basis that, pursuant to the critical date doctrine, their post-hoc character had rendered them irrelevant,<sup>29</sup> citing, *inter alia*, Louis Goldie's observations that the critical date is "exclusionary" and "terminal".<sup>30</sup> Laos counter-argued that:

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<sup>24</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [102].

<sup>25</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [103]–[108].

<sup>26</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [64]–[65], citing Robert Pietrowski, "Evidence in International Arbitration" (2006) 22(3) *Arb Intl* 373 at 399.

<sup>27</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [67].

<sup>28</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [49]; see also paras 17–21 below.

<sup>29</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [105].

<sup>30</sup> LFE Goldie, "The Critical Date" (1963) 12(4) *ICLQ* 1251.

- (a) the critical date doctrine had no application in the present case;<sup>31</sup>
- (b) the 2014 Letters should not be excluded as that would be inconsistent with Articles 31(3)(a) and 31(3)(b) of the Vienna Convention of the Law of Treaties<sup>32</sup> (“VCLT”), which envisaged that there could be a “subsequent agreement” or “subsequent practice” that influences the interpretation of a treaty;<sup>33</sup> and
- (c) post-critical date evidence was, in any event, according to Goldie<sup>34</sup> and Robert Pietrowski,<sup>35</sup> admissible to the extent that it was corroborative in nature (that is, evidence that is consistent with, and a continuation of, the pre-critical date legal position), with the 2014 Letters being merely confirmatory of the pre-existing legal position that the PRC–Laos BIT did not apply to Macau.<sup>36</sup>

14 With regard to the critical date doctrine, the Court held that:

- (a) where the substantive dispute engages questions of public international law (as was the case in the appeal), the court must consider the question of admissibility and weight within the framework of any other applicable principles of international law, including the critical date doctrine;<sup>37</sup> and

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<sup>31</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [66].

<sup>32</sup> Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force on 27 January 1980).

<sup>33</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 (CA) at [66]. It should be noted that the judge had agreed with this argument. See *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 (HC) at [68]–[69].

<sup>34</sup> LFE Goldie, “The Critical Date” (1963) 12(4) ICLQ 1251 at 1254.

<sup>35</sup> Robert Pietrowski, “Evidence in International Arbitration” (2006) 22(3) *Arb Intl* 373 at 399–400.

<sup>36</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [106]–[107].

<sup>37</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [103].

- (b) the critical date doctrine allows the admission of post-critical date evidence only to the extent that it merely confirms the legal position that had been established by the pre-critical date evidence, even in a situation where the pre-critical date evidence is inconclusive, but special attention must be given to the weight that should be attached to such evidence.<sup>38</sup> The Court also determined that the pre-existing legal position was that the PRC–Laos BIT would, by operation of the rules of State succession under public international law, apply to Macau.<sup>39</sup>

15 With regard to the 2014 Letters, the Court held that they should be excluded from the evidence on the basis that the 2014 Letters did not confirm the pre-existing legal position but, rather, that they sought to advance a contradictory position (based on PRC domestic law) that the PRC–Laos BIT did not extend to Macau.<sup>40</sup> The Court also noted that there was no inconsistency between excluding the 2014 Letters and Articles 31(3)(a) and 31(3)(b) of the VCLT since, even if the critical date doctrine applied to exclude the 2014 Letters, this did not prevent Laos from relying on other evidence to show that there was a “subsequent agreement” between the parties, so long as it came into being before the critical date.<sup>41</sup> The Court went on to opine that, even if the 2014 Letters were admissible on account of the pre-critical date evidence being inconclusive on the question of the inapplicability of the PRC–Laos BIT to Macau, no material weight could be placed on the 2014 Letters.<sup>42</sup>

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<sup>38</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [108].

<sup>39</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [47]–[49]; see also paras 17–21 below.

<sup>40</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [112].

<sup>41</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [68]–[69].

<sup>42</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [113]–[121]; see also para 16 below.

#### **D. 2015 Letters issue**

16 With respect to the 2015 Letters issue, the parties had accepted that a party that sought to admit further evidence before the Court when it considers the substantive appeal must satisfy the *Ladd* test. The Court held that the 2015 Letters should be admitted because all *Ladd* test conditions had been fulfilled,<sup>43</sup> particularly that, since the 2015 Letters served the purpose of confirming the authenticity of the 2014 Letters, they were by nature evidence that could not have been obtained prior to the High Court hearing. However, the Court ultimately came to the conclusion that the 2015 Letters had no bearing on the dispute, owing to the Court's decision that the 2014 Letters were to be given no evidentiary weight.<sup>44</sup>

#### **E. Macau issue**

17 On the Macau issue, the issue arose because of the return of Macau from Portuguese administration back to the PRC on 20 December 1999, which was after the date on which the PRC–Laos BIT entered into force (31 January 1993). Since the PRC–Laos BIT was silent on its application to Macau, and the Basic Law of Macau enabled Macau to conclude and implement investment agreements with foreign States and regions on its own, there was uncertainty over whether the PRC–Laos BIT extended to Macau after the handover.<sup>45</sup> The 2014 Letters and 2015 Letters also complicated matters, as it appeared that both Laos and the PRC were of the *ex post facto* opinion that their treaty did not apply to Macau.

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<sup>43</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [30]–[35].

<sup>44</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [121].

<sup>45</sup> Basic Law of the Macau Special Administrative Region of the People's Republic of China (adopted at the First Session of the Eighth National People's Congress on 31 March 1999 and promulgated by Order No 3 of the President of the People's Republic of China on 31 March 1993, and effective as of 20 December 1999) ("Basic Law of Macau").

18 The relevant rule of public international law governing this issue was the “moving treaty frontiers” rule (“MTF Rule”), which is encapsulated in Article 29 of the VCLT<sup>46</sup> and Article 15(b) of the Vienna Convention on the Succession of States in Respect of Treaties<sup>47</sup> (“VCST”). It was accepted by the parties that the two provisions reflected customary international law,<sup>48</sup> with the MTF Rule thereby being taken by the Court as binding on all States, including the PRC.<sup>49</sup> The MTF Rule essentially provides that a treaty is binding on the entire territory of each contracting State (including any new territories), unless it appeared from the treaty or is “otherwise established” that:

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<sup>46</sup> Article 29 of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force on 27 January 1980) (“VCLT”) states that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.

<sup>47</sup> Vienna Convention on the Succession of States in Respect of Treaties (signed 23 August 1978, entered into force 6 November 1996) (“VCST”). Article 15 states that:

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

- (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
- (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

<sup>48</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [47].

<sup>49</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [75]–[76].

- (a) the treaty did not apply in respect of the entire territory of the contracting State; or
- (b) the application of the treaty to the territory in question would:
  - (i) be incompatible with the object and purpose of the treaty; or
  - (ii) radically change the conditions for its operation.

The court therefore proceeded on the footing that the PRC–Laos BIT was to be presumed to automatically apply to the territory of Macau following the handover, with the relevant issue being whether any of the exceptions to the MTF Rule applied.<sup>50</sup> The relevant exception here was whether it was “otherwise established” that the PRC–Laos BIT did not apply in respect of Macau.<sup>51</sup> As preliminary points, the Court determined that:

- (A) the standard of proof under public international law was the standard of satisfaction on a balance of probabilities;<sup>52</sup> and
- (B) the critical date doctrine applied, so that post-critical date evidence would, insofar as they seek to contradict the pre-critical date legal position, be given little, if any, evidentiary weight.<sup>53</sup>

19 Laos maintained its argument made in the High Court proceedings that several pre- and post-critical date instruments and documents had “otherwise established” that the PRC–Laos BIT did not apply to Macau – in particular, relying on the 2014 Letters as constituting a “subsequent agreement” within the meaning of Article 31(3)(a) of the VCLT between Laos and the PRC to exclude Macau.<sup>54</sup> Sanum, on the other hand, argued

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<sup>50</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [49].

<sup>51</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [61]–[70].

<sup>52</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [61]–[62].

<sup>53</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [103]–[108].

<sup>54</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [63].

that the judge had erred in doing so.<sup>55</sup> The judge had accepted Laos' 2014 Letters argument by analogising the factual matrix of the case to that which was given in *Lee Hsien Loong v Review Publishing Co Ltd*<sup>56</sup> in which Judicial Commissioner Sundaresh Menon (as he then was) held that the Singapore–PRC Treaty on Judicial Assistance in Civil and Commercial Matters did not apply to Hong Kong by relying on a letter from the Singapore Ministry of Foreign Affairs (which stated that the Hong Kong Department of Justice had confirmed that the Treaty was not applicable to Hong Kong).<sup>57</sup> The judge had also added his view that the two letters did not amount to a retroactive agreement that altered the positions and expectations of third parties but, rather, were “an affirmation of the common understanding between the states that the treaty from its inception did not apply to Macau”, on the basis that the PRC letter was “worded in general terms” and espoused a “categorical approach”.<sup>58</sup>

20 The Court ultimately held that none of the evidence produced had displaced the presumption under the MTF Rule that the PRC–Laos BIT was to apply to Macau following the handover.<sup>59</sup> With regard to the 2014 Letters, in particular, the Court held that they were inadmissible since they were post-critical date evidence (discussed above),<sup>60</sup> but it went on to opine that, even if the 2014 Letters were admissible, no

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<sup>55</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [63].

<sup>56</sup> [2007] 2 SLR(R) 453.

<sup>57</sup> Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China, GN No T2/2001, Bilateral Treaty No B459 (28 April 1997).

<sup>58</sup> *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [76]–[77].

<sup>59</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [70]–[122].

<sup>60</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [112]–[113].

material weight could be placed on them for three reasons.<sup>61</sup> First, the Court noted that, under Article 27 of the VCLT, the internal laws of a State cannot be invoked to justify the non-performance of a treaty, and since the only stated justification in the 2014 Letters was based on the PRC's internal legislation in relation to Macau (that is, the Basic Law of Macau), the 2014 Letters were held to be irrelevant and inadmissible as a consideration in international law.<sup>62</sup> Second, the Court considered that Laos was in an even poorer position in attempting to invoke the operation of the internal laws of another State (the PRC) in order to justify Laos' own position that it was not bound to arbitrate the claim brought by Sanum.<sup>63</sup> Lastly, the Court was of the view that the 2014 Letters did not amount to a "subsequent agreement" or "subsequent practice" under Articles 31(3)(a) to 31(3)(b) of the VCLT and that giving effect to the 2014 Letters would amount to an impermissible retroactive amendment of the PRC–Laos BIT, as there was no evidence of any such agreement prior to the 2014 Letters.<sup>64</sup>

21 The Court also noted that, while it might be open to the PRC and Laos to now enter into an express agreement to modify the PRC–Laos BIT to accord with their intentions as stated in the 2014 Letters, no such agreement could take retroactive effect and adversely affect a third party that had already commenced proceedings.<sup>65</sup> The Court distinguished:

(a) *ADF Group Inc v United States of America*<sup>66</sup> ("*ADF Group*"), in which the Tribunal took into consideration a post-critical date note of

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<sup>61</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [113].

<sup>62</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [114].

<sup>63</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [115].

<sup>64</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116].

<sup>65</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116(e)].

<sup>66</sup> ICSID Case No ARB(AF)/00/1, Award (9 January 2003).

interpretation on the basis that the note had been rendered binding pursuant to an express provision in the investment treaty;<sup>67</sup> and

(b) *Lee Hsien Loong v Review Publishing*, on the basis that the central issue in this case was ultimately one of service of process under Singapore domestic rules and that the issues of the retroactive amendment of treaties and the applicability of the critical date doctrine had not arisen then due to those points not having been raised or argued.<sup>68</sup>

### **F. Arbitration clause issue**

22 With respect to the arbitration clause issue, the question was whether the Tribunal possessed subject-matter jurisdiction over Sanum's expropriation claims. The question centred on the proper interpretation of Article 8(3) of the PRC–Laos BIT, which provided that a dispute “involving the amount of compensation” may be submitted to arbitration, provided that the investor concerned has not resorted to the Article 8(2) procedure of submitting the dispute to courts of the Host State.<sup>69</sup> The parties disagreed over whether Article 8(3) of the PRC–

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<sup>67</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [117]–[118].

<sup>68</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [120].

<sup>69</sup> Articles 8(1)–8(3) of the PRC–Laos BIT, reproduced in full, are as follows:

Article 8

- (1) Any disputes between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.
- (2) If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
- (3) If a *dispute involving the amount of compensation for expropriation* cannot be settled through negotiation within six months as

*(continued on next page)*

Laos BIT meant that any claim that included a dispute over the amount of compensation for expropriation could be submitted to arbitration (Broad Interpretation) or whether recourse to arbitration was limited to circumstances where the only issue in dispute was the amount of compensation for expropriation (Narrow Interpretation).<sup>70</sup> The judge had opined obiter that the Narrow Interpretation should apply.<sup>71</sup> As a preliminary point in ascertaining the interpretation to be preferred, the Court noted that, pursuant to Article 31 of the VCLT,<sup>72</sup> the Court was to consider:

- (a) the ordinary meaning to be accorded to the words used in Article 8(3) of the PRC–Laos BIT;

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specified in paragraph 1 of this Article, it may be submitted at the request of either party to an *ad hoc* arbitral tribunal. *The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article*

[emphasis added]

<sup>70</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [124].

<sup>71</sup> *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [121].

<sup>72</sup> Art 31(1) of the VCLT states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”; while Art 31(3) states that, in the interpretation of a treaty:

[There] shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

- (b) the context of the PRC–Laos BIT and
- (c) the object and purpose of the PRC–Laos BIT.<sup>73</sup>

23 The Court ultimately held that the Tribunal did possess subject-matter jurisdiction with regard to Sanum's expropriation claims. With regard to the ordinary meaning of Article 8(3) of the PRC–Laos BIT, the Court held that the word "involve" was, by its ordinary meaning, capable of supporting both positions and, therefore, moved on to consider its context.<sup>74</sup> With regard to the context of Article 8(3) of the PRC–Laos BIT, Laos had put forward the position that the effect of Article 8(3) (under the Narrow Interpretation) was that an investor must first go to a competent national court to determine whether an impermissible expropriation had occurred before submitting any dispute on the amount of compensation to a Tribunal, and that there was nothing to prevent an investor from submitting disputes other than the amount of compensation to the municipal courts.<sup>75</sup> Laos also cited in support a generational shift in the PRC BITs, where pre-1998 "first-generation" PRC BITs (which included the PRC–Laos BIT) contained narrowly defined dispute resolution clauses that appeared to provide arbitral jurisdiction over disputes on the quantum of compensation only, whereas the "second-generation" PRC BITs concluded from 1998 onwards contained much broader arbitration clauses.<sup>76</sup> Laos also relied upon five cases<sup>77</sup>

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<sup>73</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [125].

<sup>74</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [126].

<sup>75</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [128].

<sup>76</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [22].

<sup>77</sup> *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005); *Austrian Airlines v Slovakia*, UNCITRAL, Final Award (9 October 2009); *ST-AD GmbH v Republic of Bulgaria*, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013); *Vladimir Berschader and Moise Berschader v Russian Federation*, SCC Case No 080/2004, Award (21 April 2006); *RosInvest Co UK Ltd v*

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that appeared to support the Narrow Interpretation,<sup>78</sup> two of which involved BITs concluded by the Russian Federation (Russia) and had the tribunals accepting that Russia had specifically intended its “first-generation” BITs to have a limited right to arbitration.<sup>79</sup> In the High Court, the judge had relied on this generational shift in PRC BITs in coming to his view that the Narrow Interpretation was to be preferred.<sup>80</sup>

24 Sanum contended that such an interpretation would render Article 8(3) wholly ineffective on the basis that the issues of expropriation and quantum were inextricably intertwined. One of the four criteria for determining whether an impermissible expropriation has occurred under Article 4(1) of the PRC–Laos BIT is whether “effective and appropriate compensation” had been accorded by the Host State,<sup>81</sup> which meant that any municipal court that is faced with the issue of whether there had been an impermissible expropriation must first determine whether effective and appropriate compensation had been paid, and once it has,

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*Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007).

<sup>78</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [135]–[145].

<sup>79</sup> *Vladimir Berschader and Moise Berschader v Russian Federation*, SCC Case No 080/2004, Award (21 April 2006); *RosInvest Co UK Ltd v Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007).

<sup>80</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [123]–[126].

<sup>81</sup> Article 4(1) of the PRC–Laos BIT, reproduced in full, is as follows:

Article 4

- (1) Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as ‘expropriation’) against investments of investors of the other Contracting state in its territory, unless the following conditions are met:
  - (a) as necessitated by the public interest;
  - (b) in accordance with domestic legal procedures;
  - (c) without discrimination;
  - (d) against appropriate and effective compensation.

the investor is barred under Article 8(3) from referring the dispute on whether there had been effective and appropriate compensation to a tribunal.<sup>82</sup> In the High Court, the judge had taken into consideration Sanum's concerns on the effectiveness of Article 8(3) but ultimately held that they were not insurmountable on the basis that the option to arbitrate under Article 8(3) remained available if:

- (a) the only issue in dispute was that of the amount of compensation; and
- (b) the investor did not first submit the dispute to the municipal courts – that is, it was the host State that had submitted the dispute on expropriation to the municipal courts (the judge's view of Article 8(3)).<sup>83</sup>

25 The court held that the Narrow Interpretation was untenable, in the context of the PRC–Laos BIT, due to the impossibility of segregating the intertwined issues of liability and quantum for determination in two separate forums.<sup>84</sup> The Court agreed with Sanum that, under the fork-in-the-road provision in Article 8(3), once an expropriation claim was referred to the municipal court, no aspect of that claim, including the amount of compensation for expropriation, could then be referred to arbitration, citing in support the decision in *Tza Yap Shum v Republic of Peru*,<sup>85</sup> in which the tribunal adopted the Broad Interpretation to a materially similar dispute resolution clause in the Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal

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<sup>82</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [128].

<sup>83</sup> *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [122].

<sup>84</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [130].

<sup>85</sup> ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence (19 June 2009). This decision was subsequently and unsuccessfully challenged in ICSID annulment proceedings: see *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Annulment (12 February 2015).

Protection of Investments (“PRC–Peru BIT”) in order to prevent its “evisceration”.<sup>86</sup> With respect to the judge’s Article 8(3) view, the Court was of the opinion that it had ignored several difficulties. First, it was unclear what issue the host State would have referred to the municipal court if the only issue were one of quantum. If the host State had indeed referred the issue of quantum to the municipal court, it was also unclear how a subsequent reference to arbitration of the same issue would be resolved.<sup>87</sup> Second, the Court agreed with the present authors’ view in our previous comment that, as a matter of practical reality, “cases of direct expropriation (with only quantum issues being in dispute) are becoming increasingly rare, and that it is entirely open to the Host State to avoid arbitration over the amount of compensation for indirect expropriation simply by not submitting the dispute on liability to its municipal courts”.<sup>88</sup> The Court observed that this would lead to the untenable conclusion that, notwithstanding the presence of an arbitration clause, the investor would in practice have no access to arbitration.<sup>89</sup>

26 The Court also distinguished all of the five cases cited by Laos in support of its argument for the Narrow Interpretation, particularly on the ground that none of them involved a similar fork-in-the-road

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<sup>86</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [130]–[131]. See also Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (signed 9 June 1994, entered into force 1 February 1995) (“PRC–Peru BIT”).

<sup>87</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [133].

<sup>88</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [133], citing Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 522.

<sup>89</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [133].

provision, which meant that a narrow interpretation to the dispute resolution clauses would not have resulted in an illusory right to arbitration.<sup>90</sup> The Court also considered that the specific context relevant to the Russian BITs could not be transposed to PRC BITs.<sup>91</sup> With regard to the generational shift in the PRC BITs, the Court was of the view that there had to be evidence of a “specific intention” of the State parties to the BIT and not mere general observations made by commentators or the general policy stance of a State.<sup>92</sup> With regard to the object and purpose of Article 8(3) of the PRC–Laos BIT, the Court held that the Broad Interpretation was consistent with the object and purpose of the PRC–Laos BIT, which had the express purpose (as stated in its preamble<sup>93</sup>) of promoting investment by investors and advancing the development of economic cooperation between both States.<sup>94</sup>

#### **IV. Mechanics of the municipal review of arbitral awards**

27 While the Court reversed the substantive decision made by the Court below, the Court agreed with the judge on all aspects of the mechanics of the review of arbitral awards – that is, the issues of justiciability, the standard of review and the admission of fresh evidence. However, there remain certain aspects of the Court’s decision on these issues that are worth revisiting.

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<sup>90</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [135]–[146].

<sup>91</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [145].

<sup>92</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [146].

<sup>93</sup> The preamble to the PRC–Lao BIT stated as follows:

Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States.

<sup>94</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [149]–[150].

### **A. Jurisdiction and justiciability**

28 The Court of Appeal was of the view that the Singapore courts possessed the jurisdiction to review investment treaty awards, stating that the High Court was not only competent to consider the interpretation and application of the PRC–Laos BIT but also was obliged to do so in the circumstances of this case under section 10 of the IAA, which applied to govern the arbitration by virtue of the parties having designated Singapore as the seat of the arbitration.<sup>95</sup> Some commentators, however, have criticised the application of section 10 of the IAA to investment treaty arbitral awards on the basis that:

- (a) the IAA is a piece of legislation that is intended to give effect to the Model Law, which is concerned only with international commercial arbitration;<sup>96</sup> and
- (b) an investor’s claims against the host State is based not on a commercial relationship between the parties but, rather, on treaty obligations in a BIT between the host State and the investor’s home State.<sup>97</sup> On this basis, it was said that it was “doubtful” that a Singapore court could be asked to invoke its jurisdiction under section 10 of the IAA to review the Tribunal’s jurisdiction<sup>98</sup> and that the readiness of the Singapore courts to assert supervisory

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<sup>95</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [38].

<sup>96</sup> In support of this argument were several references to the use of the word “commercial” in the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”) and the UNCITRAL Model Law. For example, the long title of the IAA (“conduct of international commercial arbitrations”), the title to Pt II of the IAA (“International Commercial Arbitration”), s 5(2)(b) of the IAA (“obligations of the commercial relationship”) and Art 1(1) of the Model Law (“this law applies to international commercial arbitration”) and its accompanying footnote to “commercial”.

<sup>97</sup> Lawrence Boo & Earl J Rivera-Dolera, “Arbitration” (2015) 16 SAL Ann Rev 100 at 100–102.

<sup>98</sup> Lawrence Boo & Earl J Rivera-Dolera, “Arbitration” (2015) 16 SAL Ann Rev 100 at 102.

jurisdiction could potentially work against Singapore's intention to poise itself as a place of choice for investor–State arbitration.<sup>99</sup>

29 In our view, this is a rather curious submission to make for three reasons. First, while it is true that the Model Law itself defines its scope of application to “international commercial arbitration”, it also states that the term “commercial” should be given a “wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”, including matters of “investment”.<sup>100</sup> Such an interpretation would, on its face, be wide enough to encompass a relationship arising from investments made in a host State that are given certain protections by an investment treaty to which the host State is a party. Second, several courts and tribunals have accepted the applicability of the law of the tribunal's juridical seat in investor–State arbitration (including annulment provisions),<sup>101</sup> and it would be odd to view this as

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<sup>99</sup> Lawrence Boo & Earl J Rivera-Dolera, “Arbitration” (2016) 17 SAL Ann Rev 89 at 93.

<sup>100</sup> Art 1(1) of the UNCITRAL Model Law states:

*The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.* Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road. [emphasis added]

<sup>101</sup> See Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration* (Oxford University Press, 2013) at pp 30–35, citing *Petrobart Ltd v Kyrgyz Republic*, SCC Case No 126/2003, Award (29 March 2005) at p 23; *RosInvest Co v Russian Federation*, Supreme Court of Sweden Case No O 2301–09, Decision (12 November 2010) at para 3; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta* [2006] EWCA Civ 1529 at [93] (Court of Appeals of England and Wales); *Jan Oostergetel and Theodora Laurentius v Slovak Republic*,  
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being any different merely because the law of the juridical seat is based on the Model Law. Furthermore, the Singapore Court of Appeal has stated that “no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings”,<sup>102</sup> and it would be strange to see this general principle apply to commercial arbitration but not to investor–State arbitration. Lastly, if section 10 of the IAA were not to apply to investment treaty awards on the basis that the IAA and the Model Law are concerned only with international commercial arbitration, then it stands to reason that no other provisions of the IAA or the Model Law should apply either. This would lead to the untenable situation where the parties to investment treaty arbitrations seated in Singapore could obtain no form of curial assistance from the Singapore courts, thereby rendering the seat of the arbitration in Singapore effectively meaningless. In practical terms, it would also lead to Singapore becoming a rather unattractive location for investment treaty arbitration, which would run contrary to Singapore’s ambitions.<sup>103</sup>

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UNCITRAL, Final Award (23 April 2012) at para 142; *Chevron Corp and Texaco Petroleum Co v Republic of Ecuador* UNCITRAL, PCA Case No 34877, Partial Award on the Merits (30 March 2010); *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) at [31]; *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova*, SCC Case No 93/2004, Award (22 September 2005) section 2.2.1; *Austrian Airlines v Slovak Republic* UNCITRAL, Final Award and Dissenting Opinion (redacted version) (20 October 2009) at [81]. See also *Russian Federation v Sedelmayer*, Stockholm District Court Case No T6-583-98 (12 December 2002).

<sup>102</sup> *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [26]. See also *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 at [84].

<sup>103</sup> See for example Meixian Lee, “Strong Take-Up Drives Expansion at Maxwell Chambers” *The Business Times* (23 June 2017); N Vivekananda & John Menezes Jagdish, “Singapore as a Seat for Investor-State Disputes” <<http://www.siac.org.sg/newsite/index.php/70-articles/169-singapore-as-a>>  
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### **B. Standard of review for investment treaty awards**

30 The Court of Appeal upheld the judge's decision that the standard of review under section 10 of the IAA was *de novo* and that, while the Tribunal's findings would be considered, it was the cogency and quality of the reasoning, and not the eminence or expertise of the Tribunal, that would serve as a factor in the evaluation of the matter.<sup>104</sup> We had previously commented that this must be correct since, among other things, any standard of review other than *de novo* would result in the entire arbitral process pulling itself up by its own bootstraps, and the parties would be free, in any event, to engage public international law experts to aid the municipal judge in coming to his or her decision.<sup>105</sup>

31 However, there remain potential difficulties to be faced by municipal courts in reviewing investment treaty awards on jurisdiction. As we mentioned before, one such difficulty is where the tribunal's ruling on jurisdiction is intertwined with the merits of the dispute (for example, whether the investor has made an "investment").<sup>106</sup> Another difficulty is where the issues that are considered by the tribunal pertain not to jurisdiction but, rather, to admissibility. A tribunal's decisions on the latter are generally viewed as not being subject to the

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seat-for-investor-state-disputes> (accessed 17 January 2018). See also the recent Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Edition, 1 January 2017) ("SIAC IA Rules 2017") <<http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017>> (accessed 17 January 2018).

<sup>104</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [44]. See also *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 at [87].

<sup>105</sup> Michael Hwang & Aloysius Chang, "Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters" (2015) 30(3) ICSID Rev—FILJ 506 at 515.

<sup>106</sup> Michael Hwang & Aloysius Chang, "Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters" (2015) 30(3) ICSID Rev—FILJ 506 at 515–516.

same standard of review as decisions on jurisdictional issues,<sup>107</sup> but it may be difficult to draw the line between jurisdiction and admissibility, such as in the issue of pre-conditions to arbitration.<sup>108</sup> While the issue of the standard of review of jurisdictional awards may be settled as a matter of Singapore law, the parameters of its application to a myriad of international arbitral awards remains to be seen.

### C. *Evidential issues in de novo review*

32 As mentioned in our earlier comment, the judge's decision left open some questions as to the treatment of evidence in a section 10 IAA review, in particular:

- (a) whether the court would be required to conduct a complete retrial and/or rehearing on the question of whether the tribunal had jurisdiction in fact; and
- (b) whether the judge had been correct in applying the *Lassiter* test in the admission of fresh evidence in a *de novo* review of a tribunal's ruling on jurisdiction.<sup>109</sup>

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<sup>107</sup> Gary Born, Jonathan W Lim & Darshini Prasad, "*Sanum v Laos* (Part II): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT" *Kluwer Arbitration Blog* (11 November 2016), citing *BG Group plc v Republic of Argentina* 134 SCt 1198 (2014) (Supreme Court of the United States); Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014) at pp 936–938.

<sup>108</sup> Gary Born & Marija Šcekic, "Pre-Arbitration Procedural Requirements: 'A Dismal Swap'" (David D Caron *et al* eds) in *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015) at p 243. See also Laurent Gouiffe's & Melissa Ordonez, "Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?" (2015) 31(1) *Arb Intl* 107; Jan Paulsson, "Jurisdiction and Admissibility" (Gerald Aksen *et al* eds) in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005) at p 601.

<sup>109</sup> See Michael Hwang & Aloysius Chang, "Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters" (2015) 30(3) *ICSID Rev—FILJ* 506 at 516.

The Court of Appeal expressly addressed the first question by agreeing with the obiter remarks of Judith Prakash J (as she then was) in *AQZ v ARA*<sup>110</sup> that *de novo* review simply means that the court is unfettered by any principle limiting its fact-finding abilities and that this does not entail a full rehearing of all of the evidence.<sup>111</sup> In *AQZ v ARA*, it was further remarked that the Singapore courts retained the discretion under the Singapore Rules of Court<sup>112</sup> to allow the admission of oral evidence and/or cross-examination for the purposes of securing the “just, expeditious and economical disposal of the matter”, which would only be exercised where special circumstances exist beyond the mere existence of factual disputes (for example, “awkward and recondite” issues involving foreign law).<sup>113</sup> While the Court of Appeal made no reference to this further remark, it is an eminently sensible one that ought to be followed in future cases.

33 As for the second question, the Court of Appeal had no need to address it as there appeared to be no real dispute on the applicability of the *Lassiter* test, leading the court to focus entirely on the more pertinent question of the critical date doctrine and its application to the 2014 Letters.<sup>114</sup> In contrast to the High Court in *Sanum*, Judith Prakash J held the opinion in *AQZ v ARA* that, in a *de novo* review, fresh evidence is admissible as of right, with the lateness of the introduction of the evidence going only to its evidential weight and issues of costs.<sup>115</sup> As noted in a subsequent case, there therefore appears to be two entirely different approaches under Singapore law as to the admission of

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<sup>110</sup> [2015] 2 SLR 972.

<sup>111</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [34], citing *AQZ v ARA* [2015] 2 SLR 972 at [57].

<sup>112</sup> Cap 322, R 5, 2014 Rev Ed.

<sup>113</sup> *AQZ v ARA* [2015] 2 SLR 972 at [49]–[59].

<sup>114</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [102]–[103].

<sup>115</sup> *AQZ v ARA* [2015] 2 SLR 972 at [59], citing *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190 at [22].

fresh evidence in a section 10 IAA review,<sup>116</sup> with the correct approach being an issue that was left unresolved by the Court of Appeal in *Sanum*.

34 We had previously written that the *Lassiter* test is ill-suited for application to the *de novo* review of a tribunal's ruling on jurisdiction since:

- (a) it is based off the *Ladd* test, which was designed to prevent abuse of the appellate process and not a process of *de novo* review; and
- (b) the *Lassiter* test is essentially a relaxed version of the *Ladd* test that applies specifically to decisions of the Registrar,<sup>117</sup> which does not involve the conducting of proceedings akin to a full trial.<sup>118</sup> Therefore, we suggest that guidance should instead be taken from *Central Trading & Exports Ltd v Fioralba Shipping Co*,<sup>119</sup> where the English High Court adopted an approach in which the parties had the right to adduce fresh evidence, but the Court retained the discretion to exclude any such evidence, with the overall objective of establishing fairness to the parties and preventing irremediable prejudice.<sup>120</sup> We maintain that this approach would better enable the courts to strike a balance between the competing priorities of ascertaining arbitral consent and preventing abuses of the arbitral process. Another commentator had also come to the same conclusion, adding that the *Fioralba* approach “accords appropriate significance to the fact that a challenge on the tribunal's jurisdiction does not operate by way of an appeal by holding that the starting

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<sup>116</sup> *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 at [50]–[53].

<sup>117</sup> The Registrar of the Supreme Court of Singapore is a judicial officer that heads the Supreme Court Registry and is equivalent to a master in the courts of England and Wales and other common law jurisdictions.

<sup>118</sup> Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 516–517.

<sup>119</sup> [2014] EWHC 2397 (Comm).

<sup>120</sup> Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 517.

point is that a party generally has the right to adduce fresh evidence".<sup>121</sup>

35 Separately, it is also notable that the Court of Appeal had taken cognisance of the role of public international law in matters of evidence and proof in a section 10 IAA review of investment treaty awards – in particular, by holding that:

- (a) the standard of proof under public international law, at least with regard to the issue of whether an exception to the MTF Rule had been established, was that of satisfaction on a balance of probabilities;<sup>122</sup> and
- (b) where the substantive dispute engages questions of public international law, the court "must consider the question of admissibility and weight within the framework of any other applicable principles of international law, such as the critical date doctrine".<sup>123</sup> This will no doubt provide much clarification for future applications under section 10 of the IAA in the investment treaty context.<sup>124</sup>

## **V. Use of subsequent agreements in treaty interpretation**

36 In our earlier comment, we stated that the judge, in holding that the 2014 Letters amounted to a "subsequent agreement" within the

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<sup>121</sup> Darius Chan, "The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction" *Singapore Law Blog* (8 October 2014).

<sup>122</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [61]–[62].

<sup>123</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [103].

<sup>124</sup> While *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 is the first case of an investment treaty Award being reviewed by the Singapore courts, it was swiftly followed by another one; a partial final Award issued against the Kingdom of Lesotho was set aside by the High Court of Singapore on the grounds of a lack of jurisdiction. See *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 at [84].

meaning of Article 31(3)(a) of the VCLT, notwithstanding that they came into existence after the date of the institution of arbitral proceedings, had seemingly glossed over the temporal element of treaty interpretation, particularly, the critical date doctrine.<sup>125</sup> The critical date doctrine follows naturally from the principle in investor–State arbitration that a tribunal’s jurisdiction is vested at the point that consent is perfected, even if the contracting States have amended or terminated the investment treaty retroactively.<sup>126</sup> As a matter of policy, such a rule provides certainty and precludes any attempt by the respondent host State to defeat jurisdiction while proceedings are in progress, which may include acts such as the amending of legislation, denouncing a treaty or changing the nationality of a person.<sup>127</sup> The Court’s careful examination of the critical date doctrine and its application of it to the 2014 Letters is therefore a welcome development.

37 One point of interest in the Court of Appeal’s judgment is the revelation of the inherent tension between the interpretive authority of the treaty parties and of international courts and tribunals. In *Sanum*, this tension manifested itself in the conflict between the critical date doctrine and Article 31(3)(a) of the VCLT, in that, while the critical date doctrine all but precluded the use of evidence that came into existence after the submission of the dispute to arbitration, Article 31(3)(a) of the VCLT clearly allowed the use of subsequent agreements in interpreting a treaty. This was apparent to both the judge<sup>128</sup> as well as the Court of Appeal; the latter having noted that its conclusion might appear

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<sup>125</sup> Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 518–519.

<sup>126</sup> James D Fry & Odysseas G Repousis, “Intertemporality and International Investment Arbitration: Protecting the Jurisdiction of Established Tribunals” (2015) 31(2) Arb Intl 213 at 247.

<sup>127</sup> Christoph Schreuer, “At What Time Must Jurisdiction Exist?” in *Practising Virtue: Inside International Arbitration* (David D Caron *et al* eds) (Oxford University Press, 2015) at p 270.

<sup>128</sup> See *Government of the Lao People’s Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 at [68]–[69].

“counter-intuitive”.<sup>129</sup> PRC scholars have mostly found it difficult to accept that the critical date doctrine could operate to allow a municipal court to ignore the treaty parties’ common position on the scope of their own treaty.<sup>130</sup>

38 It is notable that, in international law disputes, this tension exists almost exclusively in the investor–State realm. In inter-State disputes, the issue of the use of subsequent agreements or practices between the treaty parties often does not arise simply because, if the treaty parties manage to agree on a particular interpretation of the treaty, there is unlikely to be a dispute about that treaty; it is more likely that inter-State parties would have a dispute over the existence of an alleged agreement or practice or the interpretation of a joint instrument.<sup>131</sup> In investor–State disputes, however, the dispute is not between the treaty parties but, rather, between an investor as the claimant and one of the treaty parties as the respondent. In such a scenario, it is entirely possible for the respondent to refer to subsequent agreements or practices between it and the other treaty party or parties in order to adopt concordant stances and for the investor to contest the existence and use of such agreements or practices.<sup>132</sup>

39 An adjudicator in an investor–State dispute would be far more circumspect about the use of such agreements and practices; in inter-State disputes, the adjudicator would naturally be deferential to the views of the treaty parties as they are both the creators and beneficiaries of the treaty, so that the scope for “interpretation” is not

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<sup>129</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116].

<sup>130</sup> See Lawrence Boo & Earl J Rivera-Dolera, “Arbitration” (2016) 17 SAL Ann Rev 89 at 92, fn 11.

<sup>131</sup> See Anthea Roberts, “Subsequent Agreements and Practice: The Battle over Interpretive Power” in *Treaties and Subsequent Practice* (Georg Nolte ed) (Oxford University Press, 2013) at p 97.

<sup>132</sup> Kendra Magraw, “Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties” (2015) 30(1) ICSID Rev—FILJ 142 at 144–145.

necessarily determined by a fixed “original intent”,<sup>133</sup> but in investor–State disputes, the treaty’s creators and its beneficiaries are not one and the same since the treaty creates legal rights and obligations that are intended for the benefit of third parties.<sup>134</sup> International courts and tribunals in investor–State disputes may therefore view themselves, at least partially, as trustees tasked with protecting the interests of the non–State beneficiaries of the treaty.<sup>135</sup>

40 The Court of Appeal in *Sanum* was evidently alive to the problems of the use of subsequent agreements in the context of investor–State disputes as well as of its role in protecting the interests of the holders of rights accrued under an investment treaty. The Court noted that, while it may be open to the PRC and Laos to enter into an express agreement to modify the PRC–Laos BIT to accord with their intentions as stated in the 2014 Letters, this could not “take retroactive effect and adversely affect a third party which has already brought proceedings”.<sup>136</sup> This is analogous to general contract law principles where parties to a contract generally cannot act to adversely impact third party rights once the beneficiary has accepted them or reasonably acted in reliance on them,<sup>137</sup> and it is consistent with an emerging view in investment treaty jurisprudence that the interpretation of investment treaties should be

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<sup>133</sup> Georg Nolte, “Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties”, Doc A/CN.4/671 (26 March 2014) at pp 50–51.

<sup>134</sup> Anthea Roberts, “Subsequent Agreements and Practice: The Battle over Interpretive Power” in *Treaties and Subsequent Practice* (Georg Nolte ed) (Oxford University Press, 2013) at p 99.

<sup>135</sup> Karen J Alter, “Agents or Trustees? International Courts in their Political Context” (2008) 14 EJIL 33 at 38; Karen J Alter, “Delegation to International Courts and the Limits of Re-contracting Political Power” in *Delegation and Agency in International Organizations* (Darren Hawkins *et al* eds) (Cambridge University Press, 2006) at p 326.

<sup>136</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [116(e)].

<sup>137</sup> Rahim Moloo, “When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation” (2013) 31(1) Berkley J Intl L 39 at 74.

less susceptible to the *post-hoc* interpretive whims of the treaty parties.<sup>138</sup> The Court's adoption of the critical date doctrine, which is not uncommon in the investment treaty context,<sup>139</sup> may therefore be seen as simply one way of protecting the interests of non-State beneficiaries. Such a view is legitimate as a matter of treaty interpretation, as Article 31(3) of the VCLT only requires the adjudicator to "take into account" any subsequent agreement or practice between the treaty parties. International courts and tribunals are therefore free to give less,

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<sup>138</sup> See for example *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) at [386] ("Moreover, even if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries"); *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) at [162]:

In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the 'long term' for such an effect (if at all); and indeed such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date.

<sup>139</sup> See for example *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Jurisdiction (14 November 2005) at [60]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at [178]; *Antoine Goetz v Republic of Burundi*, ICSID Case No ARB/95/3, Award (10 February 1999), reprinted in (2000) 15 ICSID Rev—FILJ 457 at [72] and *Amco Asia Corp v Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (10 May 1988) (resubmitted case), reprinted in (1988) 3 ICSID Rev—FILJ 166 at 184–185. See also Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) at p 41.

if any, weight to any such subsequent agreement or practice insofar as it is in reality an attempt to ride roughshod over rights and benefits that have been accrued to third parties.

41 Another related point of interest is that the Court of Appeal appeared to accept (albeit *obiter*) that post-critical date evidence might operate to deprive a tribunal of its jurisdiction if it had amounted to a binding interpretive statement under the relevant investment treaty. In *Sanum*, the Court had distinguished *ADF Group* on the basis that the post-critical date note was, pursuant to an express provision in the investment treaty (North American Free Trade Agreement (“NAFTA”)), binding on the Tribunal.<sup>140</sup> The post-critical date note in *ADF Group* was an interpretation issued in July 2001 by the NAFTA Free Trade Commission (“FTC”),<sup>141</sup> composed of “Cabinet-level representatives” of the NAFTA parties or their designees, which has the power to supervise the implementation of the NAFTA, oversee its further elaboration and “resolve disputes that may arise regarding its interpretation or application”,<sup>142</sup> with such interpretations being binding upon tribunals established under Chapter 11 of NAFTA.<sup>143</sup> It should be noted that such non-judicial interpretative mechanisms are not unique to NAFTA; they are present in several international instruments (such as the US–Singapore Free Trade Agreement<sup>144</sup>) as well as in certain international organisations where the charter or other constitutive documents vest power in a body of the organisation to provide interpretations of the relevant treaty.<sup>145</sup>

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<sup>140</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [117]–[118]; North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (“NAFTA”).

<sup>141</sup> NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11 (31 July 2001).

<sup>142</sup> NAFTA Art 2001(2).

<sup>143</sup> NAFTA Art 1131(2).

<sup>144</sup> US–Singapore Free Trade Agreement (signed 6 May 2003, entered into force on 1 January 2004) Art 20.1.

<sup>145</sup> For example, the World Trade Organization and the International Monetary Fund. See Gabrielle Kaufmann-Kohler, “Interpretive Powers of the Free  
(continued on next page)

42 However, the use of such interpretative statements is controversial, especially where the statement is issued in the middle of ongoing disputes. Commentators have argued against the use of such statements, particularly because:

- (a) such interpretative statements may be nothing more than masked amendments of the treaty in question;<sup>146</sup>
- (b) they incentivize parties to intentionally blur the line between treaty amendment (which has only prospective effect) and treaty interpretation (which has both retrospective and prospective effect) in an attempt to change the rules of the game in their favour;<sup>147</sup> and
- (c) the application of such interpretative statements to pending disputes may violate various legal principles, such as those of due process,<sup>148</sup> non-retroactivity<sup>149</sup> and *nemo iudex in causa sua* (no person may be a judge in his or her own cause),<sup>150</sup> thereby

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Trade Commission and the Rule of Law” in *Fifteen Years of NAFTA Chapter 11 Arbitration* (Emmanuel Gaillard & Frédéric Bachand eds) (JurisNet LLC, 2011) at p 177.

<sup>146</sup> Ian Laird, “Betrayal, Shock and Outrage: Recent Developments in NAFTA Article 1105” in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Todd Weiler ed) (Transnational Publishers, 2004) at p 49.

<sup>147</sup> Charles H Brower, II, “Structure, Legitimacy and NAFTA’s Investment Chapter (2003) 36 Vand J Transnatl L 37. See also *Methanex Corp v United States of America*, UNCITRAL, Second Opinion of Professor Sir Robert Jennings QC (6 September 2001) at pp 4–6.

<sup>148</sup> Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) at p 35.

<sup>149</sup> Article 28 of the VCLT states: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

<sup>150</sup> Todd Weiler, “NAFTA Investment Arbitration and the Growth of International Economic Law” (2002) *Bus L Intl* 158 at 183–184; Charles  
*(continued on next page)*

undermining the rule of law.<sup>151</sup> A future court faced with a similar non-judicial interpretive mechanism should therefore be aware that not even a “binding” interpretive statement would provide an easy answer to the dispute.<sup>152</sup>

43 Separately, it remains unclear what effect *Sanum* has for future investment treaty disputes under PRC BITs that involve investors from the special administrative regions, considering especially that, in October 2016, the PRC’s Ministry of Foreign Affairs claimed that the Singapore Court of Appeal was wrong to hold that the PRC–Laos BIT applied to Macau on the basis of the PRC’s domestic laws and the 2014 Letters and 2015 Letters.<sup>153</sup> In such a future dispute, it is entirely possible that the respondent host State will seek to rely on the 2014 Letters and 2015 Letters as well as Laos’ pleadings in *Sanum* and the PRC’s public statements, as constituting a subsequent agreement or practice to the effect that the BIT in question does not confer investment protection on Hong Kong and Macanese investors. This would be in line with a recent trend in investor–State arbitration in which host States

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H Brower II, “Fair and Equitable Treatment under NAFTA’s Investment Chapter” (2002) 96 *Am Socy Intl L Proc* 9.

<sup>151</sup> Gabrielle Kaufmann-Kohler, “Interpretive Powers of the Free Trade Commission and the Rule of Law” in *Fifteen Years of NAFTA Chapter 11 Arbitration* (Emmanuel Gaillard & Frédéric Bachand eds) (JurisNet LLC, 2011) at pp 190–192.

<sup>152</sup> Bilateral investment treaties (“BITs”) do not normally have non-judicial interpretive mechanisms, but this might not be the case for newer BITs based off the US Model BIT (2012), as Art 30(3) of the US Model BIT provides for binding interpretive statements issued jointly by the treaty parties.

<sup>153</sup> Ministry of Foreign Affairs, People’s Republic of China, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on October 21, 2016” <[http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1407743.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml)> (accessed 17 January 2018). See also Caroline Simson, “China Says Singapore Court Got It Wrong in Laos Treaty Case” *Law360* (21 October 2016) <<https://www.law360.com/articles/854332/china-sayssingapore-court-got-it-wrong-in-laos-treaty-case>> (accessed 17 January 2018).

have sought to rely on the pleadings of host States as a subsequent agreement and/or practice in putting forth their legal defence against the investor's claims, which is in itself controversial.<sup>154</sup>

## **VI. Interpretation of “amount-of-compensation” dispute resolution clauses in investment treaties**

44 In *Sanum*, the issue of the scope of Article 8(3) of the PRC–Laos BIT before the Court of Appeal, unlike before the High Court, was a live one due to the Court's decision that there was nothing to displace the operation of the MTF Rule to the PRC–Laos BIT. The Court of Appeal ultimately came to the opposite conclusion of the judge's *obiter* view on the interpretation of Article 8(3) of the PRC–Laos BIT, holding that Article 8(3) provided arbitral jurisdiction over issues about not only the quantification of compensation for expropriation but also the investor's entitlement to compensation for expropriation in the first place. The Court of Appeal had engaged in a very careful analysis of the workings of Article 8(3) as well as a meticulous examination of the available jurisprudence and commentary on similar treaty provisions, effectively remedying what we had described as a missed opportunity in the High Court.

45 In our previous comment, we had discussed the history and context behind such “amount of compensation” dispute resolution clauses found in “first generation” investment treaties concluded by communist states as well as the problems they present.<sup>155</sup> The main problem with such clauses is that their usefulness had become questionable due to the decreasing relevance of direct expropriation (with only the amount of compensation being in dispute) and the concomitant rise of indirect

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<sup>154</sup> See generally Kendra Magraw, “Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties” (2015) 30(1) ICSID Rev—FILJ 142 at 144–145.

<sup>155</sup> Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 519–521.

expropriation (with the issue of whether a governmental measure amounted to expropriation being in dispute) in modern investment disputes.<sup>156</sup> While it may have made sense to have a limited scope of jurisdiction over the amount and method of compensation in the mid-20th century when investor–State disputes often revolved around the appropriate amount of compensation for direct expropriation,<sup>157</sup> depriving modern investment tribunals of the power to determine whether an expropriation has occurred would effectively deprive investors of their right to have the amount of compensation for indirect expropriation determined by an international tribunal, as the host State could easily avoid such narrow jurisdiction simply by denying the existence of any regulatory expropriation.<sup>158</sup> While the Court in *Sanum* noted that, even in cases of direct expropriation, host States could also deny investors of the right to arbitration simply by denying that it had engaged in expropriatory acts,<sup>159</sup> it would be extremely difficult for a host State to plausibly deny an act of direct expropriation, which is usually in the realm of very public acts of nationalisation.<sup>160</sup>

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<sup>156</sup> See, for example, August Reinisch, “Expropriation” in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds) (Oxford University Press, 2008) at p 408.

<sup>157</sup> See for example the Libyan oil-concession arbitrations: *Libyan American Oil Co (Liamco) v Libya* 62 ILR 140 (1981); *Texaco Overseas Petroleum Co (Topco)/California Asiatic (Calasiatic) Oil Co v Libya* 17 ILM 1 (1978); *British Petroleum v Libya* 53 ILR 297 (10 October 1973 and 1 August 1974).

<sup>158</sup> August Reinisch, “How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?” (2011) 2(1) J Intl Disp Settlement 115 at 117 and 173.

<sup>159</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [133].

<sup>160</sup> Where outright nationalisation has occurred, the question of the existence of an expropriation is generally not in dispute. See, for example, *Guaracachi America Inc and Rurelec plc v Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Award (31 January 2014) where the claimant’s allegation that Bolivia’s nationalisation of a power company was an act of expropriation went uncontested.

46 In modern investment disputes, the problematic nature of such restrictive arbitration clauses is reflected in the sharp divide in the case law jurisprudence on the proper interpretation to take. Some tribunals employ a broad interpretation so as to arbitrate disputes on both liability for expropriation and quantum of compensation,<sup>161</sup> while other tribunals have adopted a narrow interpretation to restrict their jurisdiction to disputes on quantum of compensation only.<sup>162</sup> The outcomes have differed despite the common use of Article 31 of the VCLT as an interpretative tool, depending on whether the tribunal chooses to place importance on the ordinary meaning of the treaty text or to instead give a dominant role to the object and purposes of the BIT.<sup>163</sup>

47 It was an emphasis on the context, object and purposes of the BIT, as well as the principle of *effet utile*, that led the Court of Appeal in *Sanum* to favour the Broad Interpretation of Article 8(3) of the PRC–Laos BIT. However, any potential impact the Court's interpretation may have in future investment disputes on such “amount-of-compensation” clauses may be quite narrow, as the chief consideration in the Court's judgment was the fork-in-the-road provision in Article 8(3), which,

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<sup>161</sup> See, for example, *Franz Sedelmayer v Russian Federation*, SCC Case Award (7 July 1998); *Telenor Mobile Communications AS v Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006); *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007); *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm); *Renta 4 SVSA v Russian Federation*, SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009).

<sup>162</sup> See, for example, *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005); *Austrian Airlines v Slovakia*, UNCITRAL, Final Award (9 October 2009); *ST-AD GmbH v Republic of Bulgaria*, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013); *Vladimir Berschader and Moise Berschader v Russian Federation*, SCC Case No 080/2004, Award (21 April 2006); *RosInvest Co UK Ltd v Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007).

<sup>163</sup> August Reinisch, “How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?” (2011) 2(1) *J Intl Disp Settlement* 115 at 174.

under the Narrow Interpretation, made the purported path to arbitration an effective dead end.<sup>164</sup> The Court was clearly aware of the practical reality that the Narrow Interpretation would have led to Article 8(3) being denuded of all force for modern investment disputes concerning indirect expropriation,<sup>165</sup> though it appeared that the Court was not prepared to accept the Broad Interpretation on this concern alone.<sup>166</sup> With regard to the PRC BITs' generational shift, the Court was able to avoid examining this thorny issue at length on the ground that there had to be evidence of a "specific intention" of the treaty parties,<sup>167</sup> although the Court could equally have relied on Article 32 of the VCLT, which permits the use of such supplementary means of interpretation only if the interpretation under Article 31 had led to an ambiguous or obscure meaning or a manifestly unreasonable or absurd result.<sup>168</sup>

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<sup>164</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [130]–[133].

<sup>165</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [133].

<sup>166</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [146]. *Cf. Renta 4 SVSA v Russian Federation*, SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009) where the tribunal adopted broad interpretation of the "amount of compensation" clause despite there being no fork-in-the-road provision precluding arbitration upon submission of the dispute to the municipal courts.

<sup>167</sup> *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [146].

<sup>168</sup> Article 32 of the VCLT titled "Supplementary means of interpretation", provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

48 A recent example of how an entirely different outcome may be arrived at by emphasizing the text of the investment treaty can be seen in *Juan Ignacio v Russia*,<sup>169</sup> a decision by the Svea Court of Appeal concerning the interpretation of Article 10 of the Agreement for Reciprocal Promotion and Protection of Investments between Spain and the Union of Soviet Socialist Republics (“Russia–Spain BIT”).<sup>170</sup> Article 10 states that any dispute between an investor and a host State “relating to the amount or method of payment of the compensation [for expropriation under Article 6]” may be referred to arbitration either under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce<sup>171</sup> or arbitration under the UNCITRAL Arbitration Rules. The Tribunal held that Article 10 was to be construed broadly to include disputes on both the existence of “compensable expropriation”,<sup>172</sup> and the quantum of compensation, on the basis that, considering that a “fundamental advantage” perceived by investors in many, if not most, BITs is that of “the internationalisation of the host state’s commitments”, it would be “impermissible to read Article 10 ... as a vanishingly narrow internationalisation of either Russia’s or Spain’s commitment”.<sup>173</sup> As with

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<sup>169</sup> *Juan Ignacio Luca de Tena 11 v Russian Federation* Case No T 9128-14 (18 January 2016) unofficial English translation available at [https://www.italaw.com/sites/default/files/case-documents/italaw7714\\_8.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7714_8.pdf) (accessed 17 January 2018).

<sup>170</sup> Agreement for Reciprocal Promotion and Protection of Investments between Spain and the Union of Soviet Socialist Republics (signed 26 October 1990, entered into force 28 November 1991) (“Russia–Spain BIT”).

<sup>171</sup> Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010).

<sup>172</sup> Due to the wording of Article 10 and a concession by the claimant, the tribunal considered that its subject matter jurisdiction did not extend to all aspects of expropriation but, rather, was restricted to whether there had been compensable expropriation. See *Renta 4 SVSA v Russian Federation*, SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009) at paras 41–42 and 63.

<sup>173</sup> *Renta 4 SVSA v Russian Federation*, SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009) at [56].

the cases of *Tza Yap Shum v Republic of Peru*,<sup>174</sup> *Sanum* and *Beijing Urban Construction Group Co Ltd v Republic of Yemen*<sup>175</sup> (“*Beijing Urban*”), the Tribunal was particularly taken by the fact that, should Article 10 be limited to quantum disputes, the host State may unilaterally deprive the investor of any access to arbitration simply by denying liability for expropriation.<sup>176</sup> However, in subsequent annulment proceedings, the Svea Court of Appeal came to the opposite conclusion, holding that Article 10 was, by its text alone, clear that the tribunal’s jurisdiction was limited to disputes on the amount or method of payment of compensation for expropriation.<sup>177</sup> Notwithstanding the Tribunal’s concerns on the consequences of a narrow interpretation of Article 10, the Svea Court of Appeal was of the view that its interpretation left no room for any remaining ambiguity or obscurity and did not lead to manifestly unreasonable or absurd outcomes.<sup>178</sup> It is an open question whether the Court of Appeal in *Sanum* might have come to a different conclusion since, unlike Article 8(3) of the PRC–Laos BIT, Article 10 of the Russia–Spain BIT contains a very different fork-in-the-road provision, with both forks leading to international arbitration and neither undermining the other.

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<sup>174</sup> ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence (19 June 2009). This decision was subsequently and unsuccessfully challenged in ICSID annulment proceedings: see *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Annulment (12 February 2015).

<sup>175</sup> ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017).

<sup>176</sup> *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017).

<sup>177</sup> *Juan Ignacio Luca de Tena 11 v Russian Federation*, Case No T 9128-14 (18 January 2016) unofficial English translation available at [https://www.italaw.com/sites/default/files/case-documents/italaw7714\\_8.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7714_8.pdf) (accessed 17 January 2018).

<sup>178</sup> *Juan Ignacio Luca de Tena 11 v Russian Federation*, Case No T 9128-14 (18 January 2016) unofficial English translation available at [https://www.italaw.com/sites/default/files/case-documents/italaw7714\\_8.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7714_8.pdf) (accessed 17 January 2018).

49 However specific it may be, the Court of Appeal's reliance on the fork-in-the-road provision, which was first seen in *Tza Yap Shum*,<sup>179</sup> has already proven to be influential in the interpretation of other "first-generation" PRC BITs, though it is far from being the final word on the subject. In *Beijing Urban*, the tribunal was faced with Article 10 of the Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Republic of Yemen<sup>180</sup> ("PRC–Yemen BIT"), which stated that any dispute between an investor and the host State may be submitted to either a competent court of the host State or arbitration under the International Centre for the Settlement of Investment Disputes ("ICSID"), subject to the proviso that the contracting States "shall give its irrevocable consent to the submission of any dispute relating to the amount of compensation for expropriation for resolution under such arbitration procedure", with other disputes to be "mutually agreed upon between both Contracting parties".<sup>181</sup> The Tribunal held, following *Sanum*, that a broad interpretation of Article 10 (so that issues of both liability and quantum could be referred to arbitration) was necessary to prevent the "untenable conclusion" that the investor would "never actually have access to arbitration".<sup>182</sup> Yemen's argument on the PRC BITs' generational shift was dismissed by the

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<sup>179</sup> *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence (19 June 2009) at [188].

<sup>180</sup> Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Republic of Yemen (signed 16 February 1998, entered into force on 10 April 2002) ("PRC–Yemen BIT").

<sup>181</sup> PRC–Yemen BIT Arts 10.1–10.2.

<sup>182</sup> *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) at [69]–[87] (citing in support *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence (19 June 2009)); *Renta 4 SVSA v Russian Federation* SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009); *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536.

Tribunal on the basis that Article 32 of the VCLT precluded the use of such supplementary means of interpretation.<sup>183</sup>

50 In contrast, in *China Heilongjiang International Economic & Technical Cooperative Corporation v Republic of Mongolia*<sup>184</sup> (“*China Heilongjiang*”), which concerned a dispute resolution clause in the Agreement between the Government of the People’s Republic of China and the Government of the Mongolian People’s Republic Concerning the Encouragement and Reciprocal Protection of Investments<sup>185</sup> (“PRC–Mongolia BIT”) that is virtually identical to Article 8(3) of the PRC–Laos BIT,<sup>186</sup> the Tribunal came to the opposite conclusion of the Court of Appeal in *Sanum* by holding that Article 8(3) of the PRC–Mongolia BIT was to be read narrowly to allow only quantum disputes to be submitted to arbitration.<sup>187</sup> The Tribunal was of the view that the Narrow Interpretation would not render the right to arbitration under Article 8(3) of the PRC–Mongolia BIT illusory, particularly because the investor would clearly have the right to arbitration in cases of “formally proclaimed” expropriations (that is, expropriations that had been formally announced by the host State via legislative or executive means)

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<sup>183</sup> *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) at [93]–[97].

<sup>184</sup> UNCITRAL, PCA Case No 2010-20, Award (30 June 2017).

<sup>185</sup> Agreement between the Government of the People’s Republic of China and the Government of the Mongolian People’s Republic Concerning the Encouragement and Reciprocal Protection of Investments (signed 25 August 1991, entered into force 1 November 1993) (“PRC–Mongolia BIT”).

<sup>186</sup> Article 8(3) of the PRC–Mongolia BIT states:

If a dispute *involving the amount of compensation* for expropriation cannot be settled within six months after resorting to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. *The provisions of this paragraph shall not apply if the investment concerned has resorted to the procedure specified in the paragraph 2 of this Article* [emphasis added]

<sup>187</sup> *China Heilongjiang International Economic & Technical Cooperative Corp v Republic of Mongolia*, UNCITRAL, PCA Case No 2010-20, Award (30 June 2017) at [448].

with only the amount of compensation being in dispute.<sup>188</sup> In the Tribunal's view, while formally proclaimed expropriations were less common than non-proclaimed ones, their occurrence was nonetheless uncontested, and an arbitration provision that would encompass an entire category of disputes could not fairly be said to be lacking *effet utile*.<sup>189</sup>

51 The Tribunal was of the further view that the right to arbitration was also available in cases of non-proclaimed (indirect) expropriation on the basis that the investor was, under the fork-in-the-road provision of Article 8, free to seek redress from the domestic courts while expressly reserving the quantum issues for arbitral proceedings under Article 8(3) of the PRC–Mongolia BIT.<sup>190</sup> Unlike the Court of Appeal in *Sanum*, the Tribunal did not appear to be of the opinion that the issues of liability and quantum for expropriation were inextricably intertwined. The *China Heilongjiang* Award is currently subject to setting aside proceedings before the US District Court for the Southern District of New York on the ground that the Tribunal's interpretation of Article 8(3) of the PRC–Mongolia BIT “defeats the purpose of investor state arbitration”.<sup>191</sup> It therefore appears that the issue of the proper interpretation of Article 8(3) of the PRC–Mongolia BIT remains in flux.

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<sup>188</sup> *China Heilongjiang International Economic & Technical Cooperative Corp v Republic of Mongolia*, UNCITRAL, PCA Case No 2010-20, Award (30 June 2017) at [448].

<sup>189</sup> *China Heilongjiang International Economic & Technical Cooperative Corp v Republic of Mongolia*, UNCITRAL, PCA Case No 2010-20, Award (30 June 2017) at [448].

<sup>190</sup> *China Heilongjiang International Economic & Technical Cooperative Corp v Republic of Mongolia*, UNCITRAL, PCA Case No 2010-20, Award (30 June 2017) at [449].

<sup>191</sup> See Lacey Yong, “Mongolia Treaty Award Challenged in New York” *Global Arbitration Review* (2 October 2017) <<http://globalarbitrationreview.com/article/1147895/mongolia-treaty-award-challenged-in-new-york>> (accessed 17 January 2018). See also Damien Charlotin, “In-Depth: A First Look inside the Now-Surfaced Award in the Case of *China Heilongjiang v Mongolia Award*; Claimants Now Pursuing Set Aside” *Investment Arbitration Reporter* (1 October 2017).

52 The upshot of all this is that *Sanum's* impact on the interpretation of such “amount-of-compensation” clauses may be restricted to disputes over clauses that have a similarly critical drafting flaw, namely a fork-in-the-road provision that leads to there being no actual right to arbitration, no matter the type of dispute. Such clauses are present in around 70 “first-generation” PRC BITs – hence, the interpretation of their dispute resolution clauses has potentially significant implications for Chinese foreign investments around the world. Notably, while the PRC has disputed the applicability of its BITs to the special administrative regions, it has not disputed the correctness of the Court’s decision on the interpretation of Article 8(3) of the PRC–Laos BIT.<sup>192</sup> It may well be that an expansive reading of such clauses may no longer be of particular concern to the PRC since it has accepted international arbitration for all disputes in its “third-generation” BITs.<sup>193</sup>

53 With regard to “amount-of-compensation” clauses in general, the case law on the proper interpretation of such clauses is foreseen to remain unsettled; as observed by the Court of Appeal in *Sanum*, minor differences in wording can significantly alter the operation of two otherwise similar treaties,<sup>194</sup> and there are other ways to expansively interpret restrictive arbitration clauses, such as through the use of

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<sup>192</sup> Ministry of Foreign Affairs, People’s Republic of China, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on October 21, 2016” <[http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1407743.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml)> (accessed 17 January 2018). See also Caroline Simson, “China Says Singapore Court Got It Wrong in Laos Treaty Case” *Law360* (21 October 2016) <<https://www.law360.com/articles/854332/china-says-singapore-court-got-it-wrong-in-laos-treaty-case>> (accessed 17 January 2018).

<sup>193</sup> Norah Gallagher, “China’s BIT’s and Arbitration Practice: Progress and Problems” in *China and International Investment Law: Twenty Years of ICSID Membership* (Wenhua Shan & Jinyuan Su eds) (Brill Nijhoff, 2015) at p 210.

<sup>194</sup> *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 at [146].

“most-favoured nation” clauses<sup>195</sup> or even the general policy consideration that foreign investment would not be promoted by purely formal or illusory standards of protection.<sup>196</sup> Further, as seen in the *China Heilongjiang* case, a tribunal may arrive at an entirely different interpretation depending on the available evidence on the operation of such clauses in the territories of the contracting States.

54 However, what is clear is that the Singapore courts have taken on a more assertive and internationalist role in the adjudication of investment disputes. In our previous case comment,<sup>197</sup> we had stated that the crux of the issue here is whether an investment tribunal may pragmatically interpret a restrictive treaty term in an expansive way notwithstanding the apparent intentions of the contracting States. From this inquiry, we now consider the further and difficult question of whether it is the proper role of investment tribunals to correct the meaning of dispute resolution clauses they deem useless or senseless or whether such remedial action should remain reserved to the State parties to the investment treaty – that is, whether it is the treaty interpreter or the treaty maker who determines the proper scope of the arbitration.<sup>198</sup> It would appear that, in its recognition of the need to protect rights and benefits accrued to third parties to the investment treaty and in its efforts to avoid an illusory right to arbitration, the Court of Appeal in *Sanum* emphatically decided in favour of the former.

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<sup>195</sup> See for example *Vladimir Berschader and Moïse Berschader v Russian Federation*, SCC Case No V080/2004, Separate Opinion of Todd Weiler (7 April 2006) at [20]; *RosInvest Co UK Ltd v Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007).

<sup>196</sup> *Renta 4 SVSA v Russian Federation*, SCC Case No V 024/2007, Award on Preliminary Objections (20 March 2009) at [56].

<sup>197</sup> See Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 521.

<sup>198</sup> See Michael Hwang & Aloysius Chang, “Case Comment: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters” (2015) 30(3) ICSID Rev—FILJ 506 at 521.

## VII. Conclusion

55 *Sanum* is a highly significant and well-reasoned decision of the Singapore Court of Appeal. As the first judgment by Singapore's apex court involving the curial review of an investment award, *Sanum* has provided much needed clarity on several aspects of the mechanics of such review, such as the confirmation that the interpretation and application of treaties to which Singapore is not a party are justiciable matters insofar as the Singapore courts are required to do so in order to give effect to the parties' rights and duties under the IAA as well as the confirmation that the standard of review of arbitral awards on jurisdiction is *de novo*. *Sanum* also shows that the Singapore courts will not shy away from dealing with complex issues of public international law, as shown in its application of the critical date doctrine in determining issues concerning the operation of the MTF Rule and its clarification that the standard of proof on matters concerning public international law is on a balance of probabilities.

56 Most significant is perhaps the Court's serious and meticulous examination of the issues and jurisprudence surrounding "amount-of-compensation" clauses in investment treaties as well as its treatment of unworkable "fork-in-the-road" provisions in such clauses. The Court has shown that it is very much aware of the general problems that plague such clauses, and it has settled on an interpretation that ensures that a fork in the road towards the path to arbitration does not end up being a dead end. It will undoubtedly be seen as an influential and prominent decision in modern investment treaty jurisprudence on the workings of not-so-modern investment treaties.

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## **Part II**

### **MEDIATION**

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## Background to Essay 19

In 2014, I jointly organised a programme for the International Council for Commercial Arbitration Congress in Beijing together with Wang Sheng Chang, the then secretary-general of the China International Economic and Trade Arbitration Commission. I had a small speaking role at the conference on whether arbitrators should act as settlement facilitators. My view then was that an arbitrator should not, at the beginning of the main hearing, propose to the parties that they should consider mediation when they were expected to arbitrate as a neutral tribunal. My view then was based on the following reasons.

First, the parties, not being acquainted or familiar with the members of the tribunal, might be suspicious as to why the arbitrators were reluctant to carry out the task for which they were being paid (*ie*, to arbitrate and resolve the dispute).

Second, this feeling of puzzlement might then lead the parties to wonder whether the tribunal was finding the case too difficult to decide and was looking for a quick solution rather than buckle down to work on the problem of deciding the legal rights and liabilities of the parties, however difficult the case might be.

Third, either or both parties might actually question the neutrality of the tribunal.

But times have changed. While my view remains that arbitrators should not act as mediators themselves, I now think that the tribunal should develop a working relationship that engenders trust in the parties in the competence and integrity of the tribunal, so that parties will not be suspicious when the tribunal suggests mediation.

Accordingly, I now think that there is room for tribunals, from the very beginning of the arbitration, to take a healthy interest in trying to understand the dynamics of the dispute between the parties to develop and form an opinion on whether the dispute is one capable of mediation. My standard Procedural Order No 1 (which is circulated to the parties before the first Case Management Conference, and before the parties meet the tribunal) now contains

a provision to enquire whether parties have attempted mediation before initiating arbitration.

In the first Case Management Conference, I will then confer with the parties to explore whether there should be further attempts made to mediate, either in parallel with the progress of the arbitration (which should advance in the usual way), or to suspend the arbitration for a short period to enable mediation to take place.

This essay was originally published in the International Council for Commercial Arbitration Congress Series No 12 (Beijing 2004) entitled *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (Kluwer Law International, 2005) at pp 571–581.

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## THE ROLE OF ARBITRATORS AS SETTLEMENT FACILITATORS\*

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Michael HWANG SC†

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\* This paper was delivered at the 17th International Council for Commercial Arbitration Conference in Beijing (18 May 2004). I gratefully acknowledge my debt to two papers, from which I have drawn inspiration for the preparation of this paper: Michael Collins, “Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them?” (2003) 19(3) *Arbitration International* 333 and Anne Netto, Teresa Ee & Alice Christudason, “Med-Arb in the Catbird Seat of ADR” (2003) 20(4) *International Construction Law Review* 517.

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## **I. The principle**

1 Arb-Med – the process whereby an arbitrator turns mediator – as a hybrid dispute resolution process is generally discouraged in both Europe and America, and most European and American institutional rules do not provide for it. In Asia, however, it is generally encouraged, and Asian arbitration legislation and institutional rules often provide for Arb-Med where the parties have consented to this process.

2 However, section 8 of the International Bar Association (“IBA”) 1987 Rules of Ethics for International Arbitrators does provide for Arb-Med. It provides that Arb-Med can be carried out with the consent of the parties and that the tribunal (or the presiding arbitrator) may make settlement proposals to the parties. However, private caucuses are discouraged; and if such private caucuses occur, then the arbitrator will be disqualified from acting further as an arbitrator.

3 The traditional reasoning against Arb-Med is that an arbitrator has only a mandate to determine the dispute and not to settle it. Further, an arbitrator who attempts to mediate may expose his eventual award to challenge by the losing party.

4 I now examine the theoretical and practical problems associated with Arb-Med.

### **A. What can be done by the tribunal?**

5 Where Arb-Med is permitted by institutional rules or legislation, the question is what the tribunal can actually do.

6 *First*, the tribunal can encourage a settlement. There can be no objection to arbitrators encouraging a settlement, although some cynics

may say that arbitrators, in encouraging a settlement, are trying to earn their fees without doing the work for which they were paid (assuming that their fees would not be substantially reduced if the arbitration were to be settled at the beginning or half-way through the hearing).

7 *Second*, the tribunal can propose mediation by an independent mediator and stay or adjourn the arbitral proceedings for the mediation to take place. Again, there can be no objection to this where parties have consented. An independent mediator can usually be found very quickly, especially in a setting like Singapore or Hong Kong, where there are many commercial mediators available at short notice. However, where the dispute is factually complex, with a multitude of stand-alone issues, such as a heavy construction dispute, it may be difficult to get a mediator up to speed with the background to the dispute in a very short time so as to allow him to do his job effectively. In such cases, it may not be possible or desirable to adjourn an ongoing arbitration hearing while the parties go off to mediation for a day or two, with the arbitrators on standby ready to resume the arbitration at a moment's notice if the mediation proves unsuccessful.

8 *Third*, the tribunal can try to mediate the dispute itself. Most of the problems with Arb-Med arise from this function of the tribunal, and this problem will be examined separately. Another way in which the tribunal can try to mediate the dispute itself is to let part of the tribunal engage in mediation (either by the Chair, as envisaged by the IBA Rules of Ethics, or by the party-appointed arbitrators) so that, if need be, with the consent of the parties, the non-mediating arbitrator(s) can carry on with the arbitration if the mediation fails.

### ***B. Perceived difficulties of Arb-Med***

9 Most of the problems of Arb-Med arise when the tribunal tries to mediate the dispute itself.

10 *First*, an arbitrator may, during the course of mediation, express a view as to the merits of the dispute. This may be seen as affecting his impartiality. However, this problem is more apparent than real, as it arises from a misunderstanding of the nature of mediation. Generally,

mediation can be facilitative or evaluative. In the facilitative model (which is the most widely practised version), the mediator does not express a view on the merits but encourages the parties to explore all the possible methods of resolving the dispute without regard to the merits of the dispute. Further, an arbitrator is concerned about each party's *position* while a mediator is concerned about each party's *interests*. In the facilitative model, a mediator should not be the primary instigator of proposals for settlement, which must ultimately emanate from the parties themselves. On the other hand, even in a facilitative model, a mediator is not immune from evaluating the merits of the case. This is because, towards the end of the mediation, if the parties reach an impasse on settlement, mediators are taught to give a "reality check" to encourage a party with an over-optimistic view of his chances of success to re-look at his case on its merits.

11 *Second*, there is the problem of private caucuses. The problem with private caucuses is that, in subsequent setting aside or enforcement proceedings of the award, the Arbitrator-Mediator may be accused:

- (a) (by the caucusing party) of using improper pressure to settle or of making use of confidential information imparted by that party to decide the case when he reverts to being an arbitrator; and/or
- (b) (by the non-caucusing party) of relying on confidential information imparted by the caucusing party to decide the case without giving the non-caucusing party an opportunity to challenge the accuracy or relevance of that information.

12 The problem of private caucusing will now be further examined.

### **C. *How has the problem of private caucuses been approached?***

13 The English High Court decision of *Glencot Development & Design v Ben Barrett*<sup>1</sup> ("*Glencot v Barrett*") reflects the European approach towards the problem of private caucusing. Briefly, the facts in *Glencot v*

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<sup>1</sup> [2001] BLR 207.

*Barrett* were that the appointed adjudicator<sup>2</sup> of a construction dispute was asked, in the course of a meeting to determine issues set out in an agenda, to mediate on one of many issues in the dispute. One of the parties subsequently argued that the appointed adjudicator should withdraw from the adjudication because that adjudicator had previously acted as mediator, and accordingly his neutrality was impaired.

14 Judge Humphrey Lloyd QC applied the apparent bias test objectively in determining whether or not the adjudicator turned mediator was guilty of impartiality. The apparent bias test essentially asks whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased.

15 Further, Judge Lloyd also stated that, since the adjudicator was being asked to mediate on one of the issues of the dispute, he was right in making it clear to the parties that what he might be doing was a departure from adjudication and in getting their agreement to it. Judge Lloyd stated that such agreement was essential in a case where an arbitration is stopped to allow for a period of mediation.

16 On the facts of the case, Judge Lloyd found that the adjudicator-mediator went to and fro between the parties during the mediation and that, although he was under no obligation to report what was conveyed during the mediation, those private discussions could have conveyed information or impressions which subsequently influenced his decision. Judge Lloyd also found it significant that the discussions during the mediation were heated, so that it would have been understandable if the adjudicator-mediator had formed some view about one or both of the parties. Further, the adjudicator-mediator was also asked to form a view about the credibility of the applicant's case without any documentary evidence or basis. Judge Lloyd concluded that these were facts where

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<sup>2</sup> Mr Peter Talbot was the arbitrator in the *Glencot Development & Design v Ben Barrett* [2001] BLR 207. Within a month of the judgment, he delivered a paper on his reaction to the judgment: see "Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?" (2001) 67 *Arbitration: Journal of Chartered Institute of Arbitrators* 221.

*unconscious or insidious bias* might have been present in the arbitration. Lastly, the adjudicator's action in writing to ask the parties whether they wanted him to withdraw also tellingly suggested that he was concerned about what an outsider might reasonably think about what had taken place. Under these circumstances, Judge Lloyd considered that there was a real possibility of the adjudicator being biased, despite his openness and explanations.

17 Assuming that the decision is correct (and it is likely that this will not be the definitive statement of English law on this point), could the outcome of this case have been avoided? Two suggestions have been made by Mr Peter Talbot himself for the future:

- (a) the arbitrator-mediator should avoid caucusing completely (but this would be to make the mediation less effective); or
- (b) the arbitrator-mediator should get the parties to sign a mediation agreement expressly authorising the arbitrator-mediator to mediate in caucus, and permitting him to resume his role as arbitrator if the mediation proves unsuccessful. Arguably, natural justice is capable of waiver at common law (as has been established by statute in New South Wales) so that, where parties give their informal consent to caucusing they should be bound by that consent.

18 Singapore and Hong Kong are the only jurisdictions directly to address the problem of private caucuses in Arb-Med by statute.

19 The legislation of both territories is in identical terms and draws a distinction between Med-Arb and Arb-Med. Where a person is first appointed as a mediator and then, by consent of the parties, goes on to act as arbitrator if the mediation fails, he is subject to no constraints on his powers of private caucusing. The legislation then goes on to say that no objection can be taken to his appointment as arbitrator solely on the ground that he had previously acted as mediator.

20 In contrast, an arbitrator who has turned mediator with the consent of the parties is expressly allowed to engage in private caucuses and is required to keep information disclosed to him in caucus as confidential unless the disclosing party consents to it being revealed to

the other party. However, if the mediation fails, and the arbitrator has to carry on as arbitrator then, before resuming the arbitration proceedings, he must disclose to all other parties to the proceedings “so much of that [confidential] information as he considers material to the arbitral proceedings”.

21 No one I have spoken to knows the origin of this last provision, requiring the arbitrator to disclose to all other parties confidential information disclosed during the mediation, which the arbitrator considers is material to the arbitral proceedings, so we can only guess at its rationale. Possibly it is to overcome the objection to Arb-Med that has been encountered in Australasia, where the view has been expressed that Arb-Med may violate rules of natural justice.

22 If an arbitrator-mediator receives certain information which is confidential for purposes of the mediation, that does not impinge on the integrity of the mediation because the mediator is only a facilitator and not an adjudicator (and no question of violation of natural justice can arise at this stage). However, where the arbitrator-mediator puts aside his mediator’s hat and puts back on his arbitrator’s hat, the risk is that he will be unable to put that information wholly out of his mind when he comes to make his award. Accordingly, that information (which has not been revealed to the other party, who will not therefore have an opportunity of responding to it) will or may affect his decision (possibly unconsciously).

23 Accordingly, the rationale for such legislation is presumably to have a level playing field for the parties so that all relevant information given to the Arbitrator-Mediator in caucus should be on the table in case the other party wishes to challenge or rebut that information.

24 However, there are clearly problems in interpreting this legislation, on which there has been no case law either from Singapore or Hong Kong. This has in all probability been due to the rarity of Arb-Med in both these territories. I have made inquiries with the Singapore International Arbitration Centre (“SIAC”), which has no records of any Arb-Med cases under its administration (although there could of course have been *ad hoc* or other institutional arbitrations taking place in Singapore which could have applied this provision). Similarly, I am not

aware of any reported cases in Hong Kong except for one case indirectly reported in a journal.<sup>3</sup>

25 A number of legal questions arise as to the question of what is considered information “material” to the arbitration proceedings. In other words, how is materiality to be interpreted? Consider the following examples:

- (a) The caucusing party discloses that he needs to settle the case urgently because he is facing a large income tax assessment.
- (b) The caucusing party discloses that one or two of his claims (or defences, as the case may be) were put in without great faith in their chances of success (but without explaining why).
- (c) The caucusing party discloses that he may not have enough assets to satisfy any award made against him beyond a certain sum.
- (d) The caucusing party discloses that one of his witness’ affidavits contains an incorrect statement on an important issue of fact.
- (e) The caucusing party shows the mediator a document which he has not disclosed to the other party which is clearly relevant to the issues in the arbitration.

26 I will risk controversy by saying that, in my view, only (d) and (e) should be disclosed before the arbitration is resumed. “Material” must mean “material to the issues in the case” and not to a claimant’s solvency, his need for funds, or his own belief in the strength of his case or otherwise. While (a), (b) and (c) would be material for purposes of mediating a settlement, they cannot affect the decision of the arbitrator on the merits of the claim.

27 But let us look at the realities of the situation.

28 *First*, in my experience as a mediator, I have yet to come across a party who admitted to any fact that would have been truly damaging to his case had that fact been disclosed in open court. In practice, no one is going to admit to a mediator that his witnesses are telling lies or that his case is without merit. Mediation is about what the parties are prepared

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<sup>3</sup> See Michael Thomas CMG QC, “Mediation at Work in Hong Kong” (1992) 58(1) *Arbitration* 29.

to do to make the dispute go away: the question is not who is right or wrong, but what is the best thing for each party in order to move forward. Mediators look to the future rather than at the past. Accordingly, the danger of an arbitrator-mediator's dilemma is more apparent than real.

29 *Second*, I believe that, if there were Arb-Med cases under the Singapore or Hong Kong regime, it is likely that such mediation would be more inhibited than a regular mediation by an independent mediator who was not also an arbitrator. Any arbitrator-mediator would have to warn the parties of the consequences of disclosures made in private caucuses, and he might also be more reluctant to adjourn into private caucuses in the first place, so as to reduce the incidence of confidential disclosures that will cause him the dilemma of deciding which disclosures to reveal to the other side. Accordingly, in an Arb-Med where the arbitrator is also the mediator, there might be inhibitions on both sides which could reduce the effectiveness of the mediation process.

***D. Private caucusing as a breach of natural justice and waiver by the parties***

30 One objection to Arb-Med is that private caucusing during mediation is against the rules of natural justice. Indeed, in New Zealand, an arbitral award may be set aside if it is regarded as contrary to public policy and an award obtained in breach of the rules of natural justice will be set aside. The objection against Arb-Med is reflected in New Zealand's legislation which does not provide for Arb-Med.

31 On the other hand, the approach in New South Wales is less strict. Although arbitrators who also act as mediators are "bound by the rules of natural justice", section 27(3) of New South Wales' Commercial Arbitration Act 2010 allows parties to waive a breach of natural justice, allowing the arbitrator to mediate. Indeed, the Chartered Institute of Arbitrators' branch in Australia is currently developing a scheme for smaller commercial disputes that would allow a mediator to subsequently act as arbitrator. However, despite this more liberal

attitude towards Arb-Med, there remains concern and uncertainty over private caucuses and the impartiality of the arbitrator turned mediator.

### ***E. The Singapore experience***

32 The only successful Arb-Med case of which I have personal knowledge is one that took place at the SIAC.<sup>4</sup> It is not without significance that the tribunal in this case was made up of a German, a Chinese and a Singaporean. The Germans and the Chinese are of course great believers in Arb-Med, and the Singaporean was no doubt influenced by the Singaporean legislation specifically empowering Arb-Med.

33 On a more general note, the courts in Singapore have for many years practised Arb-Med on an informal basis, particularly in cases where the judges have felt that the case should be settled. What they do is first to explore with counsel whether the parties have been in negotiations for a settlement and, if so, where they have broken down. They will then, in appropriate cases, either before the hearing commences, or even after the hearing has progressed, speak to counsel (often with the clients present) to try and broke a settlement. Our judges are conscious of their role as the ultimate adjudicators of the dispute, and will not say anything to pre-empt their decision on the merits, but they can employ all the techniques available to mediators by pointing out the uncertainties and consequences of litigation and the benefits of settlement in the context of the parties' wider interests.

34 This has been so ingrained as a tradition in Singapore that it has now been institutionalised in the lower courts by a procedure known as Court Dispute Resolution ("CDR") whereby all cases passing through the lower courts (generally speaking, cases where the monetary value is less than US\$150,000) need to go through a court-assisted mediation process before a Settlement Judge after pleadings have been filed. Since a large proportion of such cases are traffic accident cases or debt

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<sup>4</sup> For more details on this case, see Appendix I below.

collection claims, the chances of settlement are very high, and the rate of successful mediation is correspondingly high (at about 95%<sup>5</sup>).

35 However, it is also significant that, in such court-assisted mediations, the Settlement Judge who is appointed as mediator will not be the judge who hears the case if the mediation is unsuccessful and, as a matter of policy, a different judge will be assigned to hear the case on its merits.

36 Similarly, where there is Med-Arb practised at the Singapore Mediation Centre (“SMC”), SMC will normally not allow a mediator to turn arbitrator should the mediation fail.<sup>6</sup>

37 Accordingly, the Singapore experience has so far been that, while we empower Arb-Med through legislation, we are more cautious about its actual implementation, and are waiting for individual Arbitrator-Mediators to develop their own body of precedents with possibly some guidance from the courts in a suitable test case.

38 While the CDR programme in the lower courts of Singapore has had tremendous success, I am cautious about extrapolating from Singapore’s judicial experience lessons for international arbitration. The reason why judges have been able to practise mediation in the way they do is largely due to their unquestioned position of impartiality. They are public servants with no competing private interests, so the question of conflict of interest hardly ever arises. Further, they are known to, and trusted by, the local bar, who can assure their clients that there is nothing sinister about judges trying to mediate. But in international arbitration, you have international arbitrators, who are often known to the parties and their lawyers only by reputation. Imagine the scene on the first day of an international arbitration hearing, when parties have come from various countries fully prepared to argue their case, if before

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<sup>5</sup> From mid-1994 to the end of 1998, a total of 8,965 cases had undergone Court Dispute Resolution and of these, 95% reached settlement. For more details, see [http://www.subcourts.gov.sg/civil/abt\\_CJ\\_CIVIL\\_DISPUTE\\_RESOLUTION.htm](http://www.subcourts.gov.sg/civil/abt_CJ_CIVIL_DISPUTE_RESOLUTION.htm).

<sup>6</sup> SMC-SIAC Med-Arb Procedure, para 6(2).

the hearing commences the tribunal were to suggest that they consider mediation. This is not something that is easy to sell on the first day. Mediation is based on trust in the mediator and his motives. To have a stranger tell you that your case is not what you think it is even before he has heard you open your mouth is likely to come as a shock, and you are probably not going to be immediately receptive to such a suggestion. Hence, my own practice will be to suggest mediation where I sit in a local arbitration, where appropriate. However in an international arbitration, I will not be the person to make the first suggestion for settlement until the parties have got to know me a little better, and I have got to know their respective cases as well as I need to in order to feel that I could make a meaningful contribution as mediator.

#### ***F. Technical issues***

39 Assuming that the parties wish to engage in an Arb-Med process, a number of technical points need to be kept in mind to ensure that the process will work in the manner intended.

40 *First*, since the process is founded on the consent of the parties, care should be taken to record that consent in writing and to address a number of consequential issues.

41 *Second*, the form of the mediation should be expressly agreed upon, especially in relation to whether private caucuses will be allowed, and what use, if any, the arbitrator-mediator will be permitted to make use of any information disclosed in such caucuses in the resumed arbitration. Should he be bound by complete confidentiality unless waived by the disclosing party, or should he follow the Singapore and Hong Kong models of disclosure of all information material to the arbitration proceedings?

42 *Third*, how much time should be set aside for the mediation and what is to happen to the arbitration in the meantime?

43 *Fourth*, how should the arbitrator-mediator's costs for the mediation be treated?

44 *Fifth*, if the mediation should be successful, how is that settlement be recorded? Ideally it should be recorded as a consent award, and the tribunal should then reconvene as such for that purpose to terminate the proceedings, so that the settlement can be enforced as a Convention award rather than merely as a contract. There is a potential technical problem if the settlement goes outside the ambit of the original dispute since both the UNCITRAL Model Law and the New York Convention will impeach an award that deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. It may be that clever drafting may be able to bring the settlement terms into the dispute by making all enforceable terms part of the resolution of the original dispute, but all that can be said in this brief paper is that this is an area that needs some care.

### **Appendix I**

45 The only known case of Arb-Med in Singapore took place at the SIAC and involved a Chinese party and a German party. The tribunal was made up of three arbitrators, a German, a Chinese and a Singaporean, and it had to decide:

- (a) whether or not there was a breach of contract by the German party;
- (b) if so, the quantum of the loss suffered by the Chinese party; and
- (c) whether or not the Germans were entitled to rely on a contractual provision which limited their liability.

46 At the start of the hearing, the German arbitrator suggested that the parties should settle and asked whether there was anything that the tribunal could do to assist the parties to reach a settlement.

47 Subsequently, it was decided that the tribunal would give the parties a preliminary indication of the merits of the case at the end of the Chinese Claimant's case. The tribunal was careful to make it clear that the preliminary indication was not conclusive and was merely based on the evidence and arguments that had been given at that stage.

48 The tribunal eventually indicated that it thought that the Chinese party had a 60% chance of succeeding on its claim for breach of contract. The tribunal also gave an indication of what it thought was the loss suffered by the Chinese party. Lastly, the tribunal considered that the Chinese party had only a 40% chance of succeeding on the issue of whether the Germans were entitled to rely on the contractual provision limiting their liability.

49 The German arbitrator then proposed a settlement on the basis that the Chinese party should recover 60% of that part of the loss within the purported limit and 40% of 60% (that is, 24%) of that part of the loss exceeding the purported limit.

50 The settlement figure proposed by the German arbitrator was then used as a starting point for further negotiations and, eventually, a settlement was reached which did not deviate too far from the starting point.

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## Background to Essay 20

Although I have been practising mediation for nearly 20 years, it does not occupy a large portion of my practice. Hence, when I was invited by Professor Ian Macduff of Singapore Management University to be one of the contributors to his book of essays on mediation, I expressed diffidence as I did not feel that I was equipped to write a learned essay on mediation techniques and philosophies.

However, I eventually agreed on the basis that I had learnt enough from my experience on the job to draw certain conclusions about the art of mediation to know what did not work in mediation and why. It is therefore a short essay which is self-explanatory.

This essay was originally published as a chapter in *Essays on Mediation: Dealing with Disputes in the 21st Century* (Ian Macduff ed) (Kluwer Law International, 2016).

*I wish to extend my thanks to Kluwer Law International for kindly granting me permission to republish this essay in this book.*

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## TWO FAILED MEDIATIONS AND THE LESSONS LEARNT FROM THEM

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Michael HWANG

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### I. Case 1

1 I was appointed as a mediator by the Singapore Mediation Centre (“SMC”) to co-mediate a medical negligence case with another experienced mediator.

2 The case involved the alleged negligence of a hospital gynaecologist who was late in attending to the mother for a Caesarean delivery, resulting in the baby being denied oxygen to the brain for an excessive period. The baby was born in a condition that rendered her subject to epilepsy fits on a daily basis for the rest of her life and reduced her life expectancy. The parents filed a writ claiming negligence against the gynaecologist as well as the hospital.

3 The mediation was scheduled to start at 9.00am. On the arrival of my co-mediator and myself at the hearing room, the lawyers for the two parties told us that advanced discussions for a settlement were in progress, and that our assistance was not needed at this stage. It was explained to us that the hospital (accepting responsibility for its gynaecologist) was prepared to agree to a settlement based on 100% liability and the only issue was how the damages were to be calculated. Both law firms appeared to be acting in a compassionate and professional manner, and we were content to leave them to try and resolve the case without our intervention. At about 11.00am, the lawyers approached us again and told us that they had reached an impasse. The annual expenses of maintaining the child for the rest of her life were more or less agreed (as was general damages for pain and suffering). What could not be agreed was the life expectancy of the child. Both lawyers had engaged specialist consultants in the relevant medical discipline and the two experts had more or less agreed that the life expectancy of the infant could be somewhere between 15 and 20 years (I recall that the infant was below five at the time of this mediation). The lawyers then said that, at this point, they needed us as mediators to persuade the parents of the child to agree to a life expectancy period of 20 years, which was the maximum period agreed by both experts, and considered reasonable by both sets of lawyers.

4 We then invited the parents to attend the meditation. We recounted our understanding of the facts and asked the parents if that was correct. While the parents agreed with our understanding, they then went on to narrate in great detail the pain and suffering that this botched delivery had caused them over the last few years, with the prospect of this unhappy situation continuing for an indefinite period of time. This was a model couple who became entrepreneurs and had set

up their own successful business. They had been trying for several years to conceive, and the mother finally had the child at a relatively late age. Hence, the expectations in respect of the newborn child were even greater than usual. Apart from the trauma of having a child with epilepsy, the daily pain and suffering that the couple had to endure was painful to hear. After about half an hour of this narration, we then tried to put things in perspective by explaining that the current issue in dispute was the financial loss and expenses that would be suffered by the parents on an annual basis. In this case, it would essentially be the agreed annual expenses of maintaining the child in her current (and subsequent) condition for the rest of her life, and two distinguished experts had agreed that the life expectancy would not be more than twenty years from the date of birth. At that point, the couple said, "You have no right to tell us when our child will die" and walked out of the room and ended the mediation.

5 My co-mediator and I had a post-mortem of this mediation in consultation with the director of SMC. After reviewing the history of the mediation, we came to the conclusion that we had not earned the right to advise the couple of what was the appropriate solution in objective terms even though in legal terms we were correct. We had only engaged with the couple for half an hour before offering our relatively obvious recommendation in the light of the information given to us by the two sets of lawyers who were acting conscientiously and professionally in trying to reach a settlement.

6 In retrospect, we felt that we had not spent enough time establishing a proper relationship with the family to be taken seriously when we offered our views on what was the appropriate solution in the circumstances.

7 We recalled that, in our mediation training, we had been taught that there were certain phases that a mediator had to go through in a mediation before reaching the kernel of the dispute. My own mediation technique normally contains six phases prefaced in each case by a banner headline, which are intended to be delivered at different times of the hearing day, with the final phase and its banner headline being delivered around 4.00pm if the matter is still not settled. The phase (with its

banner headline), *viz.* “We are now ready to discuss the financial terms of settlement”, which should have been scheduled for 4.00pm, was in fact delivered about noon in this case and, in the circumstances, was delivered too early since we had not invested the time needed to win the trust and confidence of the couple.

8 This was of course an approach peculiar to the nature of this case, and I would treat a commercial case (especially construction cases) differently because there is much less emotion involved in such cases, and settlement is usually heavily dependent on the past business relationship between the parties and the future business prospects that could be gained from a mediation settlement. But in this case, investing time and effort was a prerequisite of a successful outcome, and we had not made that investment.

9 As a postscript, I would add, that a few months later, one of the lawyers called me to say that the parties had reached a settlement close to the basis that we had recommended. Obviously, with the passage of time, the couple had reconsidered the assessment and advice given in that mediation, and had decided that this was indeed the appropriate solution to their plight.

10 So the two lessons I learnt from this experience were:

- (a) Stick to your template for running a mediation and do not cut corners. Be careful even when the lawyers tell you that there are only one or two issues to settle and they are happy for us to caucus with the parties alone. Where emotions run high, there is no alternative but to get under the skin of the disputants and find out what are the underlying causes of the dispute.
- (b) Even a failed mediation can play a role in the outcome of a successful settlement.

## **II. Case 2**

11 I was approached by two law firms to act as sole mediator of a commercial dispute about a failed management contract for the development of several resort hotels in China.

12 The dispute was between the owner of the project (a large Chinese developer) and a newly formed international hotel management company (“HMC”) headed by the former CEO of one of the major international hotel chains. The deal involved the developer appointing the HMC under a management agreement to plan, design, and oversee the building of several upmarket resort hotels in different parts of China, and ultimately to manage those hotels after completion. The developer had become disenchanted with the efforts of the HMC and purported to terminate the management agreement. The HMC commenced arbitration in Hong Kong and the developer commenced arbitration in Beijing.

13 There had been some exchange of correspondence between the parties on a “without prejudice” basis whereby the developer had first offered US\$3m in full settlement of all of the HMC’s claims, but later increased its offer to US\$5m. In response, the HMC had offered to settle for US\$8m. This correspondence was made available to me, leading me to think that this would be an easy mediation where the only issue was money and that the parties appeared to be within striking distance of a global settlement.

14 Having accepted the assignment and having receiving short briefs from each side on the position of the various court and arbitration proceedings that were in train, and setting out their respective cases and attaching the correspondence referred to above, I arrived in Hong Kong for the mediation hearing. When the mediation commenced, I explained to the parties my understanding that the developers were prepared to offer US\$5m to settle the case and the HMC was prepared to settle for US\$8m. I explained that, against that background, I had not gone into the merits of the respective arbitration cases, now being fought in two different cities, because the object of this exercise was to arrive at a mutually satisfactory settlement based on business considerations rather than legal merits.

15 We then went into caucus, and I first spoke to the developer’s representatives. They explained that they were highly dissatisfied with the performances of the HMC in delivering its promised goals which eventually led to the developer terminating the management contract for breaches of the contractual undertakings given by the HMC. Under these

circumstances, the developer was not eager to settle for the sake of settlement, but in accordance with Chinese culture, since the three principal partners of the HMC were very distinguished professionals in their field, the developers felt that they should give the other side sufficient face and offered US\$1m by way of settlement to each of the three partners in recognition of their status and reputation. They were therefore not prepared to offer anything more than US\$3m.

16 I then gave them the usual lecture about the benefits of an early settlement in terms of saving time and costs (given that there were engaged in two contentious and expensive arbitrations) and asked them to consider the economic value of being able to close the book on this relationship quickly and relatively painlessly. The chairman then looked at me and said, "I am prepared to settle this case for whatever amount you think is fair." I was flabbergasted by this remark, as I had never before been given a blank cheque as a mediator to fill in the settlement amount. I explained to him that I was not in a position to advise them on what amount to offer the other side because I had not reviewed in detail the merits of the case, nor had we gone through the process of listening to why each party felt that the responsibility for terminating the management contract lay with the other side. The chairman repeated, "We engaged you as mediator because of your great reputation and we have absolute faith in your ability to give us a fair figure to propose for a settlement." I then said that I should speak to the other side first before responding further to the chairman's request. I went across to the other breakout room and had a discussion with the three partners of the HMC. I explained the chairman's view of why they had offered their figure of US\$3m, but said that, apart from that figure, they were not prepared to make any further offer and in fact were withdrawing the earlier offer of US\$5m, which had been a second offer made to close the gap.

17 At this point, the HMC partners then said, "If the Chinese are going to back off from their written offer of \$5m we are also going to back off from our last offer of \$8m. Please go back and tell them we are only prepared to settle for \$30m."

18 Predictably, my next visit to the Chinese parties did not proceed much further. I was still unable to respond satisfactorily to the chairman's invitation to give him a figure, which he claimed that he would accept because it came from me. In addition, I had to tell him that the HMC had now increased their settlement offer to US\$30m. At this point, the chairman said that the mediation was over.

19 I had a very short post-mortem with the lawyers, who, to their credit, were stunned by the speed at which the parties – having both coming from far away to Hong Kong for the mediation – found it impossible to carry on with the mediation process (within an hour of commencement).

20 I pointed out that my expectation from the brief was that the parties were already relatively close on their respective offers, and it was for me to try and narrow and then hopefully close that gap. Instead, I had been ambushed by one party changing the rules of the game and the other party following likewise.

21 This failure led me to rethink my approach to future cases. I recalled that there was another commercial case a few years earlier where parties had come to me for mediation shortly after the writ had been filed, and an exchange of pleadings had taken place but without any quantification of the damages claimed by the plaintiff. When the mediation began, the discussion got to the question of how much it would take for the case to be settled. It turned out that the plaintiff had not given any serious consideration to a formulation of his claim for damages and was plucking figures out of the air in the mediation without any tangible justification for those figures. It was one of those cases where the damages could eventually be quantified, but it would require sitting down with an expert to work them out by reference to accounts and other documents to give some semblance of credibility. The defendant was of course not accepting the plaintiff's alleged losses at face value, and, while he was prepared to discuss the principle of settlement on issues of liability, no progress could be made towards an overall settlement in the light of the inadequate information on the claimed losses. I then informed the parties that we were not going to be able to arrive at a successful mediation unless more homework was done

by the plaintiff and asked him to go back and consult an appropriate expert to work out some figures, which could be submitted to the defendant for review, after which we could reconvene the mediation. This was duly done, and the second round of the mediation progressed much more smoothly with some rational discussions about the quantum of damages claimed and how much the defendant was prepared to admit and how much the plaintiff was willing to concede, eventually leading to a settlement.

22 Following this abortive mediation, and bearing in mind my earlier experience, I concluded that, as a matter of best practice, the parties should attend a pre-mediation conference. I now insist that, before any mediation, I must hold a meeting with at least the lawyers (but preferably with their clients) at a pre-mediation conference before I can be briefed on all aspects of the dispute (except for detailed discussion about the relative merits of each side's legal case). In particular, I would want to explore the history of any prior negotiations before the agreement to mediate and what each side was expecting to happen at the mediation. I could then prepare to address those expectations accordingly and possibly set some ground rules in advance, particularly as to any advance homework that needed to be done. This way, I would be able to give mediation its best chance of success, where both parties can actively discuss all possible options for settlement without pre-conceived ideas about immovable positions.

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## **Part III**

# **INTERNATIONAL AND DOMESTIC LAW**

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## Background to Essay 21

This essay arose from a presentation I made at an international conference held at the Xi'an Jiaotong University where various aspects of the Belt and Road Initiative ("BRI") were discussed.

My thesis was that, in order to develop any grand design for an efficient dispute resolution framework for BRI disputes, there needed to be more exchange of information between the BRI countries. In this regard, the first and most important point to begin with this exchange of information should be in the field of recognition and enforcement of foreign judgments in the BRI region.

I illustrated this possibility by reference to a unique procedure which the Dubai International Financial Centre ("DIFC") Courts have been using for some years. This was (and continues to be) the signing of a memorandum of guidance ("MOG") between the DIFC Courts and another friendly court setting out the principles and procedures governing the recognition by each court of the other court's money judgments for purposes of enforcement. The purposes of such MOGs are:

- (a) to attract the attention of important trading partners of Dubai and to persuade their courts to recognise and enforce our judgments upon compliance with the relevant laws relating to that subject; and
- (b) to provide legal and commercial information to investors and businessmen in the other countries to understand what would be required for a judgment in one MOG counterparty to be recognised and enforced in the DIFC.

This procedure has served the DIFC well, and I am recommending its adoption by all BRI countries as a first step to the eventual harmonisation of the various laws on enforcement of foreign judgments within the BRI region.

With the research assistance of some unnamed students in City University of Hong Kong, I was able to collaborate with my co-

authors, David Holloway and Lim Si Cheng, to further explore the basic requirements for the recognition and enforcement of foreign judgments in each BRI country.

This essay will be published as a chapter in a forthcoming book to be published by the Cambridge University Press.

*I wish to extend my thanks to Cambridge University Press for kindly granting me permission to republish this essay in this book.*

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## ONE BELT, ONE ROAD, ONE CLAUSE FOR DISPUTE RESOLUTION?

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Michael **HWANG SC**,\* David **HOLLOWAY**<sup>†</sup> and **LIM Si Cheng**<sup>‡</sup>

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## I. Introduction

1 The One-Belt One-Road initiative is an international project with an extraordinary ambition. It aims to invest in the history of civilisations by revitalising the overland and maritime routes of the ancient Silk Road. The initiative is anticipated to impact the lives of over 62% of the world's population and around 31% of the world's gross domestic product ("GDP").<sup>1</sup> More than 60 countries have indicated their commitment to participate in the One-Belt One-Road initiative ("OBOR initiative").<sup>2</sup>

2 The global academic community views the OBOR initiative in a generally positive light. Economists welcome it as a steady step towards growth in world trade.<sup>3</sup> Political scientists view it as a sturdy anchor against anti-globalisation sentiments.<sup>4</sup> Historians celebrate it because it

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<sup>1</sup> HKTDC, "Belt and Road Basics" available at <http://bit.ly/2sm0vqo> (accessed 25 September 2017).

<sup>2</sup> HKTDC, "Country Profile" available at <http://bit.ly/2tXlZFR> (accessed 25 September 2017).

<sup>3</sup> An example of an economic analysis of the One-Belt One-Road initiative can be found in H Chen, "China's 'One Belt, One Road' initiative and its implications for Sino-African investment relations" (2016) 8(3) *Transnational Corporations Review* 178.

<sup>4</sup> See for example N Casarini, "When All Roads Lead to Beijing. Assessing China's New Silk Road and its Implications for Europe" (2016) 51(4) *The International Spectator* 95; W Liu & M Dunford, "Inclusive Globalization: Unpacking China's Belt and Road Initiative" (2016) 1(3) *Area Development Policy* 323; A Grimmel & S My Giang, "Why China's 'One Belt, One Road' Initiative Should be taken More Seriously by the EU and How it can be an Interregional Success" *LSE EUROPP blog* (11 April 2017) available at <http://bit.ly/2tALKEI> (accessed 25 September 2017) and B Zheng, "China's 'One Belt, One Road' Plan Marks The Next Phase Of Globalization" *The Huffington Post* (18 May 2017). Of course, this is not to deny that some political scientists are less enamoured by the OBOR initiative: see A Cooley, "The Emerging Political Economy of OBOR: The Challenges of Promoting Connectivity in Central Asia and Beyond" (Centre for Strategic & International Studies, October 2016) available at <http://bit.ly/2shZSyH> (accessed 25 September 2017).

refreshes global interest in a fascinating but understudied area of world history.<sup>5</sup> But the members of the legal profession are in a more pensive mood, because they are thinking about the capacity of the law at all levels – national, transnational and international – to facilitate the resolution of commercial disputes<sup>6</sup> between enterprises that may arise in the course of the implementation of the OBOR initiative.<sup>7</sup> What dispute resolution options do contracting parties have when their cross-border transactions turn sour? And which of these options best guarantee that the winning party gets his money back?

3 The traditional answer to these questions is that international arbitration is the best option to govern cross-border disputes. The purported basis for this is that over 159 States (“NYC States”) have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“1958 New York Convention”),<sup>8</sup> making the arbitral award the most widely enforceable type of legal order in the world. An arbitral award obtained in one NYC State will readily be enforced in another NYC State, subject to certain limited grounds for the setting aside and non-recognition of arbitral awards in the 1958 New York Convention. On the other hand, foreign judgments are perceived to be less widely enforceable, due to the unfavourable treatment of foreign judgments by national laws and the lack of a multilateral treaty regulating foreign judgments. International litigation is perceived to be the poor cousin of international arbitration.

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<sup>5</sup> In fact, one historian’s book recently topped the bestseller lists in China! See University of Oxford, “Historian’s book tops bestseller charts in China” available at <http://bit.ly/2qtqwUV> (accessed 25 September 2017).

<sup>6</sup> Inter-State disputes and investor-State disputes may also arise from the One-Belt One-Road initiative, but they are beyond the scope of analysis of this chapter. We will only focus on the dispute resolution mechanisms that are available to private parties in *commercial* disputes.

<sup>7</sup> See G Wang, “The Belt and Road Initiative in quest for a dispute resolution mechanism” *Asia Pacific Law Review* (7 June 2017).

<sup>8</sup> UNCITRAL, “Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)” available at <http://bit.ly/2tX1Jul> (accessed 1 June 2018).

4 The purpose of this chapter is to investigate these assumptions in the light of some recent trends that have improved the enforceability of foreign judgments. It argues that the foreign judgment is catching up with the foreign arbitral award in terms of enforceability. International litigation is slowly emerging as a credible alternative to international arbitration. Global trends are challenging the claim that the arbitration clause is (and will always be) the only viable dispute-resolution clause. To make this argument, this chapter will proceed in the following manner. First, it will demonstrate the consistent enforceability of foreign judgments in common law countries.<sup>9</sup> Second, it will highlight a number of contemporary trends that are gradually improving the enforceability of foreign judgments in civil law countries.<sup>10</sup> Finally, it will discuss the fledgling potential of the 2005 Hague Convention on Choice of Court Agreements to standardise the law and practice of enforcement of judgments made by designated courts in exclusive choice of court agreements.<sup>11</sup>

## **II. Common law countries**

5 A number of participating countries in the OBOR initiative apply the common law of recognition and enforcement of foreign judgments, including Malaysia, Singapore, Brunei, New Zealand and South Africa.<sup>12</sup> Several territories in civil law countries also apply the common law, including Hong Kong (in China) and the Dubai International Financial Centre (“DIFC”) (in the United Arab Emirates (“UAE”)).<sup>13</sup>

6 The common law generally adopts a pro-enforcement attitude to foreign judgments. This is because the common law adheres to a doctrine of obligation, according to which “the judgment of a court of

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<sup>9</sup> See paras 5–13 below.

<sup>10</sup> See paras 14–30 below.

<sup>11</sup> See paras 31–35 below.

<sup>12</sup> HKTDC, “Country Profile” available at <http://bit.ly/2tXlZFR> (accessed 25 September 2017).

<sup>13</sup> HKTDC, “Country Profile” available at <http://bit.ly/2tXlZFR> (accessed 25 September 2017).

competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in [a common law] country are bound to enforce".<sup>14</sup> The result of this is that the common law courts "have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others".<sup>15</sup> In other words, reciprocity is not a requirement for the enforcement of a foreign judgment in the eyes of a common law court.

7 Beyond the general attitude of the common law, there is another reason why foreign judgments are generally as enforceable as foreign arbitral awards in common law countries. The reason is that the common law approach to the enforcement of foreign judgments shares three important similarities with the approach of international arbitration to the enforcement of foreign arbitral awards.

8 First, the common law and the regime of international arbitration both provide that the enforcing court is not permitted to review the foreign judgment or arbitral award (as the case may be) on the merits. Under common law, it is established that "a foreign judgment could not be re-examined on the merits provided the foreign court had jurisdiction according to the English rules of the conflict of laws".<sup>16</sup> Under the 1958 New York Convention, recognition or enforcement of a foreign arbitral award may be refused on one of the grounds set out in Article V, none of which enable the defendant to argue that the arbitral tribunal has made an error of fact or law. The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International

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<sup>14</sup> *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159, *per* Blackburn J, following *Russell v Smyth* (1842) 9 M & W 810 at 819; *Williams v Jones* (1845) 13 M & W 628 at 633.

<sup>15</sup> *Adams v Cape Industries plc* [1990] Ch 433 at 552.

<sup>16</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 721. See *Henderson v Henderson* (1844) 6 QB 288; *Bank of Australasia v Harding* (1850) 9 CB 661; *De Cosse Brissac v Rathbone* (1861) 6 H & N 301; *Godard v Gray* (1870) LR 6 QB 139.

Commercial Arbitration (“Model Law”) also does not provide for such a ground.<sup>17</sup>

9 Second, the common law and the 1958 New York Convention prescribe the same ground for the staying of enforcement proceedings. Under common law, although a foreign judgment may be considered final and conclusive notwithstanding the existence of a pending appeal in the foreign country,<sup>18</sup> a stay of execution “in a proper case ... would no doubt be ordered pending a possible appeal”.<sup>19</sup> Under the 1958 New York Convention, the enforcing court may stay the proceedings if an application for the setting aside or suspension of the arbitral award has been made to the competent authority of the country in which the arbitral award was made.<sup>20</sup>

10 Third, the common law and the 1958 New York Convention provide similar defences to the enforcement of foreign judgments and

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<sup>17</sup> N Blackaby & C Partasides, *Redfern and Hunter and International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 595: “[I]n [the Model Law] there is no possibility for challenging an award on the basis of mistake of law, however narrow.” See also *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations Publication, 2012) at p 140: “A great number of cases underline that the Model Law does not permit review of the merits of an arbitral award. This has been found to apply in principle to issues of law as well as to issues of fact.” In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 at [10], the Singapore High Court remarked: “[i]t is trite law that the court will not interfere with an arbitral award even if the award was made on a misapplication of the law or contains errors of fact”.

<sup>18</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at pp 677–678.

<sup>19</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 678.

<sup>20</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“1958 New York Convention”) Art VI. See also Art 36(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (“Model Law”).

awards. These pertain to (a) jurisdiction, (b) public policy, (c) fraud and (d) breach of natural justice, and we will discuss each aspect in turn.

- (a) **Jurisdiction.** Under common law, a foreign judgment will not be enforced if the foreign court lacked “international jurisdiction” to give that judgment.<sup>21</sup> A foreign court has international jurisdiction if the judgment debtor:
- (i) was present in the foreign country at the time the foreign proceedings were instituted;<sup>22</sup>
  - (ii) was a claimant or counterclaimant in the foreign proceedings;
  - (iii) had submitted to the foreign proceedings by way of appearance; or
  - (iv) had earlier agreed to submit to the jurisdiction of the foreign court.<sup>23</sup>

Under the 1958 New York Convention, a foreign arbitral award may be refused enforcement if the arbitral tribunal lacked the jurisdiction to arbitrate the dispute – that is, if the arbitral agreement was invalid,<sup>24</sup> or the arbitral award dealt with a dispute that fell outside the terms of the submission to arbitration.<sup>25</sup> The upshot is that, although the concept of jurisdiction differs between the two regimes, both regimes allow the defendant to challenge

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<sup>21</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 725.

<sup>22</sup> The common law requirement of presence has since been amended by s 32 of the UK Civil Jurisdiction and Judgments Act 1982 (c 27). Presence is no longer sufficient as a matter of UK law. The bringing of the foreign proceedings must also not conflict with any agreement under which the dispute was to be settled otherwise than by proceedings in the foreign court.

<sup>23</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 692.

<sup>24</sup> 1958 New York Convention, Art V(1)(a). See also Arts 34(2)(a)(i) and 36(1)(a)(i) of the Model Law.

<sup>25</sup> 1958 New York Convention, Art V(1)(c). See also Art 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law.

the foreign judgment or arbitral award on the basis of lack of jurisdiction in its respective conceptions in the two regimes.

- (b) **Public policy.** Under common law, a foreign judgment will not be enforced if to do so would be contrary to national public policy. As Scarman J held, “an English court will refuse to apply a law which outrages its sense of justice and decency”.<sup>26</sup> Likewise, under the 1958 New York Convention, a foreign arbitral award will not be enforced if the arbitral award conflicts with national public policy.<sup>27</sup> The authors of *Redfern and Hunter on International Arbitration* observe that “[m]ost developed arbitral jurisdictions have similar conceptions of public policy”.<sup>28</sup> For example, “German courts have held that an award will violate public policy if it conflicts with fundamental notions of justice, *bonos mores*, or conflicts with principles that are fundamental national or economic values”.<sup>29</sup> Likewise, the Singapore Court of Appeal has stated that public policy is violated if upholding the arbitral award would “‘shock the conscience’ ... or is ‘clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public’ ... or where it violates the forum’s most basic notion of morality and justice”.<sup>30</sup>
- (c) **Fraud.** Under common law, a foreign judgment will not be enforced if it is tainted by fraud on the part of the judgment creditor or the foreign court.<sup>31</sup> Under the 1958 New York Convention, while fraud is not expressly stipulated to be a ground for refusal of enforcement or for setting aside, most authorities

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<sup>26</sup> *Re Fuld’s Estate (No 3)* [1968] P 675 at 698.

<sup>27</sup> 1958 New York Convention, Art V(2)(b). See also Arts 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law.

<sup>28</sup> N Blackaby & C Partasides, *Redfern and Hunter and International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 598.

<sup>29</sup> N Blackaby & C Partasides, *Redfern and Hunter and International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 598.

<sup>30</sup> *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41 at [59].

<sup>31</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 727.

permit the inclusion of fraud under the heading of public policy.<sup>32</sup> Several national laws also include fraud as a separate ground for setting aside or for refusal of enforcement.<sup>33</sup>

- (d) **Breach of natural justice.** Under common law, a foreign judgment will not be enforced if the proceedings in which the foreign judgment was obtained were opposed to “natural justice”.<sup>34</sup> These principles of natural justice involve “first of all that the court ... has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court”.<sup>35</sup> Under the 1958 New York Convention, the failure to give the defendant proper notice of the appointment of the arbitrator or of the proceedings, or the opportunity to present his case, will entitle the defendant to the refusal of enforcement of the arbitral award.<sup>36</sup> While there is no express provision to deal with the lack of impartiality and independence on the part of the arbitral tribunal (which is widely regarded as a form of breach of natural justice), “it is nonetheless clear that an arbitrator’s lack of independence and/or impartiality can be a basis for denying recognition of an award”,<sup>37</sup> whether one regards it as a violation of public policy,<sup>38</sup> a deprivation of the opportunity to present one’s case<sup>39</sup> or a failure to constitute the arbitral tribunal in accordance with the agreement

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<sup>32</sup> G Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 3704.

<sup>33</sup> See s 24(a) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (Singapore).

<sup>34</sup> *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet & Maxwell, 15th Ed, 2012) at p 740.

<sup>35</sup> *Jacobson v Frachon* (1927) 138 LT 386 at 392.

<sup>36</sup> 1958 New York Convention, Art V(1)(b). See also Arts 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law.

<sup>37</sup> G Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 3587.

<sup>38</sup> Model Law, Arts 34(2)(b)(ii) and 36(1)(b)(ii).

<sup>39</sup> Model Law, Arts 34(2)(a)(ii) and 36(1)(a)(ii).

of the parties.<sup>40</sup> Certain national laws also expressly stipulate “breach of natural justice” as a ground to set aside or refuse to enforce an award.<sup>41</sup>

11 The discussion above makes it clear that the principles of the common law and the Model Law have developed along the same lines of thinking. Both regimes do not permit the enforcing court to review the foreign judgment or award on the merits. Both regimes allow the aggrieved defendant to stay the proceedings on the basis of the existence of an appeal or setting-aside proceedings (as the case may be) in the forum court. Both regimes allow the defendant to challenge the propriety of the foreign court or arbitral proceedings by reference to jurisdiction, fraud, breach of natural justice or public policy. Hence, if parties anticipate that enforcement proceedings would be instituted in a particular common law country in the event of a dispute because their assets are located in that country, there should be very few surprises if the parties decide to submit to foreign court proceedings instead of arbitral proceedings. The foreign judgment should be just as enforceable as a foreign arbitral award in that common law country.

12 To be sure, the two regimes do not completely mirror each other, and there may be defences that only one of the regimes recognises. For example, the common law requires the foreign judgment to be final and conclusive, with the result that provisional orders that fail to deal with the merits of the case are unenforceable.<sup>42</sup> On the other hand, the

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<sup>40</sup> Model Law, Arts 34(2)(a)(iv) and 36(1)(a)(iv).

<sup>41</sup> See s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (Singapore) and s 36(3)(b) of the Arbitration Act 1996 (New Zealand).

<sup>42</sup> A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd Ed, 2013) at p 168:

‘[F]inal’ means that the decision cannot be reopened in the court which made the ruling, even though it may be subject to appeal to a higher court; and ‘conclusive’ that it represents the court’s settled answer on the substance of the point adjudicated. For this reason, a foreign freezing order will not be recognized, as it is neither predicated upon a final determination of the validity of the claim nor usually incapable of review and revision by the court which ordered it.

2006 version of the Model Law allows for the enforcement of interim measures, which are defined as temporary measures to:<sup>43</sup>

- (a) maintain or restore the *status quo* pending determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute.

But all in all, there are more similarities than dissimilarities between the two regimes. In so far as common law countries are concerned, the enforceability of foreign arbitral awards and judgments are more or less on par.

13 The pro-enforcement attitude of the common law countries is further seen in the statutes enacted by these countries to govern the enforcement of judgments from the courts of certain specified countries.<sup>44</sup> The purpose of enacting these statutes is to streamline the process of enforcing judgments from these countries. Under English common law, a foreign judgment is not directly enforceable, and the judgment creditor must go through the trouble of bringing an action on the foreign judgment to obtain an English judgment.<sup>45</sup> In contrast, under

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<sup>43</sup> Model Law, Art 17(2).

<sup>44</sup> For example, the UK has enacted the Administration of Justice Act 1920 (c 81) to govern the recognition and enforcement of judgments obtained in Commonwealth countries, and the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13) for judgments obtained in countries to which the Queen has directed to extend the Act. See also the Singapore Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) and the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed); the Australian Foreign Judgments Act 1991 and the New Zealand Reciprocal Enforcement of Judgments Act 1934.

<sup>45</sup> See A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd Ed, 2013) at p 139:

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the UK Administration of Justice Act 1920<sup>46</sup> and the Foreign Judgments (Reciprocal Enforcement) Act 1933,<sup>47</sup> a judgment creditor simply registers the foreign judgment with the High Court in England, which, upon registration, will have the same effect as an English judgment for the purposes of execution.<sup>48</sup> So, if these statutes are to be remembered for anything, it is that they serve to expedite, not hinder, the enforceability of foreign judgments. They simplify the process to make foreign judgments more enforceable. This is all achieved without departing greatly from the substantive requirements of common law. As Briggs notes, “the substantive terms of the statutes which determine the entitlement to register the judgment are very close to the common law as this was understood at the date of enactment, with the consequence that in substance, although not in form, recognition will depend on the rules of the common law”.<sup>49</sup>

### III. Civil law countries

14 There are also growing signs to indicate that the enforceability of foreign judgments in civil law countries in the OBOR initiative are slowly improving. Civil law countries are becoming increasingly receptive to enforcing foreign judgments. To appreciate these trends, it is necessary to first examine the traditionally conservative attitudes of these civil law countries. This will enable us to better appreciate the significance of these positive trends.

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It is sometimes said that at common law one enforces a foreign judgment by bringing an action on the judgment. It may be true that this is the effect of the common law, but as it is written the proposition is liable to mislead: one obtains an English judgment, and enforces that.

<sup>46</sup> c 81.

<sup>47</sup> c 13.

<sup>48</sup> Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13) (UK) s 2(2); Administration of Justice Act 1920 (c 81) (UK) s 9(3).

<sup>49</sup> A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd Ed, 2013) at p 164.

### A. *Traditional positions*

15 Traditionally, the laws of civil law countries on the enforcement of foreign judgments were thought to be lamentably diverse. There was very little uniformity between the laws of civil law countries. Different civil law countries imposed different hurdles to the enforcement of foreign judgments. For example, some civil law countries only require the absence of an earlier local judgment on the same dispute.<sup>50</sup> Other civil law countries additionally require the absence of earlier local proceedings.<sup>51</sup> Even when civil law countries impose the same hurdle, they may have different conceptions of what that hurdle entails. For instance, in relation to jurisdiction, some countries require that the dispute does not fall within the “exclusive jurisdiction” of the local courts.<sup>52</sup> Other countries simply require that the local courts do not have

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<sup>50</sup> For example, Art 380 of the Qatari Civil and Commercial Procedure Law (No 13 of 1990) provides: “Execution may not be ordered unless the following is verified: ... The judgment or order is not inconsistent with the judgment or order that was issued before by a court in Qatar.” <<http://bit.ly/ZuisKaN>> (accessed 25 September 2017).

<sup>51</sup> For instance, Art 412(1)(4) of the Russian Civil Procedure Code (No 138-FZ of 14 November 2002 (as amended on 6 February 2012)) provides: “A rejection of a forcible execution of the decision of a foreign court may be admissible [if] ... in the proceedings of a court in the Russian Federation there is a case instituted on the dispute between the same parties, for the same object and on the same grounds before the case was instituted in the foreign court.” <<http://bit.ly/2sR2eYe>> (accessed 25 September 2017).

<sup>52</sup> For example, Art 169(6) of the Iranian Civil Judgments Enforcement Act 1977 provides: “Civil Judgments issued by foreign courts are enforceable in Iran if they satisfy the following conditions, unless a different procedure is mentioned by the law: ...The subject matter of the judgment should not be exclusively within the jurisdiction of the Iranian Courts.” <<http://bit.ly/2tkmouU>> (accessed 25 September 2017). See also Art 412(1)(3) of the Russian Civil Procedure Code (No 138-FZ of 14 November 2002 (as amended on 6 February 2012)): “A rejection of a forcible execution of the decision of a foreign court may be admissible [if] ... the consideration of

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“*jurisdiction*” over the dispute.<sup>53</sup> Still other countries require that the foreign court has jurisdiction *under the law of the country in which the foreign court is situated*.<sup>54</sup> These are all very different conceptions of the same requirement of jurisdiction, effected through different phraseologies of the same hurdle. Finally, even when civil law countries adopt the same phraseology in relation to the same hurdle, their local courts may have different interpretations of what that hurdle entails. Public policy is a clear example. Both Polish and Turkish laws provide for a “public policy” hurdle,<sup>55</sup> but what is contrary to Polish public policy

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the case is referred to the exclusive cognisance of the courts in the Russian Federation.”

<sup>53</sup> Article 11 of the Saudi Arabian Enforcement Law (Royal Decree No M/53 of 2013) “states that (subject to relevant treaties and conventions) an Enforcement Judge may only enforce on the basis of reciprocity and after being satisfied that (i) Saudi courts do not have jurisdiction to adjudicate the dispute”: S Al-Ammari & T Martin, “Arbitration in the Kingdom of Saudi Arabia” (2014) 30(2) *Arbitration International* 387 at 403–404. See also Art 439(4) of the Vietnamese Code of Civil Procedure 2015 (No 92/2015/QH13), which provides that a civil judgment or decision of a foreign court shall not be recognised or enforced in Vietnam if “[t]he foreign Courts that have issued the judgments/decisions do not have jurisdiction to settle civil cases as prescribed in Article 440 of this Code.” <<http://bit.ly/2tp7sfn>> (accessed 25 September 2017).

<sup>54</sup> For example, Art 235(2)(a)-(b) of the UAE Federal Law No 11 of 1992 concerning Civil Procedures <<http://bit.ly/2t1dSOD>> (accessed 25 September 2017) provides:

it shall not be possible to order the execution before the verification of the following: (a) That the state’s courts are not authorised to examine the litigation in which the decision or the order has been delivered and that the foreign courts which have delivered it are authorised therewith according to the international rules of the judicial jurisdiction decided in their law. (b) That the decision or the order has been delivered from an authorised court according to the law of the country in which it has been issued.

<sup>55</sup> See Art 1146(1)(7) of the Polish Code of Civil Procedure of 17 November 1964, available in English at <http://bit.ly/2s80RzE> (accessed 25 September 2017). See also Art 54(1)(c) of the Turkey Act on Private International and

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may be consistent with Turkish public policy (this diversity exists among common law countries too).

16 We can see the diversity of the approaches of the civil law countries in the OBOR initiative when we compare the civil procedure codes of these countries. While it may not be possible to analyse the attitude of every civil law country participant in the OBOR initiative, it is possible to sift out the countries with larger populations, higher GDP or GDP per capita, and look at their civil procedure codes to examine the hurdles they impose on the enforcement of foreign judgments. We have done exactly that and the results of our analysis are set out in the table below. Let us turn our attention to the table's results.

Civil Law Country	Hurdles to Enforcement								
	Reciprocity	Due process	No fraud	Public policy	No earlier judgment	No earlier proceedings	Jurisdiction	Legal effect	No mistake of law or fact
China (excluding Hong Kong)	✓	✓		✓	✓		✓ (Non-statutory)	✓	
The Philippines	✓ (Non-statutory)	✓	✓	✓	✓ (Non-statutory)		✓	✓	✓
Indonesia	Judgment creditors must relitigate <sup>56</sup>								
Thailand	Judgment creditors must relitigate <sup>57</sup>								

Procedural Law (Act No 5718), available in English at <http://bit.ly/2tsXZTf> (accessed 25 September 2017).

<sup>56</sup> By the phrase “judgment creditors must relitigate”, we mean that the only available option to the judgment creditor is to argue on the merits of the case again before the courts of civil law country concerned. This is because there is no provision in the law of the civil law country which allows the creditor to request for the enforcement of foreign judgments without having to argue on the merits of the case

<sup>57</sup> Some Thai judgments have used common law type reasoning as to the requirements for enforcing foreign judgments but the legal basis for this is uncertain. See s 3 of the Act on Conflict of Laws (BE 2481) and the 1918 Supreme Court decision in case no 585/2461.

Vietnam	✓	✓		✓	✓	✓	✓	✓	
Kazakhstan	✓	"to be determined by law"							
Uzbekistan	✓								
Egypt	✓	✓		✓	✓		✓	✓	
Qatar	✓	✓		✓	✓		✓	✓	
Turkey	✓	✓		✓			✓	✓	
Iran	✓			✓	✓		✓	✓	
UAE (excluding the DIFC)	✓	✓		✓	✓		✓	✓	
Saudi Arabia	✓	✓		✓	✓		✓	✓	
Poland		✓		✓	✓	✓	✓	✓	
Russia	✓	✓		✓	✓	✓	✓	✓	

17 As can be seen, there are nine “hurdles to enforcement” at the top of the table and 14 civil law countries at the left side of the table. The ticks indicate the hurdles that the corresponding civil law country imposes in its civil procedure code. Based on the table’s results, we can observe that the approaches of the civil law countries are unhappily diverse, in that different countries impose different hurdles. A judgment creditor cannot expect to encounter the same hurdles when seeking to enforce his judgment in different civil law countries. We have not even considered the limitation periods for the bringing of a claim on a foreign judgment, which are likely to differ from country to country. These procedural differences will only add to the difficulty of enforcing foreign judgments in civil law countries.

18 Another gloomy observation to be made from the table is that most civil law countries impose a criterion of reciprocity. Some of these countries require reciprocity in the narrow sense, in that they require the existence of a binding treaty between the civil law country and the foreign country for the mutual recognition and enforcement of foreign judgments (which we shall call “treaty reciprocity”).<sup>58</sup> Other countries

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<sup>58</sup> For example, Art 391 of the Uzbek Code of Civil Procedure provides that the procedure for the enforcement of foreign judgments is determined by  
(continued on next page)

require reciprocity in the broad sense, in that they do not require the existence of a treaty relationship but only require the existence of some reciprocal relationship between the foreign court and the local courts (so-called “broad reciprocity”).<sup>59</sup> Whatever the precise requirements of the civil law countries may be, the bottomline is that all civil law countries in the table above (with the exception of Poland, discussed below<sup>60</sup>) require *some* form of reciprocity. This can be problematic in terms of enforceability.

19 For civil law countries which require treaty reciprocity, enforcement will not be possible if the civil law country does not have treaty relations with the foreign country. For civil law countries which require broad reciprocity, uncertainty arises as to what exactly is required before a reciprocal relationship is deemed to exist. Must there be *possible* reciprocity, in the sense that, based on the requirements of the law of the foreign country, the foreign court is likely to enforce a judgment of the local court on terms similar to the local court’s law? Or

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the provisions of the relevant international treaty. This “effectively means that if there is no treaty between Uzbekistan and country of origin of the judgment, then such award cannot be enforced and thus will have to be re-tried by Uzbek state courts”: N Yuldashev & M Ruziev, “Uzbekistan” in *Litigation and Dispute Resolution* (M Madden ed) (Global Legal Group, 4th Ed, 2015) at p 324.

<sup>59</sup> For example, Art 282 of the Chinese Civil Procedure Law 2013 requires the People’s Court to enforce a foreign judgment “after examining it in accordance with the international treaties concluded or acceded to by the People’s Republic of China or with the principle of reciprocity”. This translation is provided by W Zhang, “Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the ‘Due Service Requirement’ and the ‘Principle of Reciprocity’” (2013) 12(1) *Chinese Journal of International Law* 143 at 150. This would also appear to be the position in Vietnam, see Art 423(1)(b) of the 2015 Civil Procedure Code (No 92/2015/QH13) and the case of *Choongnam Spinning Ltd*, HCM City first instance court decision No 2083/2007/QDST-KDTM, the Appeal court of the Supreme Court in Ho Chi Minh City, decision No 62/2008/QDKDTM-PT.

<sup>60</sup> Poland is discussed at para 22 below.

must there be *proven* reciprocity, in the sense that there must have been an earlier case in which the foreign court had enforced the local court's judgment? Furthermore, what happens when a person obtains a judgment from country X which happens to require broad reciprocity, and seeks to enforce that judgment in country Y which also requires broad reciprocity? Will country Y's courts enforce country X's judgment, absent a treaty relationship between country X and Y? In our view, this is the critical weakness of broad reciprocity, because it creates a tiresome waiting game<sup>61</sup> as the courts of each country sit idly for the other court to make the first move. No one benefits from the gridlock, so there is a real concern over whom we are sacrificing the judgment creditor for.<sup>62</sup>

### ***B. Silver lining in the cloud***

20 We have seen in the above discussion that the laws of civil law countries suffer from two weaknesses, namely diversity and reciprocity. You may even be convinced at this junction that the enforcement of

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<sup>61</sup> Such a waiting game has occurred between the courts of China and Japan. As Zhang notes in W Zhang, "Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the 'Due Service Requirement' and the 'Principle of Reciprocity'" (2013) 12(1) *Chinese Journal of International Law* 143 at 172, "[b]ecause Chinese courts refused to recognise Japanese judgments in the past, Japanese courts subsequently referred to such cases and refused to recognize Chinese judgments. A vicious circle is thus formed and continuously reinforced between China and Japan".

<sup>62</sup> Reciprocity has aptly been described as "a misplaced retaliation against private parties for acts of foreign states unrelated to the dispute": P de Miguel Asensio, "Recognition and Enforcement of Judgments in Intellectual Property Litigation: The CLIP Principles" in *Intellectual Property in the Global Arena* (J Basedow, T Kono & A Metzger eds) (Mohr Siebeck, 2010). Indeed, Adrian Briggs rejects reciprocity as a basis for the enforcement of foreign judgments: see A Briggs, "The Principle of Comity in Private International Law" in *Collected Courses of the Hague Academy of International Law* vol 354 (Brill | Nijhoff, 2012).

foreign judgments in civil law countries is a lost cause. But there are positive trends to indicate that things are looking up for the enforcement of foreign judgments in civil law countries, which are enabling foreign judgments to slowly attain similar levels of enforceability in civil law countries as arbitral awards. Let me address the two issues of diversity and reciprocity in turn.

21 With regard to diversity, our response is that diversity is not a unique problem to international litigation. Diversity also exists in international arbitration. The 1958 New York Convention permits States parties to refuse the recognition and enforcement of arbitral awards on a variety of grounds stipulated in Article V, including grounds of non-arbitrability and public policy. These grounds are prone to diverse interpretations in national courts the world over. There is in fact a growing body of academia that deals with the question of whether national courts have interpreted the 1958 New York Convention grounds in a consistent manner.<sup>63</sup> So we should neither be alarmed by diversity nor expect complete uniformity. At any rate, the laws of civil law countries are not so diverse that they include hurdles beyond the scope of imagination of international arbitration. Civil law countries impose requirements of jurisdiction, due process, and public policy, which are familiar concepts in international arbitration. The only hurdle which international arbitration is foreign to is the hurdle of “no mistake of law or fact”, but this hurdle is only imposed by the Philippines. In any case, the Philippine Supreme Court has declared in the 2005 case of

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<sup>63</sup> See, for instance, G Bermann, “Interpretation and Application of the New York Convention by National Courts” in *Ius Comparatum – Global Studies in Comparative Law* vol 24 (M Schauer & B Verschraegen eds) (Springer, 2017); *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (H Kronke *et al* eds) (Kluwer Law International, 2010); *ICCA Congress series no 9 – Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (A van den Berg ed) (Kluwer Law International, 1999) and M Hwang & S Lee, “Survey of South East Asian Nations on the Application of the New York Convention” (2008) 25(6) *Journal of International Arbitration* 873.

*Bank of the Philippine Islands Securities Corporation v Edgardo V Guevara*<sup>64</sup> that the Philippine courts are not allowed to delve into the merits of a foreign judgment.

22 As regards the issue of reciprocity, we have two points to make. First, there are early signs to indicate that the winds are changing. Civil law countries are gradually repealing the requirement of reciprocity. Poland is a recent example. In 1932, the Polish Code of Civil Procedure required the existence of a treaty relationship. In 1996, Poland substituted the treaty requirement with a reciprocity requirement. In 2008, Poland abolished the reciprocity requirement altogether. In so doing, Poland joined the growing list of civil law countries that had abolished reciprocity, including Venezuela, Lithuania, Bulgaria, Macedonia, Spain and Montenegro. Even where countries retain the reciprocity requirement, there is a burgeoning trend of countries interpreting the requirement in a more liberal manner. We have two cases in mind which vividly illustrate this trend.

23 The first case is a Russian case called *Rentpool BV v Podjemnye Tekhnologii*,<sup>65</sup> decided by the Arbitrazh (Commercial) Court of Moscow in 2009. In Russia, the Civil Procedure Code imposes the requirement of a treaty between the foreign country and Russia. Article 409(1) provides that “[t]he decisions of foreign courts, including decisions on the approval of an amicable settlement, shall be acknowledged and executed in the Russian Federation if this is stipulated in the international treaty of the Russian Federation”.<sup>66</sup> Traditionally, Russian courts have “applied this requirement literally, refusing to recognise or enforce foreign

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<sup>64</sup> GR No 167052, available in English at <http://bit.ly/2s8Twlk> (accessed 25 September 2017).

<sup>65</sup> Decision of the Commercial Court of Moscow Region No A41-9613/09 of 5 June 2009, available in English at <http://bit.ly/2snZ5k4> (accessed 25 September 2017).

<sup>66</sup> Russian Civil Procedure Code (No 138-FZ of 14 November 2002 (as amended on 6 February 2012)).

judgments in the absence of a treaty obligation to do so.”<sup>67</sup> However, in *Rentpool BV v Podzemnye Tekhnologii*,<sup>68</sup> the Arbitrazh (Commercial) Court of Moscow formally acknowledged that it was not necessary to establish the existence of a treaty relationship; broad reciprocity was sufficient.<sup>69</sup>

24 The next case is an even more recent case decided by a Chinese court in late 2016. The Chinese Code of Civil Procedure imposes the requirement of broad reciprocity. Article 282 requires the people’s court to examine the application for enforcement “according to the international treaties concluded or accede to by the PRC or based on the principle of reciprocity”.<sup>70</sup> Conventionally, the practice of the Chinese courts has been to deny, in the absence of an applicable treaty, the enforcement of foreign judgments on the basis of lack of reciprocity.<sup>71</sup> However, in the 2016 case of *Kolmar Group AG v Jiangsu Textile Industry (Group)*

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<sup>67</sup> B Elbalti, “Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but not Much Bite” (2017) 13(1) *Journal of Private International Law* 184 at 197.

<sup>68</sup> Decision of the Commercial Court of Moscow Region, No A41-9613/09 of 5 June 2009, available in English at <http://bit.ly/2snZ5k4> (accessed 25 September 2017).

<sup>69</sup> The decision was later reaffirmed by the Cassation Court of Moscow Circuit on 29 June 2009 and the Federal Supreme Court of the Republic of Russia on 7 December 2009 (ruling No BAC-12688/09). Subsequent cases have followed suit: see B Elbalti, “Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite” (2017) 13(1) *Journal of Private International Law* 184 at 199.

<sup>70</sup> W Zhang, “Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the ‘Due Service Requirement’ and the ‘Principle of Reciprocity’” (2013) 12(1) *Chinese Journal of International Law* 143.

<sup>71</sup> W Zhang, “Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the ‘Due Service Requirement’ and the ‘Principle of Reciprocity’” (2013) 12(1) *Chinese Journal of International Law* 143.

*Import & Export Co Ltd*<sup>72</sup> (“*Kolmar Group*”), a Chinese court enforced a foreign judgment on the basis of broad reciprocity for the first time in reported Chinese legal history. The Nanjing Intermediate People’s Court enforced a judgment issued by the High Court of Singapore, holding that the requirement of (broad) reciprocity was satisfied given that the Singapore courts had previously enforced a judgment issued by the Jiangsu Suzhou Intermediate People’s Court in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*.<sup>73</sup> The upshot of the above is that, in so far as we perceive the imposition of reciprocity to be a problem, we can take comfort in the fact that the tides are gradually turning and civil law countries are slowly knocking down the walls of reciprocity. This has occurred along two lines of development:

- (a) the trend of civil law countries repealing the reciprocity requirement completely; and
- (b) the trend of civil law countries interpreting the reciprocity requirement in a more liberal fashion.

25 Before we move on to our second response, we should also mention a third case that overcame the hurdle of enforceability of foreign judgments in Dubai outside the DIFC. The case is called *DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holding PJSC*<sup>74</sup> and it was decided by the DIFC Court of Appeal in early 2016. As readers may know, the DIFC is an autonomous region within Dubai which adopts the common law system. The rest of Dubai adopts the civil law system, as do the other Emirates of the UAE. The consequence of this is that the hurdle of reciprocity applies to the enforcement of

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<sup>72</sup> (2016) Su01 Assisting Foreign Recognition No 3. The gradual loosening of the reciprocity requirement in China is reflected by the joint declaration in the 2nd China-ASEAN Justice Forum on 8 June 2017, which China participated in. The seventh consensus of the declaration was to promote the mutual recognition of civil and commercial judgments.

<sup>73</sup> [2014] SGHC 16.

<sup>74</sup> [2015] DIFC CA 007. The judgment was delivered by the principal author in his capacity as Chief Justice of the DIFC Courts.

foreign judgments in Dubai outside the DIFC, but does not apply to the enforcement of foreign judgments within the DIFC.

26 The open question, however, was whether a judgment creditor who has assets in Dubai outside the DIFC could use the DIFC courts as a conduit – that is, enforce his foreign judgment in the DIFC courts and take the DIFC court's judgment to the Dubai courts for enforcement. This was the question that the DIFC Court of Appeal had to decide in *DNB Bank ASA v Gulf Eyadah Corporation and Gulf Navigation Holdings PJSC*.<sup>75</sup> And this was the question that the DIFC Court answered in the affirmative, based on its interpretation of the provisions of Dubai Law No 12 of 2004, as amended by Dubai Law No 16 of 2011 (among other legislation), which is the relevant statute governing the relationship between the Dubai courts and the DIFC courts. The decision enables judgment creditors to enforce their foreign judgments in Dubai via the conduit of the DIFC courts if the creditors' assets are located in Dubai. This is yet another example of a civil law country gradually expanding the enforceability of foreign judgments within its jurisdiction.

27 Our second response to the issue of reciprocity is that it is important that we do not overstate the problems that arise from reciprocity. The fortunate reality is that many countries have entered into a range of bilateral and multilateral treaties for the mutual recognition and enforcement of judgments to overcome the hurdle of reciprocity. Even countries which do not have many treaty relations with other countries are at least parties to regional treaties for the mutual enforcement of judgments. In Central Asia, there is a treaty between Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Turkmenistan, Tajikistan, Ukraine and Uzbekistan called the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters to govern the mutual recognition and enforcement of judgments. In the Middle East, there are several regional treaties for the mutual recognition and enforcement of judgments to which many Arab and North-African countries are parties, including the 1983 Riyadh Arab Agreement for Judicial Cooperation and the 1996 GCC Convention for

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<sup>75</sup> [2015] DIFC CA 007.

the Execution of Judgments, Delegations and Judicial Notifications. These regional treaties will assume a critical role in the OBOR initiative, as many parties to these treaties are also participants in the OBOR initiative. Judgments obtained in one party's courts may therefore be enforced in another party's courts in accordance with the terms of the applicable treaty.

28 Even where there is no applicable treaty, there is still some light at the end of the tunnel for the judgment creditor. Not all civil law countries require treaty reciprocity. Some civil law countries only require broad reciprocity. This preserves the possibility of enforcing the judgments of *common law* countries in these civil law countries, and safeguards the enforceability of common law judgments. Indeed, as we have seen above, the Nanjing Intermediate People's Court enforced a Singapore judgment in *Kolmar Group* on the basis that the High Court of Singapore had previously enforced a Chinese judgment, notwithstanding the absence of a treaty between China and Singapore for the mutual recognition and enforcement of judgments.

29 Furthermore, in many civil law countries which require broad reciprocity, the position is unsettled as to whether broad reciprocity means *possible* or *proven* reciprocity. The courts have had little opportunity to contemplate this matter. So there remains a possibility for these courts to adopt the conception of possible reciprocity (which is the easier standard of the two to satisfy) when the appropriate case arises. This is important because it paves the way for a potential solution to the "waiting game" impasse we discussed above. The solution is for the courts (or the governments, depending on which the competent body is) of civil law countries which require broad reciprocity to enter into bilateral memorandums of understanding ("MOUs") that, short of imposing binding obligations on the parties, affirm their shared understanding that, for the sole purpose of overcoming the waiting game impasse, the requirement of broad reciprocity is mutually satisfied. Such an MOU will not be easy to formulate, and its inchoate legal nature will require skilful drafting. But if it is pulled off successfully, it can serve to crystallise the reciprocity relationship between the two countries and encourage the courts of one country to take the first move and enforce the other court's foreign judgment when the opportune moment arises.

30 A similar (but not identical) development has already occurred between the DIFC Courts and other foreign courts. The DIFC Courts have taken the initiative to enter into memorandums of guidance (“MOGs”) with an increasing number of foreign courts to “set out the parties’ understanding of the procedures for the enforcement of each party’s money judgments in the other party’s courts”.<sup>76</sup> Typically, an MOG would state that “[t]he parties desire and believe that the cooperation demonstrated by this memorandum will promote a mutual understanding of their laws and judicial processes and will improve public perception and understanding”.<sup>77</sup> While the MOGs do not go so far to affirm reciprocity between the courts, the MOG model can usefully be transposed to the context of civil law countries which encounter the “waiting game” conundrum. Our point here is that there is no need for countries to take the more drastic measure of repealing the requirement of broad reciprocity if they are willing to enter into MOUs for the mutual affirmation of reciprocity. Insofar as we cannot expect the universal removal of the broad reciprocity requirement anytime soon, the MOU remains the most practical solution to the barrier of reciprocity that judgment creditors face today.

#### **IV. 2005 Hague Convention on Choice of Court Agreements**

31 We now turn to the final section of our chapter, which is the Convention of 30 June 2005 on Choice of Court Agreements (“2005 Hague Convention”). The 2005 Hague Convention is the latest global effort to regulate the treatment of exclusive choice of court agreements and the enforcement of judgments of designated courts. It has the potential to equalise the enforceability of foreign judgments and arbitral

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<sup>76</sup> See for example para 1 of the Memorandum of Guidance – Enforcement between DIFC Courts and the Supreme Court of Singapore (19 January 2015) available at <http://bit.ly/2u68JFg> (accessed 25 September 2017).

<sup>77</sup> See for example para 3 of the Memorandum of Guidance between the Dubai International Financial Centre Courts and The High Court of Kenya, Commercial & Admiralty Division (27 November 2014) available at <http://bit.ly/2twZvVx> (accessed 25 September 2017).

awards. It affirms the principle that the merits of a judgment are non-reviewable,<sup>78</sup> which is a position shared by international arbitration. It permits the enforcing court to postpone enforcement if the judgment is appealable or is being appealed against in the country of origin,<sup>79</sup> which is a position shared by common law countries in respect of foreign judgments as well as international arbitration in respect of foreign arbitral awards. Most importantly, it imposes grounds for the refusal of enforcement of foreign judgments which resemble the grounds in the 1958 New York Convention. Article 9 of the 2005 Hague Convention provides that a Contracting State may refuse enforcement if, *inter alia*:

- (a) the agreement was null and void;<sup>80</sup>
- (b) a party lacked the capacity to conclude the agreement;<sup>81</sup>
- (c) the defendant was not duly notified of the document which instituted the foreign proceedings;<sup>82</sup>
- (d) the judgment was obtained by fraud;<sup>83</sup> and
- (e) enforcement would be manifestly incompatible with the public policy of the Contracting State (including fundamental principles of procedural fairness).<sup>84</sup>

These are all familiar grounds in the world of international arbitration.

32 Furthermore, Article 2(2) of the 2005 Hague Convention specifically provides that the Convention will not apply to the following matters:

- (a) the status and legal capacity of natural persons;
- (b) maintenance obligations;
- (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

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<sup>78</sup> Convention of 30 June 2005 on Choice of Court Agreements (“2005 Hague Convention”) Art 8(2).

<sup>79</sup> 2005 Hague Convention, Art 8(4).

<sup>80</sup> 2005 Hague Convention, Art 9(a).

<sup>81</sup> 2005 Hague Convention, Art 9(a).

<sup>82</sup> 2005 Hague Convention, Art 9(c).

<sup>83</sup> 2005 Hague Convention, Art 9(d).

<sup>84</sup> 2005 Hague Convention, Art 9(e).

- (d) wills and succession;
- (e) insolvency, composition and analogous matters;
- (f) the carriage of passengers and goods;
- (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
- (h) anti-trust (competition) matters;
- (i) liability for nuclear damage;
- (j) claims for personal injury brought by or on behalf of natural persons;
- (k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
- (l) rights *in rem* in immovable property, and tenancies of immovable property;
- (m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
- (n) the validity of intellectual property rights other than copyright and related rights;
- (o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
- (p) the validity of entries in public registers.

33 Many of these areas are considered to be non-arbitrable under Article V(2)(a) of the 1958 New York Convention. Gary Born writes that:<sup>85</sup>

[T]ypical examples of nonarbitrable subjects include specific categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claim; consumer claims; labor or employment grievances; and certain intellectual property matters. In general, the type of disputes which are nonarbitrable arise from a common set of considerations, typically involving public rights, or interests of third parties, which are the subjects of uniquely governmental authority.

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<sup>85</sup> G Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 3696.

34 So, if there is one treaty that promises to advance the transnational enforceability of foreign judgments today, it is the 2005 Hague Convention, which was painstakingly negotiated since 1996.<sup>86</sup> Membership in the Convention is steadily growing. As of 25 September 2017, the 2005 Hague Convention has 30 members, 13 of whom are also participants in the OBOR initiative (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Singapore and Ukraine). China has signed the 2005 Hague Convention on 12 September 2017. In certain regions, countries are also calling upon neighbouring countries to join the 2005 Hague Convention.<sup>87</sup> If this momentum continues, we may one day be able to confidently describe the 2005 Hague Convention as the “litigation counterpart”<sup>88</sup> of the 1958 New York Convention.

35 Of course, the 1958 New York Convention and the 2005 Hague Convention are not completely identical, and there are some differences between the two regimes which affect enforceability. Some grounds for refusal of enforcement under the 2005 Hague Convention do not exist under the 1958 New York Convention. These include where:

- (a) the judgment is inconsistent with an earlier judgment in the enforcing court’s State or a third State in a dispute between the same parties;<sup>89</sup>

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<sup>86</sup> For an historical overview of the 2005 Hague Convention, see P Nygh & F Pocar, *Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (August 2000) available at <http://bit.ly/2snq6UF> (accessed 25 September 2017).

<sup>87</sup> Singapore in one example in the ASEAN region. See S Menon, “ASEAN Integration through Law” (August 2013) available at <http://bit.ly/2traAXJ> (accessed 25 September 2017) and A Reyes, “ASEAN and the Hague Conventions” (2014) 22(1) *Asia Pacific Law Review* 25 at 40.

<sup>88</sup> R Brand & P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at p 3.

<sup>89</sup> 2005 Hague Convention, Arts 9(f)–9(g). However, note that in principle, “national court judgments and arbitral awards should have the same preclusive effects in arbitral proceedings as in national court litigation ...

*(continued on next page)*

- (b) the judgment awards damages that do not compensate a party for actual loss suffered;<sup>90</sup> and
- (c) the judgment has no effect or is unenforceable in the State of origin.<sup>91</sup>

None of these grounds appear in the 1958 New York Convention. Furthermore, while the Model Law provides for the enforcement of interim measures, the 2005 Hague Convention specifically provides that interim measures are not governed by the Convention.<sup>92</sup> So there are undeniable differences between the two regimes to be aware of, but they are not so serious as to completely set back the enforceability of foreign judgments in comparison to the enforceability of foreign arbitral awards.

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Rules of preclusion are elements of the applicable law, which the arbitral tribunal is bound to apply ... An arbitral tribunal's failure to give preclusive effect to a prior and valid judicial judgment would be subject to serious enforceability challenges in many jurisdictions" on the ground of public policy: G Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2nd Ed, 2014) at p 3774. So, even though the ground of "earlier inconsistent judgment" is not expressly stated in the 1958 New York Convention, it may arguably be subsumed under the rubric of public policy.

<sup>90</sup> 2005 Hague Convention, Art 11(1).

<sup>91</sup> 2005 Hague Convention, Art 8(3). A commentary on Art 8(3) may be found in R Brand & P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at pp 274–275:

Having effect means that it is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations ... Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention. It is of course possible that the judgment will be effective in the State of origin without being enforceable there. Enforceability may be suspended pending an appeal (either automatically or because the court so ordered).

<sup>92</sup> 2005 Hague Convention, Arts 4 and 7.

## **V. Conclusion**

36 Our conclusions are as follows.

- (a) In common law countries, the enforcement of foreign judgments shares a number of essential similarities with the enforcement of foreign arbitral awards under the 1958 New York Convention, with the result that the foreign judgment is no less enforceable than foreign arbitral awards in common law countries.
- (b) In civil law countries, although they are issues of diversity which undermine the predictability of success of enforcing foreign judgments in these countries, the problem of diversity is not as crippling as we think when we realise that civil law countries impose ordinary hurdles to enforcement such as jurisdiction, public policy and due process which are all familiar concepts to the world of international arbitration.
- (c) The only unusual hurdle to the enforcement of foreign judgments is reciprocity, of which different civil law countries have different conceptions (some being treaty reciprocity and others being broad reciprocity). But let us not disregard the fact that an increasing number of civil law countries are repealing the requirement of reciprocity, or are interpreting the requirement more liberally.
- (d) Even where civil law countries have not repealed the requirement of broad reciprocity, there is a way to overcome the “waiting game” impasse other than through repeal. The solution lies in entering into bilateral MOUs with other civil law countries which impose the requirement of broad reciprocity that, short of imposing treaty-like obligations on the parties, affirm the mutual satisfaction of the broad reciprocity requirement.
- (e) The entry into force of the 2005 Hague Convention will only consolidate the steady improvement of the transnational enforceability of foreign judgments. Not only are the merits non-reviewable under the Convention, the grounds for the refusal of enforcement under the Convention replicate (for the most part) the grounds for the refusal of enforcement under the 1958 New York Convention. The 2005 Hague Convention has 30 members at present, 13 of whom are also participants in the OBOR initiative.

China has also signed the 2005 Hague Convention on 12 September 2017.

- (f) The consequence of the above is that the enforceability of foreign judgments is firmly catching up with the enforceability of foreign arbitral awards. The conventional belief that the arbitration clause is the only viable dispute-resolution clause is increasingly being challenged. Countries such as Singapore have anticipated this global trend, and have seized the opportunity and established international commercial courts in addition to existing arbitration institutions on the faith that the enforceability of the judgments of these courts will improve with time.
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## Background to Essay 22

In 2003–2004, I acted for the Civil Aviation Authority of Taipei (“CAA”) which was being sued by Singapore Airlines (“SIA”) as being liable to indemnify SIA against all claims arising out of SIA’s first and only major aircraft collision, which occurred on 31 October 2000 at Taipei’s Chiang Kai-shek International Airport (now Taoyuan International Airport).

SIA was being sued by passengers (or the families of passengers) on the ill-fated flight, and SIA joined CAA as a third party, from whom it claimed full indemnity or contribution in respect of those claims. CAA then applied to the Singapore court for it to be discharged on grounds that it could not be sued, since it was an agency of the government of Taiwan and was entitled to claim sovereign immunity.

A similar action was commenced in Quebec in Canada with the same scenario where the defence of sovereign immunity was raised. In both cases, the Ministry of Foreign Affairs of the respective governments of Singapore and Canada issued certificates to the court hearing the case, and the certificates were similar (but not in identical terms) to each other, namely that the ministry could not certify that Taiwan was indeed a sovereign state.

In Singapore, the trial judge rejected the defence of sovereign immunity. However, the judge in the Quebec action accepted that defence. I appeared in the appeal to the Singapore Court of Appeal to try to persuade the court to find Taiwan to be a sovereign nation, and accordingly immune from the suit, but the Court of Appeal declined to do so. The Canadian judge, on the other hand, took the view that the certificate of his government (which was in similar terms to the Singapore certificate) meant that he was entitled to undertake an independent inquiry as to whether Taiwan should, under principles of public international law, be considered a sovereign state, and he found that to be the case.

Unfortunately for the state of the law, the cases in both countries were settled, with the judgments therefore unchanged in both countries. So it remains controversial (but perhaps understandable)

that the two countries came to different views of public international law on essentially similar facts.

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**BREAKING THE SILENCE OF THE EXECUTIVE:  
THE RESIDUAL ROLE OF THE COMMON LAW COURTS IN THE  
DETERMINATION OF STATEHOOD\***

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## I. Introduction

1 The principle of State immunity is a fundamental rule of customary international law.<sup>1</sup> The modern practice of States has been to codify this rule in their domestic spheres, so that national courts have a municipal statute to apply directly. In most cases before these courts, the status of the foreign entity is not contested, so the only issue to deal with is whether the foreign State enjoys immunity under the statute concerned. However, in several cases, the claimant may wish to contest the status of the foreign entity as a State. When this happens, the forum court must confront the issue of how to deal with the claimant’s contention. Are there national laws for the court to apply? If so, how should they be interpreted and applied?

2 In common law countries, the answer to these questions is usually supplied by the statute which governs State immunity. The statute would ordinarily provide that a certificate by the executive is the final word on whether an entity is a State.<sup>2</sup> This “executive certificate” system

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<sup>1</sup> The International Law Commission observed in 1980 that the rule of State immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of States”: see UNGA “Report of the International Law Commission on the Work of its Thirty-Second Session” GAOR 35th Session Supp No 10 UN Doc A/35/10 (1980) 147.

<sup>2</sup> For example, see s 21(a) of the UK State Immunity Act 1978 (c 33); s 18(a) of the Singapore State Immunity Act (Cap 313, 2014 Rev Ed); s 14(1) of the Canadian State Immunity Act 1985 and s 40(1) of the Australian Foreign States Immunities Act 1985.

may work if the executive is prepared to give guidance on the matter at hand, but it does not work if the executive has a habit of refusing to provide clear certificates. In the absence of an executive certificate, can the court determine the status of the foreign entity itself?

3 The legal question we have just posed is not a hypothetical one. The executives of common law countries have refused in several instances to provide clear certificates. One need not look very far into history to find a case like this. In 2003, a department of the Taiwanese government was joined as a third party in proceedings before the Canadian and Singapore courts. The department claimed State immunity before the two courts. The executives in both proceedings refused to provide certificates on the status of Taiwan. The Canadian<sup>3</sup> and Singapore<sup>4</sup> courts were forced to consider the role of the courts in the absence of a certificate (the outcome of which will be discussed in further detail). Therefore, there is a real need for scholars and practitioners to address this question squarely and discern its true answer, by reference to the applicable case law and academic commentaries which deal with this matter. We bring these materials together in this article to make our central argument, which is that the English courts are permitted to transform the principles of statehood under customary international law into English common law in accordance with the doctrine of judicial transformation, so that they may be applied by the courts for the purposes of State immunity in the absence of an executive certificate.

4 The structure of this article is as follows. First, to give the reader an understanding of how this legal question might come into play in practice, we discuss the decisions of the Canadian and Singapore courts

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<sup>3</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70.

<sup>4</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570. The principal author acted for the Civil Aeronautics Administration of Taiwan before the Singapore Court of Appeal. For a fuller discussion of the status of Taiwan, see P Hsieh, "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan" (2007) 28(4) *Michigan Journal of International Law* 765.

alluded to above. Second, we identify that the statutory executive certificate systems of the various common law countries are based on English common law, and, on that footing, survey the case law in England to see if the English courts have put the matter to rest. We conclude that the English courts have not. Finally, in view of the lack of answers in English case law, we argue that the English courts are permitted to transform (and should transform) the customary international legal principles of statehood into common law in accordance with the doctrine of judicial transformation, so that they may be applied by the English courts in the absence of an executive certificate. Nothing should prevent the English courts from breaking the silence of the executive on the subject of statehood.

## **II. Contextualising the question: Two court decisions**

### **A. *The facts***

5 On the evening of 31 October 2000, Singapore Airlines SQ006 was scheduled to take off from Taipei's Chiang Kai-shek International Airport (now known as Taiwan Taoyuan International Airport) *en route* to Los Angeles. Amidst heavy rain caused by Typhoon Xangsane, the aircraft attempted to take off from a closed runway and ultimately crashed, on take-off, into construction equipment on that runway. Eighty-three of the 179 passengers and crew on board perished, with many more sustaining injuries. To date, the incident is the only Singapore Airlines crash that has resulted in passenger fatalities.

6 The families of the perished passengers and the injured survivors commenced proceedings against Singapore Airlines ("SIA") in various States, including Singapore and Canada. In both cases, SIA joined the Civil Aeronautics Administration of Taiwan ("CAA"), a department of the Taiwanese Ministry of Transport and Communications which operated and controlled the airport, as a third party on the basis that CAA was liable for contribution or indemnity for being wholly or partly responsible for the accident. CAA argued that it was entitled to State immunity under Canada's State Immunity Act 1985 and Singapore's

State Immunity Act.<sup>5</sup> In both cases, it was not disputed that CAA was a department or agency of the Taiwanese government, so the only issue left for the courts to determine was whether Taiwan could be considered a State.

7 Section 14(1)(a) of the Canadian State Immunity Act 1985 provided that a certificate issued by the Minister of Foreign Affairs with respect to the question of whether a country is a foreign State for the purposes of the Act is “admissible in evidence as conclusive proof” of the matter stated in the certificate with respect to that question. Similarly, section 18(a) of the Singapore State Immunity Act provided that “a certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question ... whether any country is a State”. Pursuant to these sections, the parties made the following requests to the respective ministries.

Request in Canadian case	Request in Singapore case
<p><b>Counsel for SIA:</b></p> <p>“[W]e request an issuance of a certificate under Section 14 of the State Immunity Act to establish <i>whether Taiwan is indeed a foreign state</i> for the purposes of the State Immunity Act or whether it can be considered to be a political subdivision of the Republic of China for the purposes of the State Immunity Act”<sup>6</sup> [emphasis added]</p>	<p><b>Counsel for SIA:</b></p> <p>“We would be required to appraise the Court at the hearing of the application whether your Ministry is prepared to issue a certificate <i>confirming Taiwan (the Republic of China) is indeed a state</i> for the purposes of the State Immunity Act.”<sup>7</sup> [emphasis added]</p> <p><b>Counsel for CAA:</b></p> <p>“We have been instructed by the CAA (and the MOTC) to request for a Certificate pursuant to Section 18 of the SI Act <i>certifying that Taiwan (the Republic of China) is a State</i> for the purpose of Part II of the SI Act”<sup>8</sup> [emphasis added]</p>

8 It is opportune to note at this juncture that the wording of the two requests differ in one subtle aspect. The request to the Canadian

<sup>5</sup> State Immunity Act (Cap 313, 2014 Rev Ed) (Singapore).

<sup>6</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [24].

<sup>7</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [9].

<sup>8</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [7].

Ministry was phrased neutrally, asking for a certificate “to establish *whether* Taiwan is indeed a foreign state”. The requests to the Singapore Ministry were phrased positively, asking for a certificate “*certifying* that Taiwan is a State”. As will be seen later, this difference would prove to be a critical reason for the divergence in reasoning between the two courts. But for now, let us look at the replies from the Canadian and Singapore Ministries.

Reply in Canadian case	Reply in Singapore case
<p><b>Canadian Department of Foreign Affairs:</b>                      “I wish to inform you that <i>the Department cannot respond positively to your request and no such certificate will be issued at this time.</i> Canada has a one-China policy which recognises the People’s Republic of China, with its government located in Beijing, and it has full diplomatic relations with that government. Canada does not have diplomatic relations with ‘Taiwan’ or the ‘Republic of China’.”<sup>9</sup> [emphasis added]</p>	<p><b>Singapore Ministry of Foreign Affairs:</b>                      (To SIA) “I wish to inform you that <i>we are unable to issue the certificate</i> pursuant to section 18 of the State Immunity Act.”<sup>10</sup> [emphasis added]                      (To CAA) “I regret to inform you that <i>we are unable to accede to your request for a certificate</i> pursuant to Section 18 of the State Immunity Act.”<sup>11</sup> [emphasis added]</p>

9 As may be observed, the respective replies of the Canadian or Singapore Ministries stated unequivocally that the Ministry concerned could not provide the requested certificate. How then did the Canadian and Singapore courts deal with the question of the status of Taiwan in the absence of an executive certificate?

### **B. The Canadian decision**

10 The Quebec Supreme Court (“Quebec Court”) recognised that the Canadian Department “could not respond positively and that no certificate would be issued at that time”.<sup>12</sup> In view of this state of affairs, the Quebec Court held that it “must analyse the evidence

<sup>9</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [25].

<sup>10</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [10].

<sup>11</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [8].

<sup>12</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [25].

adduced” to determine whether Taiwan was a State.<sup>13</sup> Section 14 of the Canadian State Immunity Act did not prevent this, as it did not say the certificate was the “only means of proof” to establish statehood.<sup>14</sup> To determine this matter, the court would apply the principles of statehood under customary international law, as the Canadian State Immunity Act “incorporated into Canadian law the principle of jurisdictional immunity stemming from international customary law”.<sup>15</sup> Customary international law provided four criteria to statehood, as set out in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, namely:<sup>16</sup>

- (a) a permanent population;
- (b) a defined territory;
- (c) [an effective] government; and
- (d) capacity to enter into relations with other States.

Recognition by other States was immaterial, as a State’s existence was a question of fact.<sup>17</sup> Applying these criteria, the evidence satisfied the four criteria and Taiwan was a State.<sup>18</sup> Hence, CAA was entitled to immunity under the Canadian Act.

### **C. Singapore decision**

11 By contrast, the Singapore Court of Appeal (“Singapore Court”) took the view that the reply of the Singapore Ministry amounted to a certificate that Taiwan was *not* a State.<sup>19</sup> The basis for the Singapore Court’s interpretation was the context in which the reply was made: the parties had made positive requests to which the Singapore Ministry had

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<sup>13</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [47].

<sup>14</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [39].

<sup>15</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [53].

<sup>16</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [54].

<sup>17</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [55].

<sup>18</sup> *Parent v Singapore Airlines Ltd* [2004] 5 LRC 70 at [56].

<sup>19</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [11].

refused to accede.<sup>20</sup> Therefore, although the reply was “couched in polite and diplomatic terms”, the reply was “nonetheless equally clear. It said ‘no’ in effect”.<sup>21</sup> It did not matter that the response came in the form of a letter: “the Act [did] not lay down the form in which the certificate should take”.<sup>22</sup> Thus, the reply was conclusive evidence that Taiwan was not a State under section 18 of the Singapore Act, and CAA was not entitled to immunity.

12 The reasoning of the Singapore Court obviated the need for it to consider the role of the courts in the absence of an executive certificate. However, the Singapore Court did not want to sidestep the matter, so it went on to consider the hypothetical scenario in *obiter dicta*. But even as it took the bull by the horns, the Singapore Court appeared to deliver mixed signals. On the one hand, it recognised that “[t]he situation would be different if the Executive were to refuse to give a reply or gives a reply which does not answer the query and leaves it in no doubt that the court is to make its determination based on customary international law”.<sup>23</sup> On the other hand, it described statehood as a question “eminently a matter within the exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy”.<sup>24</sup> Indeed, while it recognised that “under customary international law, four conditions must exist for there to be a State”<sup>25</sup> (namely a defined territory, a permanent population, an

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<sup>20</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [12].

<sup>21</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [11].

<sup>22</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [11].

<sup>23</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [41]. See also *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [28].

<sup>24</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [22].

<sup>25</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [30].

effective government and the capacity to enter into relations with other States), and that “under the declaratory theory of customary international law, recognition is not essential for a State to come into being”,<sup>26</sup> it also asserted that “in relation to a matter such as sovereign immunity, recognition is vital”<sup>27</sup> without citing authorities for this point. Notwithstanding this, the Singapore Court proceeded to examine the evidence to see if Singapore impliedly recognised Taiwan, holding that there was insufficient evidence to prove implied recognition.<sup>28</sup> For these reasons, the Singapore Court concluded that, even if there was no certificate, the result would have been the same. Taiwan would still not have been a State so far as the instant case was concerned.

13 CAA argued in the alternative that, if Taiwan was not a State, it followed that Taiwan had no *locus standi* to be sued. This is not a specious argument. In fact, in *Wulfsohn v Russian Socialist Federated Soviet Republic*, the Court of Appeals of New York accepted this reasoning, acknowledging that there would have been “no proper party defendant before the court” had the defendant not been the existing *de facto* government of Russia.<sup>29</sup> Despite this, the Singapore Court gave short shrift to the argument, holding that it was “critical to differentiate between the question whether an entity is a State for the purposes of

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<sup>26</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [31].

<sup>27</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [31].

<sup>28</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [36].

<sup>29</sup> *Wulfsohn v Russian Socialist Federated Soviet Republic* 234 NY 372 at 374, 138 NE 24 (1923). See also Steyn J’s judgment in *Gur Corp v Trust Bank of Africa* [1987] QB 599 at 605: “an unrecognised state cannot sue or be sued in an English court: *City of Berne v Bank of England* (1804) 9 Ves Jun 346”. See also G von Glahn & J Taulbee, *Law Among Nations: An Introduction to Public International Law* (Routledge, 11th Ed, 2017) at p 172: “if indeed [governments] have no legal personality, they cannot be the focus of a suit because litigation cannot be brought against something that does not exist”.

state immunity and the question whether an entity is a State for other purposes”.<sup>30</sup> The Singapore Ministry’s reply merely stated that Taiwan was not a State for the purposes of the State Immunity Act; it did not follow that Taiwan was not a State for other purposes.<sup>31</sup> “CAA’s capacity to sue and be sued must be determined on the basis of its governing instrument and/or the law of Taiwan. There is no suggestion from CAA that it lacks such a capacity.”<sup>32</sup> Hence, there was “nothing seriously inconsistent with the stand of not granting recognition to an entity for purposes of state immunity and yet permitting that entity to be sued for its acts”.<sup>33</sup>

14 A second argument which CAA could have advanced in the alternative was that, if Taiwan was not a State because the Singapore executive recognised it as part of the People’s Republic of China (“PRC”), it stood to reason that Taiwan had immunity because the PRC had immunity.<sup>34</sup> CAA did not make this argument before the Singapore

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<sup>30</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [43].

<sup>31</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [43].

<sup>32</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [43].

<sup>33</sup> *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [49]. A similar answer was provided by the Singapore High Court in *Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2003] 3 SLR(R) 688 at [9]–[10].

<sup>34</sup> Similar lines of reasoning were successfully adopted in two foreign cases. In the US case of *Atlantic Mutual Insurance Co v Northwest Airlines Inc* 796 F Supp 1188 (ED Wis, 1992), the plaintiffs commenced an action against the defendant in the circuit court for Milwaukee county in the US. The plaintiffs alleged that certain of their machinery components were damaged due to the defendant’s negligence during the air transport of the components from Milwaukee to Taipei. The question was whether the circuit court or the federal court had subject matter jurisdiction over the claim. This turned on whether Taiwan was a party to the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air from which the claim arose. The US District Court for the Eastern

Court of Appeal. However, counsel for CAA advanced this argument before the court of first instance, the Singapore High Court, in *Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)*,<sup>35</sup> although counsel prefaced this submission with the strong caveat that this was not Taiwan's stand.<sup>36</sup> The High Court held that, since this was not a serious argument, the High Court was "not bound

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District of Wisconsin held that the Taiwan was covered by the Convention because, although Taiwan was not a party to the Convention, the PRC was. And the PRC had said in its instrument of accession that the Convention would apply "to the entire Chinese territory *including Taiwan*" [emphasis added]. In addition, the US had formally recognised the PRC as the sole government of China. Hence, the US District Court concluded that Taiwan was part of the PRC and a party to the Convention, so the federal court had subject matter jurisdiction. In the English case of *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, the USSR took over East Germany (where Jena was located) and set up the German Democratic Republic ("GDR") to govern East Germany. The GDR government passed a decree that situated Jena in Gera. Under the constitution of a charitable foundation called "Carl-Zeiss-Stiftung", the effect of this political change was to invest the role of the special board of Car-Zeiss-Stiftung in the newly-established Council of Gera. In its capacity as special board, the Council issued an English writ against the defendants to restrain them from passing off optical instruments under the title "Carl-Zeiss-Stiftung". The defendants obtained letters from the executive to prove that the English courts could not take notice of the Council as being the special board with authority to bring proceedings on the foundation's behalf, because it was set up by a decree of an unrecognised state, the GDR. The House of Lords interpreted the letters from the executive to assert that, while the UK Government did not recognise the GDR as an independent, sovereign state, it recognised the USSR and its government as *de jure* entitled to exercise governing authority in respect of East Germany. Since the GDR was set up by the USSR, the GDR was a subordinate body of the USSR through which the USSR was entitled to exercise indirect rule. Hence, the GDR's decree and by extension the Council of Gera could be taken notice of by the English courts.

<sup>35</sup> [2003] 3 SLR(R) 688.

<sup>36</sup> *Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2003] 3 SLR(R) 688 at [8].

to consider this argument seriously”.<sup>37</sup> However, if the argument had been seriously pursued, the High Court intimated that it would have been a “strong argument”.<sup>38</sup> When the case reached the Singapore Court of Appeal, counsel for CAA abandoned the argument, and CAA was spared of the embarrassment of claiming immunity based on the argument that Taiwan was part of the PRC. One might say the argument was the elephant that had hastily left the room.

### **D. Analysis**

15 The foregoing discussion illustrates the divergent approaches of the Canadian and Singapore courts. On the one hand, the Quebec Court recognised that there was no certificate and accepted that, in such a scenario, the Quebec Court could apply the criteria of statehood under customary international law, holding that Taiwan fulfilled those criteria. On the other hand, the Singapore Court asserted that the Singapore Ministry’s reply amounted to a certificate that Taiwan was *not* a State, so CAA could not claim immunity under the Singapore State Immunity Act. Even if there was no certificate, the Singapore Court insisted that the result would have been no different, because recognition was vital in questions of State immunity and, in this case, there was no evidence to demonstrate that Singapore recognised Taiwan. The Singapore Court was therefore clearly opposed to the idea of carving out a residual role for the courts in the task of determining statehood, even as it paid lip service to that possibility.

## **III. Investigating the position in English case law**

16 We have seen that the Canadian and Singapore courts have adopted polar-opposite attitudes to the question of the role of the courts in the absence of an executive certificate. The cause of this divergence is

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<sup>37</sup> *Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2003] 3 SLR(R) 688 at [8].

<sup>38</sup> *Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2003] 3 SLR(R) 688 at [8].

obvious: the State Immunity Acts did not provide for this scenario, so there was no guidance from the respective parliaments on how the courts ought to deal with disputes over a foreign entity's status when the executive fails to provide a certificate on this matter. All the State Immunity Acts merely said was that, *if* the executive provides a certificate, that certificate would be the last word.<sup>39</sup> So the answer to our question does not lie in the State Immunity Acts and we must look to alternative sources for clues.

17 The executive certificate systems in the State Immunity Acts of the various common law countries originate from section 21 of the UK State Immunity Act 1978. Section 21 draws inspiration from English case law in turn.<sup>40</sup> In view of this ancestry, we were interested to look at English judgments to see if the answer resided in English case law. We set out to investigate the position at English common law further. Unfortunately, our research reached a dead-end, as we found that English common law did not yield clear answers to our inquiry. The following passages share the lessons we drew from our research.

### **A. *Judicial referral practice***

18 The first thing we learned from English case law is that section 21 of the UK State Immunity Act 1978 originates from a practice developed by the English courts since the 19th century. According to that practice, whenever the status of a foreign entity was contested, the English courts would rely on their personal knowledge to answer that question;

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<sup>39</sup> The Singapore Court of Appeal took the view that the s 18 of the Singapore State Immunity Act (Cap 313, 2014 Rev Ed) had a different legal effect from s 14 of the Canadian State Immunity Act 1985: see *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 at [41]. However, it is difficult to see the difference between the two Acts. See O Elias, "The International Status of Taiwan in the Courts of Canada and Singapore" (2004) 8 SYBIL 93 at 97–98 for a criticism of the views of the Singapore Court of Appeal.

<sup>40</sup> H Fox & P Webb, *The Law of State Immunity* (Oxford University Press, 3rd Ed, 2013) at p 223.

but if that knowledge turned out to be insufficient, the courts would refer the matter to the executive and treat the executive's answer as conclusive (see the authorities quoted below). This practice, which we call the "judicial referral practice", traces its origins to a series of cases decided by Lord Eldon<sup>41</sup> and Lord Shadwell<sup>42</sup> in the early 1800s, and has since been affirmed by the English courts in later cases. For instance:

- (a) In the 1893 case of *Mighell v Sultan of Johore*,<sup>43</sup> Kay LJ of the Court of Appeal declared: "when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive".<sup>44</sup>
- (b) In the 1900 case of *Foster v Globe Venture Syndicate Ltd*<sup>45</sup> ("*Foster*"), Farwell J of the Chancery Division pronounced: "I am bound by the authorities which have been cited to take judicial cognisance whether they are or are not independent, and if my personal knowledge is insufficient to instruct me on that point, then I have the authority of those cases for saying that the proper course is to apply to the Secretary of State for Foreign Affairs for information, and his answer ... is conclusive on the parties."<sup>46</sup>
- (c) In the 1924 case of *Duff Development v Government of Kelantan*<sup>47</sup> ("*Duff Development*"), Viscount Cave of the House of Lords affirmed: "It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be

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<sup>41</sup> See *City of Berne in Switzerland v The Bank of England* (1804) 9 Ves Jr 347; and *Thompson v Byree*, *The Times* (31 May 1824).

<sup>42</sup> See *Taylor v Barclay* (1828) 57 ER 769 and *Thompson v Powles* (1828) 57 ER 761.

<sup>43</sup> [1894] 1 QB 149.

<sup>44</sup> *Mighell v Sultan of Johore* [1894] 1 QB 149 at 158.

<sup>45</sup> [1900] 1 Ch 811.

<sup>46</sup> *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811 at 813.

<sup>47</sup> [1924] AC 797.

questioned by the parties.”<sup>48</sup> Likewise, Viscount Finlay declared: “It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the Court to receive information from the appropriate department of His Majesty’s Government, and the information so received is conclusive. The judgment of Farwell J in *Foster v Globe Venture Syndicate* seems to me to be a perfectly accurate statement of the law and practice on this point.”<sup>49</sup>

### **B. Rationale for judicial referral practice**

19 The second thing that may be observed about English case law is that, although the English courts have consistently endorsed the judicial referral practice, they have not extensively developed the rationale for *that* practice. Throughout the years of the practice’s existence, the English courts did not seriously address the question of the practice’s rationale. In most cases, the courts were content to justify the practice tangentially, as will be seen in the quoted authorities below. So, at face value, the English courts do not seem to have a clear idea of *why* the judicial referral practice should be adhered to.

20 Nevertheless, when we inspected the language used by the courts in the English cases more closely, we identified a pattern in English case

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<sup>48</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 805–806.

<sup>49</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 813. See also Lord Sumner’s speech (at 822): “The practice is also well settled that the Court may and generally should make its own inquiry of the competent Secretary of State in order to ascertain, in case of need, whether a particular State is a sovereign State, or a particular person is the head, hereditary or elected, of such a State.” See also Lord Carson’s speech (at 830): “the Courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. As Lord Esher said in the case of *Mighell v Sultan of Johore*: ‘When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is decisive.’”

law. The pattern is that the language of the English judgments has oscillated between two competing rationales, which we shall call the “best-evidence rationale” and the “prerogative rationale”.<sup>50</sup> These rationales are not terms of art employed by the English courts, but rather are hypothetical and logically distinct rationales which we developed in the course of our research, so as to enable us to categorise the cases under the headings of either rationale and track the oscillation of the English courts. Let us explain what we mean by these two rationales before we elaborate on the pattern of oscillation.

21 A court which adheres to the *best-evidence* rationale would explain that statehood is a question of fact of which the courts will take judicial cognisance. The courts will rely on their personal knowledge to determine statehood; but if that personal knowledge is insufficient, the courts will look for the next best evidence, just as they would for any other issue of fact raised before them. In the case of statehood, the “best evidence” is a statement from the executive, because statehood is a matter which falls outside the public domain, and which the executive is likely to understand best. Hence, the courts will refer a question of statehood to the executive and take their word for it, much like how they would refer to a calendar to establish a date.<sup>51</sup>

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<sup>50</sup> Our inspiration for the formulation of these rationales is drawn from F Mann, “Judiciary and Executive in Foreign Affairs” (1943) 29 *Transactions of the Grotius Society* 143 at 149, who distinguished between a “rule of best evidence” and a “rule of obligatory certification”.

<sup>51</sup> See A Lyons, “Judicial Application of International Law and the ‘Temporizing Certificate’ of the Executive” (1952) 29 *BYBIL* 227 at 227. Lyons explains that:

The statement that such matters are the subject of judicial knowledge is seen, on analysis, to consist of two possible meanings. One is that the matter is in fact within the personal knowledge of the individual who is sitting as judge; the other is that the matter is one about which he is permitted to inform himself by direct inquiry and not only from the evidence of witnesses or proved documents. Thus, in order to establish a date, it will be proper for the judge to refer to a calendar or almanac, and for the meaning of an uncommon English word, or one

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22 By contrast, a court which adheres to the *prerogative* rationale would explain that statehood is a question of fact<sup>52</sup> which the executive alone can determine. This is because it falls within the royal prerogative of the Crown and outside the scope of adjudication of the courts. This being so, the courts should speak in one voice with the executive, and should not depart from the executive's position. If the executive refuses to provide a certificate, the appropriate course is for the courts to adjourn the proceedings. In no circumstance should the court proceed to determine the foreign entity's status for itself.

23 So, if we could put the difference between the two rationales more bluntly, we would say that, under the prerogative rationale, a court would say "we accept the executive's certificate as conclusive because we *have to*; we are legally obliged to do so". By contrast, under the best-evidence rationale, a court would say "we accept the executive's certificate as conclusive because we *want to*, in the sense that we want to rely on the best evidence of the foreign entity's status which in this case is the executive's certificate".

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with a special technical significance, he may refer to a standard dictionary.

<sup>52</sup> A variant of the prerogative rationale would say that the decision to recognise a State is not simply an inquiry of fact, but a decision that may include extraneous political considerations. This has not featured widely in English jurisprudence. One rare instance is Viscount Cave's dicta in *Duff Development v Government of Kelantan* [1924] AC 797 at 808: "where ... a question [of statehood] arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, *which is entitled to have regard to all the circumstances of the case*" [emphasis added]. The rarity of such dicta is attributable to the enduring influence of Hersch Lauterpacht on British foreign policy, whose view was that States owed a "duty" to recognise an entity as a State when it satisfied the legal criteria of statehood: H Lauterpacht, *Oppenheim's International Law* vol I (Longmans Green & Co, 7th Ed, 1948) at p 123. This rarity is a testament to the fact that the English courts understand recognition to be primarily an investigation of fact.

24 The distinction between the two rationales is important because they bear upon the issue of whether the courts are permitted to determine the status of a foreign entity in the absence of an executive certificate. An adherent to the prerogative rationale would answer “no”, because he would say that the constitution vests the power to recognise States *exclusively* in the Crown such that the courts can *never* determine statehood. An adherent to the best-evidence rationale would answer “yes”, because the executive certificate is the best evidence of a foreign entity’s status, without which the court would simply move on to the next best evidence (that is, the evidence of the parties) to make an independent determination of the foreign entity’s status.<sup>53</sup> The oscillation of the English courts between these two rationales, as well as the outcome of this oscillation, suggests that the position in English common law on this issue is lamentably uncertain. Let us now demonstrate how the English courts have oscillated between these two rationales.

*(a) Oscillation between the two rationales*

25 The starting point of our analysis is *Taylor v Barclay*,<sup>54</sup> where Lord Shadwell of the Court of Chancery employed language which conveyed aspects of the prerogative rationale:<sup>55</sup>

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<sup>53</sup> A Lyons, “Judicial Application of International Law and the ‘Temporizing Certificate’ of the Executive” (1952) 29 BYBIL 227 at 259 compares this to the scenario in which a judge refers to a dictionary to find the meaning of a word:

If [a judge] consults a dictionary as to the meaning of a word of specialized application only to find that the dictionary does not give any, or any useful, definition, he does not complain of the useless of a rule that requires him to consult a book of reference. He accepts the fact that no assistance is to be obtained from that direction and applies himself to obtain what he wants from other sources.

<sup>54</sup> (1828) 57 ER 769.

<sup>55</sup> *Taylor v Barclay* (1828) 57 ER 769 at 772.

In consequence of the arguments in this case I have had communication with the Foreign Office, I am authorised to state that the Federal Republic of Central America has not been recognised as an independent Government by the Government of this country ... *sound policy requires that the Courts of the King should act in unison with the Government of the King.* [emphasis added]

26 This manner of speech was not followed by the Court of Appeal in *Mighell*. Kay LJ utilised language which leaned closer towards the best-evidence rationale:<sup>56</sup>

*The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognisance – that is to say, a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of Johore, and the means which the judge took of informing himself as to his status was by inquiry at the Colonial Office. In answer to that inquiry there came a letter from that office ... to the effect which has been stated. It was contended that that letter was not sufficient, and did not satisfactorily establish the status of the defendant as an independent sovereign. I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter.* [emphasis added]

27 The language of the best-evidence rationale continued in *Foster*, when Farwell J of the Chancery Division remarked that:<sup>57</sup>

[I]f the Court has judicial knowledge of a fact, that is judicial knowledge without argument, and when once it is stated that it has that knowledge there is an end of it; and when that knowledge is obtained by information direct from the Crown, then it is an

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<sup>56</sup> *Mighell v Sultan of Johore* [1894] 1 QB 149 at 161–162.

<sup>57</sup> *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811 at 813–814.

*a fortiori* case. *It is still more a knowledge of facts* that cannot be disputed. [emphasis added]

28 However, Farwell J also employed language of the prerogative rationale, paving the way for judicial conflation between the two rationales:<sup>58</sup>

*Sound policy appears to me to require that I should act in unison with the Government* on such a point as that. Assume that the Foreign Office have already satisfied themselves that the territory in question is within the dominion of Morocco, and have applied to the Sultan of Morocco for redress in any given matter, it would surely be improper that I, sitting here as a judge of the High Court, should, in the face of that act of Her Majesty, hold as a matter of fact that the territory in question was not within the dominion of the Sultan of Morocco. *I should be contravening the act of Her Majesty acting as a Sovereign* in a matter which is within the cognizance of Her Majesty's Foreign Office. [emphasis added]

29 This confusion reappears in *The Gargara*,<sup>59</sup> when the Court of Appeal approved the passage of *Mighell v Sultan of Johore* quoted above but also impliedly conveyed its support for the prerogative rationale:<sup>60</sup>

Reading these deliberate statements of the Law Officers of the Crown, as expressing the attitude of the Government towards this Esthonian National Council, I cannot but feel that *if the Court claimed to exercise, and did exercise, jurisdiction in respect of such a dispute as arises in this action*, they would not be acting in accordance with what was pointed out in *The Parlement Belge* as being the principle of international comity, and that *there would be a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take*. [emphasis added]

30 In the subsequent case of *Duff Development*, three of the five Law Lords joined the chorus of advocating the prerogative rationale.

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<sup>58</sup> *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811 at 814–815.

<sup>59</sup> [1919] P 95.

<sup>60</sup> *The Gargara* [1919] P 95 at 104.

- (a) Lord Dunedin:<sup>61</sup> “[T]he home sovereign has in him the only power and right of recognition. If our sovereign recognises and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the Courts of our own sovereign to proceed upon an examination of that person’s supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded?” [emphasis added]
- (b) Viscount Cave:<sup>62</sup> “[The reply of the Secretary of State shows clearly that ... [the British] Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. *If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise*, and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.” [emphasis added]
- (c) Lord Carson:<sup>63</sup> “I agree with your Lordships that the Courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown ... Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion ... And, in truth, *it is the recognition of the status of the Government which must be the main element to determine this question*; the only proper evidence of which can be supplied by the officer representing the Crown.” [emphasis added]

31 By contrast, the general tenor of Viscount Finlay’s judgment suggested that he was a supporter of the best-evidence rationale:<sup>64</sup>

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<sup>61</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 820.

<sup>62</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 808–809.

<sup>63</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 830–831.

<sup>64</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 813. It may be argued that the line “Such information is not in the nature of

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In all matters of which the Court takes judicial cognizance *the Court may have recourse to any proper source of information. It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government*, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance. [emphasis added]

32 The last Law Lord, Lord Sumner, also endorsed the best-evidence rationale, as may be seen in his initial comments on this matter:<sup>65</sup>

The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the Courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. *I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf.* [emphasis added]

33 However, when Lord Sumner began to explain why a statement from the executive was the best evidence, he inadvertently used language which aligned more closely with the prerogative rationale:<sup>66</sup>

*It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from*

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evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance” could be interpreted as a statement of support for the prerogative rationale. However, our view is that context is important, and when the stated line is read in the context of the preceding lines, the irresistible interpretation is that the line coheres with the best-evidence rationale.

<sup>65</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 823–824.

<sup>66</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 824.

*time to time the status with which foreign powers are to be deemed to be invested.* This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. [emphasis added]

34 Ultimately, however, Lord Sumner returned to dicta which inclined towards the best-evidence rationale:<sup>67</sup>

*I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best,* subject, of course, to the presumption that, in the case of a new organization, which has de facto broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change. [emphasis added]

35 The final episode in our analysis is *The Arantzazu Mendi*,<sup>68</sup> which was also decided by the House of Lords. The composition of the panel of Law Lords in this case was totally different from the composition in *Duff Development*. The lead judgment was delivered by Lord Atkin, who took aim at the views of Lord Sumner. This placed Lord Atkin firmly within the pro-prerogative rationale camp.<sup>69</sup>

I pause here to say that not only is [writing to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign State] the correct procedure, but that *it is the only procedure* by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the judgments in this House in the Kelantan case. *With great respect I do not accept the opinion implied in the speech*

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<sup>67</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 825.

<sup>68</sup> [1939] AC 256.

<sup>69</sup> *The Arantzazu Mendi* [1939] AC 256 at 264.

*of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone. [emphasis added]*

36 The language of Lord Wright's judgment in the same case also inclined towards the prerogative rationale:<sup>70</sup>

The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, *which is the organ of His Majesty's Government for this purpose in a matter of this nature*. Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law. [emphasis added]

(b) *Legacy of the oscillation*

37 Since *The Arantzazu Mendi*, the English courts have leaned towards the prerogative rationale. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*,<sup>71</sup> the House of Lords asserted that "Her Majesty's Government has never given up the right to inform the courts as to its recognition or non-recognition of states, and the public policy need for the courts to follow that information, spoken to by Lord Atkin and others, remains."<sup>72</sup> In *Belhaj v Straw*,<sup>73</sup> the Supreme Court proclaimed *obiter dicta* that the constitutional separation of powers, which assigned the conduct of foreign affairs to the executive, was "why the court does not conduct its own examination of the sovereign status of a foreign state or government but treats the Secretary of State's certificate as

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<sup>70</sup> *The Arantzazu Mendi* [1939] AC 256 at 267–268.

<sup>71</sup> [2002] UKHL 19.

<sup>72</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 at [349].

<sup>73</sup> [2017] UKSC 3.

conclusive”.<sup>74</sup> The existence of a prerogative power to recognise States is widely acknowledged by the academic community in England<sup>75</sup> as well as by the political branches of the UK government.<sup>76</sup>

38 At the same time, the English courts have never definitively decided on the question of whether the English courts are permitted to determine questions of statehood in the absence of an executive

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<sup>74</sup> *Belhaj v Straw* [2017] UKSC 3 at [225]. The prerogative rationale has led the English courts to insist that the judiciary must “take [any obscurities in the expressions of the executive] as they stand” and must “resolve [cases of doubt] in the only way they know, which is to look at the question and then construe the answer given”: *Gur Corporation v Trust Bank of Africa* [1987] QB 599 at 625. The prerogative rationale has even led the English courts to suggest that, in the event there is no or insufficient evidence of the view of the executive, the Court should adjourn until it can be ascertained: *R (on the application of Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616 at [14].

<sup>75</sup> See H Barnett, *Constitutional and Administrative Law* (Routledge, 12th Ed, 2017) at p 112: “The recognition of foreign states is within the prerogative of the Crown.” See also R Brazier, “Constitutional Reform and the Crown” in *The Nature of the Crown: A Legal and Political Analysis* (M Sunkin & S Payne eds) (Oxford University Press, 1999) at p 353: “Routine legal and diplomatic matters are conducted by the Foreign and Commonwealth Office on behalf of the Crown. The recognition of a country as an independent State is effected under the prerogative.”

<sup>76</sup> Between November 2007 and May 2008, the UK government conducted a survey across 64 government departments and agencies, asking them to identify prerogative powers used to perform executive functions. The results of the survey were published in Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (October 2009). “Recognition of states” was identified by the participants as one such prerogative power. See also Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 2003–04, 422) para 9(b): “The principal royal prerogative, or Ministerial executive, powers exercised by Ministers include the following. ... The conduct of diplomacy, including the recognition of states, the relations (if any) between the United Kingdom and particular Governments, and the appointment of ambassadors and High Commissioners.”

certificate. The Judicial Committee of the Privy Council has recognised the unsettled nature of this issue in *Sultan of Johore v Abubakar Tunku Aris Bendahar*.<sup>77</sup> Many academics have also taken the view that the English courts are allowed to decide questions of statehood in the absence of an executive certificate.<sup>78</sup> So what we have today in England

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<sup>77</sup> [1952] AC 318. However, at 340–341, their Lordships decided that it was unnecessary to decide the matter, because the executive had provided a clear certificate confirming its recognition of the Sultan of Johor as an independent sovereign: “[Their Lordships can] proceed on the admitted basis that the appellant was recognized by His Majesty’s Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status. This renders it unnecessary to decide in this appeal a point on which some difference of opinion appears to be expressed in the speeches of the majority in *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, namely, whether the status enjoyed by a foreign sovereign in a British court can be established, in case of doubt, only by certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on ‘secondary information’ of another kind.”

<sup>78</sup> H Lauterpacht, *Oppenheim’s International Law* vol II (Longmans Green & Co, 7th Ed, 1948) at p 685. See also H Lauterpacht, “The Form of Foreign Office Certificates” (1939) 20 BYBIL 125 at 127: “When, as occasionally happens, the statement of the Foreign Office lacks clarity on account of the novelty or the complexity of the facts which it is requested to certify, the Court is presumed to have the power – and the duty – to interpret the certificate in accordance with the principles of International Law applicable to the situation.” A Lyons, “Judicial Application of International Law and the ‘Temporizing Certificate’ of the Executive” (1952) 29 BYBIL 227 at p 259–260: “in the words of Lord Sumner in the [*Duff Development v Kelantan* Case, ‘if the Crown declines’ – or, one may add, is unable – ‘to answer the inquiry ... the Court might be entitled to accept secondary evidence in default of the best.’ It is indeed submitted that the court is, not ‘might be’, entitled to see such evidence aliunde.” C Warbrick, “Executive Certificates in Foreign Affairs: Prospects for Review and Control” (1986) 35(1) ICLQ 138 at 148: “the executive itself may decline to issue a certificate, even on a question within its undoubted competence. It does not seem likely that the Foreign Office can be compelled to issue a  
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is a muddled state of affairs that is devoid of legal principle.<sup>79</sup> On the one hand, the courts, government officials and academics in England acknowledge the existence of the prerogative power to recognise States. On the other hand, academics contend that the English courts are permitted to decide questions of statehood in the absence of an executive certificate. These viewpoints cannot be reconciled under the prerogative rationale, because it insists that the task of recognition falls *exclusively* within the province of the Crown. Our conclusion is that English case law does not provide a settled answer to the question of whether the courts are permitted to decide questions of statehood in the absence of an executive certificate as a matter of common law.

#### IV. Transforming the law of statehood

39 Given the jumbled state of English case law, we submit that a set of principles have emerged under customary international law in relation to statehood which the English courts ought to transform into English common law in accordance with the doctrine of judicial transformation for the purposes of determining the statuses of foreign entities in the absence of an executive certificate.<sup>80</sup> First, we demonstrate that

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certificate. The result is to leave the court to decide the question for itself.” C McLachlan, *Foreign Relations Law* (Oxford University Press, 2014) at p 390: “The executive retains the power to recognise or to decline to recognise, a foreign state. If it chooses to do so, and to set forth its position by certificate expressed in unequivocal terms, the courts are bound to give it conclusive effect. But, if no such certificate is issued, or if the certificate is issued in equivocal form, the court may still proceed itself to determine whether the relevant entity is or is not a state.”

<sup>79</sup> As E Wilmshurst, “Executive Certificates in Foreign Affairs: The United Kingdom” (1986) 35 ICLQ 157 at 158 observes: “the doctrine of the executive certificate in the field of foreign affairs developed only gradually and without clear principles or an agreed rationale”.

<sup>80</sup> Warbrick has made a similar plea in C Warbrick, “The New British Policy on Recognition of Governments” (1981) 30(3) ICLQ 568 at 577 and 581:

If statehood be a question of international law, then [a conclusion on statehood] might fall outside the confines of a certificate restricted to

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statehood is a question of (international) law as opposed to fact. Second, we set out the English framework for the reception of customary international law into English common law. Finally, we apply this framework to show that it is appropriate for the English courts to incorporate the principles of statehood under customary international law into the common law in England for the purposes of determining State immunity.

### **A. Statehood: A question of law not fact**

40 The conventional understanding among English judges and academics is that the executive is only permitted to certify facts. It is not permitted to certify points of law. Mann observes that the “facts, circumstances and events which lie at the root of foreign affairs and their conduct by the Executive ... are facts which are peculiarly within the cognisance of the Executive ... [which] can be proved only in a special manner, namely by a certificate issued by the Foreign and Commonwealth Office”.<sup>81</sup> Lyons avers that the general practice of the English courts has been “to accept as conclusive, statements made to them by the Executive as to the existence of certain facts of an international law nature”.<sup>82</sup> Wilmshurst affirms that “it is generally correct to say that the Foreign and Commonwealth Office certifies as to

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matters of fact ... There are [authorities] from other jurisdictions which suggest that the approach of the English courts may not be entirely satisfactory. These cases base themselves on the premise that sovereign immunity is a matter of international law, that as a matter of international law, a de facto government is entitled to immunity (and, it may be further argued, that as a matter of international law, statehood is a question of law independent of recognition). Accordingly, a municipal court ought to decide the matter of sovereign immunity according to the international legal status of the defendant in so far as its own constitutional law allows it to do so.

<sup>81</sup> F Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986) at p 23.

<sup>82</sup> A Lyons, “The Conclusiveness of the Foreign Office Certificate” (1946) 23 BYBIL 240 at 240.

facts, not law”.<sup>83</sup> The English courts accept this distinction, as a passage in Lord Upjohn’s judgment in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*<sup>84</sup> reveals:<sup>85</sup>

It has never been the practice of Her Majesty’s Secretaries of State to express any views upon the law. While they constantly express views on recognition in answer to questions submitted to them by the courts, the legal consequences that flow from recognition is a matter which is always left to these courts.

41 The UK Secretary of State for Foreign affairs acknowledges this distinction. In *Bogusławski v Gdynia-Ameryka Linie Zeglugowe Spółka Akcyjna*,<sup>86</sup> the Secretary of State certified that “as from midnight of July 5/6 [1945] His Majesty’s Government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London being the government of Poland”.<sup>87</sup> The issue was whether recognition of the new Polish government had retroactive effect. The Secretary of State refused to express his view on this in the certificate because, in his view, it was not a matter for the executive to decide: “I am advised that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts.”<sup>88</sup>

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<sup>83</sup> E Wilmshurst, “Executive Certificates in Foreign Affairs: The United Kingdom” (1986) 35 ICLQ 157 at 160.

<sup>84</sup> [1967] 1 AC 853.

<sup>85</sup> *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 950.

<sup>86</sup> [1953] AC 11.

<sup>87</sup> *Bogusławski v Gdynia-Ameryka Linie Zeglugowe Spółka Akcyjna* [1953] AC 11 at 17.

<sup>88</sup> *Bogusławski v Gdynia-Ameryka Linie Zeglugowe Spółka Akcyjna* [1953] AC 11 at 18. See also *Civil Air Transport Incorporated v Central Air Transport Corp* [1953] AC 70, where the Foreign Office also replied that “I am advised that the effect of recognition by HM Government as stated in answer to questions 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of the evidence before it.” See also *The Arantzazu Mendi* [1938] P 233  
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42 The traditional assumption among English judges and academics in the past was that statehood is one such question of fact. Brierly contends that “[w]hether or not a new state has actually begun to exist is a pure question of fact”.<sup>89</sup> Oppenheim opines that “[t]he formation of a new State is ... a matter of fact, and not of law”.<sup>90</sup> Henderson adopts the view that “[t]here are many facts which the Court will notice judicially, and of which it is therefore unnecessary to give any evidence. The following are examples: – ... the existence of a foreign state recognised by the British government; but not otherwise”.<sup>91</sup> Farwell J in *Foster* referred to the question of whether the tribes of Suss were an independent State as a question of fact.<sup>92</sup> Lord Sumner in *Duff Development* likened the status of “foreign communities and the identity of the high personages who are the chiefs of foreign states” to “any other issue of fact raised before them”.<sup>93</sup> Lord Atkin in *The Arantzazu Mendi* described the executive certificate as “the only procedure by which the Court can inform itself of the material *fact* whether the party

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at 242–243. Bucknill J requested for an executive certificate on whether the Nationalist Government of Spain was recognised by the UK government as a foreign sovereign State. After stating among other things that the UK government recognised (1) Spain as a foreign sovereign State, (2) the Government of the Spanish Republic as the *de jure* Government of Spain, and (3) the Nationalist Government as a government which exercised *de facto* administrative control over the larger portion of Spain, the UK Foreign Office concluded: “The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised.”

<sup>89</sup> J Brierly, *The Law of Nations* (Clarendon Press, 6th Ed, 1963) at p 137.

<sup>90</sup> L Oppenheim, *International Law: A Treatise* vol I (Longmans Green & Co, 1st Ed, 1905) at p 264.

<sup>91</sup> J Henderson, *Roscoe's Digest of the Law of Evidence on the Trial of Civil Actions* (Steven & Sons, 19th Ed, 1922) at p 72.

<sup>92</sup> *Foster v Globe Venture Syndicate Limited* [1900] 1 Ch 811 at 813–814.

<sup>93</sup> *Duff Development v Government of Kelantan* [1924] AC 797 at 824. See also Lord Carson's judgment at 830.

sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State” [emphasis added].<sup>94</sup>

43 We cannot fault the English judges and academics for making this assumption in the past. The majority of States in the late 19th century were so widely recognised that their existence was virtually unimpeachable. There used to be very few entities whose status was controversial. But the 20th century came to pass and the world entered into a period of rapid decolonisation. Borderline cases surfaced and challenged the assumption that statehood was a self-evident matter of fact. Legal quandaries ensued and prompted the academic community to define the State.<sup>95</sup> It was not entirely clear then “whether what was being described in the process was a sociological fact or a legal category”.<sup>96</sup> However, over time, a working definition of the State emerged under the invisible hand of customary international law. What we have today is a set of legal criteria that governs statehood, as evidenced by Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States as well as the writings of leading jurists.<sup>97</sup> If an

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<sup>94</sup> *The Arantzazu Mendi* [1939] AC 256 at 264.

<sup>95</sup> See for instance L Oppenheim, *International Law: A Treatise* vol I (Longmans Green & Co, 1st Ed, 1905) at pp 100–101, who proposed keywords such as “people”, “country” and “Sovereign Government”.

<sup>96</sup> M Craven, “Statehood, Self-determination and Recognition” (M Evans ed) *International Law* (Oxford University Press, 4th Ed, 2014) at pp 214–215.

<sup>97</sup> J Crawford, *Brownlie’s Principles of International Law* (Oxford University Press, 8th Ed, 2012) at p 127:

It is sometimes said that statehood is a question of fact, meaning that it is not a question of law. However, as lawyers are usually asking if an entity is a state with a specific legal claim or function in view, it is pointless to confuse issues of law with the difficulties of applying the legal principles to the facts and of discovering the key facts in the first place. The criteria of statehood are laid down by the law.

Moreover, these criteria do not include a criterion of recognition by other States, consistent with the declaratory theory of recognition. The weight of academic authority and State practice supports this conclusion: see S Talmon, “The Constitutive Theory versus the Declaratory Theory of

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entity satisfies those criteria, it attains statehood by virtue of international law. Statehood in this sense is a legal status<sup>98</sup> conferred by international law, much like how criminality is a legal status conferred by national criminal laws.<sup>99</sup> And if the State owes its existence to a system of law, “that existence is not, or not only, a ‘fact’”.<sup>100</sup> Hence, the determination of statehood, through the identification and application of the criteria of statehood under customary international law, must be regarded as a question of law, and can no longer be accurately described as a question of fact.

44 This is not to deny the involvement of facts in the making of that determination. While the *identification* of the criteria of statehood is a pure question of law, the *application* of those criteria to the facts of the case is a mixed question of law and fact.<sup>101</sup> For instance, the legal criterion of population requires there to be a sufficiently “permanent”<sup>102</sup> population. The legal criterion of “government” requires there to be a

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Recognition: *Tertium Non Datur?*” (2005) 75(1) BYBIL 101 and T Chen, *The International Law of Recognition* (Steven & Sons Limited, 1951).

<sup>98</sup> J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd Ed, 2006) at p 5: “A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.”

<sup>99</sup> M Craven, “Statehood, Self-determination and Recognition” in *International Law* (M Evans ed) (Oxford University Press, 4th Ed, 2014) at p 215.

<sup>100</sup> J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd Ed, 2006) at p 5.

<sup>101</sup> See H Lauterpacht, “The Form of Foreign Office Certificates” (1939) 20 BYBIL 125 at 127: “Whether a community possesses a sufficient degree – and permanence – of independence so as to acquire the status of a sovereign community in international law is a mixed question of fact and law”; see also C McLachlan, *Foreign Relations Law* (Oxford University Press, 2014) at p 388: “Statehood is not in any event properly a question of fact. It is a question of public international law, only partly answered by reference to factual criteria of effective independence.”

<sup>102</sup> J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd Ed, 2006) at p 52.

sufficiently “effective”<sup>103</sup> government. These criteria impose open-textured standards that may be interpreted in different ways. In easy cases, the fulfilment (or non-fulfilment) of these criteria is so glaringly obvious that it is taken to be a “fact”. But in hard cases, it will be less obvious whether these criteria have been fulfilled, and an entity that wishes to defend its statehood will need to give reasons why it considers these criteria to have been satisfied and draw comparisons with other cases where appropriate to support its position. In other words, the entity must engage in *legal* reasoning to substantiate its viewpoint. So the application of the criteria of statehood is a mixed question of law and fact in that in easy cases, it admits a clear answer but in hard cases the answer will require a more thorough elucidation. The ultimate point remains that statehood must be regarded as a question of law, because the criteria of statehood derive from customary international law.

***B. English framework: Judicial transformation, not automatic incorporation***

45 The orthodox view of the English courts and the academic community is that customary international law *automatically* forms part of English law without the need for legislative intervention. As early as the 1760s, Blackstone wrote: “the law of nations (whenever any question arises which is proper the object of its jurisdiction) is here adopted in its full extent by the common law and is held to be a part of the law of the land”.<sup>104</sup> This was followed by Lord Langdale MR in *Duke v Brunswick v King of Hanover*, when he expressed the view that “the law of nations ... when ascertained, is to be deemed part of the common law of England”.<sup>105</sup> Likewise, in *West Rand Central Gold Mining Co*, Lord Alverstone CJ opined that “whatever has receive the common consent of civilized nations must have received the assent of our

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<sup>103</sup> J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd Ed, 2006) at p 55.

<sup>104</sup> W Blackstone, *Commentaries on the Laws of England* Book IV (Oxford University Press, 2016) at p 44.

<sup>105</sup> *Duke v Brunswick v King of Hanover* (1844) 6 Beav 1 at 45.

country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant".<sup>106</sup> More recently, in *Trendtex Trading v Central Bank of Nigeria*<sup>107</sup> ("*Trendtex*"), Lord Denning MR declared that "the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament".<sup>108</sup> So there is at first glance a considerable body of authority to support the view that English law adheres to a doctrine of *automatic incorporation*.

46 However, in a seminal article written by O'Keefe in 2009,<sup>109</sup> O'Keefe explains that there is a conceptual difficulty in the doctrine of automatic incorporation. International legal norms impose obligations on one *State* for the benefit of another. They do not impose obligations on the *organs* of a State, such as the Crown or Parliament or the courts.<sup>110</sup> As a consequence, "a rule to the effect that customary international law is automatically part of the common law is of no help to a claimant seeking to argue that the Crown or the courts are compelled to adopt a particular course of action, since the only entity bound by the putative

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<sup>106</sup> *West Rand Central Gold Mining Co* (1905) 2 KB 391 at 406–407.

<sup>107</sup> [1977] QB 529.

<sup>108</sup> *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529 at 579. Note however that that reservations have been expressed by English judges with regard to the validity of the doctrine of automatic incorporation: see *R v Jones (Margaret)* [2007] 1 AC 136 at [11], *per* Lord Bingham of Cornhill.

<sup>109</sup> R O'Keefe, "The Doctrine of Incorporation Revisited" (2009) 79(1) BYBIL 7.

<sup>110</sup> *R v Lyons* [2003] 1 AC 976 at [40]:

International law does not normally take account of the internal distribution of powers within a state. It is the duty of the state to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers.

common-law rule (and this only for the sake of argument, since the statement speaks to its own impossibility) is the United Kingdom”.<sup>111</sup> O’Keefe uses the example of State immunity to illustrate his point:<sup>112</sup>

In the immunity cases, the rule of customary international law in question – that each State is obliged to ensure that the organs, individual officials and property of a foreign State are immune from the jurisdiction of its courts – is a rule binding on the United Kingdom, not on the English courts. As such, if we were to give effect to a rule which says that customary international law is automatically part of the common law, the result would simply be (and this is impossible) that the United Kingdom was bound by an English common-law rule to the same effect as the customary international rule. *To posit that the English courts themselves are bound by this common-law rule would amount to holding X to account for the breach by Y of an obligation owed by Y.* So in the immunity cases, where the latter was indeed posited, more must be going on than meets the eye. [emphasis added]

47 O’Keefe argues that the English courts do not adhere to a doctrine of *automatic incorporation* in reality. They adhere to a doctrine of *judicial transformation*, pursuant to which a rule of customary international law is incorporated into English common law *only if* the courts consider it to be an appropriate occasion to “coin in near enough [an image of the customary international legal rule in question] a rule of common law applicable in an English court”.<sup>113</sup> As O’Keefe explains, “what is happening in the immunity cases is that the courts are taking a rule of customary international law binding on the United Kingdom, but at the same time a rule which, in terms of its structural logic, lends itself readily to application by the English courts, and turning it into a rule of

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<sup>111</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 57.

<sup>112</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 57–58.

<sup>113</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 59.

common law directed towards and binding on those courts”.<sup>114</sup> The result of this is that the reality of incorporation is not mechanical. Rather, “it involves discernment of what is appropriate and what is not”.<sup>115</sup> Its outcome in a given case depends on “the court’s discriminating assessment of a range of factors born out by the case-law”,<sup>116</sup> including the following:<sup>117</sup>

- (a) whether the customary international law rule is structurally amenable to domestic application (“structural amenability hurdle”);
- (b) whether crafting a common-law rule from the customary international law rule would run counter to an overriding constitutional principle (“constitutional principle hurdle”); and
- (c) whether crafting a common-law rule from the customary international law rule would contradict a basic principle or rule of the common law (“common law principle hurdle”).

48 For O’Keefe, the doctrine of judicial transformation explains why there are so few English cases which have successfully transformed the rules of customary international law. The majority of customary international legal rules did not satisfy all three hurdles. Only the rules of State immunity<sup>118</sup> and rights of angary<sup>119</sup> surmounted these hurdles.

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<sup>114</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 56–58.

<sup>115</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 61.

<sup>116</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 62.

<sup>117</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 62. A similar set of criteria is endorsed by P Sales & J Clement, “International Law in Domestic Courts: The Developing Framework” (2008) 124 LQR 388 at 419.

<sup>118</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 23.

<sup>119</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 24. The two cases that affirmed the transformation of the right of angary under customary international law into English common law are *Commercial and Estates Co of Egypt v Ball* [1920] 36 Times LR 526 and  
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Nevertheless, regardless of the statistical difficulty of overcoming these hurdles, our contention remains that the law of statehood is able to cross three hurdles and should therefore be transformed into the English domestic sphere. In the following passages, we consider the application of each hurdle in turn.

### **C. Application of English framework to law of statehood**

#### *(a) Structural amenability hurdle*

49 O’Keefe explains that the general rule is that customary legal rules relating to *individual-State* relations are amenable to domestic application while customary legal rules regarding *inter-State* relations are not.<sup>120</sup> However, State immunity is an exception to this rule, as although it concerns inter-State relations, “it is a natural progression to say that a foreign State is entitled under the common law to see that its various organs and officials and its property enjoy immunity from the jurisdiction of the English courts.”<sup>121</sup> Thus, in O’Keefe’s view, it was

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*Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271. The right of angary refers to the “right of a belligerent Sovereign to take possession of the property of neutrals so found within his territory or territory occupied by his forces for the purposes of warfare”: *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271 at 293.

<sup>120</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7, cites *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] QB 684 (“*Thakrar*”) as authority for this distinction. In *Thakrar*, the Court of Appeal rejected the argument that “International law which is part of UK law says that as a British national, if he is expelled from the land where he is living, he is entitled as of right to come into the UK”. Lord Denning explains (at 702) that this rule, if it existed, is one that governs relations between States: “the rule of international law is only a rule as between two states. It is not a rule as between an individual and a state. The expelling state – if it had a good case – might call upon the home state to receive the person whom it expelled. But the individual could not pray the rule in aid for his own benefit”.

<sup>121</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 65.

acceptable for the Court of Appeal in *Trendtex* to examine whether public international law had moved from the absolute doctrine of State immunity to the restrictive doctrine, so as to disentitle the Central Bank of Nigeria to State immunity in respect of the impugned commercial transaction.<sup>122</sup>

50 In the context of the law of statehood, we argue that it feels odd to categorise the law of statehood as either “inter-State” or “individual-State”, because the law of statehood does not impose obligations on one state for the benefit of another but merely sets out the legal criteria that an entity must satisfy in order to be a State.<sup>123</sup> This being so, the better view is that the category to which the law of statehood belongs should depend on what the judge is determining statehood *for*. So, if the judge is determining the legal status of an entity for the purpose of ascertaining whether or not to grant it State immunity, the law of statehood should follow the law of State immunity,<sup>124</sup> and fall within the exception to the rule that customary law rules relating to inter-State

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<sup>122</sup> *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529 at 579. This was confirmed by the Privy Council in *The Philippine Admiral* [1977] AC 373.

<sup>123</sup> There is only one academic who has propounded that a State has the “duty” to recognise another foreign entity if that entity objectively fulfils the criteria for statehood, namely H Lauterpacht, *Oppenheim’s International Law* vol I (Longmans Green & Co, 7th Ed, 1948) at pp 122–123: “[The] principle ... is that certain conditions of fact, not in themselves inconsistent with International Law impose the duty of and confer the right of recognition”. However, J Crawford, *Brownlie’s Principles of International Law* (Oxford University Press, 8th Ed, 2012) at p 22 retorts that “State practice demonstrates neither acceptance of a duty to recognize, nor a consistent constitutive view of recognition.” This has recently been confirmed by C Warbrick, “British Policy and the National Transitional Council of Libya” (2012) 61(1) ICLQ 247 at 256: “there [is] no duty to recognize a foreign authority, no matter how strong its own domestic position”.

<sup>124</sup> P Allott, “The Courts and the Executive: Four House of Lords Decisions” (1977) 36(2) CLJ 255 at 273: “It is not merely, in United Kingdom terms, the exercise of a discretionary executive power; it is a formal act taking effect in relations between states.”

relations are not amenable to domestic application. The result would be that the first hurdle of structural amenability is surpassed in so far as the purpose of determining statehood is to consider whether the entity concerned is entitled to State immunity.

*(b) Constitutional principle hurdle*

51 O’Keefe explains that the transformation of the customary international legal rule in question should not offend a constitutional principle, such as the supremacy of Parliament or the separation of powers.<sup>125</sup> A critic of our position may rely on this statement to argue that transforming the law of statehood into the English domestic sphere would conflict with the prerogative power of the Crown to recognise States. We wish to say a few words on the nature of the royal prerogative before we respond to this argument.

52 The royal prerogative refers to the residue of legal powers which remain vested in the Crown.<sup>126</sup> The task for the English courts is to

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<sup>125</sup> R O’Keefe, “The Doctrine of Incorporation Revisited” (2009) 79(1) BYBIL 7 at 45.

<sup>126</sup> See *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 at 633, [47]: “The Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation.” *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 101: “The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.” A Dicey, *The Law of the Constitution* (Oxford University Press, 2013) at p 189: “The prerogative is the name for the remaining portion of the Crown’s original authority, and is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers.” This definition has been criticised by W Blackstone, *Commentaries on the Laws of England*, Book I (Oxford University Press, 2016) at p 155: “It signifies, in its etymology (from prae and rogo) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can  
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“inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent”.<sup>127</sup> The approach of the English courts to identifying the existence and scope of the prerogative powers is “a historical one: how was it used in former times and how has it been used in modern times?”<sup>128</sup> This is often an extremely difficult task,<sup>129</sup> because the case law on the prerogative powers is usually sparse<sup>130</sup> and

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only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects”; Lord Parmoor in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 571–572: “A right common both to the Crown and all subjects is not in the strict sense a prerogative right of the Crown. Royal Prerogative implies a privilege in the Crown of a special and exclusive character.” W Wade & C Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014): “‘Prerogative’ power is, properly speaking, legal power which appertains to the Crown but not its subjects.” CfS Payne, “The Royal Prerogative” in *The Nature of the Crown: A Legal and Political Analysis* (M Sunkin & S Payne eds) (Oxford University Press, 1999) at pp 85–86 and Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 105.

<sup>127</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 398.

<sup>128</sup> *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 101. See also the judgment of Lord Bingham of Cornhill in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [69]: “When the existence or effect of the royal prerogative is in question the courts must conduct an historical inquiry to ascertain whether there is any precedent for the exercise of the power in the given circumstances.”

<sup>129</sup> As Lord Reid admitted in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 99: “It is not easy to discover and decide the law regarding the royal prerogative and the consequences of its exercise.”

<sup>130</sup> The evidentiary implications of scarcity are also unclear. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 at 58, Nourse LJ remarked that “the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does”.

“*obiter dicta* and the views of institutional writers and text writers are not always very helpful”.<sup>131</sup> But there is another more fundamental reason for the difficulty of this task, which is that, in former times, “there was seldom a clear-cut view of the constitutional position”<sup>132</sup> of the authority of the Crown. The “line between what the king could do without a parliament, and what he could only do with the aid of parliament, was only drawn very gradually, and it fluctuated from time to time.”<sup>133</sup> So, not only do we lack the tools to identify the original authority of the Crown, we also cannot even be sure that there is a fixed scope of original authority to identify in the first place.

53 The same difficulties arise when we attempt to verify the existence of the prerogative power to recognise States. The case law and academic literature on this prerogative power was relatively sparse prior to the 1800s. From the 1800s, the English courts oscillated between the best-evidence rationale and the prerogative rationale as we have seen above, causing confusion over which rationale was to be preferred. And whenever they inclined towards the prerogative rationale, they omitted to provide reasons for their belief in the existence of a prerogative power to recognise States. So there is not a lot of authoritative material to rely on to determine the existence of the prerogative power to recognise States.<sup>134</sup> One may legitimately argue that the origins of this prerogative power are dubious.

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<sup>131</sup> *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 99.

<sup>132</sup> *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 99.

<sup>133</sup> F Maitland, *The Constitutional History of England* (Cambridge University Press, 1919) at p 196. See also S Payne, “The Royal Prerogative” in *The Nature of the Crown: A Legal and Political Analysis* (M Sunkin & S Payne eds) (Oxford University Press, 1999) at p 101: “the transformation of the political context in which the old cases are to be read has been so gradual, and is still continuing, as to make it difficult to say that the cases are irrelevant or to provide an arbitrary cut off point prior to which such cases lose their value.”

<sup>134</sup> There may be authorities to suggest the existence of a general prerogative power to conduct foreign affairs: W Blackstone, *Commentaries on the Laws of England*, Book I (Oxford University Press, 2016) at pp 163–164;

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54 But if the existence of this prerogative power began as a legal myth, it has surely become an accepted legal fact since.<sup>135</sup> Most judges, government officials and academics in the UK acknowledge its existence today. As recently as 2014, the UK parliament voted to urge the executive to recognise Palestine, impliedly acknowledging the prerogative power to recognise States.<sup>136</sup> To refute its existence would upset the constitutional peace that the UK enjoys today, so we do not wish to contest the existence of this prerogative power in its entirety.

55 Instead, our response is that the prerogative power to recognise States is not an *exclusive* one. By this we simply mean that, if the executive fails to exercise the prerogative power on behalf of the Crown, the English courts are permitted to determine the status of the foreign

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J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth & Son, 1820) at pp 6 and 39; C Warbrick, "The New British Policy on Recognition of Governments" (1981) 30(3) ICLQ 568 at 576; F Vallat, *International Law and the Practitioner* (Manchester University Press, 1966) at pp 54–55; F Mann, "Judiciary and Executive in Foreign Affairs" (1943) 29 *Transactions of the Grotius Society* 143 at 152. But if this did not prevent the courts from determining and applying the rules of State immunity, why should the courts be precluded from applying the principles of statehood?

<sup>135</sup> One immediately recalls the words of Goldsworthy that "[l]aw is an unusual discipline, in that the truth of legal propositions is not independent of people's beliefs about them: indeed, it depends on whether enough of the right people believe them": J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) at p 5. Was Nourse LJ referring to a process of consolidation of judicial belief when he said the following in *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 at 56? "It has not at any stage in our history been practicable to identify all the prerogative powers of the Crown. It is only by a process of piecemeal decision over a period of centuries that particular powers are seen to exist or not to exist, as the case may be."

<sup>136</sup> O Wright, "Palestine vote: MPs take historic decision to recognise Palestinian state" *The Independent* (13 October 2014) <<http://ind.pn/1yvQ6ZK>> (accessed 25 July 2017).

entity. Our basis for this position is that, while the English judges and government officials have acknowledged the existence of the prerogative power to recognise States since *The Arantzazu Mendi*,<sup>137</sup> they have not reached a definite view on the *nature* of that prerogative power. Not one judge or government official in the UK has specifically opined that the prerogative power is exclusive. Indeed, the Judicial Committee of the Privy Council has recognised that the issue of the role of the English courts had not fully been disposed of.<sup>138</sup> Many academics have argued that the courts can determine questions of statehood in the absence of an executive certificate.<sup>139</sup> So there is insufficient evidence to support the claim that the prerogative power to recognise States is an exclusive one. On this footing, we argue that the importation of the principles of statehood into the English domestic sphere does not conflict with any constitutional principle, to the extent that the courts are only asked to apply those principles in the absence of an executive certificate.

56 It is appropriate to explain at this juncture the significance of an important political event in 1980. In that year, the UK executive declared the policy change that, although it would continue to recognise States in accordance with “*common international doctrine*”, it would no longer recognise the *governments* of States.<sup>140</sup> So if the scenario arose where a new regime came to power unconstitutionally, the UK executive said that its attitude “on the question whether [an entity] qualifies to be treated as a government will be left to be inferred from the nature of the dealings, if any, which [the UK executive] may have with it”.<sup>141</sup> Several years later, the case of *Republic of Somalia v Woodhouse* arose for decision, when the status of a Somalian interim government became a matter of dispute.<sup>142</sup> Hobhouse J, who presided over the case, held

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<sup>137</sup> [1939] AC 256.

<sup>138</sup> *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318.

<sup>139</sup> See the authorities in n 95 above.

<sup>140</sup> *Hansard*, HL, vol 408, Written Answers, cols 1121–1122, 28 April 1980.

<sup>141</sup> *Hansard*, HL, vol 409, Written Answers, col 1098, 23 May 1980.

<sup>142</sup> *Republic of Somalia v Woodhouse* [1993] QB 54.

that the court *must determine for itself* whether the interim government existed,<sup>143</sup> taking into account:<sup>144</sup>

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<sup>143</sup> This accords with the majority of judges and academics, which is that the policy change frees the courts from the views of the executive and enables the courts to decide the matter themselves: F Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986) at pp 43–44: “the new practice which requires a precise distinction between the recognition of States and the existence of governments and renders a very large number of earlier authorities (such as the relevant part of the famous case of *Luther v Sagor & Co*) obsolete presupposes that new regimes ‘are able of themselves to exercise effective control of the territory of the State concerned’, and it may be that on this question of fact the court may wish and be able to obtain information (as opposed to a certificate) from the Foreign and Commonwealth Office. But in most cases the fact should be a matter of notoriety so that judicial notice may be taken of them. Alternatively, they will have to be proved by evidence in the usual way.” C Warbrick, “The New British Policy on Recognition of Governments” (1981) 30(3) ICLQ 568 at 587: “[In the context of the State Immunity Act 1978], if the certificate does not answer the question whether a particular claimant is a government, then the courts may undertake their own inquiries and ought to apply the international law standard.” C McLachlan, *Foreign Relations Law* (Oxford University Press, 2014) at p 416: “The abandonment of a general policy of express acts of recognition of governments makes nonsense of the notion that the courts must nevertheless proceed to determine questions of representation by divining recognition from the nature of the executive’s diplomatic dealings. They may still receive an authoritative statement as to the nature of those dealings by way of an executive certificate, if one is provided (as in Fiji). But the function of such a certificate is now entirely different. It simply goes to one of the factors that contribute to a larger enquiry, namely the determination of whether there is an effective government in a position to represent the state. That is a question of law for the courts, which they must determine on the basis of all the available evidence.” However, note the minority view that the legal implications of this policy change are limited, in that the courts are still obliged to infer the executive’s attitude from the nature of its dealings with the foreign entity and take that attitude as conclusive: S Talmon, “Recognition of Governments: An Analysis of the New British Policy and  
*(continued on next page)*”

- (a) whether it is the constitutional government of the state;
- (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state;
- (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and
- (d) in marginal cases, the extent of international recognition that it has as the government of the state.

57 From our perspective, these events are consistent with the view that the 1980 policy change was not a *transfer* by the Crown of its prerogative power to recognise governments to the courts.<sup>145</sup> Rather, it was a *declaration* by the UK executive of its intention *not* to exercise its *non-exclusive* prerogative power to recognise governments. In other words, the courts were permitted to adjudicate the statuses of foreign governments, not because they were *given* the power to do so, but because that prerogative power was non-exclusive in the first place (which the UK executive had declared its intention not to exercise). The corollary of this, of course, would be that if the UK executive chose to abandon its policy and proceed to certify on the status of a foreign government, that certificate would be binding on the courts, because it would amount to an exercise of its extant prerogative power. But that is precisely what had happened in *British Arab Commercial Bank plc v The*

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Practice" (1992) 63 BYBIL 231; J Crawford, "Decisions of British Courts during 1985–86 involving Questions of Public or Private International Law" (1986) 57 BYBIL 405.

<sup>144</sup> *Republic of Somalia v Woodhouse* [1993] QB 54 at 68. The *Republic of Somalia* approach has been followed by Cresswell J in *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] CLC 501, the Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117 and by Lloyd Jones LJ in *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171.

<sup>145</sup> Which the UK government is not allowed to do anyway, because that would be tantamount to altering the common law by executive fiat: S Talmon, "Recognition of Governments: An Analysis of the New British Policy and Practice" (1992) 63 BYBIL 231 at 281.

*National Transitional Council of the State of Libya*,<sup>146</sup> when the UK executive broke with tradition and certified that it recognised the National Transitional Council as the sole government of Libya,<sup>147</sup> and Blair J held that the certificate was conclusive.<sup>148</sup> So in our view, the 1980 policy change, and the events following that change, is consistent with the view that the prerogative power to recognise governments is a *non-exclusive* one; and if this is the true nature of the prerogative power to recognise *governments*, it must also be the true nature of the prerogative power to recognise *States*.

(c) *Common law principle and further notes*

58 Finally, with regard to the common law hurdle, we submit that there are no applicable common law principles that might conflict with the transformation of the principles of statehood into the English domestic sphere for the specific purpose of determining the statuses of foreign entities in the absence of an executive certificate.

59 In the light of the above, there is nothing to prevent the English courts from importing the principles of statehood into the domestic sphere for the purposes of determining State immunity in the absence of an executive certificate. On the contrary, the English courts have every reason to transform the principles of statehood into the domestic sphere. On numerous occasions, the UK executive did not provide clear answers to the questions posed, because it did not feel it was in a position to provide the information requested, owing to the novel or complex nature of the facts involved.<sup>149</sup> A court that is prevented from

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<sup>146</sup> [2011] EWHC 2274 (Comm), followed by *Hassan Bouhadi v Abdulmagid Breish* [2016] EWHC 602 (Comm).

<sup>147</sup> *British Arab Commercial Bank plc v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) at [6].

<sup>148</sup> *British Arab Commercial Bank plc v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) at [25].

<sup>149</sup> A Lyons, "Judicial Application of International Law and the 'Temporizing Certificate' of the Executive" (1952) 29 BYBIL 227 at 228–229.

applying the law of statehood in these instances would only have two options at its disposal:

- (a) to adjourn the matter indefinitely, or
- (b) to attribute a position to the executive which the executive may not have ever adopted.

Neither option is desirable.

60 We end with a final caveat. The discussion above is limited to the English context and is not intended to extend to other common law countries. Our reason for drawing this limit is that countries may have different frameworks for the reception of customary international laws into the national sphere, and different constitutional approaches to foreign affairs generally, owing to the influence of local socio-political contexts. Nevertheless, if it happens that the approaches of these countries mirror the English approach to the reception of the rules of customary international law,<sup>150</sup> and to foreign affairs more generally, our preliminary view is that our discussion should logically apply to these countries as well, *mutatis mutandis*.<sup>151</sup>

## V. Conclusion

61 Our conclusions from the foregoing analysis are as follows.

- (a) The question that was posed at the beginning of this article was whether the courts of common law countries are permitted to break the silence of the executive and determine the status of

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<sup>150</sup> We note that the Singapore courts adhere to the doctrine of judicial transformation as well: *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [91]. This is also the case for the Australian courts: *Nulyarimma v Thompson* [1999] FCA 1192 at [23].

<sup>151</sup> In New Zealand, there are cases to suggest a growing willingness on the part of the New Zealand courts to transform the principles of statehood into the domestic sphere. See *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1 and *Controller and Auditor General v Davison (Winebox case)* [1996] 2 NZLR 278.

foreign entities for the purposes of State immunity in the absence of an executive certificate.

- (b) The research in this article shows that neither the State Immunity Acts of the various common law countries nor the case law in England have reached a settled view on this matter.
- (c) Accordingly, our proposition is that the question should be answered in the affirmative in the English context, because a set of principles have emerged under customary international law in relation to statehood which ought to be transposed by the English courts into the domestic sphere, in accordance with the doctrine of judicial transformation.

While our discussion is confined to the English context, we consider that the rational response for the courts of other common law countries would be for them to take the same approach suggested in this article, if they are bound to apply similar frameworks for the reception of customary international legal rules under their respective national laws.

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### Background to Essay 23

In 1991 and 1992, sitting as Judicial Commissioner in the High Court of Singapore, I decided a textbook case on the law of vendor and purchaser of real property (*Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375). Prior to completion of the sale and purchase, the house being sold was consumed by fire, and the question was whether the contract was still valid or had been frustrated. After my research on the subject, I concluded that the contract was not frustrated and found accordingly. The case went on appeal before the Court of Appeal, which overruled me on that point of law and held that the contract was indeed frustrated.

Several years later, I took a sabbatical from my then law firm to spend a semester teaching at the law faculty of the National University of Singapore. One tangible achievement of that sabbatical was an article I wrote on the case that I had decided, and which had been overruled. In between the time of the Court of Appeal decision and my sabbatical, a new decision had emerged on this topic in the Privy Council (see *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400). Being as objective as I could, I analysed the impact of the Privy Council case and compared the reasoning of the Privy Council with that adopted by the Court of Appeal.

The interesting question therefore was whether, if this point of law ever came before the Court of Appeal again, it would follow the original Court of Appeal decision or revise its views on the law in the light of the Privy Council decision. The general opinion in academic circles is that it is likely that the Privy Council's view will prevail. The authors of the third edition of *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 2009), the leading textbook on property law in Singapore, have expressed their views on the Privy Council's reasoning, which essentially followed the same line of analysis as in my judgment.

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## DOES COMPULSORY ACQUISITION FRUSTRATE A CONTRACT FOR THE SALE OF IMMOVABLE PROPERTY?

### *LIM KIM SOM REVISITED\**

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Michael HWANG SC<sup>†</sup>

When a contract for the sale of real property is entered into, what happens if, between the time of contract and completion, an official announcement is published for the compulsory acquisition of that property? The traditional view has been based largely on one English High Court case, *Hillingdon Estates Co Ltd v Stonefield Estates Co Ltd*, which held that compulsory acquisition in such circumstances did not affect the purchaser's obligation to complete the purchase. That view was rejected by the Singapore Court of Appeal in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*, which declared such a contract frustrated. However, the Privy Council has now expressly approved the reasoning in *Hillingdon* in *E Johnson & Co (Barbados) Ltd v NSR Ltd*. This paper analyses the three decisions and the developments in local case law after *Lim Kim Som*, and suggests how the courts may proceed to deal with this question in future.

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\* Thanks are due to Prof J D Davies for his helpful comments on an early draft. The query on the status of private *en-bloc* sales was suggested by Stephen Phua. I have also benefited from several discussions with Prof Andrew Phang, but the responsibility for all errors and omissions in the final product remain with the author.

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1 In *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som*<sup>1</sup> (“*Lim Kim Som (HC)*”), the High Court in Singapore upheld the validity of a contract for the sale of land where the land had been gazetted for acquisition<sup>2</sup> between contract and completion. The court’s decision was based, in part, on the only directly relevant English case on point, *Hillingdon Estates Co v Stonefield Estates Co Ltd*<sup>3</sup> (“*Hillingdon*”).

2 On appeal, the Court of Appeal expressly declined to follow *Hillingdon* and, in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*<sup>4</sup> (“*Lim Kim Som*”), held that the contract of sale had been frustrated by the gazette notification.

<sup>1</sup> [1992] 1 SLR(R) 375 (decision of Michael Hwang JC).

<sup>2</sup> Under s 5 of the Land Acquisition Act (Cap 152, 1970 Rev Ed).

<sup>3</sup> [1952] Ch 627.

<sup>4</sup> [1994] 1 SLR(R) 233.

3 The Judicial Committee of the Privy Council has now, in *E Johnson & Co (Barbados) Ltd v NSR Ltd*<sup>5</sup> (“*Johnson v NSR*”) re-affirmed the validity of the reasoning in *Hillingdon* and held that a contract of sale for immovable property is not frustrated if it is gazetted for possible acquisition between contract and completion.

4 It is therefore an appropriate time to revisit the decision in *Lim Kim Som* in the light of the Privy Council’s decision, as well as other decisions which have purported to follow *Lim Kim Som*.

### **I. High Court decision in *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som***

5 The case concerned a piece of land then known as 74 King’s Road. At the time of the contract in 1983, there were a number of rent-controlled tenants or squatters on the property. However, shortly before the date of the contract, a fire had broken out on the property. This was known to the vendor, but not to the purchaser. The significance of the fire was that it brought into play section 33 of the Land Acquisition Act (commonly known as the “fire site” provisions) whereby a property compulsorily acquired within six months of such fire would be subject to the “one-third” rule of compensation – that is, one third of market value immediately before the fire, or the market value as at 30 November 1973, whichever was the lower.<sup>6</sup>

6 The vendor granted the purchaser an option to purchase the property for \$2,138,000. The option was granted within two months of the fire, with completion fixed on a date just under five months after the date of the fire. However, the purchaser did not complete on the contractual completion date. One week later, the vendor served a 21-day notice to complete, pursuant to condition 29 of the Law Society’s

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<sup>5</sup> [1997] AC 400.

<sup>6</sup> Section 33 has been amended. The current law fixes the date of valuation as 27 September 1995.

Conditions of Sale 1981.<sup>7</sup> On the same day, the President proclaimed his intention of compulsory acquisition of the property;<sup>8</sup> however, the proclamation was not gazetted until another week later.<sup>9</sup>

7 Following the gazette notification, and before the expiry of the 21-day notice, the purchaser informed the vendor that he was not prepared to complete the purchase in view of the acquisition. A few days later, the 21-day notice expired, and the vendor then purported to terminate the contract. In due course, the acquisition was completed, the compensation of \$450,000 (plus accrued interest) being paid to the vendor, and the Government taking possession of the land and vesting title in itself.<sup>10</sup> The vendor then sued the purchaser for the balance of the purchase price less the 10% deposit paid by the vendor and the compensation paid by the Government. The purchaser counterclaimed for the return of his deposit.

8 In the High Court, the purchaser concentrated his defence on the property law aspect of the case.<sup>11</sup> His argument was that, once a property was gazetted for acquisition under section 5 of the Land Acquisition Act, the vendor ceased to have a good title which he could pass on completion, because his interest in the property was, by virtue of the notification, converted to an interest in compensation.<sup>12</sup> He relied heavily on a passage from the Judicial Committee's judgment in *Re Robinson's*<sup>13</sup> which, after a detailed analysis, the court rejected as an authority in support of his argument.

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<sup>7</sup> This condition remains essentially the same in the present Law Society of Singapore's Conditions of Sale 1999 as condition 29.

<sup>8</sup> The date of the proclamation appears to have no legal significance: see s 5 of the Land Acquisition Act (Cap 152, 1985 Rev Ed).

<sup>9</sup> This is the operative date on which the acquisition process commences.

<sup>10</sup> Under s 18 of the Land Acquisition Act (Cap 152, 1985 Rev Ed).

<sup>11</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [14]–[18].

<sup>12</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [14].

<sup>13</sup> [1980] 1 MLJ 255 at 257.

9 He also contended that the notification was an encumbrance on the title which, being incapable of discharge before completion, frustrated the contract.<sup>14</sup>

10 Finally, there was also a brief defence based on the contractual argument that the sale contract was frustrated because of the radical change in the subject matter of the contract.<sup>15</sup>

11 The High Court therefore spent much time on the law of vendor and purchaser, analysing the devolution of title in a compulsory acquisition, and concluding<sup>16</sup> that, under Singapore law, unlike certain other countries,<sup>17</sup> a property owner does not normally<sup>18</sup> lose his title to his property until three conditions are met:

- (a) an award for compensation has been made;<sup>19</sup>
- (b) possession of the property has been taken by the Government;<sup>20</sup>  
and
- (c) the Government has entered an endorsement in the Registry of Deeds or (as the case may be) the Land Titles Registry to the effect that title has now vested in the Government.<sup>21</sup>

12 It was therefore inevitable, on the arguments before the High Court, that the court should have found (as a matter of property law) that the contract could still be performed by the vendor, notwithstanding the section 5 gazette notification, so long as the compulsory acquisition

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<sup>14</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [28]–[31].

<sup>15</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [97]–[102].

<sup>16</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [59]–[60].

<sup>17</sup> Australia and New Zealand.

<sup>18</sup> Section 17 of the Land Acquisition Act (Cap 152, 1985 Rev Ed) gives the acquiring authority power to complete the acquisition process before an award of compensation in case of emergency.

<sup>19</sup> Land Acquisition Act (Cap 152, 1985 Rev Ed) s 10.

<sup>20</sup> Land Acquisition Act (Cap 152, 1985 Rev Ed) s 16.

<sup>21</sup> Land Acquisition Act (Cap 152, 1985 Rev Ed) s 18.

had not been completed by the vesting of title in the Government before the date fixed for completion.

13 As Singapore's land acquisition laws are so different from those of other countries, no direct assistance could be found from Commonwealth case law. The closest parallel to our land acquisition laws (other than India and Malaysia, which offered no case law on the vendor and purchaser point) was England, where a compulsory purchase order does not immediately vest title in the acquiring authority. This inevitably led to a consideration of *Hillingdon*, the only English authority which was directly on the question of the effect of a compulsory acquisition order (which does not immediately vest title in the acquiring authority) on a contract of sale of immovable property. *Hillingdon* was clear and unambiguous on this point; the purchaser must complete in such a scenario.

14 The facts in *Hillingdon* were relatively simple, although unusual. A contract was made in 1938 for the purchase for two plots of land. One contract was completed, but the other was not, owing to the outbreak of World War II in 1939. In 1948 a compulsory purchase order was issued, and in 1949 the order and a notice to treat<sup>22</sup> were served on the vendor, who then sought to enforce the delayed contract against the purchaser. The latter claimed that it bought the land on the basis that it could develop it, contended that the contract was frustrated and claimed a refund of its deposit. Vaisey J held that the contract was not frustrated and ordered specific performance in favour of the vendor.<sup>23</sup>

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<sup>22</sup> An English notice to treat does not vest title to the land in the acquiring authority, which only occurs by voluntary conveyance of the landowner after the quantum of compensation has been agreed or, in the absence of agreement, by deed poll by the acquiring authority after the assessed compensation has been paid into court. See *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [22]–[23].

<sup>23</sup> *Hillingdon Estates Co v Stonefield Estates Co Ltd* [1952] Ch 627 at 633–636.

15 Bearing in mind that the following part of Vaisey J's judgment:<sup>24</sup>

I have always understood (and indeed it is a common-place) that when there is a contract by *A* to sell land to *B* at a certain price, *B* becomes the owner in equity of the land, subject, of course, to his obligation to perform his part of the contract by paying the purchase-money; but subject to that, the land is the land of *B*, the purchaser. What is the position of *A*, the vendor? He has, it is true, the legal estate in the land, but, for many purposes, from the moment the contract is entered into he holds it as trustee for *B*, the purchaser. True, he has certain rights in the land remaining, but all those rights are conditioned and limited by the circumstance that they are all referable to his right to recover and receive the purchase-money. His interest in the land when he has entered into a contract for sale is not an interest in land; it is an interest in personal estate, in a sum of money; and it seems to me that in a case such as this, when the date for completion is long past, the purchasers, subject to the payment of that purchase-money are to be regarded as the owners of the land. So I think they are; and the effect of this notice to treat and this compulsory purchase process is merely to place an obligation on those who are already the owners of the land in question. The compulsory purchase order does not affect the vendors; they have no interest in the matter save in respect of the purchase-money which they are entitled to be paid. The persons who are affected by the compulsory purchase order are the owners of the land, namely, the plaintiffs, *ie*, the purchasers.

has been the subject of some judicial criticism,<sup>25</sup> the court expressly<sup>26</sup> eschewed reliance on the controversial passage. It was not necessary for

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<sup>24</sup> *Hillingdon Estates Co v Stonefield Estates Co Ltd* [1952] Ch 627 at 631–632.

<sup>25</sup> *SJR Investment Co Pty Ltd v Housing Commission of Victoria* [1971] VR 211 at 213; *Austin v Sheldon* [1974] 2 NSWLR 661 at 669–672. However, there are other authorities expressly approving this passage, some of which are identified at *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [62]–[64]. This passage has now been approved by the Privy Council in *Johnson v NSR*: see *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 407B–D.

<sup>26</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [62]–[64].

the property law part of the court's judgment to rely on the concept of passing of beneficial ownership. *Hillingdon* was helpful as being the only case with a similar fact situation to *Sheriffa Taibah*, and from a jurisdiction with a similar compulsory acquisition regime to Singapore.

17 Quite apart from his remarks about the passing of beneficial ownership, Vaisey J also addressed the contractual argument that the contract had been frustrated. Vaisey J's remarks on this point are straightforward and pungent:<sup>27</sup>

I agree that this compulsory purchase order very much altered the situation, but I cannot appreciate that it has altered it in such a fundamental and catastrophic manner as to justify the court in holding that the whole contract has been frustrated.

To say, however, that the contract has been frustrated goes far beyond any authority cited to me and does not accord with what I understand as frustration of a contract.

No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country, but that does not mean that, whenever such interference or intervention takes place, parties are discharged from bargains solemnly entered into between them. In my judgment, it is the duty of the parties, in such a case as this, to carry out their obligations; and I cannot see that there is any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served, or at any other date in the process of the making and carrying into effect of the compulsory purchase order.

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<sup>27</sup> *Hillingdon Estates Co v Stonefield Estates Co Ltd* [1952] Ch 627 at 633–634.

18 The decision of Vaisey J was clear and unambiguous. He held the purchaser liable to complete, and there was no reason for the High Court not to follow that decision, without necessarily completely embracing his reasoning.

## **II. Court of Appeal decision in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*<sup>28</sup>**

19 In the Court of Appeal the argument took a different turn, possibly owing to the appointment of an *amicus curiae*.<sup>29</sup> The emphasis was no longer on property law but on contract, and on the doctrine of frustration. There was therefore no detailed discussion of the impact of the devolution of title on the contractual obligations of the parties. Indeed, the Court of Appeal accepted<sup>30</sup> the High Court's analysis of the devolution of title, but approached the problem in a different way. It posed two questions:

- (a) is a contract for the sale of land capable of frustration?
- (b) if so, should that doctrine be applied to the present case?

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<sup>28</sup> For further academic comment on this case, see Andrew Phang, "Frustration of Contracts for the Sale of Land in Singapore" (1995) 44 ICLQ 443; *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths, 2nd Singapore and Malaysian Ed, 1988) at pp 963–964 and 971–972; Joan Sethupathy, "When Equity and the Common Law conflict, Equity does not always prevail" (1995) 7 SAcLJ 212; and Hairani Saaban, *Singapore Conveyancing Practice: Forms, Precedents and Materials* vol 2 (Butterworths Asia, 1992)) at V [9.7], IX [1431].

<sup>29</sup> The appointment of an *amicus curiae* in a commercial case where both parties were already represented by counsel was itself an unusual procedure, where no apparent separate public interest needed to be represented.

<sup>30</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [30]–[36].

### **A. Whether frustration can apply to contract for sale of land**

20 The Court of Appeal, after examining several authorities, came to the conclusion that a contract for the sale of land was capable of frustration.<sup>31</sup> Put in that abstract way, there can be no quarrel with this finding. Although it is questionable whether all the cases cited by the Court of Appeal are valid authorities for that proposition,<sup>32</sup> the proposition itself is nevertheless supported by other cases and textbook writers, and is not controversial.<sup>33</sup>

### **B. Whether frustration applies on the facts of the case**

21 The court correctly observed that each case of frustration turns upon its own specific facts.<sup>34</sup> However, the problem with the court's

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<sup>31</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [23]–[27] and [52]–[63].

<sup>32</sup> For example, *Wong Lai Ying v Chinachern Investment Co* (1979) 13 BLR 81 (a sketchily reported case) may be analysed as a building contract (to which different principles of frustration apply) rather than as a contract for the sale of land; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 is a case on frustration of leases (where again different principles of frustration apply because there is a continuing contractual relationship); *Capital Quality Homes Ltd v Colwyn Construction Ltd* (1976) 61 DLR (3d) 385, a decision of the Ontario Court of Appeal, was distinguished by the same court in *Victoria Wood Development Corp Inc v Ondrey* (1979) 92 DLR (3d) 229, and has been criticised by Professor SW Waddams in *The Law of Contracts* (Canada Law Book, 3rd Ed, 1993) at p 248.

<sup>33</sup> The proposition is generally accepted, albeit cautiously, and with the qualification that it operates very rarely: see for example *9 Halsbury's Laws of England* (4th Ed Reissue) at para 452. The matter seems to have been put beyond doubt by the Privy Council in *Johnson v NSR* (see *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400), where the judgment proceeded on the assumption that the contract of sale was capable of frustration.

<sup>34</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [29].

analysis of this case is that its treatment of the facts of this case is controversial. Further, its analysis of the law is couched in general terms which suggests that *Lim Kim Som* is not a case decided on its special facts, but is meant to be the paradigm for the future.

22 Let us examine the Court's reasoning in detail.

### **C. Test for frustration**

23 The Court of Appeal adopted the well-known test propounded by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC*<sup>35</sup> ("*Davis Contractors*"), which defines frustration as occurring where (without default) a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. In short, can the party claiming frustration say: "It was not this that I promised to do"?<sup>36</sup>

24 Again, there is no difficulty here; this is a universally accepted test – the question is how it is to be applied.

25 The court then focused on the terms and conditions of the contract made in this case (read in the light of the surrounding circumstances) as well as the supervening event, to see if the agreement was wide enough to cover this development. To paraphrase the words of Lord Radcliffe, had any unexpected event occurred that had changed the face of things?

### **D. Terms of the contract**

26 The court referred to various clauses in the Law Society's Conditions of Sale 1981 and concluded that they did not deal with the

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<sup>35</sup> [1956] AC 696.

<sup>36</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728–729.

question of compulsory acquisition.<sup>37</sup> It then referred to Special Condition 5, which was in the following terms:

The sale and purchase herein is subject to satisfactory replies to legal requisitions filed with various government departments. Provided always that any outstanding property tax or other charges which are capable of being paid and discharged on or before completion or any outstanding notice which is capable of being complied with on or before completion or any road, drainage sewerage or government scheme which does not adversely affect the property shall not be construed as unsatisfactory and the purchaser shall be bound to complete the purchase in accordance with and subject to the terms and conditions herein contained. Subject to the above, if the answers to any requisitions are unsatisfactory, the purchaser may annul the sale in which event, all moneys paid to the vendor to the account of the purchase price herein (including the option money) shall be refunded to the purchaser forthwith free of interest and neither party shall have any claim or lien against the other whatsoever thereafter, provided further that in the event any replies shall not be received by the date fixed for completion, the same shall be deemed satisfactory.

27 The court observed that this clause did not cover the present situation and the question of compulsory acquisition was not provided for in this clause.<sup>38</sup> It then went on to say:<sup>39</sup>

The agreement therefore has not provided for the event of compulsory land acquisition. From the nature of the property the purchaser obviously purchased it for a commercial purpose. It was obviously not contemplated that compulsory acquisition by the government would occur. There was no indication known to the purchaser on which he ought to have known that such an event would take place.

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<sup>37</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [27]–[36].

<sup>38</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [34].

<sup>39</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [35].

28 With great respect, these conclusions can be challenged. The question of contractual provision for compulsory acquisition has to be analysed in the light of the prevalence of compulsory acquisition in Singapore (particularly in 1983), as well as the practice of conveyancing lawyers then and now in relation to clauses providing for the possibility of compulsory acquisition.

29 It is commonplace that (a) compulsory acquisition was a frequent practice in the 1980s and (b) conveyancing lawyers were well aware of its possibility. This was particularly true of undeveloped land, especially those with rent-controlled tenants or squatters, which made it difficult, if not impossible, for the owner to develop such land. No self-respecting lawyer could have said that the acquisition of any particular property could not be foreseen, particularly undeveloped land. Indeed, the use of the “satisfactory answers to requisitions” clauses emerged precisely as a response to the problem of purchasers wishing to enter into a binding contract before their lawyers could complete their searches on the local authorities to ascertain (among other things) whether the subject property (or any part of it) was going to be acquired. There are, of course, many forms of “satisfactory answers to requisitions” clauses in use in Singapore,<sup>40</sup> some more precise than others as to the disclosure of the existence (or even the possibility) of compulsory acquisition as an “unsatisfactory answer”. But the point is this: if a requisition on a local authority sent out by the purchaser’s lawyer had revealed either a current or an impending acquisition, would the purchaser, on the wording of Special Condition 5, not have been entitled to treat that answer as “unsatisfactory” and to annul the contract accordingly?<sup>41</sup> The

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<sup>40</sup> Each solicitors’ firm will have at least two different forms, one when acting for a vendor, and one when acting for a purchaser.

<sup>41</sup> In the 1970s and 1980s, the standard requisition on the Development Control Division contained a question: “Is the property affected by any Government Gazette Notification?”, which would have captured any existing section 5 notification. The current forms of requisition do not contain any specific question about compulsory acquisition, as a section 5 notification would now be revealed by the Lotbase search in the Registry of

term “satisfactory” was not defined in Special Condition 5 (unlike many versions in use today) but, taking the objective test of “satisfactory” to mean “satisfactory to a reasonable purchaser acting honestly and reasonably”,<sup>42</sup> can it be seriously argued that an answer to a requisition that showed an actual or threatened acquisition would be regarded as satisfactory? If not, then the law must acknowledge that the insertion of a “satisfactory answers to requisitions” clause is meant to cover the possibility of compulsory acquisition to some degree or other. In many cases, the exact wording of the clause will have been the subject of negotiations.<sup>43</sup> If then the clause does not quite achieve its purpose (for example, because there is no specific requisition inquiring about a section 5 gazette notification), is it the court’s function to repair the gaps in the drafting so as to give the purchaser (and possibly the vendor) a protection that his solicitors did not see fit to accord him, even though they must have foreseen the possibility of acquisition?<sup>44</sup>

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Deeds and Titles. In theory this means that existing gazette notifications should be discovered before a contract is entered into.

<sup>42</sup> See *Hudson v Buck* (1877) 7 Ch D 683; *Smallwood v Smallwood* (1971) 3 All ER 717 at 720; *Median v Jones* (1982) 56 ALJR 813; and Tan Sook Yee, “*The Road Interpretation Plan – Requiescat in Pace?*” [1988] 2 MLJ lxxxviii at xciii.

<sup>43</sup> In 1989, I gave a paper at a seminar organised by the Singapore Academy of Law on “Satisfactory Answers to Requisitions”. Before the seminar I communicated with the Law Society to inquire if the Council wished to suggest a form of standard “satisfactory requisitions” clause that could be adopted by the profession in the same way as its standard Conditions of Sale. I was informed that there was so much disagreement among practitioners about such a clause that it was not possible for the Law Society to agree on the wording of a standard clause, even on a recommendatory basis.

<sup>44</sup> The purchaser in *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 entered into a binding contract before seeing his solicitor. He also sued his solicitor (who was appointed after the date of contract) for negligence; his suit was dismissed. See *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [173]–[174].

30 In the light of the foregoing analysis, it is respectfully submitted that the Court of Appeal's remarks about the terms of the contract and the contemplation of the parties are an unrealistic analysis of the situation in fact and in law.

31 This issue also needs to be looked at together with the later discussion about the foreseeability of the supervening event.

### ***E. Supervening event that had occurred***

32 This is the core of the Court of Appeal's reasoning, which may be summarised as follows:

- (a) It rejected Vaisey J's argument that frustration was not applicable because the purchaser of land became its owner in equity as from the date of contract, citing various authorities criticising this proposition,<sup>45</sup> and relying on the argument that the passing of beneficial ownership to a purchaser of land is premised on the availability of specific performance, and this remedy will not be ordered of a frustrated contract.<sup>46</sup>
- (b) It also rejected the High Court's alternative analysis<sup>47</sup> that, where the date fixed for completion falls prior to title vesting in the acquiring authority, the vendor is able to convey his interest to the purchaser and the contract is not frustrated on the ground that the

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<sup>45</sup> *Barnsley's Conveyancing Law and Practice* (Butterworths Law, 3rd Ed, 1988) ("*Barnsley's*") at p 227; *Austin v Sheldon* [1974] 2 NSWLR 661 at 670 and 672 and MP Thompson [1984] *The Conveyancer* at 49. However, the two commentators, while criticising the argument, do not attack *Hillingdon Estates Co v Stonefield Estates Co Ltd* [1952] Ch 627 ("*Hillingdon*") as such. Indeed, the fourth edition of *Barnsley's* (edited by MP Thompson and written before *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400) specifically cites *Hillingdon* with approval at pp 250–251.

<sup>46</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [36]–[42].

<sup>47</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [40]–[41].

availability of specific performance is only decided at the time of the proceedings (which is invariably after the date when the date for completion has passed).<sup>48</sup>

- (c) It agreed with the High Court that (a) a section 5 declaration does not vest the title to the state and (b) the title only vests when the entry or notification is made in the register under section 18. However, it argued that, once a declaration is made, the process of acquisition has started and “its progress will lead with almost absolute certainty to divesting the owner of his title to the land and vesting it in the state”, relying on the passage from *Re Robinson’s* discussed and rejected by the High Court.<sup>49</sup>
- (d) It accepted that, technically, an owner of a property gazetted for acquisition was capable of conveying both title and possession to the purchaser prior to entry on the register pursuant to section 18. However, the court felt that the position *vis-à-vis* the property had fundamentally altered. On completion, the purchaser would acquire possession of the property for a limited period and a title which would become defeasible in a matter of one or two years (or thereabouts). In reality, the purchaser would not on completion get what he had bargained for, *viz* not only the legal estate but the use of the property. Further, the compensation the purchaser would receive would be far below the market value of the property. Accordingly, applying the Lord Radcliffe test in *Davis Contractors*, the compulsory acquisition had fundamentally altered the “face of things” and “there was such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for”. This case was therefore an appropriate one to which to apply the doctrine of frustration.<sup>50</sup>

33 The following comments may be made on this line of reasoning.

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<sup>48</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [40]–[54].

<sup>49</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [40]–[44]. See also *Re Robinson’s* [1980] 1 MLJ 255 at 257.

<sup>50</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [45]–[46].

34 First, while Vaisey J's emphasis on the passing of beneficial ownership upon contract is controversial, the contrary argument based on the discretionary nature of specific performance proves too much. If one cannot determine whether specific performance will be granted until the actual date of hearing of the trial to enforce the contract, then we are left with no rule at all as to the passing of beneficial ownership. The only other possible rule is that beneficial ownership does not pass until legal ownership passes, and this is certainly not the law as it stands.<sup>51</sup> Merely because the law will in some exceptional cases deny specific performance is no reason to deny the *prima facie* rule that, as a general rule, the court will grant specific performance to enforce any contract for the sale of immovable property, however commonplace and lacking in uniqueness it may be.<sup>52</sup> That proposition would then create a rebuttable presumption that, absent exceptional circumstances, equitable ownership will pass on contract.<sup>53</sup> This is also the *prima facie* rule in the sale of goods, which suggests that it is a sensible rule of thumb.

35 Second, (and more important) the issue of the passing of beneficial ownership is not the key question to determine the question of frustration. The more relevant consideration is the passing of risk, because frustration is about the allocation of risk, and the doctrine obviously needs to be applied having regard to the general legal rules relating to the passing of risk in a contract for the sale of immovable property. By way of analogy, the Sale of Goods Act shows us that, while risk normally passes with property or beneficial ownership in the sale of

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<sup>51</sup> There is no rule preventing beneficial ownership passing before, at or after the passing of legal ownership; it is all a matter of agreement.

<sup>52</sup> *Chitty on Contracts* vol 1 (Sweet & Maxwell, 28th Ed, 2000) at para 28-007.

<sup>53</sup> The United Kingdom Law Commission, in its Working Paper No 109 *Transfer of Land: Passing of Risk from Vendor to Purchaser* (1988) decided against recommending what circumstances should cause a contract for the sale of land to be frustrated, on the basis that this issue was best left to case law: see p 82, para 3.45.

goods, the two concepts are distinct and not necessarily intertwined, and can pass at different times.<sup>54</sup>

36 Third, while it is true that, as a matter of practice, once a property is gazetted for acquisition, the acquisition process is almost always carried out to the end, the fact remains that section 48(1) of the Land Acquisition Act specifically allows for the possibility of the process being terminated or withdrawn, and section 18 makes it clear (and accepted by the Court of Appeal) that beneficial ownership does not vest in the acquiring authority until the entry or notification in the register under section 18. Moreover, the Australian and English cases are persuasive authority that the virtual certainty of acquisition does not of itself automatically frustrate a contract for the sale of immovable property.<sup>55</sup>

37 Finally, to say that compulsory acquisition changes the bargain between the parties is to beg the question. One must first analyse the particular contract to see what (objectively) that bargain was, not only considering its express terms, but also taking into account what the parties did not say which they could have said. In this exercise, the normal rules of contractual interpretation should be followed, and evidence of subjective intention not translated into the words of the contract (or reasonably to be inferred from its express terms) should be ignored. On the facts of this case<sup>56</sup> the evidence of the intention of the parties in entering into this contract was disputed, and no primary findings of fact were made by the High Court at first instance, except to express skepticism about the credibility of the purchaser as to the circumstances in which he entered into the contract. With respect, there

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<sup>54</sup> Section 20(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). Under s 17(1), property passes when the parties intend it to pass and under s 18(2) the presumptive rule is that, where there is an unconditional contract for the sale of goods in a deliverable state, the property in the goods passes to the *buyer* when the contract is made. See also *Chitty on Contracts* vol 2 (Sweet & Maxwell, 28th Ed, 2000) at para 43-188.

<sup>55</sup> *Tsekos v Finance Corp of Australia Ltd* [1982] 2 NSWLR 347; *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400.

<sup>56</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [109]–[125].

was an insufficient factual basis for the Court of Appeal's conclusion<sup>57</sup> that:

From the nature of the property the purchaser obviously purchased it for a commercial purpose ... There was no indication known to the purchaser from which he ought to have known that such an event would take place.

38 Even assuming this to have been the case, what matters is, not so much the purchaser's purpose or intended use of the property, but how the contract (or bargain) is to be characterised. There are many ways in which a bargain can be characterised for the purposes of Lord Radcliffe's test in *Davis Contractors*. If it is a simple contract for the sale of a piece of property without more (for example, under an open contract with no special terms) then it is submitted that compulsory acquisition would not make it a different bargain from what had been agreed.<sup>58</sup> However (to take only one example), if the contract is one which contains a term that the purchase is subject to planning approval for a certain type of development, then the bargain would be characterised differently, because there would be a contractual recognition by the seller that the purchaser is buying not just a piece of land, but one capable of development. If therefore unexpected Government intervention makes that purpose impossible, then the case would be much stronger for frustration. In *Lim Kim Som*, there was only Special Condition 5, which arguably did not change the characterisation of the contract from a plain vanilla contract for the sale of land to a contract for the sale of land

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<sup>57</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [32]–[33].

<sup>58</sup> *Cf Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 at 176H: "The subject matter of the contract is simply a specified piece of land described in the contract and nothing more. Can it then be said that listing before completion frustrated the contract?" (*per* Sir John Pennycuik). That question might just as well have been asked with reference to the facts of *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233, substituting "compulsory acquisition" for "listing".

which was (say) capable of development.<sup>59</sup> In any event, the Court of Appeal's remarks raise the issue of foreseeability, which will be discussed later.

39 The Court of Appeal then dealt with two remaining objections made by the vendor.

(a) *Purchaser had been at fault in delaying completion*

40 The first argument was that, if the purchaser had completed the contract on the date fixed for completion, the contract would have been fully discharged and there would have been no basis for any argument of frustration. Instead, the acquisition had been gazetted after the contractual date of completion. The Court of Appeal rejected this argument summarily:<sup>60</sup>

Whilst such delay was fortuitous from the viewpoint of the purchaser, as long as the contract remained executory it could be frustrated. Breach by the purchaser can only prevent frustration where there is a causal link between the breach and the event which is alleged to be frustrating.

41 The court cited two cases to illustrate the latter proposition. In *FC Shepherd & Co Ltd v Jerrom*<sup>61</sup> ("*Shepherd v Jerrom*") the English Court of Appeal rejected an argument of self-induced frustration where an apprentice, having been imprisoned for a criminal offence, was prevented from performing his contract of employment. This was

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<sup>59</sup> *Cf Tat Lien Hardware Pte Ltd v Tan & Lie* [1982] 1 MLJ 9 and the cases that followed (discussed in Hairani Saaban, *Singapore Conveyancing Practice: Forms, Precedents and Materials* vol 2 (Butterworths Asia, 1992) at IX [14311]). In *KBK No 138 Ventures Ltd v Canada Safeway Ltd* (2000) 185 DLR (4th) 650, a contract for the sale of a property was held frustrated owing to Government downzoning causing a 90% reduction in expected floor space since the contract expressly contemplated development of the property by the buyer.

<sup>60</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [46].

<sup>61</sup> [1987] 1 QB 301.

because his criminal act had not by itself affected his performance of his contract of employment; it was the act of the tribunal in sentencing him to a prison term.

42 The other case was *Lauritzen A/S v Wijsmuller B V* (“*The Super Servant Two*”)<sup>62</sup> (“*The Super Servant Two*”) where the defendant had signed a contract which stipulated that performance could be effected by either one of two transportation units, “Super Servant One” or “Super Servant Two”. The latter vessel sank, and the English Court of Appeal held that the plea of frustration was not available because the defendant could have used “Super Servant One” to fulfil its obligations but chose not to do so. *The Super Servant Two* was distinguished in a single sentence by the comment that its facts were far removed from those in the present case.

43 After this short discussion, the court concluded that it could not be said that the purchaser was in any way responsible for the compulsory acquisition of the property. Accordingly, his breach of contract was irrelevant to the question of frustration.

44 With respect, this argument deserved a more thorough discussion than was given by the Court of Appeal.

45 The court’s reliance on *Shepherd v Jerrom* was misplaced.

46 In that case an apprentice, who had become involved in a fight between two motorcycle gangs, was convicted of conspiracy to commit assault, and sentenced to a period of Borstal training, which sentence he served for 39 weeks. The employers told his father that they were not prepared to take him back, and subsequently resisted his claim for compensation for unfair dismissal on the ground that the contract had been frustrated. It was to rebut this defence that the apprentice argued that there had been no discharge by frustration since the alleged frustration had been self-induced. Sir Guenter (formerly Professor) Treitel has pointed out that acceptance of the apprentice’s argument would have entirely perverted the purpose of the rule that frustration

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<sup>62</sup> [1990] 1 Lloyd’s Rep 1.

must not be due to the fault of the party relying on it.<sup>63</sup> That purpose is to prevent the party at fault from relying on an allegedly frustrating event (where it is due to his fault) and so to impose a liability on that party. In *Shepherd v Jerome*, the apprentice sought to rely on his own criminal conduct in order to *establish a right* to compensation for unfair dismissal. The Court of Appeal rightly rejected his claim and held that the contract was frustrated. This is wholly consistent with the well-known formulation that “reliance cannot be placed on self-induced frustration” for the party relying on frustration was the employer, and he had not induced the frustration. Treitel goes on to say that the classic formulation would, however, have excluded frustration if the claim had been made, not by the employee but against him: that is, if the employer had been claiming damages for the employee’s breach of the contract in failing to render the agreed services. In other words, the employee would have been held to his contract and have been liable for damages for breach of contract. If Treitel’s comments are applied to the facts of *Lim Kim Som*, the claim of frustration should not have been available to the purchaser, but may have been available to the vendor.

47 The reference to *The Super Servant Two* was, with respect, a red herring, because the principle of self-induced frustration was well established long before that case, and the case itself has in any event been criticised by Treitel as a controversial application of that principle.<sup>64</sup>

48 A more relevant precedent for discussion would have been *Hillingdon* itself, where the fact situation was essentially identical to the present case. There, the date fixed for completion was 31 January 1939, but the purchaser did not complete, and in 1948 the compulsory purchase order was made. The purchaser’s breach was acknowledged by the fact that it paid late completion interest up till 1949. Vaisey J clearly took this factor into account before rejecting the argument of frustration:<sup>65</sup>

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<sup>63</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at p 489.

<sup>64</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at pp 492–493.

<sup>65</sup> *Hillingdon Estates Co v Stonefield Estates Co Ltd* [1952] Ch 627 at 635.

The purchasers in this case are certainly no worse off than they would have been if they had completed their contract in a period rather less than 12 years from the time when they agreed to complete it. Had they completed the contract without the delay of 12 years, quite clearly the compulsory purchase order would have affected them. However that may be, I have to consider the matter as I find it; and taking into consideration the long delay which has taken place, I still think that the contract, so far from being frustrated, can and should be carried out.

49 It was this narrow finding that the High Court found of assistance in coming to its decision,<sup>66</sup> although neither the English court nor the Singapore court dealt specifically with the argument of self-induced frustration, since that argument was not raised directly before either court. Unfortunately, Vaisey J's judgment is not as fully reasoned as one might wish (hence leading to academic speculation as to the exact basis for his decision). Treitel has justified<sup>67</sup> the decision in *Hillingdon* on the basis of the excessive delay in completion and argues that this is a version of the principle that a party cannot rely on self-induced frustration (the principle being capable of application even through the conduct in question does not amount to an actual breach of contract, as in this case).

50 One may respectfully disagree with Treitel on his last proposition, because the passage in *Hillingdon* he refers to makes it plain that, while the issue of breach was not clearly pleaded, Vaisey J was in no doubt that he viewed the failure to complete as being a default by the purchaser. Nor is it clear that the decision in *Hillingdon* turned on *excessive* delay; the significance of delay was surely that it put the purchaser in breach of contract which (however slight) must amount to a self-induced frustration if conduct falling short of breach can be so classified. However, the point to note is that Treitel sees no difficulty in recognising this as a case akin to self-induced frustration. While it may

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<sup>66</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [62]–[64].

<sup>67</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at pp 126–127.

not come within the classical definition of that principle as being frustration due to the contracting party's own conduct or to the conduct of those for whom he is responsible,<sup>68</sup> there is another principle which comes into play here.

51 The Court of Appeal in *Lim Kim Som* argued that the purchaser's breach in not completing on the contractual completion date did not cause the happening of the frustrating event (that is, the acquisition). But it is undeniable that, if the purchaser had completed on the contractual date, the acquisition, when it occurred, could not have been a frustrating event. Why then should the purchaser be allowed to act in wilful default of his contractual obligations, and to take advantage of his own breach to create a situation when frustration applies?<sup>69</sup>

52 The practical consequence of the Court of Appeal's finding is that a purchaser who (before completion) gets wind of a possible compulsory acquisition may delay completion for as long as possible, even to the point of resisting a writ for specific performance. If at any time before he is actually forced to complete (possibly even after judgment), a section 5 gazette notification is published, he will be relieved from his contractual obligations.<sup>70</sup> Is that the kind of contractual behaviour the law wishes to encourage?

53 It may well have been open to the vendor in *Lim Kim Som* to have invoked the principle that, where a party who, by his own act or default, makes further performance of the contract impossible, the other party

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<sup>68</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at p 473.

<sup>69</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at pp 473–475.

<sup>70</sup> *Cf E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 where, although it held that the purchaser had wrongfully refused to complete (since the acquisition of the property had in fact been completed by the time the appeal was heard), the Privy Council declined to order specific performance. However, because the contract had not been frustrated, the Privy Council ordered an assessment of damages for breach of contract.

may treat the contract as discharged and sue for breach of contract.<sup>71</sup> The purchaser, by failing to complete on time, created a situation where (on the approach taken by the Court of Appeal) the acquisition adversely affected the vendor by leaving him to suffer the consequences of the acquisition. Would the vendor not have a claim against the purchaser for the loss suffered by the purchaser's breach, quantified as the amount he would have received from the purchaser had the contract been completed on time?

54 It should be noted that frustration did not apply till the date of the gazette notification, which was after the breach had already occurred and the vendor's right of action had crystallised. And if he had such a right of action, could the law not reach the same conclusion by simply denying that the doctrine of frustration applies where it occurs after one party has been in breach of its obligation to complete the contract?<sup>72</sup>

55 This point is well demonstrated by the House of Lords decision in *Monarch SS Co v A/B Karlshamns Oljefabriker*<sup>73</sup> ("*Monarch*") where a ship was chartered for a voyage, but was prevented from completing the voyage by detention owing to the outbreak of war. However, it was found that the ship was unseaworthy, and that the voyage would have been accomplished before the outbreak of the war, if the shipowner had not been in breach of its duty to provide a seaworthy ship. The House of Lords held that the shipowner was precluded by its own breach of contract from relying on the detention as a ground of discharge, even though the unseaworthiness would not of itself have given rise to a frustrating delay. This case, and others like it,<sup>74</sup> illustrate the proposition that the doctrine of frustration is not available to a party where his own

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<sup>71</sup> Cf G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at pp 476–478, where Treitel argues that frustration will even be denied if the party claiming it has been guilty of mere default (even if without actual fault).

<sup>72</sup> Cf G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at pp 478–479.

<sup>73</sup> [1949] AC 196 (although frustration was not specifically mentioned in the judgments).

<sup>74</sup> *The Eugenia* [1964] 2 QB 226; *The Lucille* [1984] 1 Lloyd's Rep 244.

breach was one of the factors giving rise to the impossibility that would, but for his breach, be a ground of discharge. The doctrine of frustration is excluded even though the breach does not amount, or of itself give rise, to the impossibility, but is only one of the factors leading to it.<sup>75</sup>

56 This then qualifies the Court of Appeal's test of when a breach of contract disentitles the guilty party from relying on the doctrine of frustration. The test is not (as the Court of Appeal put it) a simple analysis of whether the breach caused the frustrating event (in the criminal or tortious sense of the *causa causans*), but rather whether the breach was one of the factors leading to the contract becoming impossible of performance.<sup>76</sup>

57 If the *Monarch* approach is adopted, it can clearly be seen that, while the purchaser's delay in *Lim Kim Som* did not of itself *cause* the compulsorily acquisition, had the purchaser fulfilled his contractual obligation to complete on the date fixed for completion, there would have been no argument available to the purchaser if (a) he had completed on the contractual date, and (b) the acquisition was gazetted after completion. Both common law and common sense demanded that the purchaser should not have been allowed to take advantage of his own wrong to wriggle out of his contractual obligations.

*(b) Compulsory acquisition was a possibility in Singapore in 1983 and should have been foreseen by the purchaser*

58 The Court of Appeal, having first expressed its doubts about the relevance of foreseeability to the doctrine of frustration,<sup>77</sup> argued that there was no evidence in the present case that the parties actually foresaw that an acquisition might take place. There was no discussion of

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<sup>75</sup> G H Trietel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at p 479.

<sup>76</sup> See also *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (causation expressed in terms of the "dominant cause").

<sup>77</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [45]–[47].

acquisition or the insertion of any clause to cover its consequences. There was no effort even to negotiate with the vendor to make the sale subject to planning approval, as was normal with contracts of this kind.<sup>78</sup>

59 With respect, the factual analysis was both incomplete and unnecessary.

60 It was incomplete in that it omitted to consider, in this context, the incorporation of Special Condition 5 in the contract, and the significance of this clause in considering the contemplation of the parties has already been discussed earlier in this article.

61 It was also unnecessary in the broader context of the whole conveyancing picture that prevailed in Singapore in the 1980s and even (if to a slightly lesser extent) today. The first duty of any purchaser's solicitor (then as now) is to ensure that his client gets a good title to the property being purchased. High on the list of priorities in the title search is the need to ensure that the property is as safe from compulsory acquisition as the solicitor can make it from his inquiries and contractual negotiations. Conversely, the vendor's solicitor will try (as far as he can) to make the contract one where *caveat emptor* applies, and to reduce the circumstances where the contract can be rescinded to as few as possible. The end result in most cases is the contract being made subject to "satisfactory answers to requisitions",<sup>79</sup> one of the main purposes of requisitions being to ascertain the reality or likelihood of all or part of the property being compulsorily acquired.

62 It requires no factual analysis to conclude that, once a "satisfactory answers to requisitions" clause is included in the contract, the possibility of compulsory acquisition has been (or must be deemed to have been)

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<sup>78</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [48]–[55].

<sup>79</sup> See "Satisfactory replies to legal requisitions", a paper presented by Assoc Prof Tan Sook Yee at a seminar presented by the Singapore Academy of Law in 1989; Hairani Saban, *Singapore Conveyancing Practice: Forms, Precedents and Materials* vol 2 (Butterworths Asia, 1992) at V [9.8–9.12].

considered by both parties (whoever first introduced that clause into the contract), however perfunctory that consideration may have been. Once it is acknowledged that the parties did apply their minds to the possibility of acquisition by the provision of a clause to cover that eventuality, then the parties should be bound by the solution they have voluntarily adopted to meet that eventuality, however imperfect that solution might be. It has already been noted earlier that the contract in *Lim Kim Som* did include a “satisfactory answers to requisitions” clause (Special Condition 5), thus pointing to the fact that the parties had given consideration to the usual precautions that a purchaser would want to take to protect against the possibility of compulsory acquisition.<sup>80</sup>

63 In any event, even in the absence of a “satisfactory answers to requisitions” clause, it is clear from the English authorities that actions by the government affecting the value or permitted usage of the property being purchased are such commonplace events that purchasers must be taken to have foreseen such a possibility. This principle clearly underpinned Vaisey J’s remarks quoted earlier,<sup>81</sup> even though he did not articulate the principle. These remarks have now been expressly approved by the Privy Council.<sup>82</sup>

64 A clear expression of the principle may be found in *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd*<sup>83</sup> (“*Amalgamated Investment*”), a case strangely cited by the Court of Appeal in *Lim Kim Som* in support of its conclusions. In this case, a building was entered in the statutory list of buildings of special architectural or historical interest a few days after the date of a contract for its sale. The listing had the effect of dramatically reducing its market value. The English Court of Appeal held that the risk of a building being

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<sup>80</sup> *Quaere* whether a “satisfactory answers to requisitions” clause today may still have the same effect, since a section 5 gazette notification is now disclosed by the Lotbase search rather than a government requisition. See n 41 above.

<sup>81</sup> See n 27 above.

<sup>82</sup> *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 407.

<sup>83</sup> [1977] 1 WLR 164.

listed was one to which every owner and purchaser must recognise that he is subject, with the result that the contract was not frustrated. The following words of the court are as relevant to *Lim Kim Som* as they were to *Amalgamated Investment*.<sup>84</sup>

[*per* Buckley LJ]

I have reached the conclusion that there are not here the necessary factual bases for holding that this contract has been frustrated. It seems to me that the risk of property being listed as property of architectural or historical interest is a risk which inheres in all ownership of buildings. In many cases it may be an extremely remote risk. In many cases it may be a marginal risk. In some cases it may be a substantial risk. But it is a risk, I think, which attaches to all buildings and it is a risk that every owner and every purchaser of property must recognise that he is subject to.

...

They must also, in my judgment, be taken to have known that there was the risk, although they may not have regarded it as a substantial risk, that the building might at some time be listed, and that their chances of obtaining planning permission might possibly be adversely affected to some extent by that, or at any rate their chances of obtaining speedy planning permission. But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

...

[*per* Lawton LJ]

Anybody who buys property knows, and certainly those who buy property as property developers know, that there are all kinds of hazards which have to be taken into consideration. There is the obvious hazard of planning permission. There is the hazard of fiscal and legislative changes. There is the hazard of existing legislation being applied to the property under consideration – *compulsory purchase, for example*.

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<sup>84</sup> *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 at 173 and 175–177.

At common law anyone entering into a contract for the purchase of real property had to accept the risk of damage to the property after the contract had been made. Damage to the property nowadays can arise from causes other than fire and tempest. Financial loss can arise from government intervention. This is a risk which people have to suffer.

...

[*per* Sir John Pennycuik]

Again certainly, the vendors knew the purchasers' purpose and knew that the price would have been much less if the purchasers had known that the property would not be available for development, even if the purchasers had been willing to purchase at all. But, on the other hand, it was not a term or condition of the contract that the property should continue to be available for development at the date of completion; nor, I think, can such a condition be implied into the contract. The subject matter of the contract is simply a specified piece of land described in the contract and nothing more. Can it then be said that listing before completion frustrated the contract?

...

The listing struck down the value of the property as might a fire or a *compulsory purchase order* or a number of other events. It seems to me, however, that the listing did not in any respect prevent the contract from being carried to completion according to its terms; that is to say, by payment of the balance of the purchase price and by conveyance of the property. The property is none the less the same property by reason that listing imposed a fetter upon its use. It seems to me impossible to bring the circumstances of the present case within the test enunciated by Lord Radcliffe. One cannot say that the circumstances in which performance, *ie* completion, will be called for would render that performance a thing radically different from that which was undertaken by the contract. On the contrary, completion, according to the terms of the contract, would be exactly what the purchasers promised to do, and of course the vendors.

[emphasis added]

65 The parallels between *Amalgamated Investment* and *Lim Kim Som* are striking in the following respects, and it is surprising that the Singapore Court of Appeal did not find more assistance from this case:

- (a) the English court was (as was the Singapore court) applying Lord Radcliffe's test of frustration to a contract for the sale of land;<sup>85</sup>
- (b) it was a contract for the commercial purpose of enabling the purchaser to redevelop the property (as the Singapore court found was the case in *Lim Kim Som*), but the contract made no stipulation that the purchase was subject to planning permission being obtained (which is a common term in Singapore contracts);
- (c) the English court would have treated an order for compulsory acquisition no differently from the listing, since two judges specifically drew analogies with compulsory acquisition for this purpose.<sup>86</sup>

66 However, it is difficult to be dogmatically assertive about the court's reasoning on foreseeability, as this is an area beset by uncertainty.

67 The fact that the parties have foreseen the event but not made any provision for it in their contract will usually, but not necessarily, prevent the doctrine of frustration from applying when the event occurs. It is a question of construction of the contract whether the parties intend their silence to mean that the contract should continue to bind in that event, or whether they intend the effect of that event, if it occurs, to be determined by any relevant legal rules.<sup>87</sup>

68 The issue is ultimately whether one party or the other has assumed the risk of the occurrence of the event. The degree of foreseeability needed to support the inference of risk assumption is higher than the test applied for the tort of negligence, and must be one which the

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<sup>85</sup> *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 at 172–173 and 176–177.

<sup>86</sup> *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 at 175B, per Lawton LJ and at 177C, *per* Sir John Pennycuik.

<sup>87</sup> *Chitty on Contracts* vol 1 (Sweet & Maxwell, 28th Ed, 2000) at paras 24-057 and 24-058.

parties could reasonably have thought was a real, rather than a theoretical, possibility.<sup>88</sup>

69 Against that background, one must concede that the wording of Special Condition 5 and the factual circumstances of this case (shrouded as they were in unsettled controversy) could give rise to a justifiable difference of views as to the foreseeability of compulsory acquisition of this property provided a court felt it was necessary to look into these matters at all.

70 However, the thesis of this paper is that, on the authority of *Amalgamated Investment* (now approved by the Privy Council):

- (a) the possibility of compulsory acquisition is taken as a matter within the reasonable contemplation of a normal vendor and purchaser of real property; and
- (b) the intention of the parties on this subject need not (in the absence of any exceptional contractual provisions or special facts) be the subject of a detailed contractual analysis or factual investigation.

### **III. Privy Council decision in *E Johnson & Co (Barbados) Ltd v NSR Ltd***

71 The Judicial Committee of the Privy Council has now spoken unequivocally on the question in *Johnson v NSR* and affirmed the correctness of *Hillingdon*.

72 The facts of this case require a little attention, as they can be distinguished from *Lim Kim Som*. In July 1989, NSR agreed to buy a piece of land from Johnson. A deposit was paid and completion was fixed for the end of September. Prior to the date fixed for completion, a notice was issued under section 3 of the Barbados Land Acquisition Act that the property was likely to be required for acquisition or other public purposes. The purchaser NSR then sued for the return of its deposit, and the vendor Johnson counterclaimed for specific performance. Under

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<sup>88</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) at p 466.

the Barbados Act, a section 3 notice enabled the government to do a number of acts preparatory to compulsory acquisition, but did not have the effect of vesting the land in the government until a notice was published under section 5 of the Act declaring it to have been acquired, whereupon the land would vest in the government. Before the action came to trial, a section 5 notice was published, vesting the land in the government.

73 The Judicial Committee held that the publication of a notice under section 3 of the Barbados Land Acquisition Act warning that land under a contract of sale was likely to be required for government purposes did not frustrate the contract since it was to be presumed, in the absence of specific provision to the contrary, that the purchaser had agreed to accept the normal risks incidental to land ownership as from the date of the contract, including the risk of interference with land-owning rights by the government. The Judicial Committee further held that the limited powers accruing to the government pursuant to the issue of a section 3 notice did not extend to a right to immediate possession so as to prevent the owner of the land from being able to give vacant possession to a purchaser on completion. Accordingly, since the vendor had been in a position to give vacant possession on completion, the contract had not been frustrated and the purchaser had been in breach of contract.<sup>89</sup>

74 Lord Jauncey of Tullichettle, delivering the advice of the Judicial Committee, dealt with the frustration argument in a relatively short passage:<sup>90</sup>

Consideration of these submissions requires in the first place an analysis of the precise effect of publication of a section 3 notice. This is threefold, namely: (1) it is a warning that the land is likely to be required for Crown purposes; (2) it empowers the chief surveyor to enter on the land for certain limited purposes none of which involves taking possession of the land or any part thereof, and (3) it enables the Governor-General to authorise, under section 4, the chief surveyor to do work on the land before it vests in the Crown

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<sup>89</sup> *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 409E.

<sup>90</sup> *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 406–407.

by publication of a section 5 notice. However it provides no certainty that the land will be acquired and section 9 makes provision for abandonment of the compulsory purchase procedure at any time before payment of compensation.

Is this threefold effect such as to render the obligation to give vacant possession 'incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract?' (*Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729, *per* Lord Radcliffe). Their Lordships consider that the answer must be 'No'. On the conclusion of a contract for *sale* of land the risk passes to the purchaser. It will be presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. The risk of interference with land-owning rights by the Crown or statutory authorities is always present. The land may be needed for the construction of a road or an airport, wayleaves for power lines or for gas or oil pipes may be required, restrictions may be imposed on the use of the land by planning legislation or the peace and quiet which the owner had hoped to enjoy may be shattered by a noisy local development. These are some of the examples of the ways in which a landowner is at risk of having his rights and enjoyment removed or curtailed. A threat of compulsory purchase, and publication of a section 3 notice can amount to no more than that, does not radically alter the nature of the contract of sale. What it does is simply to increase the likelihood of an existing albeit remote risk becoming an eventuality.

75 Lord Jauncey then went on to quote with approval the remarks of Vaisey J in *Hillingdon* about frustration which have been quoted above<sup>91</sup> ("No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country ..."), and said:<sup>92</sup>

Their Lordships consider that these observations are equally applicable to the position in this case after the publication of the section 3 notice.

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<sup>91</sup> See n 27 above.

<sup>92</sup> *E Johnson (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 407D.

76 Lord Jauncey also relied on the Court of Appeal's decision in *Amalgamated Investment* and concluded:<sup>93</sup>

It follows that a section 3 notice does not amount to a frustrating event.

77 Essentially, the Judicial Committee decided as follows:

- (a) The risk of Government intervention in land-owning rights is always present and (implicitly) must be foreseen (contrast this with the Singapore Court of Appeal's view<sup>94</sup> that "the rigid insistence on the fact that the event ought to have been foreseen cannot be an adequate solution and it would negate the very test propounded by Lord Radcliffe in the *Davis Contractors case*").
- (b) A threat of compulsory purchase does not radically alter the nature of the contract of sale within the Lord Radcliffe test, but only increases the likelihood of an existing (albeit remote) risk becoming an eventuality, and therefore does not frustrate the contract (compare this with the Singapore Court of Appeal's view<sup>95</sup> that a section 5 gazette notification means a moral certainty that the property will be acquired and this does radically alter the nature of the contract).
- (c) Despite a section 3 notice, the vendor was still in a position to deliver vacant possession at the date of completion and (implicitly) to fulfil its contractual obligations to vest legal title in the purchaser (compare this with the High Court's reasoning in *Lim Kim Som (HC)*<sup>96</sup> that a section 5 gazette notification did not take legal title away from the owner until a section 18 entry had been made in the relevant register).

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<sup>93</sup> *E Johnson (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 407F.

<sup>94</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [44]–[45].

<sup>95</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [9]–[24].

<sup>96</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [59].

- (d) The decisions and reasoning in *Hillingdon* and *Amalgamated Investment* apply to a section 3 notice under the Barbados Act (contrast this with the Singapore Court of Appeal's express refusal to follow *Hillingdon* and its curious citation of passages from *Amalgamated Investment* effectively supporting *Hillingdon* without any comment on those passages except to rely on them for the proposition that a contract for the sale of land can be frustrated).<sup>97</sup>

78 A further aspect of the Judicial Committee's decision is of interest. Although it held that the contract was not frustrated by the section 3 notice, it went on to hold<sup>98</sup> that the vendor's counterclaim for specific performance could not be enforced by the time of the trial (this being the relevant date for consideration: see *Price v Strange*,<sup>99</sup> the same authority relied in by the Singapore Court of Appeal) since by then a section 5 notice had been published vesting the land in the Government, hence preventing the vendor from conveying title. While, therefore, the Judicial Committee (unknowingly) agreed with the Singapore Court of Appeal that the question of specific performance could only be determined at the trial, this did not prevent the Privy Council from expressly agreeing with Vaisey J's controversial remarks about beneficial ownership passing on contract.<sup>100</sup> In other words, the Judicial Committee saw no problem with reconciling its approval of the principle that equitable ownership passes on contract (which was one of the main reasons for Vaisey J's decision in *Hillingdon*, and which was rejected by the Singapore Court of Appeal) with its holding that specific performance is in effect a floating remedy that only crystallises at the time of the trial of a dispute about its enforcement.

79 This lends strong support to the argument raised earlier in this article that equitable ownership has to be decided on a *prima facie* basis – that is, on the presumptive rule that, absent special

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<sup>97</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [6]–[13].

<sup>98</sup> *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 410–411.

<sup>99</sup> [1978] Ch 337.

<sup>100</sup> *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 at 407B–D.

circumstances, the court will enforce every contract for the sale of real property. This in turn leads to the logical connection between the passing of property and the passing of risk, which puts the purchaser on risk of anything untoward happening to the property between contract and completion.

80 It is unfortunate that *Lim Kim Som* was not cited to the Judicial Committee and we can never know how the Privy Council would have dealt with that decision. There may be those who would argue that the Judicial Committee's decision is distinguishable from *Lim Kim Som* because the two cases were interpreting two different statutory provisions which are not in *pari materia*. While that may be a technically correct argument, it is submitted that the Judicial Committee is unlikely to have decided *Lim Kim Som* in the same way as the Court of Appeal. It is true that a Barbados section 3 gazette notification does not have the same relative finality in terms of the acquisition process as a Singapore section 5 gazette notification. However, it is clear that the Judicial Committee was giving broad approval to the line of reasoning first espoused by Vaisey J in *Hillingdon*, and later developed in *Amalgamated Investment*. Even the controversial remarks of Vaisey J about the passing of beneficial ownership on the signing of the contract were in effect approved by repetition of the same argument by Lord Jauncey, who expressly approved the same line of reasoning adopted in *Amalgamated Investment*. Further, the Judicial Committee expressly applied Lord Radcliffe's test of frustration in *Davis Contractors*, and it would take a brave person to argue that the Judicial Committee would have decided *Johnson v NSR* differently had *Lim Kim Som* been cited to it.

81 Subject to the remarks which will be made at the end of this article, any future consideration of *Lim Kim Som* and *Johnson v NSR* should therefore at least begin on the premise that these two decisions are inconsistent with each other (at least in spirit). The question will therefore be: which path will the law follow? It is clear which way the English courts will go, judging from the wholesale acceptance of *Johnson v NSR* by English textbooks (in the absence of any English case

authority for the moment);<sup>101</sup> The present English position after *Johnson v NSR* is definitively stated by Treitel as follows:<sup>102</sup>

Specific performance of a contract for the sale of land can be ordered against the purchaser even though, after contract, a compulsory purchase order is made in respect of the land. (*Hillingdon*) The contract is not frustrated because the risk of compulsory acquisition is on the purchaser from the time of the contract, and because the court's order will result in the conveyance of the land to him, against payment of the price, so that he will in due course get the compensation payable by the acquiring authority. Where, in pursuance of the compulsory acquisition order, the land is taken over by the acquiring authority *after* completion has become due, but before the hearing, the court will not order *specific* performance, since it cannot order the vendor to convey, but the contract is not frustrated, so that the purchaser's failure to complete on the due day is a breach for which he is liable in damages. (*Johnson v NSR*) The position is different where the land is sold with vacant possession and is actually requisitioned *before* completion is due. In such a case it has been held, not only that the vendor cannot specifically enforce the contract (since he cannot perform his obligation to give possession on the due date), but also that the purchaser can get back his deposit. It must follow from this reasoning that the purchaser will not be liable in damages.

82 It is therefore a matter for speculation as to how the Singapore courts will proceed from here.

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<sup>101</sup> *Eg, Chitty on Contracts* vol 1 (Sweet & Maxwell, 28th Ed, 2000) at para 24-055; *Anson's Law of Contract* (Oxford University Press, 27th Ed, 1998) at p 526.

<sup>102</sup> G H Treitel, *The Law of Contract* (Sweet & Maxwell, 10th Ed, 1999) at p 835.

#### **IV. Local case law after *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman***

83 There have been a surprising number of cases which have referred to *Lim Kim Som*. Not all are relevant to the issue of frustration.<sup>103</sup> Those that deal with frustration show that the principle has been applied in a way that was not perhaps intended by the Court of Appeal, and sometimes with surprising consequences.

##### **A. Win Supreme Investment (S) Pte Ltd v Joharah bte Abdul Wahab<sup>104</sup>**

84 This was the first Singapore case in which *Lim Kim Sam* was judicially cited.

85 The plaintiff bought a property from a mortgagee (UMBC) of the developer of the property (Sri Jaya), and sued the occupier (the defendant) of the property for vacant possession. The occupier's father had bought the property from the lessee (the Society) of the developer, whose interest had been overreached by the mortgagee sale. After his father's death, the occupier agreed to pay a fresh fee to the lessee in return for a new lease to be issued in the name of the occupier. When the plaintiff sued the occupier, the latter claimed third-party relief against the lessee for breach of this agreement. The lessee claimed that the agreement had been frustrated by the mortgagee's action in selling the property.

86 Chao Hick Tin J dealt with the frustration argument in this way: he cited *Lim Kim Som* as deciding that frustration applies to a contract for the sale of immovable property, but distinguished it from the present

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<sup>103</sup> In *British & Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1999] 1 SLR(R) 61, the Court of Appeal reiterated (at [67]) its view expressed in *Lim Kim Som* (at [66]) that ownership passes on contract only where that contract is specifically enforceable. This view has been criticised by Joan Sethupathy in "When Equity and the Common Law conflict, Equity does not always prevail" (1995) 7 SAclJ 212.

<sup>104</sup> [1996] 3 SLR(R) 583.

case because *Lim Kim Som* was a case of statutory intervention. Further, the developer's default under the mortgage was clearly something foreseeable (an interesting observation in the light of the Court of Appeal's doubts about the relevancy of foreseeability). The lessee was therefore in breach of contract even though its breach was caused by the developer, against whom the lessee could claim an indemnity.<sup>105</sup>

87 There can be no quarrel with Chao J's holding that the doctrine of frustration applies to the sale of land, and his instinct in restricting the scope of *Lim Kim Som* is to be commended. However, nothing in the judgment deals with the merits of the Court of Appeal's findings on the facts of that case.

### **B. Lee Seng Hock v Fatimah bte Zain**

88 The appellant in *Lee Seng Hock v Fatimah bte Zain*<sup>106</sup> ("*Lee Seng Hock*") was the registered proprietor of a H share in a piece of land. The other H share was owned by the estate of a deceased person, of which the respondent was the administratrix. In December 1979, the respondent (as administratrix) agreed to sell the deceased's H share to the appellant for RM40,000, and a deposit of RM4,000 was paid. In March 1990 a *kadi's* certificate was issued distributing the deceased's H share to the respondent and *baitulmal* (that is, property of the Muslim community and public treasury comparable to the old common law escheat) in equal shares. This had the legal effect of preventing the sale of the deceased's H share to the appellant. In May 1994, the whole land was acquired by the Government.

89 Compensation was awarded to the appellant and respondent for their respective shares in the land. The respondent's compensation for her G share was RM97,314 and the same amount was awarded for the estate's G share. The sale and purchase agreement between the appellant and the respondent had not been completed as it was subject

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<sup>105</sup> *Win Supreme Investment (S) Pte Ltd v Joharah bte Abdul Wahab* [1996] 3 SLR(R) 583 at [30]–[34].

<sup>106</sup> [1996] 3 MLJ 665.

to an order of court sanctioning the sale, which could not be applied for owing to the events described above. The appellant then claimed the respondent's personal share of the compensation (less the balance of the purchase price of RM36,000), since the amount awarded to her as administratrix belonged to *baitulmal*. He based his claim on the premise that the sale agreement was still valid despite the failure to obtain a court order to sanction the sale and despite the fact of the acquisition, arguing that the contract had not been frustrated.

90 The Malaysian Court of Appeal found that the delay in completion was not due to the fault of the respondent (a vital distinguishing feature from *Hillingdon* and *Lim Kim Som*) because of the events that had taken place after the sale agreement. The court found that the compulsory acquisition that occurred here took place 14 years after the contract was entered into and could not have been foreseen by the parties. The court then applied the Lord Radcliffe test of whether there had been a radical change in the parties' obligations and held that what had been agreed was a sale of the H share of the respondent. When the land was compulsorily acquired and compensation was awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible, and the acquisition therefore frustrated the agreement. The court applied *Lim Kim Som* and held that the appellant could not claim the compensation, although he was entitled to a refund of his 10% deposit.

91 The curious feature about this case is that, unlike *Hillingdon*, *Lim Kim Som* and *Johnson v NSR*, it was the purchaser who was seeking to enforce the contract. On the facts this was not surprising, because the value of the compensation was higher than the purchase price.

92 There can be no criticism of the actual decision in this case, whatever view one takes of *Lim Kim Som*, because, even if one applied *Johnson v NSR*, the contract would still have been held to be frustrated. The reason is that, in this case, the process of acquisition had been completed before the sale had been completed, and therefore the vendor was, at the time of the trial, unable to convey title. Further, unlike the fact situation in the three cases mentioned above, the vendor was not at

fault for the late completion, and there could be no objection to her relying on the doctrine of frustration.

93 In the circumstances, the reliance on *Lim Kim Som* was gratuitous, and the only contribution of this case to our discussion is to point out that it is not always the purchaser who will suffer or the vendor who will gain if the parties are held to their contractual obligations despite the making of a compulsory purchase order.

### C. **Tay Ah Poon v Chionh Hai Guan**<sup>107</sup>

94 This case had even more bizarre facts than *Lee Seng Hock*.

95 The vendors agreed on 21 March 1995 to sell their HDB flat to the purchasers for \$228,000. The purchasers paid a deposit of \$5,000 and completion was fixed for 15 September 1995. On 22 August 1995, the Government announced that the Boon Tong Estate (where the subject property was located) would be compulsorily acquired for the Selective En-Bloc Redevelopment Scheme (“SERS”). The terms of acquisition were that the owners of all affected flats would be given a compensation package more favourable than under the Land Acquisition Act (indeed, virtually the same as the contract price) plus an assured allocation of a new flat for a fresh 99-year lease at a 20% discount off the price of the new flat.<sup>108</sup> On 14 September 1995, a formal gazette notification was published under section 5 of the Land Acquisition Act. Later, the vendors’ solicitors advised the purchasers that the vendors did not wish to proceed with the sale, relying on clause 5 of the agreement, under which they claimed that they had a contractual right to terminate the agreement on refunding the deposit and paying a sum equivalent to 10% of the purchase price as liquidated damages. The vendors forwarded a cheque for \$27,800 to the purchasers, who refused to accept it, and sued for specific performance.

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<sup>107</sup> [1996] 2 SLR(R) 553; on appeal, [1997] 1 SLR(R) 596.

<sup>108</sup> Details of the SERS are described in *CCH/SISV Singapore Real Estate Handbook* by Amy Lee-Khor Lean Suan and Tay Kah Poh at para 30-525.

96 The vendors' position was that, on the true construction of the agreement, they were entitled to terminate the agreement on paying the sum of \$22,800; however, they later changed their position to argue that they need not even pay the 10% by way of liquidated damages as the contract had been frustrated since, if specific performance were ordered, the purchasers would get very much more than what they had bargained for, which was a four-room flat.

97 The purchasers' position was that the doctrine of frustration did not apply because, unlike *Lim Kim Som*, the contract could still be performed, as the defendants could convey the flat. There was no change in the nature and duration of the title; the HDB would pull down the existing blocks (including the subject property) and put up new flats for the owners which would come with fresh 99-year leases.

98 At first instance, Lai Siu Chiu J held as follows:<sup>109</sup>

The real issue in this case is, who should reap the unexpected windfall resulting from the compulsory acquisition of the flat, unlike other acquisition exercises? Counsel for the defendants in submitting that the agreement was frustrated said if specific performance was ordered, the plaintiffs would have obtained more than what they had bargained for, which was a four-room flat. Conversely, counsel for the plaintiffs in arguing against frustration pointed out that there was nothing to prevent the defendants from transferring the title in and the flat to the plaintiffs; it would take some time for the Government to implement the acquisition exercise which will only be done *after* the Government has built new flats for affected owners to move in *before* their existing flats are demolished for redevelopment. It is also obvious that in that event the plaintiffs would have obtained more than what they had bargained for as, besides the compensation sum, they would be allotted a new flat with a fresh 99-year lease. Unlike *Lim Kim Som v Sheriffa* the acquisition exercise here, which was before not after, the scheduled completion date, would not frustrate the contract, as the position *vis-à-vis* the flat has not been altered fundamentally. It cannot be said that after the sale and purchase has been completed,

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<sup>109</sup> *Tay Ah Poon v Chionh Hai Guan* [1996] 2 SLR(R) 553 at [27].

what would be conveyed to the plaintiffs would be an estate which is unuseable and unsaleable let alone that the plaintiffs would receive compensation far below the market value of the flat. In fact the position would be quite the opposite. [emphasis in original]

99 Accordingly, as she found that, on the true construction of clause 5, the vendors were entitled to call off the sale upon payment of the liquidated damages, she upheld the vendors' rescission of the contract.

100 Leaving aside her interpretation of clause 5 (which was reversed on appeal), Lai J's interpretation of *Lim Kim Som* is curious. Her reliance on the ability of the vendors to convey title was precisely the argument that the High Court in *Lim Kim Som (HC)* had relied on in denying frustration,<sup>110</sup> and this argument was rejected by the Court of Appeal, which underlined the point that, regardless of whether the frustrating event occurred before or after the scheduled date of completion, if the event was one that radically changed the obligation, then it would frustrate the contract so long as it was executory. This leads to Lai J's second point, that the position of the flat had not been altered fundamentally by the acquisition since, unlike *Lim Kim Som*, what would be conveyed would not be unusable and unsaleable with compensation below the market value of the flat; indeed, what would happen would be quite the opposite.

101 Lai J's reasoning seems to imply that one applies Lord Radcliffe's test only from the viewpoint of the purchaser: if the result of the putative frustrating event is to leave him with a pig in a poke, then there is frustration, but if it gives him a windfall which would otherwise accrue to the vendor, then there is no frustration. However, the actual decision can probably be rationalised by an objective characterisation of the contract as one for the sale of property in exchange for a sum of money. The purchasers got a property which was exchangeable for a superior property at no loss to them (in fact at a financial gain), and the vendors got the same amount of money due under the contract. The real point is that, unlike in *Lim Kim Sam*, neither party suffered a financial

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<sup>110</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [63].

loss arising from the compulsory acquisition. As will be argued later, this is an important distinction which can lead the way to a true understanding of the limited scope of the decision in *Lim Kim Som*.

102 On appeal,<sup>111</sup> the Court of Appeal disagreed with Lai J's interpretation of clause 5 and held that it did not exclude the purchasers' common law right to specific performance, and the court accordingly granted the purchasers that relief. Its finding made it unnecessary for it explicitly to deal with the question of frustration, but the inevitable conclusion to be drawn from its decision is that the court must have impliedly approved of Lai J's reasoning on the issue of frustration, since it could hardly have granted specific performance of a frustrated contract. This is borne out by Karthigesu J's citation<sup>112</sup> of Lai J's remarks about *Lim Kim Som* quoted above, without any comment. Since Karthigesu J was one of the members of the Court of Appeal in *Lim Kim Som*, one must presume that he approved of Lai J's interpretation of his earlier judgment, strange as that interpretation may seem.

#### **D. Maxi Developments Pte Ltd v Tan Siew Kheng Helen<sup>113</sup>**

103 This is the only local case which has discussed *Lim Kim Som* and *Johnson v NSR* in the same judgment (indeed, it is the only local case that has mentioned *Johnson v NSR* at all). Unfortunately, it has not enlightened us as to which decision the local courts will follow.

104 The purchasers of a piece of property had purchased the property by tender. The tender document specified that the property was sold subject to all road proposals and schemes, and the purchasers were deemed to have purchased the property subject to such proposals and schemes and also subject to the Government acquiring the property. The purchasers now claimed that the title was bad in that they had been misled by a faxed site plan into believing that the property was capable of redevelopment, when in fact a road proposal made redevelopment

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<sup>111</sup> *Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 596.

<sup>112</sup> *Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 569 at [11].

<sup>113</sup> [1998] 1 SLR 875.

impossible. The contract contained no term that the property was capable of redevelopment.

105 Christopher Lau JC dismissed the claim on various grounds, mainly because he found that the purchasers had not relied on the site plan and were bound by the clear terms of the contract. However, in passing, he also uttered these words:<sup>114</sup>

The plaintiffs had not contended that the contract had been frustrated or that the property was subject to acquisition by the State or that the property would be unusable or unsaleable on account of such land acquisition. Such an allegation would only have applied if the properties or a substantial part thereof had been the subject matter of notice under the Land Acquisition Act (Cap 152) – see *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233. The properties had not been affected by any notice of land acquisition. In any event the Privy Council had recently held in *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400 that even if a property was subject to a notice of acquisition (which was not the case here) in the absence of a specific provision in the contract to the contrary (which was also not the case here as the property was sold subject to all road proposals and schemes) the purchaser had agreed to accept the normal incidents of land ownership as from the date of the contract including the risk of interference with land owning rights by the State and consequently the purchaser was obliged to complete the purchase of the property.

106 It is not clear how Christopher Lau JC thought that the two cases were reconcilable. His use of the term “notice of acquisition” in relation to the section 3 notification in *Johnson v NSR* does not suggest that he was thinking of distinguishing the effect of the Barbados notification from the effect of the section 5 gazette notification in *Lim Kim Som*. However, whatever his reasoning, as will be pointed out later, the decision is important in asserting the argument that *Johnson v NSR* can be regarded as applicable in Singapore despite *Lim Kim Som*.

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<sup>114</sup> *Maxi Developments Pte Ltd v Tan Siew Kheng Helen* [1997] 3 SLR(R) 865 at [6(c)].

## V. *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* and private *en-bloc* sales

107 Reference has been made above to the problems of compulsory acquisition arising from the HDB SERS. A further problem arises with private *en-bloc* sales consequent upon the recent amendments to the Land Titles (Strata) Act.<sup>115</sup> Part VA of the amended Act now compels individual subsidiary proprietors (and their successors in title) to sell their lots in the condominium development if an order to that effect is made by the Strata Titles Board.<sup>116</sup> The frustration question will then arise in the following scenario:

- (a) An existing subsidiary proprietor (“SP”) agrees to sell his lot to a purchaser (“P”) for \$1m.
- (b) After the contract, but before completion, the remaining subsidiary proprietors obtain an order from the Strata Titles Board for all the units in the condominium development to be sold at a price reflecting an apportioned value for SP’s lot of \$1m.
- (c) P is upset, because he will be forced to sell the lot as soon as completion takes place, which will:
  - (i) deprive him of a home, which he may consider particularly suitable for his needs;<sup>117</sup>
  - (ii) result in a net financial loss to him after paying two sets of transactional fees and expenses.
- (d) Will *Lim Kim Som* apply to frustrate the contract? To SP, the nature of the obligation has not radically changed, as he is still

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<sup>115</sup> Land Titles (Strata) (Amendment) Act 1999 (S 34/1999).

<sup>116</sup> Land Titles (Strata) Act (Cap 158, 1988 Rev Ed) s 84B(1).

<sup>117</sup> *Cf* the argument of the Court of Appeal in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [45] that the purchaser had bargained for not only the legal estate, but the use of the property, and denial of this expectation was (at least in part) justification for applying the doctrine of frustration. *Cf* also the argument of the purchasers in *Tay Ah Poon v Chionh Hai Guan* [1996] 2 SLR(R) 553 at [15] that it would be unfair to frustrate the contract as they had spent considerable time and effort selecting this particular unit, which was especially suitable for their needs.

selling the legal and beneficial interest to his lot. However, P may argue that there is a radical change in the nature of his obligation, as he was buying a unit for occupation, and he will not be able to occupy the unit, but will be forced to sell it, and at a loss to boot.

- (e) Although the loss here is not as devastating as was the case in *Lim Kim Som*, the logic of the Court of Appeal's argument could be stretched to encompass P's argument. However, to accept P's argument would lead to a detailed comparison of the terms of the order made by the Strata Titles Board with the terms of the contract made between SP and P, resulting in uncertainty as to the validity of the contract. It would also create an anomalous discrepancy between an HDB SERS situation and a private *en-bloc* sale, if the decision in *Tay Ah Poon* is accepted as the paradigm in every HDB SERS case.

108 The scenario described above could be varied if the apportioned *en-bloc* sale price for the lot were to be higher than the sale price agreed between SP and P. The fact situation could become somewhat complicated:

- (a) SP might now argue for frustration, on the ground that the *en-bloc* order was unforeseeable, and P was buying the unit for personal occupation, which was now impossible. If P agreed with SP, the frustration issue would become moot because the parties would simply agree to rescind the contract.
- (b) However, if P did not wish to argue for frustration because he was happy to take the profit on the *en-bloc* sale and buy another unit elsewhere, can SP nonetheless steal P's argument and contend that the nature of the obligation is to be determined objectively at the time of the making of the contract and P cannot be allowed to take advantage of the unexpected opportunity to change his mind about wanting the unit for occupation?

109 These are the problems that await a reconciliation of *Lim Kim Som* and *Johnson v NSR*.

## VI. Inherent caution of the courts

110 The interesting fact that has emerged is that, although a number of courts and cases have purported to approve or apply *Lim Kim Som*, in virtually no case has a contract actually been declared to have been frustrated following *Lim Kim Som*.<sup>118</sup> Either *Lim Kim Som* is of narrower application than originally believed, or the courts are being affected by their natural instinct to apply the doctrine of frustration itself restrictively.

111 This instinct may be illustrated in another recent case, *M P Bilt Pte Ltd v Edy Yumianto*<sup>119</sup> which is of interest as it is another case for the sale of real property where the doctrine of frustration was invoked although reliance was (surprisingly) not placed on *Lim Kim Som*. This was one of the cases that arose out of the Asian financial crisis, resulting in a number of Asian buyers of condominiums under development (in this case Ardmore Park) being unable or unwilling to meet the progress payment claims of the developer under the standard prescribed form of housing developers' contract. One of the defences pleaded here was that the financial crisis in Indonesia had caused such inflation and consequent loss to the Indonesian buyer's business that he was no longer able to pay the instalments under the agreement, which was therefore frustrated. Choo Han Teck JC rejected this argument because the subject matter of the agreement was the property in Singapore, which was unaffected by the Indonesian crisis. Inflation might bring about frustration only in very exceptional circumstances, but this was only one factor which had to be set against the terms and nature of the contract. In this type of agreement, the financial capacity of the buyer was his own concern, and he had to run the risk of his own financial difficulties.

112 Choo JC's decision was upheld by the Court of Appeal (which did not deliver a written judgment) and is clearly right. However, it is

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<sup>118</sup> Except for the Malaysian case of *Lee Seng Hock v Fatimah bte Zain* [1996] 3 MLJ 665, where the decision was in reality not dependent on *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 and was unnecessarily applied.

<sup>119</sup> [1999] 2 SLR(R) 655.

slightly regrettable that he even countenanced the possibility that, in certain circumstances, inflation might bring about frustration, relying on a dictum in *Wates Ltd v Greater London Council*.<sup>120</sup>

113 It is respectfully submitted that inflation of any currency other than the currency of the contract can never give rise to frustration, as it will not bear on the subject matter of the contract, but merely affect the ability of one party to perform its financial obligations, which is generally accepted as not being a frustrating event.<sup>121</sup>

### **VII. Whither *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*?**

114 The key question here is whether *Lim Kim Som* is reconcilable with *Johnson v NSR*. Although two of the three judges in *Lim Kim Som*<sup>122</sup> are now no longer on the Bench, given that it is a relatively recent decision of the court, which was not only a fully considered decision, but one which has apparently been accepted by other local courts, it would be unrealistic to expect the Court of Appeal openly to reverse its own decision, despite its ability to do so.<sup>123</sup>

115 If the underlying philosophy of *Johnson v NSR* is accepted, then the courts (including the Singapore Court of Appeal) may come to view *Lim Kim Som* more restrictively, in the light of its own special circumstances. Although this article has earlier suggested that *Lim Kim Som* can be viewed as a paradigm case (and hence a decision capable of wide, if not general, application), the case does differ from the English cases in one important respect. There is no English provision equivalent to the fire site provisions of the Land Acquisition Act that made the section 5 gazette notification such a disaster for the purchaser in *Lim Kim Som*. The compensation was not only pegged to an out-of-date valuation but was further diminished by the one-third rule. In Western countries (and

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<sup>120</sup> *M P Bilt Pte Ltd v Edy Yumianto* [1999] 2 SLR(R) 655 at [14].

<sup>121</sup> *Universal Corporation v Five Ways Properties Ltd* [1979] 1 All ER 552 at 554d.

<sup>122</sup> Karthigesu JA and Warren Khoo J.

<sup>123</sup> *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689.

even in this part of the world under certain circumstances),<sup>124</sup> compulsory acquisition is not necessarily a financial disaster and may even bring financial and other gains for the landowner. If the purchaser in *Lim Kim Som* had been forced to complete the purchase, he would have been hit with a triple body blow:

- (a) he would have lost the enjoyment of the land he had bought;
- (b) the valuation of the land was fixed at 30 November 1973 instead of the date of his purchase; and
- (c) the actual award was one-third of that reduced value.

116 Clearly these factors aroused the sympathy of the Court of Appeal.<sup>125</sup> The argument can therefore be made that, where the fire site provisions do not apply, neither does *Lim Kim Som*. A narrower argument might be that *Lim Kim Som* does not apply to any acquisition where the artificial valuation provisions of section 33 are not invoked, with the result that the landowner receives full market value as compensation (as in *Tay Ah Poon*). Indeed, *Tay Ah Poon* provides a strong clue as to the likely direction the Court of Appeal will take, because it implicitly approved Lai Siu Chiu J's reasoning that there was no frustration since, from the financial viewpoint, the purchaser would not suffer in the same way as the purchaser would have in *Lim Kim Som*.

117 It has to be said that such an approach would not be intellectually satisfying because the Court of Appeal in *Lim Kim Som* appeared to place as much (if not greater) emphasis on the loss of the use of the property as on the financial consequences of the acquisition.<sup>126</sup> This emphasis would suggest that frustration applies to *all* cases of compulsory acquisition, whatever the financial and other circumstances of the

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<sup>124</sup> As in *Tay Ah Poon v Chionh Hai Guan* [1996] 2 SLR(R) 553 (HC), [1997] 1 SLR(R) 596 (CA) and *Lee Seng Hock v Fatimah bte Zain* [1996] 3 MLJ 665.

<sup>125</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [45].

<sup>126</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [45].

acquisition. Fortunately, whatever the intellectual merits of the argument may be, that suggestion cannot stand in the light of *Tay Ah Poon*, and it is suggested that the way is now clear for even lower courts to apply *Lim Kim Som* only to acquisitions where the fire site provisions do not apply or (at the least) where the compensation paid is less than the property's market value at the time of the gazette notification. Further support for this approach can be found in *Maxi Developments*, where Christopher Lau JC seemed to find no contradiction between *Lim Kim Som* and *Johnson v NSR*, although the basis for his reasoning is unclear.

118 Finally, there is sound doctrinal justification for this approach since, as noted by the Court of Appeal itself in *Lim Kim Som*,<sup>127</sup> each case on frustration must be decided on its own particular facts, and the courts must therefore be slow to extract broad principles from any decision on frustration unless the judgment itself is expressed in terms of such principles. The language of the Court of Appeal in *Lim Kim Som* can (if one does not interpret it too imaginatively) be confined to the peculiar circumstances of that case (as compared to the language of the Court of Appeal in *Amalgamated Investment* and the Judicial Committee in *Johnson v NSR*, which was expressed in much broader terms of principle).

119 In the ultimate analysis, *Lim Kim Som* may not be as radical or far-reaching a decision as might have first been supposed. The natural pragmatic instincts of common law judges have again demonstrated the effectiveness of the common law as an instrument of law reform – to develop the law by increments rather than by sweeping statements of new principle. It may be disappointing to proponents of a broad and liberal doctrine of frustration to see how little the law has actually changed since *Lim Kim Som*. However, this is to fail to see its true significance. It is (probably) the first direct authority in the Commonwealth for the proposition that a contract for the sale of real property may be frustrated but, on its true interpretation, the case has re-affirmed the principle that every case of frustration has to be

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<sup>127</sup> *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [29].

analysed on its own facts. This in turn means that, while there is no doctrinal road block to declaring a contract for the sale of real property frustrated, the application of that principle will still have to be based on existing methods of case by case analysis. Compulsory acquisition *per se* will not necessarily result in frustration; the courts will still have to analyse the circumstances, both of the contract as well as of the acquisition, before deciding whether to declare the contract frustrated. Put that way, *Lim Kim Som* and *Johnson v NSR* may (however uneasily) co-exist.

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## Afternote to Essay 23\*

Michael HWANG SC<sup>†</sup> and Rachel ONG<sup>‡</sup>

There has been no case law development in Singapore and the common law world but it is noteworthy that the Privy Council decision of *Johnson (E) & Co (Barbados) Ltd v MSR Ltd*<sup>1</sup> has yet (as far as my research shows) to be cited in the common law world.

Since *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*<sup>2</sup> (“*Lim Kim Som*”), the leading textbook on property law in Singapore supports the view that was taken by the High Court in *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som*.<sup>3</sup> The learned authors of *Tan Sook Yee’s Principles of Singapore Land Law* (“*Tan Sook Yee*”) opined that, although the Court of Appeal in *Lim Kim Som* clarified that the doctrine of frustration applied to contracts for the sale of land, it is less clear whether the application to the case was justified. Under the Land Acquisition Act,<sup>4</sup> title only vests in the State when the collector has taken possession under section 16, and the necessary formalities for registration have taken place under section 18. It therefore remains arguable that, until title actually vests in the State, the vendor does have a title to pass to the purchaser on the date of completion.<sup>5</sup>

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\* Michael Hwang, “Does Compulsory Acquisition Frustrate a Contract for the Sale of Immovable Property? *Lim Kim Som* Revisited” [2000] Sing JLS 379. References to the first-person singular are to the principal author.

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‡ LLB (Hons) (Southampton); Associate, Michael Hwang Chambers, Singapore. [1997] AC 400.

<sup>1</sup> [1997] AC 400.

<sup>2</sup> [1994] 1 SLR(R) 233.

<sup>3</sup> *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375.

<sup>4</sup> Cap 152, 1985 Rev Ed.

<sup>5</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.105.

One difficulty with the Singapore Court of Appeal's reasoning is that, on a conventional view, the equitable interest passes to the purchaser and with it the risk also passes to the purchaser. In the classic English case establishing the rule that a contract of sale vests the equitable interest in the purchaser, *Lysaght v Edwards*, Jessel MR stated that, as between the vendor and purchaser of land, equitable title passes to the purchaser when there was a valid contract:<sup>6</sup>

It is the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

A valid contract means a binding contract, where there is "no ground for setting it aside as between the vendor and purchaser". A contract is only valid when he has made out his title according to the contract or the purchaser has accepted the title and the moment he accepts the title, the contract is fully binding on the vendor.<sup>7</sup>

*Lysaght v Edwards* also elaborated on the meaning of a valid contract:<sup>8</sup>

'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon

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<sup>6</sup> *Lysaght v Edwards* (1876) 2 Ch D 499 at 506.

<sup>7</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.81; *Lysaght v Edwards* (1876) 2 Ch D 499 at 507.

<sup>8</sup> *Lysaght v Edwards* (1876) 2 Ch D 499 at 507.

the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract ... If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's.

However, the Singapore position established by the Court of Appeal in *Lee Christina v Lee Eunice* is that equitable ownership passes when the contract is enforceable and binding.<sup>9</sup> The Court of Appeal in *Lim Kim Som* dealt briefly with this point by holding that, in the case before it, the equitable interest did not pass as the contract was frustrated and therefore could not be specifically performed. The Court of Appeal seemed to assume that the date for deciding whether the contract is specifically enforceable is the date of judgment.<sup>10</sup> However, the authorities are clear that the date on which the equitable title passes to the purchaser is when the purchaser had accepted the title of the vendor, and when the contract becomes enforceable, and not at the date of judgment. On the facts, the purchaser had not indicated that there were objections to the title of the property and the contract was enforceable at the date of completion.<sup>11</sup>

On the issue of whether compulsory acquisition would render the thing radically different from which it was undertaken such that frustration

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<sup>9</sup> *Lee Christina v Lee Eunice* [1993] 2 SLR(R) 644 at [48]; Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.81.

<sup>10</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.108; *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 233 at [41].

<sup>11</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.108.

applied to discharge the contract, in theory, so long as the contract remains an executory one, the doctrine of frustration can apply if there are sufficient grounds. While the vendor retains the title, it is arguable that, because of the impending compulsory acquisition of the property, the contract would render the thing radically different from which it was undertaken in the contract. The learned authors of *Tan Sook Yee* posit that this line of reasoning depends on the outcome when the State takes over the land. The Court of Appeal followed the earlier Privy Council decision in *Re Robinson; Robinson & Co v Collector of Land Revenue*<sup>12</sup> where a more technical view of compulsory acquisition was taken. It was of the view that the purchaser had intended the land for development, which brought the matter within the “coronation cases”, where unforeseen supervening events affected the purpose of the contract.<sup>13</sup> It is also apparent from the Court of Appeal’s reasoning that, when land was gazetted for acquisition in Singapore, it was inevitable that the property would be acquired and the compensation paid would not be commensurate with the current market rate.<sup>14</sup> The Court of Appeal’s approach has been said to be practical and commercially-oriented rather than technical,<sup>15</sup> which has resulted in the lack of clarity which is illustrated below.

The learned authors of *Tan Sook Yee* also take the view articulated in my article and question Lai Siu Chiu J’s decision in *Tay Ah Poon v Chionh Hai Guan*,<sup>16</sup> which arguably makes a stronger case for frustration on its

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<sup>12</sup> *Re Robinson; Robinson & Co v Collector of Land Revenue* [1980] 1 MLJ 255.

<sup>13</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.107; see also *Krell v Henry* [1903] 2 KB 740.

<sup>14</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at paras 16.107 and 16.109.

<sup>15</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 3rd Ed 2009) at para 16.109.

<sup>16</sup> [1996] 2 SLR(R) 553.

facts.<sup>17</sup> Here, the gazette notification came one day before completion was due and the vendor refused to complete on the basis that the contract was frustrated. Lai J distinguished *Lim Kim Som* on the basis that the gazette notification in this case came one day before completion was due, whereas the gazette notification came after the scheduled completion date in *Lim Kim Som*. On that basis, Lai J held that the contract was not frustrated. Upon closer study of the judgment, it is apparent that what weighed more heavily with her was that, unlike the situation in *Lim Kim Som*, where what would be conveyed was unusable and unsaleable or that the compensation would be far below the market value of the property, there was nothing here to prevent the vendors from transferring the title in the flat to the plaintiffs and it would take some time for the government to implement the acquisition exercise, which would only be done after the government had built new flats for new owners to move in before their existing flats were demolished for redevelopment.<sup>18</sup>

The case then went on appeal. The Court of Appeal implicitly agreed with Lai J's reasoning on the issue of frustration and granted the purchasers specific performance upon the true interpretation of clause 5 of the contract.<sup>19</sup> Lai J's reasoning implies that one applies Lord Radcliffe's test only from the viewpoint of the purchaser. If the result of the putative frustrating event is to leave him with a pig in a poke, then there is frustration. But if it gives him a windfall which would otherwise accrue to the vendor, then there is no frustration.<sup>20</sup> This outcome appears to be arbitrary and unfair to the parties to the contract if only the viewpoint of the purchaser is adopted.

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<sup>17</sup> Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 16.109.

<sup>18</sup> *Tay Ah Poon v Chionh Hai Guan* [1996] 2 SLR(R) 553 at [27].

<sup>19</sup> *Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 596.

<sup>20</sup> Michael Hwang, "Does Compulsory Acquisition Frustrate a Contract for the Sale of Immovable Property? *Lim Kim Som* Revisited" [2000] Sing JLS 379 at 412.

I maintain my position as articulated in my article which remains relevant given that the Privy Council decision of *Johnson (E) & Co (Barbados) Ltd v NSR Ltd*<sup>21</sup> remains good law. The Court of Appeal and the High Court in the *Lim Kim Som* cases fundamentally differed in principle. What the Court of Appeal was saying is that frustration of a contract of sale of a property can happen if the property is compulsorily acquired after the execution of the contract. On the other hand, I continue to adopt a more orthodox view that upon the conclusion of a contract for sale of land the risk passes to the purchaser and it is presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. The risk of interference with land-owning rights by the State or statutory authorities is always present.

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<sup>21</sup> [1997] AC 400.

## Background to Essay 24

Between 2003 and 2005, as counsel I argued a case concerning an American real estate entrepreneur who had died in a traffic accident in Singapore. He had a lifestyle which resulted in his giving a relatively small amount of maintenance on a periodic basis to his wife and children. However, he had been a man of a considerable wealth, and there was no doubt that he would have left his family a large sum of money and other assets by way of inheritance if he had lived for the rest of his expected natural life span and earned what he was capable of, even taking into account the normal commercial risks of entrepreneurship.

While damages for wrongful death had been recognised in many countries in the common law world, the High Court of Singapore found that, on a strict wording of the Civil Law Act, this head of claim known in other countries as “loss of inheritance” or “loss of savings” was not a recognised legal claim of loss for wrongful death in Singapore. Accordingly, the award for damages was actually much lower than the computation that I had submitted based on the concept of loss of savings and inheritance (see *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8).

We filed an appeal, but the case was settled before it reached the Court of Appeal, and therefore the law remained as stated by the High Court.

Later, I became a member of the Singapore Academy of Law’s Law Reform Committee and proposed that we should recommend a change in the law on damages for wrongful death. Gathering all my old authorities from the previous case, I presented a draft report explaining why the decision of the High Court was wrong in principle and resulted in injustice for the family of the deceased. My draft report was eventually accepted by the Law Reform Committee and published.

Thankfully, the committee’s recommendation in this report was accepted by the Government and the law was changed by the Civil Law (Amendment) Act in 2009. The concept of loss of savings and inheritance has now been recognised in statute and case law (see *Zhu Xiu Chun v Rockwills Trustee Ltd* [2016] 5 SLR 412).

The original version of this essay was published as a paper for the Law Reform Committee of the Singapore Academy of Law in April 2008.

*I wish to extend my thanks to Singapore Academy of Law for kindly granting me permission to republish this essay in this book.*

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## LOSS OF INHERITANCE OR SAVINGS: A PROPOSAL FOR LAW REFORM

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Michael **HWANG** and **FONG** Lee Cheng

In March 2007, Mr Michael Hwang first raised to the attention of the LRC a law reform proposal to allow for loss of savings or loss of inheritance to be taken into account in dependency claims. Recommendations for allowing such claims were discussed by the LRC and eventually approved in March 2008. These are now presented in this publication.

This paper reflects the authors' current thinking on the researched area of law and does not represent the official position of the Singapore Academy of Law or any governmental agency. The report has no regulatory effect and does not confer any rights or remedies.

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## I. Executive summary

1 A dependency claim arises when a breadwinner is killed by the tortious act of another, for example, in a car accident. The general measure of damages in dependency claims is assessed via an implied calculation based on the multiplicand and multiplier approach. This involves a measure of the annual or monthly sum given to the dependants and the number of years for which the moneys is expected to be given. However, this approach breaks down where there is a divergence between what one actually gives and what one can afford to give or where the deceased prefers to reinvest the moneys instead of disbursing it to his dependants.

2 In other common law jurisdictions which derive their legislation from the English Fatal Accidents Act 1846<sup>1</sup> (“Lord Campbell’s Act”), a sum reflecting what the dependants could have expected to inherit or benefit from the deceased’s savings had he lived his natural life (“loss of savings or inheritance”)<sup>2</sup> is awarded as part of the dependency claim. Singapore’s law of dependency as reflected in the Civil Law Act<sup>3</sup> is also derived from the English Lord Campbell’s Act.

3 In Singapore, before 2005, savings may sometimes be taken into account by implication if a certain method of calculation is adopted. However, the legal position in Singapore today is reflected in the case of

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<sup>1</sup> c 93.

<sup>2</sup> Whether it is called savings or inheritance is determined by the reference point of the assessment.

<sup>3</sup> Cap 43, 1999 Rev Ed.

*Lassiter Ann Masters v To Keng Larr*<sup>4</sup> (“*Lassiter v To*”) which decided in 2005 that Singapore would not follow the interpretation of the other jurisdictions and expressly stated that loss of savings or inheritance cannot be awarded in a dependency claim.

4 This means that, if a deceased killed in an accident in Singapore earns \$10,000 a month and gives his dependant only \$1,000, with the intention of saving the other \$9,000 for a rainy day (or bequeathing this sum to his family), the dependant might get only \$1,000 even though he might reasonably have expected that some part of the \$9,000 might come to him in the future had the deceased not been killed. The court in *Lassiter v To* itself recognised that this would give rise to apparent injustice to a deceased who put away a lot of his income in investments or savings, but considered that it was bound by the Civil Law Act to decide in this manner.

5 The present position is unsatisfactory as it creates a gap which benefits tortfeasors or their insurers at the expense of dependants. There is a need to bring Singapore law back in line with the more persuasive position taken by the other common law jurisdictions which have similar legislation and expressly allow for loss of savings or inheritance to be taken into account in a dependency claim.

6 Today, differences in our system of social welfare compared to other countries, as well as an aging population, mean that Singaporeans save more to provide for various contingencies. When an actively-saving breadwinner is prematurely killed, the failure to recognise loss of savings on a head of claim means that dependants are not fully compensated for the full extent of their financial losses existing from the death of their breadwinner.

7 The driving principle behind the law of dependency claims is to compensate dependants for all reasonable expectation of pecuniary benefit. The test of “reasonable expectation of pecuniary benefit” is applied by all the common law jurisdictions which derive their legislation from Lord Campbell’s Act. The other jurisdictions have held that such

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<sup>4</sup> [2005] 2 SLR(R) 8.

reasonable expectation should include the dependant's expectation of benefiting from the future savings of the deceased. There is no reason why Singapore's interpretation of the same test should be different. In fact, loss of future Central Provident Fund ("CPF") contributions, a type of enforced savings, has already been expressly awarded to dependants as a reasonably expected pecuniary benefit. Accordingly, the loss of other types of savings should be similarly awarded, less the necessary discounts for acceleration due to early receipt of a capital sum, tax and other contingencies.

8 England, Australia and Malaysia have taken savings into account as part of the value of the dependency by either including savings when calculating the annual value of the dependency or by way of an additional sum. Canada and the US award a separate sum for loss of inheritance in a dependency claim. Hong Kong takes into account savings in the award of an accumulation of wealth in an estate claim. Similarly, Singapore should not deprive dependants of the amount of lost future savings/inheritance which they would have been given by or inherited from the deceased had he not died prematurely.

9 The fact that the Hong Kong, US and Canadian courts have been explicitly awarding sums as accumulation of wealth or loss of inheritance for at least the past decade demonstrates clearly that such awards reflect a calculable and estimable pecuniary loss that dependants can demonstrate would have accrued to them and which they have therefore lost as a result of their breadwinner having been prematurely killed. The Hong Kong cases clearly show that even cleaners and construction workers (the man on the street) are capable of establishing a savings pattern from which a loss of savings or inheritance can be calculated. The fact that insurance premiums may be affected has not prevented these jurisdictions from awarding full and fair compensation to innocent dependants.

10 The concern in *Lassiter v To* which resulted in Singapore law taking a different position was that an award of the portion of savings that a dependant could reasonably expect to inherit could not be awarded

owing to a statutory prohibition in the Civil Law Act against the recovery of loss of income after death by the estate.<sup>5</sup> However, section 10 of the Civil Law Act was only intended to bar double recovery by both dependants and the estate for the same loss. It was not to bar all recovery. An award for loss of savings/inheritance in a dependant's claim is different in nature from an estate claim for loss of income as it is based on the probability of the dependant inheriting or receiving the benefit of the deceased's savings. Only the portion of the deceased's future savings that a dependant could reasonably expect to benefit from or inherit will be awarded to him. Taking our example above, the deceased might have spent \$7,000 on his personal enjoyment and medical care during retirement and intended to give the remainder of \$2,000 to his dependant either towards the end of his life or after he died. The dependant should then be awarded the present value of the expected \$2,000 discounted for probability of inheritance or probability that dependant would not benefit (for example, likelihood of dependant surviving the deceased assuming the deceased had lived, or likelihood that dependant would cease to be dependent), tax, *etc.*

11 The award of loss of savings or inheritance would not necessarily result in a large increase in sums awarded to dependants as shown by the table "Sums courts have awarded for loss of savings/inheritance"<sup>6</sup> illustrating the practice of courts in other jurisdictions.

12 Any residual danger of double recovery by the estate and dependants is eliminated in Singapore as dependency and estate claims can be subsumed in one action, so that any overlap in recovery would be obvious to the judge. Probabilities and various contingencies can be assessed in a holistic manner by the judge.

13 Another reason why the law in this area should be clarified is that the Singapore courts currently use two different calculation methods interchangeably, where one of the methods impliedly takes into account the loss of savings or inheritance and the other method does not.<sup>7</sup> This

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<sup>5</sup> Civil Law Act (Cap 43, 1999 Rev Ed) s 10.

<sup>6</sup> See Appendix I below.

<sup>7</sup> For more details, see paras 14–40 below.

does not provide for a consistent or fair treatment of dependency claims. There is a need for the Legislature to correct this injustice by passing legislation stating that savings or inheritance can be expressly recognised in dependency claims.

## II. Legal background

### ***A. Existing method of calculation: Failure to take into account loss of savings creates gap which benefits tortfeasors or their insurers***

14 In Singapore, traditionally, damages for the loss of dependency are calculated pursuant to section 20 of the Civil Law Act<sup>8</sup> using a multiplicand and multiplier method. In practice, what is done is that the court takes the value of the material benefits for dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided for them, had he not been killed.<sup>9</sup> This determines the multiplicand, which represents the annual value of the dependency, taking into account various contingencies.

15 In determining a multiplier, the court then looks at the number of years that it is anticipated that the dependency would have lasted had the deceased not been killed, which will vary between dependants, taking into account the age, life span and expected working life of both deceased and dependant.<sup>10</sup>

16 The multiplicand is then multiplied by the multiplier to give the amount of the award.

17 In determining the multiplicand, there are two methods of calculation which take into account the loss of inheritance or savings, as

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<sup>8</sup> Cap 43, 1999 Rev Ed.

<sup>9</sup> *Tay Say Moi v Mua Hin Poultry Farm Pte Ltd* [1992] SGHC 219.

<sup>10</sup> *Carrie Chan et al, Practitioner's Library: Assessment of Damages: Personal Injuries and Fatal Accidents* (Subordinate Courts & LexisNexis, 2005) at para 9-50.

well as a third method (“traditional method”) which does not take into account the loss of inheritance or savings:

- (a) the two-way split (loss of savings impliedly taken into account, also described as the percentage method in *Hanson Ingrid Christina v Tan Puey Tze*<sup>11</sup> (“*Christina Hanson*”)): take the deceased’s income, deduct his personal expenses (usually expressed as a percentage) and assume that the remainder would be for the benefit of the dependants;
- (b) the three-way split (separate sum awarded for loss of savings): take the deceased’s income, deduct what he would have spent on his dependants annually, and add a separate sum reflecting what the dependants would have inherited or received from the deceased towards the end of his life;
- (c) when there is no sum awarded for the loss of savings, and only a sum representing the benefits received by the dependants from the deceased is awarded, this is known as the “traditional method”, which has been applied both in *Lassiter v To* and most recently in *Christina Hanson*. When the separate sum in paragraph (b) is not added, the dependants will be under-compensated.

18 Previously, the courts treated the two-way split (percentage method) and the traditional method as interchangeable, according to *Assessment of Damages: Personal Injuries and Fatal Accidents*.<sup>12</sup>

First, add up the financial benefits received by the dependants ... Non financial benefits can also be taken into consideration, such as services provided by the deceased ... Then, deduct from that sum the proportion that is attributable to the benefit of the deceased, *eg* his share of the food bill and electricity. The balance sum calculated on an annual basis will be the multiplicand. [the traditional method]

An alternative method is to take the deceased’s net income [excluding entitlements from the employer like housing or overseas

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<sup>11</sup> [2008] 1 SLR(R) 409.

<sup>12</sup> Carrie Chan *et al*, *Practitioner’s Library: Assessment of Damages: Personal Injuries and Fatal Accidents*, (Subordinate Courts and LexisNexis, 2005) at p 101.

monthly allowance] and deduct from that figure the deceased's own expenses. The balance will presumably be for the benefit for the rest of the family. Yong CJ in *Ho Yeow Kim v Lai Hai Kuen* [1999] 2 SLR 246 at [22] commented that this is a rule of thumb which will not be applied where the facts clearly did not warrant so. [two-way split]

19 In *Tan Harry v Teo Chee Yeow Aloysius*,<sup>13</sup> the court on appeal explained the difference between the two-way split and the three-way split:<sup>14</sup>

[S]avings is generally not mentioned as a factor to be taken into account in dependency claims because the usual approach is to split the deceased's income into what he would have spent on himself and on his dependants *ie* a two-way split instead of a three-way split which would then include savings. Indeed the *Practitioner's Library* recognises the two-way split as the alternative approach to adding up all the benefits received by dependants (see at 708).<sup>[15]</sup> However, [in the present case] the AR had split Philip's income three ways including savings. ...

20 However, in the recent case of *Christina Hanson*,<sup>16</sup> Judith Prakash J (as she then was) clarified that the two-way split (or the percentage method) is to be used only when a stable pattern has been established in a marriage and virtually all net earnings are spent on living expenses.

21 Other examples where the traditional method has been applied – that is, where the court has made an assessment of loss of dependency very largely based on the annual or monthly sum given to the dependants – are *Lee Kwan Kok v Wong Chan Tong*,<sup>17</sup> *Sim Hau Yan v*

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<sup>13</sup> [2004] 1 SLR(R) 513.

<sup>14</sup> *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513 at [36]. See also quote from Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 36-038, reproduced at para 54 below.

<sup>15</sup> Also quoted in Carrie Chan *et al*, *Practitioner's Library: Assessment of Damages: Personal Injuries and Fatal Accidents* (Subordinate Courts and LexisNexis, 2005) at para 9-50.

<sup>16</sup> See para 17 above.

<sup>17</sup> [2004] SGHC 211.

*Ong Sio Beng*,<sup>18</sup> *Ang Song Huay v Chu Yong Thiam*,<sup>19</sup> *Tay Say Moi v Mua Hir*<sup>20</sup> and *Lim Soh Neo Jane v Amirtham d/o Veeraperumal*.<sup>21</sup>

22 The traditional method is acceptable if the monthly sum is close to what the deceased can afford to give his dependants or is determined by the deduction of the deceased's personal expenses from his total income (since savings are impliedly taken into account). However, taking only the monthly sum or annual sum is unacceptable if one were to exclude savings, because there is a divergence between what the deceased actually gives, and what he can afford to give. If a dependant meets with an unexpected mishap, or illness (for aged parents), or even a fortunate incident (opportunity to go overseas, marriage, *etc*) there may be a possible lump sum expenditure by the deceased not taken into account if only the monthly or annual expenditure is awarded.

23 In other jurisdictions, the inadequacy of taking only the monthly sum handed over by the deceased to his dependants is recognised in *Recovery for Wrongful Death and Injury*.<sup>22</sup>

In the common situation where the beneficiary claimants are the wife and children of decedent, the loss of inheritance element of damage sometimes comes in through the back door when the court acknowledges that the reasonable expectation of contribution from a husband and father equals the sum total of his income minus his expenses. In some cases where decedent was a wage-earner, this shorthand measurement ... will be a true measure of the claimant's loss of support. Where the husband is, however, in fact, accumulating money or wealth, the modern approach discussed in this section will also encompass his prospective accumulations.

... If [a] man brings home ... \$10,000 [monthly, he is not going to hand his dependants the \$10,000]. He may give [them] \$1,000 and

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<sup>18</sup> [1996] SGHC 256.

<sup>19</sup> [1995] SGHC 116.

<sup>20</sup> [1992] SGHC 219.

<sup>21</sup> [1993] SGHC 43.

<sup>22</sup> Stuart M Speiser, Charles F Krause & Juanita M Madole, *Recovery for Wrongful Death and Injury* (New York: Clark Boardman Callaghan, service updated 22 November 1995).

put the rest away in the bank or in annuities or stocks or bonds ... He left an estate fat enough [for the dependant] ... if you tortiously cut down that bread-winner ... and cake-winner, you deprive the [dependants] of not only contributions, what he handed over from time to time, but also of the reasonable value of the accumulations to his estate. This is the loss of inheritance.

24 In Australia, Luntz commented:<sup>23</sup>

It is possible to arrive at the lump sum by calculating separately the loss suffered by each of the claimants and then to add up the amounts so assessed. It is more common to assess the loss to the family as a whole and then to apportion the damages among the claimants afterwards. ... The family's dependency may be calculated by taking the probable earnings (in money and in kind ...) ... after tax and deducting therefrom what would have been spent on the deceased himself [and other non-claimants].

... In *Pannel v Fischer* [1959] SASR 77 (FC) it was argued that the method of assessment which, after allowance for the deceased's expenses, treated the balance as going to the wife and children, is appropriate only where the deceased's income was insufficient to allow for any saving. ... *While the court agreed with this argument, it pointed out that, where the income exceeded what was necessary for support, the family are entitled to claim also what the deceased would have saved and ultimately left to them. If the deceased was thrifty and devoted to his family, to deduct the deceased's own expenses from the earnings and allow the balance to the family would ... be a short-cut to the same solution.*

[emphasis added]

25 In the US and Canada, the award for loss of inheritance is expressly recognised as a separate head (that is, the three-way split). England sometimes applies the percentage method or also separately awards a sum reflecting loss of savings.

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<sup>23</sup> Harold Luntz, *Assessment of Damages for Personal Injury and Death* (Butterworths, 3rd Ed, 1990) at para 9.3.2.

26 There is a need for the Legislature to decide whether the loss of inheritance or savings is to be expressly recognised as a head of loss to be awarded to the dependants in Singapore.

27 Another proposed amendment to the Civil Law Act concerns the right of a former spouse with a maintenance order against the deceased to recover damages. Presently, a former spouse with a maintenance order in his/her favour is not considered a dependant. This is unfair as a former spouse may still be dependent on the deceased at least for some time after the marriage has ended. Accordingly, a former spouse with a right to maintenance should be included in the definition of “dependant”.

28 This issue nearly arose in the recent case of *Christina Hanson*. Christina Hanson was the former wife of the late Sandy Eu and parties had filed for divorce before Sandy Eu’s unfortunate death in a car accident. At the time of the accident, the decree *nisi* for divorce had been issued but not the decree absolute. The defendant applied to strike out Christina Hanson’s claim on the basis that she was not Sandy Eu’s lawful wife at the time of his death and not a dependant. However, the assistant registrar held that as decree absolute had not been issued, the legal form of the marriage remained intact. Christina Hanson was therefore still considered Sandy Eu’s wife and could maintain her claim.

29 It is foreseeable that future cases may similarly involve a recent divorce but the divorce may be rendered absolute such that a former wife, who would have received maintenance had the deceased been living, would be barred from bringing a dependency claim due to his death. This is an unfair result which also needs to be corrected.

30 The Law Reform Committee therefore proposes that changes be made to the Civil Law Act as follows:

That a subsection 22(1A) be inserted after section 22(1) of the Civil Law Act which will read:

In assessing the damages under subsection (1), the court shall take into account any moneys or other benefits which the deceased would be likely to have given to the dependants by way of maintenance, gift, bequest or devise or which the dependant would likely to have received by way of succession

from the deceased had the deceased lived beyond the date of the wrongful death.

That section 20(8)(a) be amended to read:

- (8) In this section, 'dependant' means —
  - (a) the wife or husband of the deceased, [*including any former wife*]; ...

### ***B. Relevant statutory provisions for dependency and estate claims***

#### *(1) Section 20 of Civil Law Act (dependency claims)*

31 Section 20 of the Civil Law Act forms the basis for dependency claims. This section is based on the English Lord Campbell's Act.

Right of action for wrongful act causing death

20.—(1) If death is caused by any wrongful act, neglect or default which is such as would (if death has not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 21(2), every such action shall be for the benefit of the dependants of the person (referred to in this section and in sections 21 and 22 as the deceased) whose death has been so caused.

....

Assessment of damages

22.—(1) In every action brought under section 20, the court may award such damages as are proportioned to the losses resulting from the death to the dependants respectively except that in assessing the damages there shall not be taken into account —

- (a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance;
- (b) any sum payable as a result of the death under the Central Provident Fund Act (Cap 36); or
- (c) any pension or gratuity which has been or will or may be paid as a result of the death.

(2) *Rationale and history of dependency claims (section 20 of Civil Law Act)*

32 Usually, a plaintiff injured in an accident would be able to claim for his loss of earning capacity or loss of future earnings.<sup>24</sup> The recovery is made directly by the plaintiff, but indirectly it would also benefit his dependants which he would normally have supported but for the injury. Where a plaintiff has died, the old common law rule used to say that the cause of action cannot survive a person's death. The dependants were left with the entire economic burden caused by the plaintiff's death.

33 With the industrial revolution, the use of trains and later motor vehicles, this position was considered to be unsatisfactory. Lord Campbell's Act was then passed in 1846 to allow claims to be made for the death of the victim for the benefit of certain dependants.<sup>25</sup> Although there was no reference to dependants, Lord Campbell's Act (which is equivalent to section 20 of our Civil Law Act) was considered to be for the benefit of dependants and not the estate. This was acknowledged by Woo Bih Li J in *Lassiter v To*.<sup>26</sup>

(3) *Rationale and history of the prohibition against recovery of loss of income after death in estate claims (section 10 Civil Law Act)*

34 Later, the UK Law Reform (Miscellaneous Provisions) Act 1934,<sup>27</sup> which provided that a cause of action survived a person's death was passed in England. English case law<sup>28</sup> then gradually developed the proposition that the estate could claim for the loss of future earnings. This led to a danger of overlapping recovery if both the dependants could claim for loss of support (which was calculated on the basis that

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<sup>24</sup> *Halsbury's Laws of Singapore* vol 18 (LexisNexis Singapore, 2004 Reissue) at para 240.333.

<sup>25</sup> For example, wife, husband, parent and child.

<sup>26</sup> See *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [13].

<sup>27</sup> c 41.

<sup>28</sup> *Pickett v British Rail Engineering* [1980] AC 136; [1979] 1 All ER 774; *Gammell v Wilson* [1982] AC 27; [1981] 2 WLR 248; [1981] 1 All ER 578.

the deceased would have supported his dependants out of his future earnings), and the estate could also claim for loss of future earnings. The court in *Gammell v Wilson*<sup>29</sup> (“*Gammell*”) recognised this danger and called for legislative change.<sup>30</sup>

35 Accordingly, the UK Parliament passed the Administration of Justice Act 1982<sup>31</sup> to bar claims for lost years, in order to prevent this overlap. Following the amendments in England, Singapore similarly amended its legislation in 1987 to the present section 10 of the Civil Law Act for the same reasons:

Effect of death on certain causes of action

10.—(1) Subject to this section, on the death of any person, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.

...

(3) Where a cause of action survives as specified under subsection (1) for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —

(a) shall not include —

...

(ii) any damages for loss of income in respect of any period after that person’s death;

...

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, *shall be calculated without reference to any loss or gain to his estate consequent on his death* except that a sum in respect of funeral expenses may be included.

...

(5) The rights conferred by this section for the benefit of the estates of deceased persons shall *be in addition to and not in derogation of any rights* conferred on the dependants of deceased persons by section 20 and so much of this section as relates to causes of action against the estates of deceased persons shall apply

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<sup>29</sup> [1981] AC 27 at 53 and 72.

<sup>30</sup> *Gammell v Wilson* [1982] AC 27 at 53 and 72.

<sup>31</sup> c 53.

in relation to causes of action under that section as applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

[emphasis added]

### **C. *Explanation for the court's decision in Lassiter Ann Masters v To Keng Lam***

36 The case of *Lassiter v To* involved a hardworking father, Mr Lassiter, who plunged almost every single cent of spare income back into his property investment business. His family lived very modestly throughout his wealth-building period. Just as he was beginning to relax in his expenditure for himself and his dependants, he was killed by Ms To in a car accident. Mrs Lassiter sued as a dependant under section 20 of the Civil Law Act, claiming loss of inheritance and loss of support.

37 Loss of inheritance was a far larger claim than loss of support owing to Mr Lassiter's thrifty lifestyle just before his death. Ms To's lawyers relied on section 10 of the Civil Law Act, arguing that, since an estate's claim for damages for loss of income after a person's death was prohibited, a claim for loss of inheritance was also impliedly prohibited.

38 Woo Bih Li J acknowledged that a dependant's claim for loss of inheritance would not cause any of the three undesirable consequences<sup>32</sup> that Parliament had been concerned with when it had introduced the prohibition against the estate claiming for loss of income after death in 1987.<sup>33</sup> However, in that case, he was constrained by what the law in Singapore before the 1987 amendment was. Upon examination of the cases before 1987, he found that a claim for loss of inheritance or

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<sup>32</sup> For an elaboration of the three undesirable consequences, see para 77 below.

<sup>33</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [30]–[31].

savings<sup>34</sup> did not exist in a dependency claim in Singapore.<sup>35</sup> He then concluded that a claim for savings/inheritance fell under an estate claim and that section 10 of the Civil Law Act in turn barred the estate from claiming for such a loss. Woo J's reasoning and concerns are addressed in subsections (2) to (5) of section A and section B of Part IV of this paper.

39 There was an appeal against Woo J's decision but it was later withdrawn because parties settled the claim. The law was thus left in an unsatisfactory position. Woo J himself acknowledged that, on his interpretation of the law, the dependants of someone who gave himself and his dependants very little income at present and kept reinvesting his savings in the hope of a better future, like the plaintiff in *Lassiter v To*, would face "apparent injustice" under the current methods of calculation. However, he concluded that it was a matter for the Legislature to address such a problem.<sup>36</sup>

40 Accordingly, there is a need to cure this injustice by way of legislation.

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<sup>34</sup> In *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [72], the court made a distinction between a loss of inheritance over and above earned income and loss of savings as part of earned income. For the purposes of simplicity, this proposal will only deal with loss of savings, meaning the amount the deceased would have saved out of his net income (minus unearned income generated by assets inherited by the dependents). Effectively, savings during the lifetime of the deceased become inheritance upon his/her death. This is recognised by various authorities which talk about savings and inheritance or accumulations as part of the same topic, for example: *Adsett v West* [1983] 3 WLR 437; *Roads and Traffic Authority v Cremona* [2001] NSWCA 338; Queensland Law Reform Commission, *The Assessment of Damages in Personal Injury and Wrongful Death Litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (Report No 45, October 1983) at pp 68–69, citing Rosalie Balkin & Jim Davis, *Law of Torts* (Sydney: Butterworths, 1991) at pp 391–392.

<sup>35</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [73].

<sup>36</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [75].

### III. Need for reform

#### A. ***Policy reasons why loss of savings should be expressly recognised as part of a loss of dependency claim***

- (1) *In the past, cases usually involved deceased who did not have much savings*

The loss of inheritance element of damages was infrequently asserted by the designated statutory beneficiaries in the older cases. Most of the decedents involved in the older death cases were persons struggling to support their families and, therefore not in the category of accumulators of wealth. Moreover, the limitations on the amount of damages recoverable in older death actions were such that plaintiff's attorneys were generally well satisfied to recover a full measure of loss of contributions, without getting involved in the separate issue of loss of inheritance.<sup>[37]</sup>

41 For example, in *Gammell*,<sup>38</sup> Lord Diplock commented, "If one ignores the savings element, which in most cases is likely to be small ... [the dependency would be equal to total future earnings minus the amount the deceased would have spent on himself]".

42 The social context against which the early cases arose may be the reason why the English courts did not consistently emphasise that savings were to be part of the dependency claim. However, most common law jurisdictions which base their legislation on Lord Campbell's Act follow the English case of *Nance v British Columbia Electric Railway Co Ltd*<sup>39</sup> ("*Nance v British Columbia Electric Railway*") which states that savings are to be taken into account.<sup>40</sup>

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<sup>37</sup> Stuart M Speiser, Charles F Krause & Juanita M Madole, *Recovery for Wrongful Death and Injury*, (New York: Clark Boardman Callaghan, service updated 22 November 1995).

<sup>38</sup> *Gammell v Wilson* [1982] AC 27 at 65; [1981] 2 WLR 248 at 253; [1981] 1 All ER 578 at 583e.

<sup>39</sup> [1951] AC 601.

<sup>40</sup> See para 54 below.

(2) *Differences in the saving habits of Singapore society as opposed to other societies resulting in savings forming part of the true value of the dependency*

43 Singapore, like Hong Kong, has a very different way of providing for social welfare as compared to Europe or the UK. As a result, the general population may have to save more to guard against contingencies. The CPF itself is a type of enforced savings scheme and the courts have already held that CPF may be taken into account in a dependency claim.<sup>41</sup> The need to save is not obviated by the existence of CPF. It is probably not uncommon for the man on the street to dip into his savings in the event his dependants are in need of money, or to be more financially generous with his dependants only at the later stages of his life.

44 Today, there is a proliferation of savings and investment instruments that encourage the general population to save and generate different streams of income. With an aging population, where dependants over 65 are increasing and young dependants decreasing, the income-earning population may realise that there is a need to save more.

45 In 1993, the Singapore Department of Statistics observed that:<sup>42</sup>

With the middle-ageing of Singapore's population and households, more households are likely to experience the 'mid-life squeeze'. As household heads reach their forties, they are likely to be faced with increasing household expenses for their children's education and health care costs for their ageing parents. However, they are also likely to be near or at the peak of their career and income-earning capacity and therefore cannot expect prolonged, substantial increases in income. Middle-aged households with children in school-going ages, who form one-third of Singapore households, are likely to be the hardest hit by this 'mid-life squeeze' in household expenses and income.

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<sup>41</sup> See *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1983–1984] SLR(R) 159.

<sup>42</sup> Department of Statistics, Singapore, *Occasional Paper on Household Statistics: Life Cycle Analysis of Singapore Households* (November 1993).

Faced with the prospect of the mid-life squeeze, it is submitted that the reaction of most households will probably be to save (or invest) more, before and during the “squeeze”.

46 When an income-earning member of the household is suddenly killed by the acts of a tortfeasor, their dependants may be left to face the mid-life squeeze. The failure to take into account the savings of the deceased may create the danger that the dependants are indirectly deprived of part of the true value of the dependency. A calculation based on the annual value of dependency may not adequately take into account any contingencies the dependant may have actually faced, the extent to which the deceased would have been prepared to help the dependant in that contingency, or the reasonable expectation of pecuniary benefit by the dependants. For example, in *Taylor v O'Connor*,<sup>43</sup> Lord Pearson recognised that the husband would be saving for the benefit of the family in the later years of his working life. The savings would have provided some present financial security not only for the husband but also for the dependants. In *Pym v The Great Northern Railway Co*,<sup>44</sup> the court recognised that a prudent parent would save from his income to provide extra advantages, such as social position, superior education and the greater comforts in life.

47 Accordingly, the failure to take into account the loss of inheritance/savings is not only a problem that would affect the minority of very rich entrepreneurs but also has the potential to affect the majority of the population, especially with the problem of an aging population. There is a need to adjust the law to cover this gap before the problem is driven home to the man on the street.

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<sup>43</sup> [1971] AC 115; [1970] 2 WLR 472; [1970] 1 All ER 365.

<sup>44</sup> (1863) B&S 396; (1863) 122 ER 508.

#### **IV. Workability of allowing savings/inheritance in a dependency claim**

##### **A. Taking loss of savings into account in a dependant's claim is consistent with the existing law of dependency**

(1) *Existing law of dependency aims to compensate dependants for all reasonable expectation of pecuniary benefit. This should include savings*

48 In *Franklin v The South Eastern Railway Co*,<sup>45</sup> Pollock CD observed: “[D]amages ... should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.”

49 This approach to assessing the value of dependency is the reason why the loss of services, pension and tax benefits are recoverable. While money can never truly replace the loss of a mother or father, the law tries to minimise the impact on dependants where it can, to the extent that such impact is financially quantifiable.

50 Lost savings, like loss of services, pension or tax benefits, are also part of the gaping hole a deceased leaves behind upon his unfortunate demise, rather than an additional surplus over the value of dependency. His savings would have formed a safety net for himself and his dependants to meet any unexpected contingencies.

51 Although Singapore authorities had not dealt directly with the issue of loss of inheritance/loss of savings, a claim for “loss of inheritance”:

- (a) is (apart from *Lassiter v To*) consistent with Singapore law;
- (b) is supported by English, Australian, Canadian and US cases applying legislation similar to Singapore's;
- (c) is supported by our local Singapore textbook, *Handbook on Damages for Personal Injuries and Death* by Michael Rutter;<sup>46</sup> and

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<sup>45</sup> (1858) 3 H&N 211 at 214; (1858)157 ER 448 at 449.

<sup>46</sup> Michael Rutter, *Handbook on Damages for Personal Injuries and Death* (Butterworths Asia, 2nd Ed, 1993).

(d) is supported by authoritative English textbooks such as *McGregor on Damages*,<sup>47</sup> *Clerk & Lindsell on Torts*,<sup>48</sup> *Winfield and Jolowicz on Tort*<sup>49</sup> and *Salmond and Heuston on the Law of Torts*.<sup>50</sup>

52 The following authorities and cases from various jurisdictions expressly or impliedly recognise that loss of savings should be awarded because the dependants have a reasonable expectation of pecuniary benefit from those savings.

(a) Academic opinion in Singapore

53 Michael Rutter, in *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, stated:<sup>51</sup>

A tortfeasor will [after 1987] still have to pay (to the dependant relatives) an amount reflecting lost support derived from lost future earnings of the deceased, from the time of death to the end of the period in which he would have provided such support. He will no longer be required to pay any amount *to the estate* reflecting lost earnings of the deceased for the period after death.

54 Consistent with the principle enunciated by Rutter, the loss of CPF contributions have also been awarded in Singapore cases.<sup>52</sup>

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<sup>47</sup> Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003).

<sup>48</sup> John Federic Clerk, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 14th Ed, 1975).

<sup>49</sup> W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 16th Ed, 2002).

<sup>50</sup> R F V Heuston & R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996). Modern editions, as well as those editions pre-dating the changes in the law in 1982 in England.

<sup>51</sup> Michael Rutter, *Handbook on Damages for Personal Injuries and Death* (Butterworths Asia, 2nd Ed, 1993) at para 1202.

<sup>52</sup> See paras 82–89 below.

(b) Academic opinion in England

(I) WINFIELD AND JOLOCWICZ ON TORT<sup>53</sup>

The [Fatal Accidents] Act simply says that the court may give damages proportioned to the injury resulting from the death to the dependants it does not say on what principle they are to be assessed, but Pollock C.B. [in *Franklin v S E Ry* (1858) 3 H&N 211] adopted the test which has been used ever since, that damages must be calculated: *'in reference to a reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance of the life'* ... [footnote] Hence the dependants are entitled to recover where the deceased has been prevented from accumulating savings which they would receive from him: *Singapore Bus Co v Lim* [1985] 1 WLR 1075.

...

... it is not necessary that the deceased should have been actually earning anything or giving any help, provided there was a reasonable probability ... that he would do so.

...

In a case under the Fatal Accidents Act the court is concerned with assessing what would have happened if the deceased had lived.

[emphasis added]

(II) SALMOND AND HEUSTON ON THE LAW OF TORTS<sup>54</sup>

The dependency: the multiplicand

... Damages can be assessed under two distinct heads. *First, in respect of the sums which the deceased would probably have applied out of his income to the maintenance of his dependants; and secondly, in respect of such portion of any additional savings which he might have accumulated during the period which ... he would have lived. ...*

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<sup>53</sup> W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 16th Ed, 2002) at paras 23-12–23-13.

<sup>54</sup> R F V Heuston & R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) at p 547.

Nor is it necessary that any benefit should have been actually received from the deceased during his lifetime. [emphasis added]

(III) *CLERK & LINDSELL ON TORTS*<sup>55</sup>

Damages are to be calculated 'in reference to a reasonable expectation of pecuniary benefit, as of right, or otherwise, from the continuance of the life'

...

... damages ... are intended to compensate the dependants ... for the loss of pecuniary benefits derived from the relationship subsisting between them. *Damages are thus not necessarily restricted to compensation for the loss of support, whether in cash or in kind, and it has been held, for example, in a case where the deceased had been making regular and substantial savings out of his income, that his dependants were entitled to damages for the loss of their interest in the savings which ... the deceased would have continued to make ...*

[emphasis added]

(IV) *MCGREGOR ON DAMAGES*<sup>56</sup>

The courts have evolved a ... [multiplier and multiplicand method] ... *Moreover, the value of the dependency can include not only that part of the deceased's earnings which he would have expended annually in maintaining his dependants but also that part of his earnings which he would have saved and which would have come to his dependants by inheritance on his death; ... Alternative methods of dealing with these savings have appeared: either they are regarded as comprised in the figure of annual dependency to be multiplied by the multiplier [two-way split] or they are excluded*

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<sup>55</sup> John Federic Clerk, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 14th Ed, 1975) at paras 426 and 430, citing *Taylor v O'Connor* [1971] AC 115; [1970] 2 WLR 472; [1970] 1 All ER 365; *cf Gavin v Wilmot Breedon Ltd* [1973] 1 WLR 1117 and *Davies v Whiteways Cyder Co Ltd* [1975] QB 262; [1974] 3 WLR 597; [1974] 3 All ER 168.

<sup>56</sup> Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 36-038.

*from the figure of annual dependency and a separate, and additional, sum is calculated and awarded in respect of them.*  
[three-way split]

*There are, exceptionally, situations in which the court is entitled to regard this conventional method of computation as inappropriate and to arrive simply at an overall figure after consideration of all the circumstances. This is usually done because of the presence of too many imponderables in the case.*

[emphasis added; words in brackets added for clarification]

(c) English cases which take loss of savings into account in awarding dependant's claims (ranging from 1951–2001)

(I) *NANCE V BRITISH COLUMBIA ELECTRIC RAILWAY*<sup>57</sup>

First, if the deceased ... had eked out the full span of life to which ... he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? ... Secondly, in addition ... *it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period* ... he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will. ... The question there is what additional amount he would probably have saved during the x years if he had ... endured, and what part, if any, of these additional savings his family would have been likely to inherit.

[emphasis added]

(II) *TAYLOR V O'CONNOR*

55 The House of Lords was prepared to take into account the deceased's savings because the savings would ultimately have gone to

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<sup>57</sup> *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 614 and 615–616.

the wife and daughter.<sup>58</sup> Lords Pearson and Reid expressly contemplated that the deceased would have been mainly saving for the benefit of his family to provide them financial security. All the judges except Lord Guest had expressly factored savings into the calculation of the dependency.

56 Both methods (assessing the savings as part of the annual value of the dependency or adding a separate additional sum representing the savings) were used. Lords Morris, Guest and Pearson added the savings to the multiplicand, whereas Lord Reid and Viscount Dilhorne calculated such savings as a separate sum. Viscount Dilhorne took into account the fact that some of the deceased's savings would go towards post-retirement maintenance. All five of their Lordships also calculated as a separate sum, the savings which the deceased would have specifically built up in the partnership capital account by retirement, taking into account post-retirement expenditure and other contingencies.

57 Lord Reid, in calculating the value of the dependency, after deducting expenses by the deceased on himself and his dependants, concluded that the deceased would either have saved £2,000 a year or that £2,000 a year would have gone towards any increase that there might have been in the cost of living or any increase in the standard of living of the family.<sup>59</sup> He considered that the widow and daughter would have had an interest in any capital that the deceased may have accumulated before his death and that the deceased would have saved as much as possible to provide for the future.<sup>60</sup> He awarded £6,000 for the £18,000 he considered that the deceased would have invested in his partnership business which would have been repayable to the deceased.

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<sup>58</sup> Two other points to note from this case: the figure for savings will be quite reduced due to contingencies and Lord Reid had acknowledged that the line between savings and dependency may not always be so clear (the £2,000 could have been used either to benefit his dependents or been saved up to form part of his estate).

<sup>59</sup> *Taylor v O'Connor* [1971] AC 115 at 130.

<sup>60</sup> *Taylor v O'Connor* [1971] AC 115 at 128.

He also awarded a further £5,000 for the £20,000 savings the deceased would have accumulated by the time of his natural death.<sup>61</sup>

(III) *GAVIN V WILMOT BREEDEN LTD*<sup>62</sup>

58 The court took part of the savings to be part of the dependency. The court's reasoning was that:<sup>63</sup>

... if one ignores the savings ... [or if] there are no savings to be taken into consideration ... [then] the money is being expended, ... and, ... applying the ordinary probabilities, ... the increased household expenditure would result in greater benefit to the deceased man as well as to his wife; ... the standard of living of *both* spouses would go up.

59 Accordingly, the court subtracted the amount attributable to the increase of the deceased's standard of living from the savings and awarded the rest as part of the dependency claim. Stephenson LJ commented that savings were a part of the husband's income which might at any time have been used to increase the family's weekly expenditure: "Whether saved ... or spent, ... sooner or later, to meet the needs of the family, some part of it should be regarded as [spent for the benefit of the husband himself]."<sup>64</sup>

(IV) *ADSETT V WEST*<sup>65</sup>

In general the bulk of a married man's income benefits his dependants and the proportion spent for his own benefit alone is small [generally only about a quarter or a third] ... [*It generally is right*] to assume that *any* money he would have saved would have been for the benefit of his dependants ... the element of savings will be part of the dependency ... [This is why] the 'surplus' [of the

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<sup>61</sup> David Kemp QC, *Damages for Personal Injury and Death* (Longman, 1993) at p 66.

<sup>62</sup> [1973] 1 WLR 1117.

<sup>63</sup> *Gavin v Wilmot Breeden Ltd* [1973] 1 WLR 1117 at 1120H.

<sup>64</sup> *Gavin v Wilmot Breeden Ltd* [1973] 1 WLR 1117 at 1121E.

<sup>65</sup> [1983] 3 WLR 437.

estate] will in the case of a married man generally be the same as the dependency ... and will usually be of the order of the two-thirds or three-quarters.

(V) *CAPE DISTRIBUTION LTD V AINE O'LOUGHLIN*<sup>66</sup>

... where ... the deceased chose to reward himself very modestly while simultaneously increasing his assets, or put another way, in effect took his rewards for his labour partly in income and partly by building up his capital and income creating assets, it would be wholly unjust to assess the damages due to his dependants (or ... if ... his injuries had made him permanently unemployable) as if the calculation of any consequent loss should be based exclusively on the modest salary he paid himself. And the difficulties of ascertaining the appropriate and fair figure does not mean that the loss is speculative, or unproved. It is merely difficult to quantify.

60 From the major textbooks cited, it can be seen that English academic opinion is in support of savings being assessed as part of the value of the dependency. The cases cited immediately above show that, from 1951 to 2001, the English courts have taken savings into account in awarding dependants compensation in at least some cases.

(d) Australian Law Reform Commission Reports which take the view that the current law in Australia (Queensland) allows for loss of savings to be taken into account in dependency claims

(I) QUEENSLAND LAW REFORM COMMISSION, *DAMAGES IN AN ACTION FOR WRONGFUL DEATH*<sup>67</sup>

... the principal source of pecuniary detriment is the loss of the deceased's net earnings, present and future. The basis of calculation is, therefore, the amount of his wages or other income from which must be deducted an estimated amount of what the deceased required for his own personal and living expenses. *The value of the*

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<sup>66</sup> [2001] EWCA Civ 178.

<sup>67</sup> Queensland Law Reform Commission, *Damages in an Action for Wrongful Death* (Report No 57, November 2003).

*dependency thus includes not only expected maintenance but also savings.*<sup>[68]</sup>

... The settled principle governing the assessment of compensatory damages ... is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the [wrongful act] had not been committed.<sup>[69]</sup>

... the calculation must not only quantify the damage already suffered by the time the claim is assessed, but also attempt to estimate the extent of losses likely to be experienced in the future.<sup>[70]</sup>

[emphasis added]

[In Queensland, statutory limits appear to apply to the amount of compensation recoverable for personal injury damages.]

(II) QUEENSLAND LAW REFORM COMMISSION, *THE ASSESSMENT OF DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH LITIGATION*<sup>71</sup>

If the deceased was the breadwinner for the family, the loss suffered by the [dependants] is calculated by reference to the lost earning capacity [after taking into account contingencies] after deducting income tax and the proportion of the product of that capacity which he would have spent on his own maintenance.

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<sup>68</sup> Queensland Law Reform Commission, *Damages in an Action for Wrongful Death* (Report No 57, November 2003) at p 7, citing Fleming JG, *The Law of Torts* (LBC Information Services, 9th Ed, 1998) at p 735.

<sup>69</sup> Queensland Law Reform Commission, *Damages in an Action for Wrongful Death* (Report No 57, November 2003) at p 13, citing *Haines v Bendall* (1991) 172 CLR 60 at 63.

<sup>70</sup> Queensland Law Reform Commission, *Damages in an Action for Wrongful Death* (Report No 57, November 2003) at p 14.

<sup>71</sup> Queensland Law Reform Commission, *The Assessment of Damages in Personal Injury & Wrongful Death Litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (Report No 45, October 1983) at p 69, citing Rosalie Balkin & Jim Davis, *Law of Torts* (Sydney: Butterworths, 1991) at pp 391–392.

61 The value of the dependency can include not only that part of the deceased's earnings which he or she would have expended annually in maintaining his or her dependants but also that part of his or her earnings which he or she would have saved and which would have come to the dependants by inheritance on his or her death. There may also be included a sum in respect of loss attributable to the cessation of contributions which the deceased, and his or her employers, had made to a superannuation or other fund of which the dependants were the nominated beneficiaries.

(e) Australian cases which take loss of savings/inheritance into account in dependency claims

(I) *CLEMENTS ESTATE V CENTRAL VALLEY TAXI*<sup>72</sup>

62 Where the deceased husband had just changed his career to sales training and set up his own company:<sup>73</sup>

Wife of deceased was entitled to [compensation] for present value of loss of potential savings resulting from loss of use of R.R.S.P as tax reductions. Recovery was also allowed for potential non-R.R.S.P savings ...

(II) *ROADS AND TRAFFIC AUTHORITY V CREMONA*<sup>74</sup>

Although ... a larger component of [the deceased]'s income would be applied to savings or investments the plaintiff and her children are entitled to claim what the deceased would have saved and ultimately left to them.

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<sup>72</sup> (1992) ACWSJ LEXIS 36193; SCBC New Westminster Registry No A910185 (26 November 1992).

<sup>73</sup> *Clements Estate v Central Valley Taxi* (1992) ACWSJ LEXIS 36193; SCBC New Westminster Registry No A910185 (26 November 1992).

<sup>74</sup> [2001] NSWCA 338 at [36], citing *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601 at [101]. See also *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, cited and followed.

(f) Canadian cases which award loss of inheritance

(i) *REMEDIES IN TORT, 1996*<sup>75</sup>

... beneficiaries are entitled to compensation for the amount by which the deceased's estate would have increased had he lived [subject to the probability of accumulation and inheritance]. However, in assessing damages under this head, the court must also consider the benefits which accrue to the claimants through premature inheritance of the deceased's estate ... [unless] the statutory beneficiaries enjoyed the inherited assets during the lifetime of the deceased.

(ii) *JUNG ESTATE V KRIMMER*<sup>76</sup>

63 The principles to be applied in determining the measure of damages under the Families' Compensation Act<sup>77</sup> is:<sup>78</sup>

the pecuniary loss suffered by the dependants as a consequence of the death, which is the actual financial benefit of which they have been deprived including any financial benefit which might reasonably be expected to accrue in the future if the death had not occurred.

[Guidelines] ...

- 1) What is the difference between the amount of capital available in fact to the dependants and the amount which would have been available to them if the deceased had not been killed?
- 2) Is there a reasonable expectation that in the future, if he had continued to live, the deceased might have withdrawn more of the company's earnings for the benefit of his family?
- 3) What sums, during the period of his working life expectancy, would the deceased probably have applied out of his income to the maintenance of his wife and family?

64 Applying these principles the court awarded a sum of \$35,000 for lost inheritance.

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<sup>75</sup> *Remedies in Tort* (Lewis N Klar QC gen ed) (Carswell: Thomson Professional Publishing, Release 6, 1996) at para 118.

<sup>76</sup> [1990] 47 BCLR (2d) 145.

<sup>77</sup> RSBC 1960, c 138.

<sup>78</sup> *Jung Estate v Krimmer* [1990] 47 BCLR (2d) 145 at [85].

(iii) *LOWRY, RONDEAU V CANADIAN MOUNTAIN HOLIDAYS*<sup>79</sup>

65 The court awarded loss of inheritance on the basis of continued savings up to 65, and salary increments and investment of the accumulated amount from 65 to 75 minus interest (as the court assumed that the interest will be used for expenditure) and subject to contingencies as well as acceleration.<sup>80</sup>

66 In the *Rondeau* claim, the court awarded no loss of inheritance to the wife, only to the children, on the basis that the deceased would have taken the entire value of his savings upon retirement to purchase a joint life and last survivor annuity paying an income for the rest of his hypothetical life, with 65% of the income continuing to the wife for her remaining lifetime, hence the court instead awarded her the value of lost annuity payments and the value of lost financial support deriving from the husband's future income from his profession.<sup>81</sup>

(iv) *TOMPKINS (GUARDIAN AD LITEM OF) V BYSPALKO*<sup>82</sup>

67 The court awarded loss of inheritance, taking into account the probability that the dependant may not have survived the deceased and that the deceased might not have left cash savings because she might have spent them on her post-retirement support. However, the court still concluded that on the deceased's hypothetical death her estate would probably have an enhanced asset value which would have gone to the dependant's inheritance.

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<sup>79</sup> [1985] BCJ No 768.

<sup>80</sup> *Lowry, Rondeau v Canadian Mountain Holidays* [1985] BCJ No 768 at [31], which quoted *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601 and followed *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601.

<sup>81</sup> *Lowry, Rondeau v Canadian Mountain Holidays* [1985] BCJ No 768 at [71]–[76].

<sup>82</sup> (1993) 1 CCLT (2d) 179.

(V) *SHARP BARKER V FEHR*<sup>83</sup>

68 This case sets out a possible framework for calculating the award to dependants, which includes loss of inheritance:<sup>84</sup>

...

5. Decide an amount adjudged to be what would be received by the family from the “savings” or inherited portion of the deceased’s assets, take its present value and make a statistical reduction that the wife will be alive at the end of the purchase period ...

Consider amounts for mother and children proportioning them to equal the total of the value of the lost dependency and the lost inheritance ...

Consider the total figure ... as to whether it constitutes fair and proper compensation for the loss, make any warranted adjustments and decide the award. ...

[Court assumed half the savings would be for deceased’s own retirement and the other half would have devolved upon his wife.]

(g) Malaysian case taking loss of savings into account for dependency claim

69 A Malaysian court has approved *Nance v British Columbia Electric Railway*, which stands for the principle that the portion of future savings the deceased’s family is likely to inherit must be taken into account in the determination of the loss of support.<sup>85</sup> In *Chan Yoke May v Lian Seng Co Ltd*,<sup>86</sup> the Malaysian court accepted that an amount equal to what the deceased would have saved should be added to the multiplier × multiplicand method, taking into account acceleration and the contingency that the dependants may have died before him.

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<sup>83</sup> [1982] 39 BCLR 19.

<sup>84</sup> See Appendix 2, at paras 100–101 below.

<sup>85</sup> *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 615.

<sup>86</sup> [1962] MLJ 243.

(h) US cases awarding loss of inheritance for dependency claim

70 The Federal Death on the High Seas by Wrongful Act<sup>87</sup> (“DOHSA”) provides that:

The recovery in [a DOHSA] suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

(l) *MARTIN V ATLANTIC COAST LINE RAILROAD CO*<sup>88</sup>

*The measure of damages ... under [the DOHSA] ... is the same as that ... in a Lord Campbell's Act type of statute creating a right of action for wrongful death.*

...

If the person injured had survived ... he would have added so much to his personal estate, which ... on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the injury, the equivalent is given by a suit.<sup>[89]</sup>

...

... A widow is entitled to a share of her deceased husband's estate if she outlives him. *If he is a man who is accumulating an estate ... the widow suffers loss from his untimely death with regard to what she might inherit as well as what she might have from the husband for support.*<sup>[90]</sup>

...

[T]he leading authors in this field of damages are in complete agreement ...:

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<sup>87</sup> 46 USC (US) § 762.

<sup>88</sup> 268 F 2d 397 (5th Cir, 1959).

<sup>89</sup> Citing *Illinois Central R Co v Barron* 5 Wall 90, 18 L Ed 591.

<sup>90</sup> Citing *O'Toole v United States* 242 F 2d 308 at 309 and 312 (3rd Cir, 1957).

Where the evidence shows that it is probable that the decedent but for his death, would have accumulated property, which, if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss.

...

[T]he damages are such as flow from the deprivation of the *pecuniary benefits which the beneficiaries might have reasonably received* [had the deceased not died] ... [Emphasis supplied.]

[T]he expectance of an inheritance from the deceased is a 'pecuniary benefit which the beneficiary (of the action) might have reasonably received if the deceased had not died from his injuries.' This fully accords with the usual and ordinary experience in our society.

... It is only an incidental and irrelevant fact that she would not have received these benefits until her husband died. The statute expresses no condition whereby the pecuniary benefits for which there is to be compensation must be expected within the lifetime of the decedent.

[emphasis added]

(II) *SNYDER V WHITTAKER CORPORATION*<sup>91</sup>

Loss of inheritance is a permissible element of DOHSA damages ... In order to obtain loss of inheritance damages, a wrongful death plaintiff must prove 'a reasonable expectation of pecuniary benefit' ... The factfinder will look at the likelihood that the decedent would have accumulated substantial property; how much consumption and taxes would eat into any accumulations; the decedent's past propensity to save or invest; and similar factors.

71 The jury took into account the deceased's stake in various partnerships, the fact that the family lived conservatively and the

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<sup>91</sup> 839 F 2d 1085 (5th Cir, 1988) at [27], citing *Tallentire v Offshore Logistics, Inc* 800 F 2d 1390 at 1392 (5th Cir, 1986) and *Solomon v Warren* 540 F 2d 777 at 790 (5th Cir, 1976).

deceased reinvested much of his savings in his business, possibilities of substantial post-retirement earnings, saving propensity and concluded that the deceased's estate would contain \$300,000 by the time he achieved his life expectancy. The court noted that "[w]hile this conclusion incorporates several inferences, those inferences are based on concrete figures and represent more than ... speculation". Hence, it declined to disturb the jury's loss of inheritance award.

(III) *ROHAN FOR ROHAN V EXXON CORP*<sup>92</sup>

[headnotes] *Worker's widow could assert claim for loss of inheritance in DOHSA action ... [provided there is conclusive evidence showing that the decedent would probably have accumulated property that wrongful death beneficiary would have inherited]. Wrongful death and survival actions are distinct causes of action, and while damages for loss of inheritance [and loss of support] depend on calculation of the decedent's future income, loss of inheritance [and loss of support] is not a recovery for future earnings.* [emphasis added]

... for this reason, courts ... that have disallowed recovery for future earnings have ... allowed recovery for loss of support and loss of inheritance as distinct and separate remedies... Although [recovery of future wages is disallowed] 'lost earnings may be proved for the purpose of determining loss of support and loss of inheritance'.

It has been well established for many years that children have a reasonable expectation of benefiting from any prospective accumulation of their parent's estate, making a claim for loss of inheritance a valid pecuniary loss claim in an DOHSA action ...

...

In the DOHSA setting, it is well established that recoverable damages include ... loss of inheritance ... predicated on a showing of full or partial dependency.<sup>[93]</sup>

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<sup>92</sup> 896 F Supp 666 at 673 and 670 (SD Tex, 1995).

<sup>93</sup> *Rohan for Rohan v Exxon Corp* 896 F Supp 666 at 672-673, [17]-[18] (SD Tex, 1995).

(IV) *SOLOMON V WARREN*<sup>94</sup>

[headnotes] Under the Death on the High Seas Act, loss of inheritance from deceased parent was an item of damages recoverable by surviving children.

The measure of recovery under [the DOHSA] is the actual pecuniary benefits that the decedent's beneficiaries could reasonably have expected to receive from the continued life of the decedent.

72 The deceased parents had an established pattern of savings and investment in real estate and similar properties. The court was convinced that they would have systematically invested in real property throughout their natural lives:<sup>95</sup>

Where the evidence shows that it is probable that the decedent ... would have accumulated property, which if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery for damages for its loss.

(i) Sub-conclusion

73 The principle of "reasonable probability of pecuniary benefit" established in English, Australian, Canadian and US cases is broad enough to cover loss of inheritance/savings. This is a view supported by the clear wording of the English textbooks, Rutter, as well as the practice of the other Commonwealth jurisdictions which apply the same principle. Since Singapore purports to adopt the same test,<sup>96</sup> then loss of inheritance/savings should also be taken into account in an award of loss of dependency, as an application of the above principle.

74 The claim for loss of inheritance/savings in a dependency claim had been recognised in other Commonwealth countries long before 1987, and there was no reason to suppose that Singapore would deviate from

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<sup>94</sup> 540 F 2d 777 at [30] (5th Cir, 1976).

<sup>95</sup> *Solomon v Warren* 540 F 2d 777 at [51] (5th Cir, 1976), citing Francis B Tiffany, *Death by Wrongful Act* (Vernon Law Book Co, 2nd Ed, 1913) at p 378.

<sup>96</sup> See *Hanson Ingrid Christina v Tan Puey Tze* [2008] 1 SLR 409 at [26].

accepted Commonwealth law. The Singapore authorities before *Lassiter v To*, while not expressly recognising this head in so many words, were all consistent with the principle, and some authorities were actually suggestive of recognition.<sup>97</sup>

75 The appeal against Woo J's decision in *Lassiter v To* was not pursued as it was settled and the law is left in an unsatisfactory state. Accordingly, there is a need for the Legislature to affirm that loss of savings/inheritance can be taken into account in a dependency claim. Most textbooks and case law of other common law jurisdictions which also derive their dependency claims from Lord Campbell's Act have accepted that this is the state of the law.

(2) *Civil Law Act amendment of 1987 was only to bar double recovery and not all recovery*

76 Section 10(3)(a)(ii) of the Civil Law Act<sup>98</sup> which abolished the right of the estate to claim for "any damages for loss of income in respect of any period after that person's death", was not intended to bar dependants' claims for the loss of savings. In fact, the statutory bar was to avoid any overlap with dependants' claims. This is indirectly evidenced by section 10(5) which essentially encapsulates how section 10 (estate claims) is intended to operate in relation to section 20 (dependant's claims):

The rights conferred by this section for the benefit of the estates of deceased persons shall *be in addition to and not in derogation of any rights* conferred on the dependants of deceased persons by section 20 ... [emphasis added]

77 At the Second Reading of the Bill to amend the Civil Law Act, the concern was to remove any potential for double recovery introduced by

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<sup>97</sup> See paras 76–79 below as well as the discussion of Central Provident Fund cases at paras 82–89 below.

<sup>98</sup> Cap 43, 1999 Rev Ed; as amended by the Civil Law (Amendment) Act 1987 (Act 11 of 1987).

*Gammell*. Prof S Jayakumar on 4 March 1987<sup>99</sup> stated the reasons for the amendment as:

- (a) Double compensation may be payable in cases where the deceased's dependants are not also beneficiaries of the estate.
- (b) Where the deceased has no dependants, other persons, *eg*, distant relatives, may receive a "windfall" and be unjustly enriched by such an award.
- (c) The estate claim for "lost years" is often higher than the loss of dependency claims. In some cases, dependants may obtain damages which are more than their actual loss of dependency. Such cases include cases where the dependants are already elderly and are likely to have died before the deceased person had he not met with a premature death in an accident.

78 At the same time, Prof Jayakumar also called for an expansion of the categories of dependants in order to ensure that other relatives who are actually dependent on the deceased but did not fall within the then existing categories could claim for loss of dependency. The purpose of the expansion was to prevent undue hardship or injustice to dependants. This further demonstrates that the intention of the Legislature then was not to deny dependants their right to full compensation of reasonably expected pecuniary benefits.

79 In *Ho Yeow Kim v Lai Hai Kuen*,<sup>100</sup> Yong Pung How CJ held that the 1987 amendments had not altered the law relating to dependency claims. Woo J in *Lassiter v To* accepted this, but came to the conclusion that the pre-1978 law of dependency had not included or expressly considered loss of savings as part of a dependency claim.<sup>101</sup> Woo J also

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<sup>99</sup> *Singapore Parliamentary Debates, Official Report* (4 March 1987) vol 49 at cols 66–69 (Prof S Jayakumar, Minister for Home Affairs and Second Minister for Law).

<sup>100</sup> [1999] 1 SLR(R) 1068.

<sup>101</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [15].

recognised that his conclusion gives rise to the need for the Legislature to make a clear statement of what the law should be.<sup>102</sup>

*(3) No residual danger of double recovery by the estate and dependants in Singapore because dependant and estate claims can be subsumed in one action*

80 There is little danger of double recovery because in Singapore, dependant and estate claims can be subsumed in one action. The *Assessment of Damages: Personal Injuries and Fatal Accidents* states that:<sup>103</sup>

In a case where both the estate claim and the dependency claims are brought by the beneficiaries of the estate who are also dependants of the deceased person, the court will 'merge' the two claims. ... the claim that is smaller in quantum will be subsumed under the claim with the larger quantum, thus avoiding over-compensation or double claims by the same group of claimants.

81 There is no danger of double recovery if the judge is careful in his mathematics. Uncertainties such as how much the deceased is willing to leave to each dependant, the chances that the dependant may have predeceased the deceased had he lived, as well as deductions for taxes, acceleration and other contingencies can all be taken into account in the particular case as a matter of probability.<sup>104</sup> Therefore, such reasons should not be used to reject the award of loss of savings in principle.

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<sup>102</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [75].

<sup>103</sup> *Assessment of Damages: Personal Injuries and Fatal Accidents* (Subordinate Courts and Butterworths, 2001) at p 710.

<sup>104</sup> *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601 at 613; *Taylor v O'Connor* [1971] AC 115; [1970] 2 WLR 472; [1970] 1 All ER 365.

(4) *If loss of future Central Provident Fund contributions is awarded to the dependants as a reasonably expected pecuniary benefit, other types of savings should be similarly awarded*

82 CPF has been recognised as a scheme of enforced or compulsory savings<sup>105</sup> and the courts have already held that CPF may be taken into account in a dependency claim.<sup>106</sup>

83 Loss of future CPF contributions had been awarded under the dependants' claim in *Singapore Bus Service (1978) Ltd v Lim Soon Yong*.<sup>107</sup> The award of future CPF contributions, like the award of loss of inheritance in other jurisdictions, is dependent on the probability of inheritance. *Assessment of Damages: Personal Injuries and Fatal Accidents* states:<sup>108</sup>

[In two cases], the children were granted a share of the estimated loss attributable to the cessation of CPF contributions even though

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<sup>105</sup> *Chan Heng Wah v Peh Thiam Choh* [1987] SLR(R) 501 at [24]; *Singapore Bus Service (1978) Ltd v Lim Soon Yong*, [1983–1984] SLR(R) 159; *Lee Wee Hiong v Koh Ah Sai Victor* [1989] 2 SLR(R) 486; *Ang Song Huay v Chu Yong Thiam* [1995] SGHC 116. (See also *Tay Say Moi v Mua Hin Poultry Farm Pte Ltd* [1992] SGHC 219; *Lim Soh Neo Jane v Amirtham d/o Veeraperumal* [1993] SGHC 43; *Ng Lim Lian v Port of Singapore Authority* [1997] SGHC 62; *Guo Xinhua v Lee Chin Ngee* [2001] SGHC 190; *Asmah v Damen Shipyards* Suit 729 of 2002 (High Court); *Zhang Xiao Ling v Er Swee Poo* [2004] SGHC 21.)

<sup>106</sup> The court in *Zhang Xiao Ling v Er Swee Poo* [2004] SGHC 21, awarded the widow 50% of the deceased's lost Central Provident Fund ("CPF") contributions as it considered that she had a reasonable expectation of benefiting from the deceased's CPF contributions. It did not award the children any of the deceased's lost CPF contributions. The court considered that the children would not have had a reasonable expectation of benefiting from such moneys because they would have ceased to be dependent by the time CPF moneys could have been notionally withdrawn.

<sup>107</sup> [1985] 1 WLR 1075.

<sup>108</sup> *Carrie Chan et al, Practitioner's Library: Assessment of Damages: Personal Injuries and Fatal Accidents*, Practitioner's Library (Subordinate Courts and LexisNexis, 2005) at pp 101 and 102.

they would have attained majority before the deceased, if he had lived, could withdraw his CPF monies. However, in *Gul Chandiram v Chain Singh* [1999] 1 SLR 154 (SGHC), the court found it highly unlikely that the daughter would be financially dependent on the contributor at the time the monies were withdrawn or that any part of the CPF monies would remain to constitute part of the deceased's estate. As such, the likelihood of the daughter *getting a pecuniary benefit* ... either when the monies were withdrawn *or by inheritance* was a matter too speculative and too remote for any award of damages to be made ...

84 It would only be consistent to treat other types of savings in a similar manner and award compensation as well. In *Tan Harry v Teo Chee Yeow Aloysius*, when discussing deduction of benefits from the dependant's award, the court noted that the CPF and the deceased's savings should in principle be treated in the same manner: "Once the claim for lost years was abolished, there was no need to deduct [certain collateral benefits received outside of an estate claim] from a dependency claim."<sup>109</sup>

85 Even though this case was dealing with deduction of collateral benefits, the same reasoning can be applied to loss of savings that is, the fact that statute has precluded the estate from claiming loss of savings does not mean that dependants are also impliedly barred from claiming loss of savings by reason of the same statutory provision barring estate claims.

86 In *Singapore Bus Service (1978) Ltd v Lim Soon Yong*, the deceased had nominated his wife and his parents as beneficiary. The defendants contended that the loss resulting from the cessation of contributions to the fund is a loss suffered by the deceased's estate. The Court of Appeal had said that:<sup>110</sup>

CPF contributions are not chargeable with estate duty. The money does not go to the estate of the contributor. In this case it goes to

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<sup>109</sup> *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513 at [95].

<sup>110</sup> *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1983–1984] SLR(R) 159 at [15].

the widow and the parents ... Had the deceased lived to ... 55 he would have withdrawn [his CPF] and the widow and children would necessarily have benefited from the deceased having this money ... therefore, the CPF contributions do form part of the widow's dependency claim.

87 On appeal to the Privy Council, the court stated that damages for loss of dependency is based on the reasonable expectation of pecuniary benefit or benefit reducible to money value:<sup>111</sup>

The courts following this statement of principle [citing *Davies v Powell Duffryn*<sup>112</sup>] have frequently awarded damages to compensate for loss going beyond that of daily maintenance. For example ... they have taken into account the value of services rendered to the dependants ... and have compensated a dependant who had a reasonable expectation of benefiting under the will of the deceased for the fact that the value of the estate would have been greater if the deceased had lived longer and so been able to save more for his dependants.

88 The method of including an additional sum representing savings in *Nance v British Columbia Railways* was cited and the court concluded:<sup>113</sup>

On the facts ... their Lordships can see no material difference between the loss of the expectation of a greater sum payable from the fund in consequence of additional contributions that would have been made and the loss of expectation under a will or intestacy resulting from additional savings. The widow and the parents had an expectation that they would benefit personally from the fund ...

The deceased might have lived beyond 55 and withdrawn the sum standing to his credit. In that event it is reasonable to infer that he would have used the money not only for his own benefit but for the benefit of his dependants. To the extent that he did not spend it he would have saved it and his dependants, particularly his widow who

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<sup>111</sup> *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1985] 1 WLR 1075 at 1078E.

<sup>112</sup> *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601.

<sup>113</sup> *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1985] 1 WLR 1075 at 1079E–1080C.

was younger than he was, would reasonably have expected to inherit from him.

... The fact that in England, before the Administration of Justice Act 1982 damages could be claimed by the estate for loss of the ability to earn over the 'lost years' ... did not take away the right of dependants to claim for their loss of dependency. The claim by the estate might affect the valuation of the claim by the dependants to the extent that they benefited from the estate but the two claims are independently sustainable.

89 For a consistent approach, normal savings should be treated similarly to CPF, as there is no logical distinction between the two. The courts are already familiar with assessing the likelihood that a dependant will obtain a pecuniary benefit from CPF moneys. It would not be difficult to extend the same assessment to other types of savings. Moreover, in *Low Yoke Ying v Sim Kok Lee*,<sup>114</sup> Yong Pung How CJ held that, in principle, there appeared to be no reason why dependants should not also be entitled to claim for any loss of support which they would have derived from a pension, gratuity or other post-retirement income which the deceased would have received, had he not been killed.<sup>115</sup> To the extent that CPF and other retirement planning schemes may also derive in part from the enforced savings of the deceased, it would be inconsistent to take such losses into account and yet exclude any benefit from loss of future savings/inheritance.

*(5) Award for loss of savings/inheritance in dependants' claim is different in nature from prohibited recovery of loss of future earnings in estate claim*

90 Unlike an estate claim, the dependants do not benefit *qua* dependants unless the accumulation of wealth results in an increase in the amount spent on them annually; the dependant's claim will be

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<sup>114</sup> [1990] 2 SLR(R) 713.

<sup>115</sup> Carrie Chan *et al*, *Practitioner's Library: Assessment of Damages: Personal Injuries and Fatal Accidents* (Subordinate Courts and LexisNexis, 2005) at para 9-49.

contingent on both the probability that the defendant would have accumulated an estate and the probability that the dependant would have inherited.<sup>116</sup> These probabilities can be assessed by the courts, and reduction made for contingencies, when determining the final award for the dependants. A dependant's claim for lost savings is thus different from an estate claim for lost accumulations.

### **B. Loss of inheritance is a calculable loss**

91 The cases from other jurisdictions illustrate that loss of savings or inheritance is a calculable loss, and it should be calculated as fully as possible, in order that dependants not be deprived of their full and just compensation, as far as money can compensate them for the loss of their breadwinner.<sup>117</sup>

92 As the Court of Appeal stated in *Ho Yeow Kim v Lai Hai Kuen*:<sup>118</sup>

[T]he calculation of the value of the dependency [the multiplicand], is a matter of hard dollars and cents subject to the element of reasonable future possibilities.

93 Accordingly, the reason for the need to expressly take into account loss of savings or inheritance is not only for theoretical coherence and equality of treatment (between savers and non-savers), but also because dependants, especially of middle-aged breadwinners who have established a savings trend, face a real financial loss. To ignore the substantial anticipated savings of such a breadwinner, who has been killed in the years where he is probably saving the most, is to ignore *the purpose* of what he is saving for. If he had been saving to donate all his life's savings to a charity, or to meet his own retirement needs, then that part of his savings can be safely disregarded. However, if he had been saving

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<sup>116</sup> *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601 at 613; *Taylor v O'Connor* [1971] AC 115; [1970] 2 WLR 472; [1970] 1 All ER 365.

<sup>117</sup> See Appendix 1 below.

<sup>118</sup> *Ho Yeow Kim v Lai Hai Kuen* [1999] 1 SLR(R) 1068 at [16], citing *Davies v Powell Duffryn Associated Collieries, Ltd* [1942] AC 601 at 613.

to create a safety net for his dependants in case of contingencies, it is more than likely that, in his later years, his safety net (or even any excess retirement money), would go to the benefit of his dependants, either just before or after death. The standard of living of his dependants would have been artificially depressed in order to create this safety net, and excluding future savings which would have been left to them after death or spent on them in the later years (as is the law under *Lassiter v To*), would deprive dependants of their reasonable expectation of pecuniary benefit.

94 Any fear of double recovery (although there should not be any) is eliminated because:<sup>119</sup>

In a case where the beneficiaries of the estate claim and the dependency claim are the same, the court will merge the two claims: *Hongkong Bank Trustee (Singapore) Ltd v Rajinder Singh* [1992] 2 SLR 31; *Lee Wee Hiong v Victor Koh Ah Sai* [1989] SLR 1029. The claim that is smaller in quantum will be subsumed under the claim with the larger quantum, thus avoiding over-compensation or double claims by the same group of claimants.

## V. Possible consequences

### A. ***Potential increase in insurance premiums and how fully dependants should be compensated: A policy decision to be made by Legislature***

95 Certain concerns in recognising the loss of savings in a dependency are neatly encapsulated in Luntz, *The Purpose of Damages in Tort Law*:<sup>120</sup>

[C]ompensation of the plaintiff cannot constitute a single purpose underlying the whole law of damages in tort ... since ...

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<sup>119</sup> Carrie Chan *et al*, *Practitioner's Library: Assessment of Damages: Personal Injuries and Fatal Accidents*, (Subordinate Courts and LexisNexis, 2005) at para 9-58.

<sup>120</sup> Harold Luntz, "The Purpose of Damages in Tort Law" in *Essays on Torts* (Paul D Finn (now Finn J) ed) (Sydney: Law Book Co, 1989) at pp 243, 261 and 263.

compensation can be more efficiently effected by means of social insurance.

... In practice, in nearly all personal injury actions, the damages are paid, not by the wrongdoer, but by the community through its contributions to compulsory and voluntary liability insurance premiums and the costs built into the prices of goods and services.

... [Also] the major pecuniary benefits which the beneficiaries would have expected were derived in most cases from the deceased's earnings ... and already wealthy people are likely to have insurance and superannuation benefits which their dependants will inherit and which under amendments to the original Lord Campbell's Act legislation are now disregarded when they were once taken into account in reduction of the damages consequent on the death.<sup>[121]</sup>

The redistributive effect in favour of the rich is manifest.

96 The counterpoint to these concerns is stated in an article "The Effects of Insurance on the Law of Damages",<sup>122</sup> where Justice Derrington pointed out that the original effect of insurance was to allay the court's concern for the ruinous effect of heavy damages upon the wrongdoer, especially if any moral fault is relatively slight. With insurance, the courts are more at liberty to apply the primary principle that a wrongly injured party should be restored, so far as money can do it, to the position enjoyed before the loss. An award for personal injury should be fair but not perfect, which warns against any instinctive response that no amount is too large to atone for the plaintiff's suffering. In the context of pecuniary loss, "all that it is meant is that the impossibility of predicting the future accurately defeats any attempt at perfection and

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<sup>121</sup> In a footnote, Luntz also observes that his own argument is slightly weakened, but not proportionately, by the disregard of social security pensions.

<sup>122</sup> Justice Derrington, "The Effects of Insurance on the Law of Damages" in *Essays on Damages* (Paul D Finn ed) (Sydney: Law Book Co, 1992).

contingencies which may not occur must still be allowed for. *Where however the loss can be established, fairness requires full indemnity*.<sup>123</sup>

97 The award of lost savings would not result in a minority benefiting at the expense of the insurance-paying majority. First, the savings pattern of the victim should be reflected in the award. It is submitted that the current rule may mean that both a living victim and the dependants of a victim who chose to spend more on his dependants, or had no established savings pattern, would have recovered a larger sum than a thrifty deceased, which may be a somewhat arbitrary result. Second, savings may not in reality be truly that distinct from the value of the dependency. To that extent, it constitutes part of the loss sustained by the dependant as a result of the tortfeasor's wrongdoing. Third, the fact that most people earn a salaried income and therefore would not face such a problem should not prejudice those who choose to be entrepreneurs and had the skill to be successful. Moreover, even those who earn salaried incomes may choose to plunge their savings into other investments, and generate other income streams. It may be unfair to penalise this class of people (who may at present be a minority but in future may be a substantial part of the population) in this manner. The fact that the difference would only become very substantial for certain cases might also have been the reason why savings were allowed to fall through the gap until now.

98 However, Luntz's concerns do make a valid point: insurance premiums may be affected if savings are taken into account when they previously have not been. Some societies require their citizens to invest more heavily in insurance than others and it is a balance to be struck in each society how fully compensated the victims of tortfeasors should be. Each society has different savings trends and retirement arrangements (such as pensions, superannuation funds, CPF, *etc*) which may affect how this balance is to be struck.

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<sup>123</sup> Justice Derrington, "The Effects of Insurance on the Law of Damages" in *Essays on Damages* (Paul D Finn ed) (Sydney: Law Book Co, 1992) at p 153.

99 This proposal for reform not only advocates that the balance be struck in favour of full compensation, it also calls for the balance to be at least struck clearly and after full consideration of the ramifications of any decision of the Legislature on this issue. The authorities in Australia, Canada, the US and Hong Kong have clearly allowed loss of savings to be claimed and in practice, they have shown it to be workable in a framework of legislation that is similar to Singapore's. Unlike pain and suffering or bereavement, the loss of savings is a pecuniary loss. It is no harder to quantify than the loss of future earnings or earning capacity. The plaintiff's net income acts as a natural cap on this loss. Dangers of double recovery can be dealt with as a matter of experience, logic and mathematics in each case, as in Singapore only a single claim on behalf of all dependants is brought and can in the appropriate case be merged with the estate claim. Accordingly, what remains for the Legislature to decide is: as a question of policy, is it desirable to have loss of savings expressly and officially recognised as a possible element of a dependant's claims?

## VI. Appendix 1: Sums Courts Have Awarded for Loss of Savings/Inheritance

Canada	Deceased	What was awarded	Sum: Canadian dollars (C\$)
<p><i>Jung v Krimmer</i> (1990) 47 BCLR (2d) 145 Owner of family poultry business</p>	<p>Age 56 years, family business At [204]: "The [trial judge] failed to take into account that the [deceased's company] had been keeping its directors' and management low in order to create a reserve in respect of certain litigation that had been commenced against the company in 1974. It had been intended that more money would be available to the directors once the litigation was resolved ... A better earnings estimate was \$120,000 a year"</p>	<p>Minimal deduction for accelerated inheritance because widow had little control over assets after his death, used the assets more for her children's benefit, and also because, by the time of the action, widow herself had died and deduction for acceleration had been made for the children's receipt of an accelerated benefit</p>	<p>\$210,000 reduced to \$175,000 (after deducting \$35,000 for acceleration) No loss of dependency because the widow drew director's fees from the family company in his stead</p>

Canada	Deceased	What was awarded	Sum: Canadian dollars (C\$)
<p><i>Lowry, Rondeau v Canadian Mountain Holidays</i> [1985] BCJ No 768</p>	<p>Vice President of Spear and Jackson (Canada) (manufacturer of industrial saws), accumulated \$41,000 at time of death, from which savings pattern of 15% of take-home pay derived. Counsel had calculated inheritance at \$319,000 based on continued savings to age 65 of unchallenged percentage of 15% of take-home pay, salary increment of 5-5.5% per annum then investment of the amount accumulated to age 65 for a further 10 years. Counsel estimated the present value to be \$41,000, to which 23% probability of widow predeceasing him will apply</p>	<p>Present value of loss of inheritance assessed at \$35,000 because there would have been encroachment on savings at least to extent of interest earned on amount saved after deceased reached 65. Deduct \$13,000 for acceleration and further \$12,000 as the value of accelerated receipt of the car and two condominiums</p>	<p>\$10,000 Value of lost support Pre-trial: \$46,800 Post-trial: \$95,222 + \$21,600 (from pension) Total loss of support: \$163,322</p>
<p><i>Tompkins v Byspalko</i> (1993) 1 CCLT (2d) 179</p>	<p>Counsel's calculation: When daughter ceased dependency, mother would have accumulated savings until stopping work at age 65, assumed 10% inheritance and allowances made for early death of daughter and mother based on life expectancies as well as taking into account post retirement expenditure</p>	<p>Discount for early receipt \$5,000</p>	<p>Loss of inheritance \$20,000 Loss of past services \$48,600 Future services: \$31,000 Past support: \$38,000 Future support: \$49,000 Future medical/dental benefits (from deceased's insurance) Total: Loss of services \$79,600 Loss of support \$87,000</p>
<p><i>Sharp Barker v Fehr</i> [1982] 39 BCLR 19</p>	<p>Grinder operator and machine helper with Canadian Pacific Rail. Estimated savings \$3,000 per annum after deducting personal spending and annual support of child and wife, high school education.</p>	<p>Present value of inheritance of \$1,500/yr for 20 years, being savings for the family and half the total predicted savings of \$3,000 per annum, taking into account termination of marriage after 20 years</p>	<p>\$11,300 (Value of dependency \$89,500)</p>

Canada	Deceased	What was awarded	Sum: Canadian dollars (C\$)
	Income at death: \$29,200 per annum		
<i>Keizer v Hanna</i> (1978) 82 DLR (3d) 449	Tool-room foreman, capable, conscientious, industrious and in good health, age 33 years, one infant child age 6 months. Gross future income \$15,000.	Court assessed \$7000/mth (to be available to dependants each year after expenses) × 31 yrs (multiplier), discount 6.5% on exhausting fund basis, allowance for income tax payable had he lived, further reduction of contingency	\$100,000 (loss of support that impliedly takes into account savings, no separate assessment of loss of savings or inheritance)

Australia	Deceased	What was awarded	Sum: Australian dollars (A\$)
<i>Lamb v Southern Tablelands County Council</i> (1988) Aust Torts Reports, para 80-220	<p>(Grazier: co-owned and operated 507ha sheep farm with father. Father intended to progressively give property to deceased but after deceased's death, left it to his wife and three daughters instead)</p> <p>Loss of inheritance because had the deceased lived, he would have acquired by gift the remainder of the property and that property would probably have accrued to his wife and family by devolution.</p> <p>[NB: This is an unusual case. If the deceased was dead, the grandfather would have willed it to some other beneficiary and the fact that the grandfather did not will it to the deceased's dependants was a deliberate choice, the only loss here was the loss of a chance to inherit.]</p>	Loss of inheritance (discount 25%) and reduced by \$5000 for probable acceleration of inheritance	<p>Loss of inheritance: \$152,208</p> <p>Loss of support Past: \$27,452 Future: \$235,962 Total: \$263,414</p> <p>Loss of services: \$39,899</p> <p>Loss of provision of car Past: \$20,364 Future: \$106,590 Total: \$126,954</p> <p>Loss of free fuel <i>etc</i> Past: \$5831 Future: \$41,047</p> <p>Loss of fuel: \$46,878</p>

United States	Deceased	What was awarded	Sum: US dollars (US\$)
<i>Snyder v Whittaker Corp</i> 839 F 2d 1085 (5th Cir, 1988)	Experienced shrimp boat captain	Loss of inheritance damages	Loss of inheritance: \$300,000 Loss of support: \$680,000
<i>Solomon v Warren</i> 540 F 2d 777 (5th Cir, 1976)	Both parents killed. Parents had established pattern of savings and systematic investment in real property that would have continued throughout their natural lives. Father's salary had risen from \$12,850 to \$23,000 in the last 11 years before his death, anticipated work life of 21 years.	Loss of inheritance damages (dissenting judge said that there was too much uncertainty and double recovery because the increased income came from real property investments from the existing estate not earned income and no or insufficient deduction had been made for living expenses)	Total combined loss of inheritance of \$499,998 (global award) (\$83,333 from each parent's estate for each of the 3 children) Loss of support (for 3 children): \$8,000 Loss of schooling: \$24,000 Loss of parental guidance (from both parents): \$183,000

Malaysia	Deceased	What was awarded	Sum: Ringgit \$ <sup>124</sup>
<i>Chan Yoke May v Lian Seng Co Ltd</i> [1962] MLJ 243		Estimate would have applied present value of \$43,596 to benefit of dependants	Global award \$35,000 (for dependency and savings)

England	Deceased	What was awarded	Sum: British pound (£)
<i>Gavin v Wilmot Breeden</i> [1973] G No 3166		Estimated would have accumulated £20,000 capital which would have gone to respondent or daughter	Savings/inheritance: £5,000 (allowing for contingencies and high rate of interest) Award of dependency (based on maintenance of £15/wk) = £14,040

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<sup>124</sup> Malaya and British Borneo dollars.

England	Deceased	What was awarded	Sum: British pound (£)
<i>Taylor v O'Connor</i> [1971] AC 115; [1970] 2 WLR 472	Age 53 years, life expectancy 18 years remaining, net spendable income \$6,000 per annum  Lord Reid: <sup>125</sup> "it is not suggested that there was any substantial likelihood that the husband would have done other than bequeath his estate to the respondent or the daughter. ... ... ... he would ... have saved as much as possible to provide for the future."  Lord Morris: some part of deceased's expenditure for dependants' benefit would have taken the form of ensuring that there was suitable provision for them for future years.	Lord Guest: £1,750 per annum for 12 years less post-retirement expenses, insurance payments, estate duty.  Lord Reid: £2,000 per annum to be used as savings or meeting the increasing cost of living.  Viscount Dilhorne: deceased would have spent £3,250 on his dependants and surplus [£1,750 × 12 yrs = £21,000] deduct personal and family's expenses post-retirement, insurance premiums, estate duty	Viscount Dilhorne: £3,500 (discounted to present value)  Lord Reid: (£2,000 per annum = £20,000) present value = £5,000 after discount  Lord Pearson: £4,000 (both maintenance and savings)  Lord Morris: £3,750  Ultimately, total award for dependency all judges agreed with trial judge's figure of £3,750 per annum although for different reasons  Final award: £45,000 as value of dependency, including savings/inheritance (no separate sum for savings/inheritance awarded)

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
<i>Chan Yee Mei v Leung Chi Fei</i> [2007] HKCU 205	Age 72 years, lady, employed by family car service business as part-time clerk, gratuitous child-minding services for family	\$705 pension payment/mth × 10 yrs on basis that deceased would have used whatever children gave her for minimal living expenses and hence would be able to save entire pension payment [NB: this reasoning may	Loss of accumulation of wealth on old age pension: \$84,600  Loss of services: \$40,000

<sup>125</sup> *Taylor v O'Connor* [1971] AC 115 at 128 and 130; [1970] 2 WLR 472 at 475 and 477.

<sup>126</sup> In Hong Kong, bereavement is usually at HK\$150,000 or HK\$70,000 unless otherwise agreed.

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
		not be applicable to a dependency claim]	
<i>Lee Sik Yee v Lo Wing Hong</i> HCPI 21/2006	Had son and daughter, frugal, civil servant earning \$19,721/mth at time of death	\$4,000 surplus after expenses + \$1,607 insurance payments which should also count as savings = \$5,600/mth up to retirement $\$5,600 \times 40 =$ \$224,000  On retirement, lump sum of \$675,650 + monthly pension \$4,020 – death gratuity \$594,049.68 + contributions by son and daughter after graduation (3 years after retirement) = \$2,000/mth, beginning 3 years after retirement  Global figure of \$500,000 for post-retirement savings after giving credit for death gratuity	Loss of accumulation of wealth: Final award \$450,000 after deductions  Loss of dependency Pre-trial: \$266,842 Post-trial: \$520,652 Total: \$787,494
<i>Pun Lai Ling v Hong Kong</i> [2006] HKCU 505	Frugal and hardworking, married, employed as petrol station worker	Living rent-free with free meals supplied by brother + MPF <sup>127</sup> payout upon retirement. Children to become independent in 12–16 years, freeing up more money for savings	Loss of accumulation of wealth: \$250,000 (lump sum)  Loss of dependency Pre-trial: \$246,100 Post-trial: \$563,300 Total: \$809,400
<i>Lee Hang Kuen v Chan Hong</i> [2006] HKCU 281	Construction worker at time of death. If he had lived he would have qualified as electrician/metal worker earning \$800/day, not heavily in debt, age 21 years	Median income assessed at \$21,000, \$6,000 left after contributing to family  Pre-trial loss of accumulation: $\$2,500 \times 62$ mths = \$155,000  MPF (employers + own) contributions \$1,000/mth	Loss of accumulation of wealth Pre-trial: \$279,000 Post-trial: \$1,047,000 Total: \$1,605,000  Total loss of dependency (for 2 dependants): \$532,320  Loss of service: \$24,000

<sup>127</sup> Mandatory Provident Fund, which is the Hong Kong equivalent of the Singapore Central Provident Fund.

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
		<p>each = \$62,000 × 2 = \$124,000</p> <p>Post-trial income \$24,000/mth. Savings: \$3,300 × 16 yrs × 12 mths = \$663,600 + MPF \$384,000 = \$1,047,000</p> <p>No further deduction as low multiplier already takes into account uncertainties of life</p>	
<i>Li Hoi Shuen v Man Ming Engineering Trading</i> HCPI 8/2004	Age 21 years, 3 dependants, monthly contribution \$5,500, earned \$12,000 at time of accident, air-con technician, unmarried	During early stage of career, unjust to jump to conclusion that no saving pattern as deceased did not earn much and could not save much, unless there was some evidence that he would not have saving pattern in future	<p>Loss of accumulation of wealth: Global award \$160,000</p> <p>Loss of dependency Pre-trial: \$199,270 Post-trial: \$192,038 Total: \$391,308</p>
<i>Tsang Choi Yung v United Christian Hospital</i> [1993] HKLY 471	\$13,500/mth earned income at time of death, age 25 years	Although savings exhausted from time to time, deceased would have been able to save up money in future when salary eventually goes out. Multiplier 14, multiplicand 20% of earnings pre-trial, 40% of estimated earnings post-trial	\$1,020,900
<i>Cheung Kai Chi v Chun Wo Contractors Ltd</i> HCPI 572/2004	Welder ganger at construction site, 2 sons	<p>Before younger son goes to university, deceased and wife's savings \$24,000 pa × 2.5 yrs = \$60,000</p> <p>After university, \$2,000/mth</p> <p>By 2009, son should get job and savings increase to \$8,500/mth</p>	<p>Total savings \$60,000 + \$2,000 × 10 mths + \$8,500 × 12 × 2 = \$284,000 + MPF (own and employer) \$216,000 + children's contributions = global assessment \$450,000 (reduced to \$337,500 for contributory negligence)</p> <p>Loss of dependency: \$604,800 + \$673,440 reduced by 25% contributory negligence = \$858,680</p>

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
<i>Li Lai Fun v Leung Yiu Cheung</i> CACV 253/2005	Age 42 years, driver, married with responsible children, simple and hardworking life	Post-retirement fund of \$800,000 – (exhaustion of \$25,000/yr = total exhaustion \$500,000) = balance \$300,000. Discount 30% for early receipt	Loss of accumulation of wealth: \$200,000 from MPF contributions (on appeal sum of MPF contributions was reduced due to an error) so final award reduced to \$132,300  Loss of dependency Pre-trial: \$960,750 Post-trial: \$1,211,250 Total: \$2,172,000
<i>Ting Kam Yuen v Ng Tai Sing</i> DCPI 32/2002	Age 30 years, fisherman, healthy, filial, hardworking frugal, no bad habits, thrifty	Absence of savings pattern, post-retirement expenses would have been more than pre-retirement as no free meals, contributed most of his income to family, would have gained more skills and experience which would have increased his income, have more money to save when mother passed away and son became financially independent	Loss of accumulation of wealth: Global award \$80,000  Loss of dependency: \$242,050
<i>Leung Tsang Hung v Tse Yiu Pui</i> HCPI 595/2002	Frugal working mother with 2 children, illegal hawker	After mortgage paid off, pre-trial loss of saving (after deducting household, dependants' and personal expenses) = (\$1,925 × 34 mths) + (\$1,725 (after daughter's pocket money reduced by \$200) × 15) = \$91,325 Son independent, savings \$4,170.40, daughter independent \$6,660.80  Post-trial loss of savings for 8 yrs = (\$1,725 × 12 × (7 – 4.25) + \$4,170.40 × 12) + (\$6,660.80 × 12 × 11) assuming working up to 60 years. Discount of 20% for increased personal expenditure	Loss of accumulation of wealth Pre-trial: \$91,325 + 80% discounted post-trial loss \$788,956.32 = \$880,281.32  Assume interest from investment of savings and pocket money from children will be adequate to support post-retirement expenses until death  Global sum \$880,000 awarded  Loss of dependency (for 2 dependants) Pre-trial: \$243,725.80 Post-trial: \$192,766.20 Total: \$436,492

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
		and healthcare in later years.	
<i>Lam Fung Ying v Lui Kwok Fu</i> HCPI 826/2002	Age 35 years, construction painter, purchased flat and paid mortgage = evidence of accumulation of wealth		Loss of accumulation of wealth: Post-trial loss: \$3,500 (earned income) × 24 mths × 10% = \$8,400 \$9,000 (earned income after construction industry improves) × 122 mths × 10% = \$109,800 Total: \$118,200  Loss of dependency Pre-trial: \$68,000 Post-trial: \$841,000 Total: \$909,000
<i>Lee Wai Man v Wah Leung Finance Ltd</i> HCPI 106/2002	No vices, typical family man, hardworking in order to cater to all the needs of wife and children. Project manager earning \$63,456.26 at time of death (taking into account bonus)	Family home will be the major asset of savings which will remain at the end of notional life. The family home had an outstanding mortgage loan of \$1,680,000, which might have been evidence of what the deceased might have saved to pay the mortgage (assuming he was able to pay it off in his lifetime). However, plaintiff had only claimed \$700,000 for loss of accumulation of wealth. So award will be \$700,000 (as claimed) with no further deduction for acceleration of receipt as \$700,000 already on the low side	Loss of accumulation of wealth: \$700,000  Loss of dependency Pre-trial: \$1,639,884.20 Post-trial: \$1,154,331.90 Total: \$2,794,216.10  Loss of gratuitous service: \$10,000
<i>Chu Wo Heung v Hui Lai Wa</i> HCPI 952/1996	Not extravagant, but considerable travelling expenses, driver of his own goods vehicle	Monthly saving at \$3,000, after estimating personal and other expenses and deducting from earned income	Loss of accumulation of wealth Pre-trial: \$322,500 Post-trial: \$181,500 Total: \$504,000

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
		Pre-trial = \$3,000 × 107.5 mths = \$322,500 Loss of accumulated wealth, multiplier of 14. Post-trial loss of savings \$3,000 × 60.5 mths = \$181,500	Loss of dependency Pre-trial: \$1,720,000 Post-trial: \$968,000 Total: \$2,688,000
<i>Or Oi Cheung v Securicor Hong Kong Ltd</i> HCPI 299/2002	Single, healthy, vice-free life, industrious and diligent saver. Hazardous job as security job, age 32 years, could have left security job eventually but later than peers	Taking into account marriage and having children, savings assessed at \$6,500/mth including MPF	Loss of accumulation of wealth: Global award \$1,200,000 Loss of dependency: \$440,300.13 (agreed)
<i>Law Yuet Kwai v Secretary for Justice</i> HCPI 430/2001	Considerable bank accounts, income \$16,000/mth at time of death, brought up son and daughter, age 49 years, another 11 years of working life without dependants, artisan of Marine Dept	Pension entitlement \$740,812	Loss of accumulation of wealth: Global award \$500,000 Loss of dependency Pre-trial: \$566,287 Post-trial: \$728,123 Total: \$1,294,410
<i>Chan Oi Ying v Kwong Wai Hung</i> HCPI 448/1998	Fluctuating savings passbook, rebuilt house in China, loan to relatives (\$180,000), roast meat cook	Would not have been able to save much as family migrating to Hong Kong but would have saved what he could	Loss of accumulation of wealth: Global award \$100,000 Loss of dependency Pre-trial: \$768,000 Post-trial: \$365,500 Total: \$1,133,500
<i>Mok Merla v Ocean Crown Transportation Ltd</i> HCPI 226/1998	No savings at time of his death but was supporting 3 sons with mortgage, so may have chance to save later, assistant operation manager	MPF entitlement: \$99,500	Loss of accumulation of wealth: Global award \$300,000 Total loss of dependency: \$966,827
<i>Chan Lai Fong v Chung Kin Wa</i> HCPI 199/2000	Construction worker, construction industry in decline, 3 dependent daughters, frugal	Post-trial: \$3,500/mth × 41 × 50% discount for uncertainties	Loss of accumulation of wealth: \$386,660 (post-trial) + \$111,750 (pre-trial) = \$498,416 Loss of dependency Pre-trial: \$991,500.75 Post-trial: \$1,690,172 Total: \$2,681,672.75

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
			(Total award was reduced by employee's compensation \$1,613,782.80)
<i>Kung Pik To v Au Kam Fai</i> HCPI 545/2000	Frugal hardworking, pattern of savings, \$1,000/mth existing pattern, taxi driver	\$2,000/mth (after children dependant) × 12 mths × 8	Loss of accumulation of wealth: \$192,000 Loss of dependency Pre-trial: \$352,320 Post-trial: \$370,038 Total: \$722,358
<i>Buaphan Wanlayaphol v the Incorporated Owners of the foremost building situate at 19-21 Jordan Road</i> HCPI 336/1998	Not extravagant, cleaner and runs hotdog venture, demonstrated pattern of industry, past savings and frugal lifestyle	15% of annual income × 13 yrs	Loss of accumulation of wealth: \$321,836.99 Loss of dependency: \$477,027.94
<i>Chow Kam Ho v Gammon Construction Ltd</i> HCPI 863/1999	Concretor (at construction site). Deceased was financially reliant on parents for large capital outlays, chance of savings only in far future, had 5 dependants.		Loss of accumulation of wealth: Global award \$100,000 Loss of dependency Pre-trial: \$446,966.35 Post-trial: \$2,228,513.30 Total: \$2,675,479.70
<i>Wong Sau Kam v Shum Yuk Fong</i> HCPI 798/1998	Construction worker, 5 children, fluctuating bank balance, frugal	Responsible, hardworking and still managed to save in spite of large dependency	Loss of accumulation of wealth: Global award \$350,000 Loss of dependency Pre-trial: \$833,437 Post-trial: \$1,485,000 Total: \$2,318,437
<i>Yu Shuk Ying v Proficiency Industrial Products Ltd</i> HCPI 1019/1997	Business generated profits of \$60,000/mth, sole proprietor of cleaning company, carried out most of the cleaning work himself	Deceased would have paid mortgage for property, 50% discount for acceleration and uncertainties in life = \$212,101 + \$100,000 general savings (conceded)	Loss of accumulation of wealth: \$312,101 Loss of dependency Pre-trial: \$1,307,200 Post-trial: \$1,133,600 Total: \$2,440,800
<i>Lam Pak Chiu v Tsang Mei Ying</i> FACV 23/2000	Age 42 years, frugal man, earning \$16,700/mth at time of death, 4 dependants, painting worker		Loss of accumulation of wealth: Affirm trial judge's award of \$320,000 Loss of dependency (all dependants)

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
			Pre-trial: \$1,277,216 Post-trial: \$3,681,144 Total: \$4,958,360
<i>Ho Pang Lin v Ho Shui On</i> [1994] 2 HKLR 313	Age 40 years, bus driver, 20% stake in employer company, earning \$8,200 at time of death		Loss of accumulation of wealth: Global award \$100,000 Loss of dependency: \$314,914.13
<i>Cheng Ching Muk v Wah Nam Travel Service Ltd</i> [1999] 1 HKC 100	Age 34 yrs, saleswoman, earning \$8,000/mth		Loss of accumulation of wealth: Global award \$150,000 Loss of dependency Pre-trial: \$162,932.80 Post-trial: \$84,672 Total: \$247,604.80
<i>Chan King Wan v Honest Scaffold</i> [2001] HKCU 146	Age 50 years, scaffolder, likely to work as contractor for next 20 yrs Had existing savings of \$2.5m, earned \$30,000 as wages and \$180,000 as dividends, estate duty figures for the first deceased's estate taken into account for award to determine amount of wealth which the deceased could be expected to have accumulated in the course of a year	Put money in property, deceased had accumulated property and shareholdings had generated considerable wealth. Multiplier 10 years Interest on assets of \$2.5m included: \$125,000 [NB: this should not be taken into account for dependency claim] At [38]: "Although ... the amount of the award is substantial, in each case the size of the award must be the result of a matter of impression and depend upon the judge's assessment of the evidence relating to the deceased and the impressions received as a result of seeing and hearing the evidence."	Loss of accumulation of wealth: \$4,166,666 awarded Loss of dependency (all dependants) Pre-trial: \$3,191,526 Post-trial: \$627,684 Total: \$3,819,210 Loss of services: \$200,853.90
<i>Leung Suk Yi v Pang Fuk Choi</i> HCPI 438/1998	Consistent savings pattern, Land Inspector (II) at the Lands Department of the Civil Service	10% of monthly earnings	Loss of accumulation of wealth Pre-trial: \$19,790.46 × 10% × 65.5 mths = \$129,627.51

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
			Post-trial: \$26,684.48 × 10% × 30.5 mths = \$81,387.66 Loss of dependency Pre-trial: \$897,281.64 Post-trial: \$563,365.41 Total: \$1,460,647.05
<i>Lee Wai Lien v Dragages et Travaux Publics and Penta-Ocean Construction Co Ltd</i> HCPI 596/1999	Insurance policy, little savings in bank account, VSL provident fund, job title: Leading Hand (for construction site)	Limited propensity to save, multiplier of 9, savings \$2,000/mth	\$474,289, taking into account provident scheme, reduced to \$380,000 after deductions for depletion + 20% discount <i>etc</i> Loss of dependency Pre-trial: \$524,730 Post-trial: \$595,653 Total: \$1,120,383
<i>Sin Kin v Dragages</i> HCPI 599/1999	Age 30 years, life insurance policy, had credit card debts, construction site worker (ex-fisherman)	10% savings + MPF, multiplier 15 (before MPF \$3,000/mth, after MPF \$4,000/mth, after cessation of dependency \$5,000/mth) At [68]: "... savings can be invested to generate income returns of a recurrent nature during the deceased's working life. ... the more you have in your retirement fund, it is likely you will spend more during the years of retirement, still leaving sufficient financial security." [This reasoning was applied to all <i>Dragages</i> cases]	Loss of accumulation of wealth: \$510,000 (deduction of 20%) Loss of dependency Pre-trial: \$359,585 Post-trial: \$674,832 Total: \$1,034,417
<i>Wong Hiu Shan v Dragages</i> HCPI 598/1999	Age 33 years, sole breadwinner, construction worker, 3 children, aged parents, (ex-fisherman, who had owned and later sold his own boat, which might have accounted for some of the savings)	MPF taken into account, would have retired from physical work from age 60, at time of death, substantial savings in plaintiff's account, clearly demonstrates propensity to save	Loss of accumulation of wealth (including MPF): \$1,000,000 Loss of dependency Pre-trial: \$821,215 Post-trial: \$2,153,040 Total: \$2,974,255

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
<i>Wong Po Lin and Wong Hiu Shan v Dragages</i> HCPI 593/1999	Had substantial savings in bank account at time of death (\$50,000), 37 yrs old at date of trial had he lived, construction worker, 2 children	MPF taken into account	Loss of accumulation of wealth: \$900,000 Loss of dependency Pre-trial: \$777,344 Post-trial: \$1,909,826 Total: \$2,687,170
<i>Wan Dan Nei v Dragages</i> [2000] HKCU 724	Age 40 years, project engineer, very frugal man, exceptional savings	Pre-trial savings \$4,000/mth after contributions to his family and personal expenditure Post-trial \$6,000/mth At [56]: "the more you have in your retirement fund, the more likely you will be likely to spend ... while leaving you with sufficient financial security"	Loss of accumulation of wealth \$1,308,000 + provident fund \$809,880 = \$2,309,880 in savings \$1,800,000 after deducting expenditure at end of notional life (after 22% deduction) Loss of dependency Pre-trial: \$1,277,216 Post-trial: \$3,681,144 Total: \$4,958,360
<i>Yeung Yuet Mei v Wong Yau Ming</i> HCPI 77/1998	Partnership business, frugal hardworking man who managed to purchase 6 properties before his death although no systematic savings		Loss of accumulation of wealth: \$500,000 Loss of dependency Pre-trial: \$728,172.50 Post-trial: \$724,842 Total: \$1,453,014.50
<i>Tsui Shuk Fong v Chan Chu Sun</i> HCPI 979/1998	Clear evidence of savings in bank accounts, employee of subcontractor (construction)	Pre-trial savings assessed at \$2,100/mth Post-trial: \$2,400/mth	Loss of accumulation of wealth: Pre-trial: \$2,100 × 12 mths × 5 = \$126,000 Post-trial: \$2,400 × 12 mths × 9 = \$259,200 Total: \$385,200 Loss of dependency: \$1,828,000
<i>Wong Kit Chun v Wishing Long Hong</i> HCPI 349/1996	Personal secretary to boss, manager of associate company of employer, right hand man of the boss and salary 3 times that of boss's son, who was the manager. No savings despite working for 20 years and earning good salary, 3 dependants, 2 insurance policies	Annual earnings at time of death: \$236,453.60 May have savings when 2 daughters independent	Loss of accumulation of wealth: Global award \$250,000 Loss of dependency Pre-trial: \$1,422,000 Post-trial: \$578,000 Total: \$2,000,000

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
<i>Tang Mei Ying v Cheung Kee Fung Construction Company Limited</i> CACV 319/1999	Monthly wage \$16,708, after rent family contributions, surplus \$4,000/mth, hardworking responsible with no wasteful vices, deceased had good consistent working record, two children, wife earning \$5,000/mth managed to save \$30,000	Savings assessed at \$1,000/mth for 4 years, further 4 years at \$3,000/mth, 2 years' savings at \$6,000/mth  Discount (fact that wife had been able to make savings out of her own income and monthly contributions from deceased taken into account)	Appeal dismissed. Savings assessed at \$1,000/mth for 4 years, further 4 years at \$3,000/mth, 2 years' savings at \$6,000/mth
<i>Kwan Lai Kuen v National Insurance Co Ltd</i> [1998] 1 HKC 98	Age 20 years, male, badminton player of exceptional ability, occupation: junior clerk	Earning \$6,000/mth at time of death	Loss of accumulation of wealth: Global award \$100,000  Loss of dependency Pre-trial: \$111,250 Post-trial: \$264,750 Total: \$375,000
<i>Kwan Yau Tai v Eng Kong Container Services Ltd</i> [1998] HKLRD (Yrbk) 329	Male, age 27 years, hookman at construction site	Earning \$9,192/mth at time of death, no pattern of saving	Loss of accumulation of wealth: Global award \$100,000  Loss of dependency Pre-trial: \$111,250 Post-trial: \$264,750 Total: \$376,000
<i>Wang Chin Ying v Lam Ping Fung</i> [1999] 4 HKC 373	Teenaged girl who had been earning \$6,000–7,000/mth, died age 17 years, just completed Form 4		Loss of accumulation of wealth: Global award \$100,000  Loss of dependency: \$180,000
<i>Chan Yuk Yin v Chan Cheung Wai</i> [1990] 1 HKC 474		Multiplier-multiplicand method: multiplier 15, multiplicand 10% of earnings	Loss of accumulation of wealth: \$154,860
<i>Cheung Yuk Shiu v Registrar General</i> (1990) HKLY 514	Male, age 19 years	Mutiplier of 16 and multiplicand 10% of earnings	Loss of accumulation of wealth: \$194,675  Loss of dependency Pre-trial: \$67,087.50 Post-trial: \$168,000 Total: \$235,087.50
<i>Wong Mee Wan v Kwan Kin Travel Services Ltd</i> (1993) HKLY 473	Student, age 18 years	Multiplier 17, multiplicand of 10% of estimated earnings	Loss of accumulation of wealth: \$153,000

Hong Kong (loss of accumulation of wealth)	Deceased	What was awarded	Sum: Hong Kong dollars (HK\$) <sup>126</sup>
<i>Ho Wun Chau v Chan Chuk Mui</i> [1997] 3 HKC 666	Male, age 34 years	Multiplier of 14 and 10% of earnings	Loss of accumulation of wealth: \$108,800

## VII. Appendix 2: Proposed methods of calculation

### A. Method A (adapted from the Canadian approach)

100 The following framework is adapted from that laid out in the Canadian case of *Sharp Barker v Fehr*.<sup>128</sup>

- (a) Calculate a capital sum sufficient to replace the loss of support due to the deceased's death, considering those contingencies which might have affected that income such as:
  - (i) increase or decrease in "personal characteristic" abilities affecting earning power as years went by;
  - (ii) unemployment due to economic conditions;
  - (iii) ceasing to provide for the family for some reason such as incapacitating sickness;
  - (iv) altered earnings because of early or late retirement;
  - (v) death before the joint expectancy period of husband and wife;
  - (vi) any other factors raised on the evidence.
- (b) Decide the proportion of the annual income that would have been used by the deceased in:
  - (i) supporting his dependants;
  - (ii) spending on his own personal needs;
  - (iii) putting aside for savings [inclusive of the part of CPF moneys that would have been applied in some manner for the benefit of dependants] or building up family assets for an estate,
 and apply the proportions to the amount projected in para (a).
- (c) Take the amount projected in para (b)(i) and estimate the total predictable income of the deceased as a lump sum after payment of

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<sup>128</sup> [1982] 39 BCLR 19.

tax and other expenses (on a net or “take home” pay basis) using the exhausting fund principle.

- (d) Consider the effect of any contingencies affecting the [dependant] personally such as:
- (i) the possibility of marriage breakdown ... [or other factors shown on the evidence],
  - (ii) whether the dependant has ceased to be dependent [however one must not necessarily assume that the fact that once dependants have an income, their reasonable expectation of a pecuniary benefit is entirely extinguished in all cases (although it may be reduced).

As stated by Lord Diplock in *Mallet v Monagle* [1970] AC 166 the purpose of the award ‘is to provide the widow and the other dependants with a capital sum, which, with prudent management, will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the defendant ...’<sup>[129]</sup>

and make any appropriate alteration to the amount projected in para (c).

- (e) Decide an amount adjudged to be what would be received by the family from the “savings” or inherited portion of the deceased’s assets, take its present value and make a statistical reduction that the [dependant] will be alive at the end of the purchase period. [In that case, the court assumed half the savings would be for deceased’s own retirement and the other half would have devolved upon his wife.]
- (f) Discount the above sum, if the facts demand, for the benefits of acceleration of the receipt of the lost inheritance.
- (g) Take the totals found in paras (d) and (f) and add back an estimated amount sufficient to pay the income tax on such amount each year on the invested proceeds of the award.

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<sup>129</sup> Cited by *Ang Song Huay v Chu Yong Thiam* [1995] SGHC 116.

- (h) Consider amounts for dependants proportioning them to equal the total of the value of the lost dependency and the lost inheritance.
- (i) Consider the total figure as to whether it constitutes fair and proper compensation for the loss, make any warranted adjustments and decide the award.
- (j) Consider an extra award (if justified) to the children for the loss of a loving parent.
- (k) Consider providing a management fee.
- (l) Consider any application of prejudgment interest.

101 For more complex situations, the court must also be careful to separate the part of future savings that derive from investing the assets of the present estate from future savings that derive from future earned income.

### ***B. Method B (CPF assessment applied mutatis mutandis to other types of savings)***

102 The current method of taking future Central Provident Fund (“CPF”) contributions into account can be extended to non-CPF future savings. This can be done by setting a percentage rate of savings relative to earned income for the various stages in life. It can function as a rough and ready alternative to Method A.

[*Assessment of Damages: Personal Injuries and Fatal Accidents*.<sup>130</sup>]  
Contributions to the CPF may be included in the figure of annual dependency to be multiplied by the multiplier or excluded from the figure of annual dependency and a separate and additional sum awarded in respect of them. In *Teoh Mee Sun v Asia-Pacific Shipyard Pte Ltd* [1991] SGHC 71, the pre-trial CPF loss was arrived at by applying the percentage rates of contribution over the period to the average of estimated earning over the period. The post-trial loss was arrived at in a similar fashion using the rate at the date of trial and the post-trial multiplier. A discount was then

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<sup>130</sup> Carrie Chan *et al*, *Practitioner’s Library: Assessment of Damages: Personal Injuries and Fatal Accidents* (Subordinate Courts and LexisNexis, 2005) at para 9-47.

given on the total to allow for uncertainties and the fact that it would be an accelerated payment. The total was then divided among the dependants according to the rules of intestate succession. A discount may be given for the fact that not all the CPF monies would necessarily go to the dependants if the deceased were alive: *Ng Lim Lian v PSA* [1997] SGHC 62, *Guo Xiuhua v Lee Chin Ngee* [2001] SGHC 190.

**C. Method C (adapted from method used by Hong Kong courts)**

103 The Hong Kong courts calculate the available surplus after monthly family contributions and then deduct a sum for personal expenses to determine the monthly saving. To adapt this to a dependency claim, the monthly saving can be multiplied by the multiplier, then a percentage for acceleration, personal post-retirement expenses and other uncertainties deducted to arrive at a fund representing savings which would be available to be spent on dependants either in the later years of the deceased's life or as inheritance. The court can then determine what proportion would benefit which dependant and apportion accordingly.

**VIII. Appendix 3: How Hong Kong has taken care of the savings gap**

104 Hong Kong has taken care of the savings gap by way of an estate claim. Section 20(2)(b)(iii) of the Hong Kong Law Amendment and Reform (Consolidation) Ordinance,<sup>131</sup> states:

Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —

...

(b) shall, where the death of that person has been caused by the act or omission which gives rise to the cause of action —

...

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<sup>131</sup> Cap 23.

(iii) not include any damages for loss of property, whether income or otherwise, in respect of any period after his death, *except in so far as the court is satisfied that, but for the act or omission that gave rise to the cause of action, the deceased would have achieved an accumulation of wealth by the time that he would otherwise have died, in which case damages may be awarded in respect of the loss of that wealth.*

Provided that damages awarded under this sub-paragraph shall be subject to such deduction as the court considers it just to make in the circumstances of any particular case on account of the accelerated receipt of that wealth and in order to avoid over-compensation.

[emphasis added]

105 In proposing this solution, the Law Reform Commission of Hong Kong's *Report of Damages for Personal Injury and Death*<sup>132</sup> had been trying to address the problem of possible double recovery due to overlapping claims of the estate and the dependants. The reason why it has chosen to deal with it by way of an estate claim is probably due to the particular development of events. The same report was proposing an abolition of estate claims for loss of future income, hence its starting point at that time was that the estate could still claim for loss of future income, which is different from our starting point today when the estate claim for loss of future income has already been abolished. In that context, it was easy for the Law Reform Commission of Hong Kong ("Law Reform Commission") to add in a *proviso* with regard to an accumulation of wealth in the process of abolishing loss of future income for an estate claim. Also, in the process of proposing legislative amendments, the Law Reform Commission was of the view that a dependency claim did not include a claim for savings, although there was a suggestion by Roberts CJ that it should. At para 11.15 of the Law

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<sup>132</sup> Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (Topic 10, 5 October 1984).

Reform Commission report, the Law Reform Commission quoted Roberts CJ in *Wong Sai-chuen v Tam Mei-chuen*:<sup>133</sup>

I suggest that it is open to a trial judge, having assessed the FAO dependency:—

- (a) to apply this figure as the first part of the free balance, unless there is evidence that the amount of dependency might have varied during the lost years;
- (b) to add to that the deceased's notional savings during his lost years.

As a starting point, it would be reasonable, in my view, to adopt the formula ... of taking 10% of the deceased's net earnings as the amount of the notional savings ... The natural thrift of the inhabitants of Hong Kong suggests that this is not an unreasonable assumption.

106 However, after quoting Roberts CJ, the Law Reform Commission somehow concluded in the following paragraph:<sup>134</sup>

This approach recognises that a person's income may be used for three purposes – for supporting his dependants, for personal expenses, and for savings. Whereas a claim under the FAO [that is, the dependency claim] only relates to the amount spent on the dependants, a claim under LARCO [the estate claim which at that point of time still included loss of future income, but was subsequently abolished as recommended by the same report except for accumulation of wealth] should be for the whole of the net income minus the personal expenses, and therefore should include any savings. Hong Kong courts have in a number of cases therefore awarded more under LARCO than under the FAO (see *eg Wong Sai-chuen v Tam Mei-chuen*; *Yeung Yuk-sim v Mak Kam-lit*; *Chung Wing v Wong Lan-ying*; *Lam Sze v Ling Shum-ha*; *Chan Kit-ching v Lee Yuk-su*).

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<sup>133</sup> [1981] HKCA 140; Civ App No 133 of 1981.

<sup>134</sup> Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (Topic 10, 5 October 1984) at para 11-16.

107 Therefore the Law Reform Commission proceeded on the basis that a claim for savings belongs to the estate claim and confined itself to considering three ways of improving the law, namely:

- (a) to abolish the dependency claim,
- (b) to abolish the estate claim,
- (c) to retain both but limit the estate claim to the loss of net savings.

108 The committee rejected (a) because:<sup>135</sup>

... in [their] view it is the dependants of the deceased who are in the greatest need of compensation in respect of the financial loss caused by the death. It is therefore wrong to allow the estate to claim the financial loss since the money may not go to those dependants. It is true that certain dependants may claim reasonable provision out of the estate under the Deceased's Family Maintenance Ordinance but this is a round-about procedure and in any event it only protects a limited class of persons.

109 Option (b) was rejected because “[i]f the [estate] claim were to be abolished, however, it would mean that the deceased's estate would be deprived not only of the sums which would have been spent on the dependants, but also of the amount which the deceased would have saved”.<sup>136</sup> Accordingly, it can be seen that the committee was careful not to let any claim for savings “fall through the gap”.

110 Therefore, option (b) was taken:<sup>137</sup>

We recommend that a LARCO claim [the estate claim] for damages for the lost years should only lie in respect of the loss of saving during the lost years, and that such a loss should be calculated on the basis of the established pattern of savings (if there is one) of the deceased prior to the accident. This approach will eliminate speculation as to the future savings habits and will make settlements

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<sup>135</sup> Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (Topic 10, 5 October 1984) at para 11-29.

<sup>136</sup> Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (Topic 10, 5 October 1984) at para 11-31.

<sup>137</sup> Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (Topic 10, 5 October 1984) at para 11-37.

easier to arrange. It will enable the estate of a deceased person with an established pattern of savings (*eg* a middle-aged family man) to recover the loss of future savings, but will eliminate claims in the case of a young person with no savings pattern. In our view this approach is preferable to the total abolition of damages for the lost years and yet has a degree of certainty and simplicity. Some commentators pointed out that it was incorrect to regard the net savings as the only surplus left from the net income after deductions are made for personal expenses and sums spent on the dependants. We acknowledge the logic of this. There may be other amounts which were dealt with in other ways by the deceased. Nevertheless we are of the view that the estate should only be able to claim for the loss of those sums which would have been saved by the deceased. If other uses made by the deceased of his money were to be taken into account we feel this would create an unacceptable level of speculation as to whether that money should be regarded as a loss to the estate.

111 It is submitted that it is not necessary to associate an award for savings only with an estate claim. It is not necessary to follow Hong Kong's approach exactly and award lost savings in an estate claim, as long as the current savings gap in Singapore can be filled by another method. An award of the portion of lost savings/inheritance which would have benefited dependants would better compensate dependants for their loss of reasonable expectation of pecuniary benefit. In addition, the award will be lower than an accumulation of wealth as it is limited by considerations such as the years of dependency, likelihood of inheritance, *etc.* Awarding lost savings under a dependency claim would achieve the need for full and fair compensation to dependants while keeping insurance premiums at a more reasonable rate compared to an accumulation of wealth assessment.

#### **A. *Application in cases***

112 It must be noted that the accumulation of wealth is approached as an estate claim. The court's starting point is what the deceased would

have left at the end of his notional life:<sup>138</sup> “[A]n award for loss of accumulation of wealth is compensation for the loss of what would have passed to the deceased’s estate upon his death after having lived out an average life span.”<sup>139</sup> Accordingly, the starting point is quite different from the award of a loss of savings under a dependency claim. The Hong Kong courts are trying to determine what the deceased would *not* have spent on his dependants during his lifetime, whilst for our purposes, loss of savings should take into account both what the deceased would have spent on his dependants from his savings in the event of any contingency, *etc.*, outside of their regular maintenance, as well as what part of his savings after his lifetime would be left to his dependants. Certain factors such as what the family members would have contributed to the deceased (such as free meals,<sup>140</sup> children giving a part of their income to their parents, enabling parents to save more from their own income) must therefore be disregarded for a loss of savings/inheritance under a dependency claim. In fact, *Chan Yee Mei v Leung Chi Fei*<sup>141</sup> also makes a clear statement that voluntary contributions to the deceased by his family are not to be taken as an accumulation of wealth. Due to the particular wording of the Hong Kong statute, accumulation of wealth is not limited to that arising from savings and means the accumulated wealth which would have been in the deceased’s estate in the normal course of events generally. The Legislature chose this approach, in order to avoid the need to define “savings” and afford greater flexibility to the court to consider the individual circumstances of each case.<sup>142</sup> However, for our purposes, any accumulation of wealth resulting from the existing estate or unearned income must also be disregarded, as the existing estate would continue to be invested by the beneficiaries and unearned

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<sup>138</sup> *Lee Hang Kuen v Chan Hong* [2006] HKCFI 168; HCPI 548/2002.

<sup>139</sup> *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>140</sup> *Pun Lai Ling v Hong Kong Master International* [2006] HKCFI 309; HCPI 53/2005.

<sup>141</sup> [2007] HKCFI 93; HCPI 370/2006; [2007] HKCU 205.

<sup>142</sup> *Chan King Wan v Honest Scaffold General Contractor Co Ltd* [2001] HKCA 333; CACV 290/2000 (on appeal from HCPI 1267 and 1269 of 1996 (consolidated)).

income would have been diverted to other living persons since the deceased has died. The use of savings to buy property can be taken into account but not the worth of the property bought as that is not a loss of savings or inheritance in a dependency claim. Mortgage payments of the family home are often taken as part of the household expenses in the dependency claim and excluded from the accumulation of wealth calculation.<sup>143</sup> The court often finds that when dependencies have ceased, a frugal deceased may convert the dependency into savings.<sup>144</sup> For a loss of savings/inheritance dependency claim, it would not matter whether the deceased converts the previous dependency into savings or chooses to spend more freely on the dependant or other dependants (except when it comes to apportionment amongst dependants).

113 For an accumulation of wealth claim, the court also disregards post-retirement expenses that the deceased spends on himself and his spouse since the purpose is to determine what is left at the end of his notional life.

114 For example, Kaplan J in *Re Lau Chuen-fat*<sup>145</sup> where no award was made for loss of accumulation of wealth. Kaplan J reasoned:<sup>146</sup>

People often do save during the course of their working life to provide for their retirement. As the population grows older, and people live longer, it is more likely than not, in my view, that any savings accumulated during the working life of people in the position of the deceased in the case before ... me would have been used up by the time of natural death.

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<sup>143</sup> See *Kung Pik To v Au Kum Fai* [2002] HKCFI 291; HCPI 545/2000; *Chow Kam Ho v Gammon Construction Ltd* [2001] HKCFI 481; HCPI 863/1999.

<sup>144</sup> See *Lee Wai Man v Wah Leung Finance Ltd* [2004] HKCFI 116; HCPI 106/2002; *Leung Tsang Hung v Tse Yiu Pui* [2004] HKCFI 242; HCPI 595/2002; *Pun Lai Ling v Hong Kong Master International* [2006] HKCFI 309; HCPI 53/2005; *Ting Kam Yuen v Ng Tai Sing* [2004] HKDC 122; DCPI 32/2002; *Chan Lai Fong v Chung Kin Wa* [2002] HKCFI 1068; HCPI 199/2000.

<sup>145</sup> [1994] 2 HKLR 173.

<sup>146</sup> *Re Lau Chuen-fat* [1994] 2 HKLR 173 at 184.

115 However, *Lam Pak Chiu v Tsang Mei Ying*<sup>147</sup> commented that this reasoning cannot be taken to extremes, at the same time setting out a framework with which the courts can treat post-retirement expenditure:<sup>148</sup>

No court would ever set up the dismal hypothesis of a man saving up during his working life for his retirement and then, during an anxious retirement, using up all of his savings so that he spends his last cent as he draws his last breath. Such a notion is wholly unrelated to reality barring an instance of the most astonishing coincidence.

It is only to be expected that any accumulation of wealth made during the working years would yield income – whether such income be in the form of rent, dividends, interest or anything else – during the retirement years. And there is also the question of pension and the like. Thus if the court were to find in any given case that an accumulation of wealth would have been achieved by the notional time of retirement, the realistic possibilities, factoring in probable inflation, would then be as follows:

- (i) expenditure during retirement may exceed the income from the accumulation plus any pension and the like received during retirement so as to exhaust the accumulation some time before the notional time of death, thus leaving the deceased dependent upon state, family or other help during his notional final years; or
- (ii) post-retirement expenditure may exceed post-retirement receipts but only so as to diminish the accumulation without exhausting it; or
- (iii) such receipts may more or less match such expenditure so as to leave the deceased's financial position at the notional time of death much the same as it had been at the notional time of retirement; or
- (iv) it may even be that such receipts would exceed such expenditure so as to leave his financial position better at the

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<sup>147</sup> [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>148</sup> *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11 at [33]–[35] and [41].

notional time of death than it had been at the notional time of retirement.

It would be for the court to select from these possibilities the one which it considers the most realistic in the particular circumstances of the case, remembering that the burden lies on the party who asserts.

...

Finding a multiplier for a loss of accumulation of wealth award would present no greater difficulty than finding a multiplier for a loss of dependency award. But finding a multiplicand for a loss of accumulation of wealth award would be very difficult, to say the least. Except in cases where there is something more to go on than one has in those cases where the court is driven to taking an almost arbitrary percentage of earnings as a multiplicand, judges and masters calculating such awards would be well advised to make global awards. This is not to say that a conventional figure across the board ought to be adopted. Nor is it to say that a figure should be plucked out of the air. Even where the exercise does not lend itself to the precision of a multiplicand as in loss of dependency claims, some process of ratiocination must underlie the global award made. And it is necessary that the judge or master indicate at least in general terms how the award has been assessed in the light of the relevant factors, including expenditure during the retirement years.

[emphasis added]

116 This framework is a useful reference for our courts if an award is to be made for loss of inheritance/savings in a dependency claim. However, for a loss of savings/inheritance dependency claim, post-retirement expenses on his spouse would have to be separated from the deceased's own post-retirement expenses and taken into account under some portion of the dependency claim (either as an annual dependency or lumped together in the loss of savings (preferred since the spouse may continue to live on the deceased's savings after his death)).

117 There are certain common factors assessed in an accumulation of wealth claim that would be equally helpful in the assessment of a loss of savings or inheritance dependency claim.

118 In order to determine whether there would be an accumulation of an estate, the court will assess the deceased's lifestyle and existing savings pattern to see if there is a probability of future accumulation of wealth.<sup>149</sup> This can be done from witness evidence and bank account evidence, showing comings and goings from the account. Other evidence such as loans to relatives, investment in life insurance policies, mortgages<sup>150</sup> can also be an indicator of a probability of accumulation.<sup>151</sup> A pattern of savings is not an absolute assessment and the court does not look for proof on the balance of probabilities.<sup>152</sup> By taking the present savings relative to the historical income of the deceased, the court is sometimes able to arrive at a steady percentage of saving. Alternatively, by having regard to the circumstances of the deceased (the number of dependants, *etc*), it will be able to discern the deceased's attitude toward the saving.

119 There need not be an existing savings pattern before the court awards an accumulation of wealth:<sup>153</sup>

The crucial question is whether [the court is] satisfied that the deceased would have achieved an accumulation of wealth by the time of his natural death. That depends on the propensity of the deceased to save money, his ability to save and his lifestyle. Although a savings pattern is one way to prove an accumulation of wealth, it is by no means the only way ...

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<sup>149</sup> See *Kwan Lai Kuen v National Insurance Co Ltd* [1997] HKCFI 560; [1998] 1 HKC 98; *Buaphan Wanlayaphol v The Incorporated Owners of the Foremost Building situate at 19-21 Jordan Road* [2001] HKCFI 477; HCPI 336/1998; *Wong Sau Kam v Shum Yuk Fong* [2000] HKCFI 112; HCPI 798/1998.

<sup>150</sup> See *Mok Merla v Ocean Crown Transportation Ltd* [2002] HKCFI 602; HCPI 266/1998.

<sup>151</sup> See *Chan Oi Ying v Kwong Wai Hung* [2002] HKCFI 628; HCPI 448/1998.

<sup>152</sup> See *Pun Lai Ling v Hong Kong Master International* [2006] HKCFI 309; HCPI 53/2005; *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>153</sup> *Lee Wai Lien v Dragages et Travaux Publics and Penta Ocean Construction Co Ltd* [2000] HKCFI 45; HCPI 596/1999 at [46], *per* Master Cannon.

120 *Lam Pak Chiu v Tsang Mei Ying*<sup>154</sup> elaborates on why a pattern of savings is not necessary:<sup>155</sup>

... in the general run of cases the surest possible foundation for an award for loss of accumulation of wealth would be a pattern of savings by the deceased during his lifetime. But is such a pattern of savings an absolute pre-condition to such an award? ... the first thing to note is that the statute itself does not lay down any such pre-condition. All that s 20(2)(b)(ii) requires is that the court be satisfied that, but for the act or omission which killed him, the deceased would have achieved an accumulation of wealth by the time that he would otherwise have died ...

... Take the example of a relatively young married man or woman with a strong sense of family responsibility. With that sort of person there would be strong prospects of achieving an accumulation of wealth at the end of a life of average span for a person like him or her. Nevertheless the financial responsibilities which such a person had faced may have prevented him or her from accumulating any wealth before an early and untimely death. But that does not mean that an accumulation of wealth would not have been achieved given an average life span ...

...

I reject the notion that a pattern of savings by the deceased during his lifetime is an absolute pre-condition to an award for loss of accumulation of wealth. Even in the absence of any savings during the deceased's lifetime, there may in any given case be, on a balanced view, real prospects of an eventual accumulation of wealth such as to justify an award for loss of accumulation of wealth. The court then assesses the award in accordance with those prospects as it sees them.

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... the further one has to look into the future the more difficult it naturally becomes to find real prospects, as opposed to a mere

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<sup>154</sup> [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>155</sup> *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11 at [21]–[22] and [26]–[28].

speculative possibility, of a future eventuality of the sort here in question.

... I should mention that there are in fact many cases in which judges and masters have made such awards even though the deceased had not made any savings during his or her lifetime ... both the global basis and the multiplier and multiplicand method have been resorted to by judges and masters making awards under this head ...

121 In cases of a young plaintiff or where it is difficult to predict what the savings pattern will be, a global award can be given.<sup>156</sup> Where the savings pattern is clearer or more predictable, a multiplier-multiplicand method can be adopted.<sup>157</sup> A mix of both methods can be used to verify the soundness of the figure awarded. The MPF (equivalent of CPF),<sup>158</sup> as well as entitlement to pensions, leading to savings<sup>159</sup> is also taken into account in the award.

122 The court in *Law Yuet Kwai v Secretary for Justice*,<sup>160</sup> explained why pension entitlements should be taken into account:<sup>161</sup>

... in a fatal accident case, where the deceased is already dead, there can be no claim for loss of pension for the same reason that the estate of the deceased is not entitled to claim for loss of future earnings. There can only be a claim for loss of *accumulation of wealth* in the sense that the court will have to decide what a

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<sup>156</sup> See *Pun Lai Ling v Hong Kong Master International* [2006] HKCFI 309; HCPI 53/2005 and *Li Hoi Shuen v Man Ming Engineering Trading Co Ltd* [2006] HKCFI 53; [2006] 1 HKC 349.

<sup>157</sup> For example, in *Chu Wo Heung v Hui Lai Wa* [2001] HKCFI 899; HCPI 952/1995.

<sup>158</sup> See *Pun Lai Ling v Hong Kong Master International* [2006] HKCFI 309; HCPI 53/2005 and *Li Lai Fun v Leung Yiu Cheung* [2004] HKCFI 1046; HCPI 697/2002.

<sup>159</sup> See *Chan Yee Mei v Leung Chi Fei* [2007] HKCFI 93; HCPI 370/2006; [2007] HKCU 205 and *Law Yuet Kwai v Secretary for Justice* [2002] HKCFI 379; HCPI 430/2001.

<sup>160</sup> [2002] HKCFI 379; HCPI 430/2001.

<sup>161</sup> *Law Yuet Kwai v Secretary for Justice* [2002] HKCFI 379; HCPI 430/2001 at [15], *per Suffiad J.*

deceased would have saved during his notional lifetime (whether from his wages or pension or both) which is not spent by him and of which he died possessed. *In so determining what is the accumulation of wealth, the court will no doubt be able to take into account his entitlement to pension and decide what part, if any, of his pension (and for that matter what part of his earnings had he not died) he would have been able to save up at the end of his notional life or whether he may have to expend some of what he had saved up during his working life in supplementing his pension to support his and/or his wife's living during his retirement.* [emphasis added]

123 Interest is usually awarded at judgment rate only after the date of judgment, although the award of interest before the date of judgment seems to vary. The Hong Kong High Court has decided that no interest is to be awarded for the pre-trial period,<sup>162</sup> although some courts awarded still awarded half judgment rate from date of death to judgment.<sup>163</sup> Accumulation of wealth is unlikely to be awarded where the deceased is old but yet no discernible pattern of saving can be shown, especially when he has expensive habits of gambling and smoking.<sup>164</sup> If the deceased is a housewife who had a pattern of savings by retaining a portion of the family contributions out of which she made a profit by way of investments, the court has held that any accumulation of wealth at the end of her notional life would have been too speculative.<sup>165</sup> Similarly if the deceased is already middle-aged and having only a barely sufficient income, the court is more likely to find that any savings he manages to make would be exhausted post-retirement and award no loss of accumulation.<sup>166</sup> In the majority of cases where there has been an

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<sup>162</sup> *Hsu Li Yun v The Incorporated Owners of Yuen Fat Building* [2000] HKCA 330; CACV 16/2000.

<sup>163</sup> See *Chan Yee Mei v Leung Chi Fei* [2007] HKCFI 93; HCPI 370/2006; [2007] HKCU 205.

<sup>164</sup> *Shek Chor Tai v Ya Lee Construction* [1999] HKCFI 897; HCPI 757/1998.

<sup>165</sup> *Chan Ki v Travel Trade Communication Network and Marketing Services Ltd* [1998] HKCFI 220; [1998] 2 HKC 57.

<sup>166</sup> *Chan Sim Lan v Shee State International Ltd* [1994] HKCFI 475; [1994] 1 HKC 460.

award, young deceased with no savings or savings patterns have shown diligence, filial piety and initiative with no great vices<sup>167</sup> and middle-aged deceased have at least shown an ability to meet household expenses, maintain dependants or pay their mortgage/insurance even if they have a propensity to indulge in personal expenses.

124 The clearest cases of a deserving award would be those of breadwinners with a frugal lifestyle.<sup>168</sup> For example, the court in *Wong Sau Kam v Shum Yuk Fong*<sup>169</sup> reasoned:<sup>170</sup>

Given the indication of the kind of man the deceased was [a responsible husband and father who worked to support his family as well as his father. It also points to a man sufficiently frugal to be able to save up a little from his meagre income despite the large dependency on him], I am quite satisfied that there would have been some accumulated savings by the deceased had he not met with this accident.

As for the amount, I take the view that if the deceased was able to save up in the region of \$60,000 to \$70,000 when supporting a family of five children, a wife and a father, there would be little reason to think that he cannot save up \$350,000 at the end of his natural life.

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<sup>167</sup> For example, *Siu Sau Yung v Tak Wing Contractors Ltd* [1997] HKCFI 190; HCPI 1139/1996; *Lee Woon Lan v Cheng Hing Pun* [1997] HKCFI 182; HCPI 465/1995; *Wang Chin Ying v Lam Ping Fung* [1999] HKCFI 830; [1999] 4 HKC 373; *Kwan Lai Kuen v National Insurance Co Ltd* [1997] HKCFI 560; [1998] 1 HKC 98; and *Wai Kang Kwan v Wong Wing Hong* [1989] HKCFI 475; [1989] 2 HKC 585.

<sup>168</sup> See *Chu Kang Yee v Giant Ocean Ltd* [1995] HKCFI 541; [1996] 1 HKC 284; *Ho Wun Chau v Chan Chuk Mui* [1997] HKCFI 354; [1997] 3 HKC 666; and *Chan Yuk Yin v Chan Cheung Wai* [1990] HKCFI 208; [1990] 1 HKC 474.

<sup>169</sup> [1997] HKCFI 560; [1998] 1 HKC 98.

<sup>170</sup> *Kwan Lai Kuen v National Insurance Co Ltd* [1997] HKCFI 560; [1998] 1 HKC 98 at [85]–[86], *per* Suffiad J.

125 The Hong Kong courts do acknowledge that assessing such a head of damage is not easy, because future loss is very difficult to assess:<sup>171</sup>

But the mere fact that an assessment is extremely difficult does not relieve the court of its duty, or deprive it of its ability, to make that assessment. The court, in the time-honoured expression, does the best it can with what it has.

126 The court in *Lam Pak Chiu v Tsang Mei Ying*<sup>172</sup> adopted Lord Diplock's comment in *Mallett v McMonagle*:<sup>173</sup>

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

127 For global awards, the court in *Lam Pak Chiu v Tsang Mei Ying*<sup>174</sup> stated:<sup>175</sup>

*A good way of testing [a global] award is to compare it with awards in previous cases, where the circumstances of the deceased persons are not wholly dissimilar. ...*

*Where a tribunal is sailing in uncharted waters, it would be wise to take as many bearings as possible. A judge, after having heard all the evidence, may have a tentative global sum in mind. Where it is*

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<sup>171</sup> *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11 at [23].

<sup>172</sup> [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>173</sup> [1970] AC 166 at 176E–176G.

<sup>174</sup> [2001] HKCFA 28; [2001] 2 HKC 11.

<sup>175</sup> *Lam Pak Chiu v Tsang Mei Ying* [2001] HKCFA 28; [2001] 2 HKC 11 at [50]–[53].

*possible, it may be desirable for him to cross-check this with the multiplicand-multiplier formula, but remembering that this too is, by its nature, an inexact exercise. If the resultant figures more or less coincide, the judge can be reasonably confident that his global sum is not far off the mark.*

...

... the legislation in its wording has left it to the court to exercise judgment generally: The only proviso being that in making an award the court is bound to make a deduction on account of the accelerated receipt. ... So long as trial judges weigh up the evidence carefully and apply common-sense, it is unlikely that appellate courts would interfere. Rightly so. If there is one area of the law where courts have to be mindful of the incidence of legal costs, lest awards of damages be eaten away by the expense of fruitless attempts to achieve theoretical perfection, it is in the personal injuries field.

[emphasis added]

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## Afternote to Essay 24\*

Michael HWANG SC<sup>†</sup> and Rachel ONG<sup>‡</sup>

When representing the plaintiff widow and dependant of the deceased in *Lassiter Ann Masters v To Keng Lam*<sup>1</sup> (“*Lassiter v To*”), I argued that the loss of inheritance or savings should be allowed. The facts of the case are briefly as follows. The deceased was an entrepreneur who plunged almost every single cent of spare income back into his property investment. His family lived very modestly throughout his wealth-building period. Just as he was beginning to relax in his expenditure for himself and his dependants, he was killed in a car accident. Mrs Lassiter sued as a dependant under section 20 of the Civil Law Act<sup>2</sup> as it then stood for loss of inheritance and loss of support. Owing to the deceased’s thrifty lifestyle before his death, loss of inheritance was a far larger claim than that of loss of support.

Woo Bih Li J held that a claim for loss of inheritance/savings did not exist in a dependency claim in Singapore and such a claim would fall under an estate claim which section 10 of the Civil Law Act barred the estate from claiming. Woo J acknowledged that a dependant’s claim for loss of inheritance would not cause any of the three undesirable consequences that Parliament had been concerned with when it had introduced the prohibition against the estate claiming for loss of

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\* Michael Hwang SC & Fong Lee Cheng, “Loss of Inheritance or Savings: A Proposal for Reform by the Law Reform Committee of the Singapore Academy of Law”. References to the first-person singular are to the principal author.

† BCL, MA (Oxford), Hon LLD (Sydney); Senior Counsel and Chartered Arbitrator, Singapore, London and Sydney.

‡ LLB (Hons) (Southampton); Associate, Michael Hwang Chambers, Singapore.

<sup>1</sup> [2005] 2 SLR(R) 8.

<sup>2</sup> Cap 43, 1970 Rev Ed and Cap 43, 1994 Rev Ed.

income after death in 1987. For completeness, the three undesirable consequences are set out as follows:<sup>3</sup>

- (a) Double compensation may be payable in cases where the deceased's dependants are not also beneficiaries of the estate.
- (b) Where the deceased has no dependants, other persons, *eg*, distant relatives, may receive a "windfall" and be unjustly enriched by such an award.
- (c) The estate claim for "lost years" is often higher than the loss of dependency claims. In some cases, dependants may obtain damages which are more than their actual loss of dependency. Such cases include cases where the dependants are already elderly and are likely to have died before the deceased person had he not met with a premature death in an accident.

The learned judge then felt that he was bound by the law at that time and disallowed a claim for loss of inheritance or savings.<sup>4</sup>

My client appealed to the Court of Appeal, but parties subsequently settled, and the law remains as set out in *Woo J's* judgment.

When I was serving on the Singapore Academy of Law's Law Reform Committee in 2008, it was proposed that the law in this regard was unsatisfactory and amendments had to be made. I was asked to prepare a fully reasoned proposal regarding the loss of inheritance and the loss of savings for the Law Reform Committee, and was assisted by Ms Jennifer Fong Lee Cheng. Eventually, my report was adopted and published as "Loss of Inheritance or Savings: A Proposal for Law Reform" in the Law Reform Committee's Paper in April 2008. We argued that a general dependency claim involved a measure of the annual or monthly sum given to the dependants and the number of years for which the money was expected to be used. However, this approach broke down where there was a divergence between what one actually gave and what one could afford to give or where the deceased preferred

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<sup>3</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [30].

<sup>4</sup> *Lassiter Ann Masters v To Keng Lam* [2005] 2 SLR(R) 8 at [67], [73] and [74].

to reinvest the moneys instead of disbursing it to his dependants. A dependency claim that only allowed loss of earnings wherein the multiplicand was based on what the deceased would spend on his dependants every month based on his past trends would mean that the dependants would recover a larger sum as compared to a deceased who was thrifty and established a savings trend. The latter would face a real financial loss, and this ignored the purpose of what the deceased was saving up for, which was to provide a larger capital inheritance for his loved ones on his death.<sup>5</sup> The Law Reform Committee also found that the existing law of dependency in England, Australia, Hong Kong and the US all allowed loss of savings or loss of inheritance as legal causes of action.<sup>6</sup>

Accordingly, the Law Reform Committee proposed amending the Civil Law Act by inserting a new section 22(1A) after section 22(1) which would read:

Section 22(1A) – In assessing the damages under subsection (1), the court shall take into account any moneys or other benefits which the deceased would be likely to have given to the dependants by way of maintenance, gift, bequest or devise or which the dependants would likely to have received by way of succession from the deceased had the deceased lived beyond the date of the wrongful death.

The proposed reform was eventually enacted into the Civil Law Act on 1 March 2009.

Since its enactment, the new section has been applied in *Zhu Xiu Chun v Rockwills Trustee Ltd.*<sup>7</sup> The matter involved a negligently performed liposuction surgery which resulted in the demise of a CEO of a public

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<sup>5</sup> Law Reform Committee, Singapore Academy of Law, *Loss of Inheritance or Savings: A Proposal for Law Reform* (April 2008) at para 13 (Michael Hwang & Fong Lee Cheng).

<sup>6</sup> Law Reform Committee, Singapore Academy of Law, *Loss of Inheritance or Savings: A Proposal for Law Reform* (April 2008) at para 13 (Michael Hwang & Fong Lee Cheng).

<sup>7</sup> [2016] 5 SLR 412.

listed REIT. Applying the new law, the High Court and the Court of Appeal upheld a dependency claim for the loss of inheritance.

In addition to the above, the Court of Appeal provided guidance on the computation process of a loss of inheritance claim. While it was largely similar to a loss of dependency claim, there was an additional factor unique to a loss of inheritance claim, which was the post-retirement expenditure of the deceased. The Court of Appeal formulated a three-step approach to be applied: (a) an appropriate multiplicand should be derived which would reflect the savings of the deceased per annum; (b) this multiplicand should be multiplied by an appropriate multiplier which would be discounted for accelerated receipt and vicissitudes of life, along with an adjustment to reflect the post-retirement expenses of the deceased; and (c) an appropriate percentage of this inheritance should be attributed to the dependant.<sup>8</sup>

It is clear that the reform advocates striking a balance in favour of full compensation and the courts do not have to worry about the dangers of double recovery. As a matter of policy, loss of savings has been expressly and officially recognised as a possible element of a dependant's claims. This reform has brought Singapore in line with the authorities in England and Wales, Australia, Canada, the United States and Hong Kong, and has redressed the essential injustice of the result in *Lassiter v To*, which made Singapore an outlier in the common law world in this area of the law of damages.

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<sup>8</sup> *Zhu Xiu Chun v Rockwills Trustee Ltd* [2016] 5 SLR 412 at [123] and [125].

### Background to Essay 25

This short piece was written for the *Law Gazette* to mark the 50th Anniversary of the Law Society of Singapore in 2017. I was asked to share my thoughts about a case that struck a particular chord with me. For me, it was fighting a case involving a modest sum of \$1,400 in 1973 that has left a lasting memory. This was my first appearance in the Court of Appeal. It was also a case that was fought through three courts and which became a landmark case in the law of the sale of a second-hand vehicle. This case represents my first positive contribution to the case law of Singapore, and is a memory I will always treasure.

The original version of this essay was published in *The Singapore Law Gazette* in May 2017.

*I wish to extend my thanks to the Law Society of Singapore for kindly granting me permission to republish this essay in this book.*

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## MY MOST MEMORABLE CASE AS COUNSEL

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Michael HWANG\*

1 *Eastern Supply Co v Kerr*<sup>1</sup> (“*Eastern Supply*”) is the first of my cases reported in the *Malayan Law Journal*<sup>2</sup> and holds a special meaning for me as it was fought through three courts for the sum of \$1,400.

2 My client was the owner of a second-hand car shop, and he sold an eight-year-old BMW to an RAF officer for \$1,400 in exchange for a post-dated cheque. Between the date of sale and delivery (14 February 1970) and the maturity date of the cheque (1 March 1970), a number of mechanical problems were encountered with the car. Complaints were

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\* Senior Counsel, Michael Hwang Chambers LLC.

<sup>1</sup> [1971–1973] SLR(R) 834.

<sup>2</sup> *Eastern Supply Co v Kerr* [1974] 1 MLJ 10.

made to my client who attended to those complaints at the shop or in his house.

3 On 28 February 1970, on the advice of his friend (who was knowledgeable about cars), Mr Kerr rejected the car, giving his reason as the unroadworthy state of the car, and stopped payment on his post-dated cheque.

4 My client then sued Mr Kerr in the District Court before District Judge Dalip Singh and, after a lengthy trial, was successful in obtaining judgment for \$1,400 and costs. Mr Kerr then appealed to the High Court, and the appeal was heard by Tan Ah Tah J, who found against my client on the ground that the car was unroadworthy.

5 By this time, a relatively large sum of money had already been spent in legal costs, but my client felt aggrieved as a matter of principle and insisted that I take the case to the Court of Appeal.

6 I argued the case in the Court of Appeal before Wee Chong Jin CJ, F A Chua J and T Kulasekaram J. When I stood up to argue my case, I was fearful that the Court of Appeal would reprimand me for bringing such a trivial case to it, but they heard me out quietly, and ultimately gave judgment in my client's favour. The Court of Appeal accepted that the defects complained of were such as to be expected from a second-hand car of this vintage, and considering the price paid for the car. They also accepted the evidence of my client's expert in preference to the opinion of Mr Kerr's friend as to the condition of the car.

7 However, the interesting point of law was on section 35 of the English Sale of Goods Act 1893<sup>3</sup> which provides that "the buyer is deemed to have accepted the goods, *inter alia*, 'when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them'. Once a buyer is deemed to have accepted the

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<sup>3</sup> c 71.

goods, he loses his right to reject for breach of conditions but can only claim for damages (see s 11(1)(c)].<sup>4</sup>

8 In the present case, the Court of Appeal found that Mr Kerr could have had the car inspected at the sales showroom but he did not do so. Instead, he and his wife used the car for two weeks before rejecting the car. Had he inspected the car earlier in that period by an expert, he would have discovered some of the defects which he relied on to say that the car was not roadworthy.

9 This case was a landmark in the law of the sale of a second-hand vehicle. If the car was not rejected after two weeks, the buyer would be deemed to have accepted the car, and he would lose his right of rejection on the ground that the car was not roadworthy unless defects making the car not roadworthy could not have been discoverable during that period.

10 I subsequently wrote an article about this case “Time for Rejection of Defective Goods”,<sup>5</sup> which was published in the *Lloyd’s Maritime and Commercial Law Quarterly* on the encouragement of Professor Francis Reynolds of Oxford University.<sup>6</sup>

11 *Eastern Supply* has been referred to with approval in two subsequent Singapore cases,<sup>7</sup> so it represents my first positive contribution to the case law of Singapore. The case is a memory that I will always treasure, coupled with my gratitude to the Court of Appeal for giving me the opportunity to make my contribution.

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<sup>4</sup> *Eastern Supply Co v Kerr* [1971–1973] SLR(R) 834 at [17]. These are now ss 35 and 11(3) respectively of the Singapore Sale of Goods Act (Cap 393, 1999 Rev Ed).

<sup>5</sup> Michael Hwang, “Time for Rejection of Defective Goods” [1992] LMCLQ 334.

<sup>6</sup> See also *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 to similar effect as *Eastern Supply Co v Kerr* [1971–1973] SLR(R) 834.

<sup>7</sup> *Sun Qi v Syscon Pte Ltd* [2013] SGHC 38; *Geolab Nor As v Lexmar Engineering Pte Ltd* [2004] SGDC 177.

## **Part IV**

# **SPEECHES AND ESSAYS ON LEGAL ISSUES IN SINGAPORE**

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### Background to Essays 26 to 30

Between 2008 and 2010, I served as the President of the Law Society of Singapore, which is one of the greatest honours that a practising lawyer in Singapore can attain. It gave me a pulpit from which to express publicly some of my more strongly-held views on various aspects of the practice of law in Singapore, as well as the substance of the law itself. Looking back, I thought that some of the views that I had expressed (almost a decade ago) remain relevant and important to the practice of law today. I therefore thought that it would be worthwhile to reproduce some of those views in this volume of essays.

I am also proud of the permanent legacy I left behind in forming the Public and International Law Committee (“PILC”) of the Law Society which was designed to fill a gap in the support given by the Law Society in developing practice areas important to Singapore, namely, the fields of constitutional and administrative law. This committee has, since its establishment in 2008, organised a number of highly popular seminars and conferences and, hopefully, has increased the awareness and interest of Singapore practitioners to acquire a deeper interest in (as well as understanding of) important legal topics that can make a real difference to Singapore’s domestic life, as well as its international and commercial relations.

The first essay is an amalgam of the two speeches that I gave, one on the establishment of the PILC on 29 May 2008, and the other at the beginning of a conference on public law held on 27 February 2015.

The second essay was taken from my monthly op-ed column in the *Singapore Law Gazette* where I used my pulpit to express some views on what the proper scope and function of criminal law should be, and the appropriate principles to guide us in finding the appropriate penalties for different types of criminal offences.

The third essay was also taken from my monthly op-ed column in the *Singapore Law Gazette*, where I reproduced my speech given at the Edu-Dine dinner for young lawyers on 14 August 2009. In my entire tenure as President, this was perhaps the one article that attracted the greatest public interest and, for a short while, I even

made the limelight of social media (which I would normally avoid), which commented on my apparently stimulating ideas. I can only hope that some of these (and other thoughts) that I shared with the profession during my time as President will have had some lasting effect on my fellow lawyers today.

The fourth essay was my acceptance speech on the occasion of the conferment of the Law Society's annual C C Tan Award for 2012, which is made to recognise senior members of the Bar who exemplify the qualities that made the late Mr C C Tan such a respected figure – honesty, fair play and personal integrity. The citation for the speech was delivered by Lok Vi Meng SC, then Vice-President of the Law Society of Singapore.

And the final essay is self-explanatory – the good old days revisited.

The essays “Crime and Punishment”, “Apathy and Independence”, “The C C Tan Award – Acceptance Speech” and “The Good Old Days Revisited”, are based on various op-ed pieces that were originally published in the *Singapore Law Gazette*. “Crime and Punishment” is based on two co-ed pieces which were published in December 2008 and January 2009. “Apathy and Independence” is based on two op-ed pieces which were published in September and December 2009. “The C C Tan Award: Acceptance Speech” was published in December 2012. Finally, “The Good Old Days Revisited” was published in October 2007.

*I wish to extend my thanks to the Law Society of Singapore for kindly granting me permission to republish the essays in this book.*

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## REFLECTIONS ON PUBLIC AND INTERNATIONAL LAW\*

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Michael HWANG

1 Public law (*i.e.*, constitutional and administrative law) is important because it concerns the rights of citizens and companies in their dealings with government departments and agencies. It is so important that, in every law school around the world, some form of public law is routinely included as one of the first subjects that law students have to learn. Why then have our lawyers apparently forgotten about public law after they left law school? Partly because of public ignorance or apathy, and partly because of our clients' reluctance to take on public authorities even if they have grievances against those authorities. But lawyers also have a responsibility, if consulted, to be alive to the rights and remedies available to individuals and companies who are the victims of decisions made against them by government agencies or tribunals having authority over their lives or affairs. When those decisions are grossly wrong, issued without authority or in excess of authority (or where government agencies refuse to carry out their legal duties), lawyers should be ready to advise their clients to exercise rights and remedies which are available to them, such as challenges to the validity of those decisions by applications for certiorari, mandamus and other judicial review orders.

2 I have deliberately mentioned that public law should also be of interest to companies because, in an age where commercial activities are increasingly becoming regulated by statutory authorities, it is important for lawyers to be able to advise whether such authorities are exercising their regulatory or licensing powers in accordance with their powers or in compliance with statutory procedures governing their constitution. Failure to do so will render their exercise invalid, and our lawyers should

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\* This essay is a blend of extracts from my speeches on this subject which were presented at the launch of the Public and International Law Committee of the Law Society of Singapore on 29 May 2008 and at the Administrative and Constitutional Law Conference in Singapore on 27 February 2015.

be ever vigilant to check on the validity of the exercise of any statutory power instead of automatically assuming that they have been properly exercised.

3 On the other side of the coin, we are also mindful that, with globalisation, international law is becoming more important in our lives, as our fishermen who trawl the waters of Pedra Branca will no doubt tell you. Public international law affects us in many unappreciated ways. Every treaty signed by our Government could potentially affect our lives or our businesses. For example, the rights of shippers are governed by the Hague–Visby Rules<sup>1</sup> and those of airplane passengers and air cargo shippers are governed by the Warsaw Convention.<sup>2</sup> In addition, generally accepted principles of customary public international law would automatically be incorporated into our domestic law even without express re-enactment by local legislation, and that is why we will be looking later at the subject of whether the Universal Declaration of Human Rights (“UDHR”) does apply as law in Singapore.

4 We have traditionally been taught that public law comprises administrative and constitutional law. But in a broader sense, public law also includes cases where an individual is in dispute with the state with regard to his civil (including commercial) rights. In such situations, there are other areas of law which provide the framework for resolving such disputes, in particular criminal law, which defines when individuals are subject to arrest and prosecution as a result of an alleged wrong to the community. You will see this examined in some of the Singapore cases that will be discussed later today.

5 You will note that I have so far avoided the term “human rights”. When we started the Public and International Law Committee (“PILC”) in 2008, I intended that human rights issues would be part of the scope of work of this committee but in a lawyerly way. The problem with

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<sup>1</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924); amended by First Protocol (1968) and Second Protocol (1979).

<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed at Warsaw on 12 October 1929).

discussions about human rights is that there is often a confusion between what the law is and what it ought to be. In my view, that term has no universally accepted meaning, and is not immediately helpful in determining an individual's rights and obligations, except in those countries which have specific laws identifying and enforcing human rights as such. In Singapore, we have no such legislation, and therefore the only rights that an individual has against or in relation to the state are those provided under the existing legal categories such as constitutional, administrative, criminal and (to a limited degree) public international law. Public international law is becoming important because it is an evolving subject. Principles which can be classified as *ius cogens* are regarded as peremptory norms of public international law which bind all nations and are deemed to be part of the domestic law of each nation. Common law countries also have the doctrine of incorporation where principles of customary international law are deemed to be incorporated into the local law either as part of the common law or as a source unless inconsistent with local legislation. But it is a far leap from the recognition of certain human rights as part of binding international law to an affirmation that all provisions of the UDHR should be treated uniformly as binding law universally. This is a complex subject and has been well explored in Singapore by Thio Li-ann in a series of lectures collectively entitled "Universality and the Three Generations of Human Rights" organised by the Law Society to inaugurate the PILC in 2008.<sup>3</sup> In those lectures, she carefully analysed and identified certain provisions which could be considered as binding on all nations without express enactments in domestic legislation.

6 As a legal term, human rights can only mean (in the Singapore context at least) such rights as existing laws give to individuals. The vast majority of such rights would have been expressly conferred by some written law, but there is hope for new rights to be created by carefully examining what principles of customary international law can be considered as peremptory rights binding on all nations which Singapore

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<sup>3</sup> These lectures were adapted into essays and were subsequently published in the *Singapore Academy of Law Journal* (2009) 21 SAclJ (March).

must follow. So the study of human rights is within the ambit of the PILC, but from a legal point of view as to what the law is, rather than what the law should be (which will come within the compass of civil rights activists such as Maruah, and good luck to them).

7 Let me now foreshadow the discussion of section 377A of the Penal Code<sup>4</sup> that will follow in the afternoon session. My view is that section 377A ought to be repealed, but for a different reason than invoking constitutional provisions concerning equality, life and liberty. The proper function of criminal law is to protect a community (and the individuals within it) from tangible harm. The function of criminal law is not to legislate against private conduct of which the majority disapproves on moral grounds. There are of course physical abuses which can be associated with gay behaviour but those cases can be legislated against to stop sexual assault, exploitation of minors and related offences. However, there is no legal principle that requires a community to impose its own standards of morality on consenting adults absent a specific tangible harm that will result from the supposedly immoral act.

8 Let me also point out that one can support the abolition of section 377A because it is an abuse of the proper function of criminal law, without going to the supposedly logical extension of supporting gay marriages as well. As Walter Woon, when he was Attorney-General, asked rhetorically when speaking as guest of honour at the launch of the PILC in 2008, "Is [same-sex marriage] a question of human rights?". I would respectfully disagree with him in one respect and qualify his statement by adding the words "not yet". But otherwise I agree with him (at least for the present, as community standards are fast changing as I speak). There is a difference between not criminalising gay conduct and recognising gay marriages. Marriage is a social instrument elevated to the level of a legal societal norm; in other words, marriage is a status created by society based on its positive approval and encouragement of that relationship. In the case of conferral of societal rights, regard may be had to the views of the majority, whether they sufficiently approve of

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<sup>4</sup> Cap 224, 2008 Rev Ed.

a relationship to grant it special rights with attendant legal consequences. Not wanting to prosecute consenting gays does not automatically mean positive approval of gay relationships – tolerance does not mean active support.

9 At first blush, it would seem that there is a bevy of laws that fall outside of these simple propositions underlying the purpose and function of criminal law. There are some laws which may be considered as enforcing community moral standards, such as laws against cruelty to animals, euthanasia/assisted suicide and drugs. Furthermore, laws such as those regulating free speech can be seen as promoting community moral standards above individual private interests. However, upon examination of the interests that these laws protect, the criminal law still functions to protect individuals and the community from tangible harm through notions of paternalism and the maintenance of public order.

10 The criminal law functions to protect individuals from harm and this would also be inclusive of acts which society (as the caring guardian of its individual members) deems to be objectively harmful, such as the consumption of harmful drugs and suicide. Laws must also protect members of society from harming themselves, not to mention the harm to society in having to bear the social cost of providing rehabilitation to drug users and the cost of sending police and civil defence officers to try and prevent suicide attempts. Accordingly, paternalism (as explained by Herbert Hart of Oxford in the 1950s and 1960s) is a justifiable ground for intervention in human activity which may cause no tangible harm to parties other than the actor, particularly when such acts have tangible social consequences like requiring the assistance of public agencies to resolve the consequences of drug-taking and attempted suicide. Rather than upholding a community moral standard of the sanctity of life or preventing moral degradation of a person through drug dependency, outlawing euthanasia/assisted suicide and drugs serves to protect those individuals from tangible self-harm. (However, the issue of assisted suicide may have to be revisited in the near future because of the weight of public concern about unnecessarily prolongation of human life when there is no more quality of life left.) Furthermore, the province of protection from harm is not limited to only humans, but extends to

other life forms – which is why, through concerned with the suffering of animals, we intervene to prevent torture of animals.

11 In addition to the protection of individuals against tangible harm, preventing tangible harm to the community is another function of criminal law. In this case, the interests of individuals and the interests of the community can be balanced by respecting individual rights of privacy. Some constitutions (but not Singapore's) have express provisions against the possibility of public disorder if the feelings of a significant portion of the community are inflamed by radical views or unconventional conduct in public. This is why the Wolfenden Report<sup>5</sup> in England, which originally recommended abolishing the crime of homosexuality in 1957, focused on the aspect of street prostitution as an annoyance, seen publicly and therefore inflammatory to the public. It is also inevitable throughout the development of a society that views that are so radical and unconventional as to give rise to the possibility of public disorder may change over time. Hence, England only decided to abolish the crime of homosexuality ten years after the Wolfenden Report was published, but retained its law of blasphemy. Blasphemy was justified, not on the ground that the only true faith was Christianity, but that if someone publicly agitated in an inflammatory way against certain fundamental principles of moral values held by the majority or a significant part of the community, there would be a risk of public disorder which the community is entitled to pre-empt by the admittedly clumsy and outdated crime of blasphemy. As English society became more secular and diverse, the blasphemy law was repealed. Even so, the necessity of maintaining public order regarding inflammatory agitation led to its replacement by offences proscribing the incitement of religious or racial hatred between the different communities, principles which have been followed in Singapore in our own legislation for many years.

12 Additional laws that serve to infringe upon freedom of speech as a means of maintaining public order are also contained in defamation laws. It is interesting to note that the criminal offence of defamation has been

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<sup>5</sup> Wolfenden Committee, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957) (Chairman: John Wolfenden).

expressly retained in Singapore through chapter XXI of the Penal Code, while this has been abolished in the UK in 2009. Furthermore, even when the criminal offence of defamation was extant in the UK, it was limited to punishing only written defamation, and only “serious libels”. These limitations are missing from Singapore’s criminal defamation laws, with both slander and libel attracting criminal liability. I would suggest the law of criminal defamation is due for a serious review.

13 At the same time, criminal liability for defamation is also enduring in civil law jurisdictions, which do not have a division between libel and slander. Their analogous laws for defamation arise from a general right of personality that includes other rights to privacy. Historically, one’s claim to protection from injury to honour and reputation (one’s right of personality) was just as clear as one’s claim to physical life. Accordingly, the offence was very serious, attracting both civil and criminal liability, as well as giving rise to various remedies that are not limited to monetary damages, unlike in common law jurisdictions.

14 In Germany, a person could claim damages for another’s statements besmirching his or her honour or reputation by establishing the defendant’s guilt for the crime of insult or slander under section 185 of the Criminal Code, thereby giving rise to a breach of the protective statute under section 823(2) of the Civil Code (*Bürgerliches Gesetzbuch*, or BGB). The right of personality is an absolute right, entitling the holder of these rights to invoke them *erga omnes*. At the same time, freedom of expression is a basic constitutional right under article 5 of the German Constitution. This has given rise to a balancing exercise in which two threads of thought can be extracted from court judgments: (a) freedom of expression prevails over the right of privacy if the expression is not merely to pursue sensationalism, but seeks to inform and educate the public at large; and (b) as the public profile of the plaintiff increases, the likelihood of success of the claim decreases. Various remedies are available to the plaintiff – the typical remedy is monetary compensation (which can include damages for moral harm), injunctions to prevent future publication of such offensive statements, a requirement that any remaining adverse effects of the misrepresentation be undone, a claim to rebuttal (or right of reply), *etc.*

15 In France, defamation is both a tort and a criminal offence under article 29 of the Law on the Freedom of the Press of 29 July 1881 (the “Press Law of 1881”) and article 1383 in the Code Civil. As a general rule, the injured party claims for damages by associating himself or herself as a civil party to the criminal trial under Article 29 of the Press Law of 1881. The right of personality is such an entrenched part of French culture, history and law that this concept did not have to be developed and is presumed as a naturally occurring right. The specific offences of *injurer* and *diffamation* in French law require maliciousness or bad faith in making such “outrageous expressions”. While there is a general defence if the statements are proved to be true, proof of the statement’s truth is inadmissible if the statements refer to the plaintiff’s private life. If it cannot be proved that the statements are true, this gives rise to a presumption that the defendant was acting in bad faith. By proving the existence of the criminal offence, the plaintiff can then recover damages in delict in respect of the financial loss or moral damage caused by the defamatory words. French law also provides for the right of reply through articles 12 and 13 of the Press Law of 1881 wherein an injured party can rebut the original publication and/or require the editor to gratuitously publish corrections for all inaccurate original statements. This right of reply is much more expansive than that within German law, which is limited to a correction of facts, as French law allows for the publication of the injured party’s opinions and points of view.

16 It is not often that I recommend that we look to Indonesia for inspiration in law reform, but in the case of defamation, their law appeals to me. Indonesian defamation law provides that a person found liable for defamation must, as his primary remedy, make a public apology for the defamatory statement. No damages as such are awarded. However, if the apology is not made, then the court imposes a fine for every day the apology is not published. This seems to me to be right. It has always seemed to me that awarding damages for injured feelings suffered by defamatory statements is not focusing on the real injury, namely the public reputation of the person defamed. And that wrong should be made right by a public apology to restore the victim’s public reputation so that the public knows that the defamatory

statements were untrue and have had to be withdrawn by the defamer. By making monetary penalties a punishment for non-compliance with a court order directing an apology, rather than as compensation to assuage the hurt and embarrassment suffered by the victims, I think Indonesian law has got it right. But realistically, I do not see anyone picking up on this suggestion anytime soon.

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## CRIME AND PUNISHMENT (PART 1)

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Michael HWANG SC\*

1 In my message for this month and the next, I propose to examine some basic thoughts on the purpose of our laws on crime and punishment, commencing with crime.

2 There are many statements on the purpose of the criminal law, but my favourite short and simple statement is from the Wolfenden Committee in England set up to review the law on Homosexual Offences and Prostitution. The function of the criminal law, as they saw it in their 1957 report, was:<sup>1</sup>

... to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable ...

It is not ... the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined ... there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

3 If we accept this as a working statement of the guide to criminalisation of conduct, then the following principles flow from this:

- (a) It is not the function of the criminal law to shape personal conduct in the way that lawmakers would like Singaporeans to behave.
- (b) Acts (or omissions) should only be made criminal if they cause positive harm to:

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\* President, Law Society of Singapore.

<sup>1</sup> Wolfenden Committee, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957) (Chairman: John Wolfenden) at p 392.

- (i) other persons or beings capable of sentient feelings;
  - (ii) the actor himself;
  - (iii) the state;
  - (iv) public order; or
  - (v) the community as a whole.
- (c) Harm has to be tangible and provable rather than speculative or subjective.
- (d) **Harm to others** ((b)(i) above) needs little explanation except for the second part which is meant to justify laws against cruelty to animals.
- (e) **Harm to the actor** ((b)(ii) above) can be justified either by the principle of paternalism (sometimes the state knows better than the individual what is harmful to him, defining harm in terms of (c) above) or the welfare principle (it is against public policy to utilise the resources of the state to expend time and money on attending to the injuries of those who could protect themselves against such injuries with little inconvenience).
- (f) **Harm to the state** ((b)(iii) above) will justify offences set out under chapters VI and VII of the Penal Code and offences such as failure to pay taxes.
- (g) **Harm to public order** ((b)(iv) above) will justify:
- (i) (in principle) the laws against public assembly and racially-insensitive speeches, although the degree to which it is necessary to control the activities of public assembly and freedom of speech is debatable; and
  - (ii) laws which prohibit behaviour which may not cause tangible harm to the object of the act concerned but, if not prohibited, will cause people who are so outraged by that act that they will take redress into their own hands (*eg*, necrophilia).
- This will also distinguish public decency and private morality, so that (for example) there should be:
- (A) criminalisation of sexual acts committed in public (which would be justified in the preservation of public order);  
but

- (B) non-criminalisation of sexual acts performed in private (other than those which cause physical harm even to consenting adults).
- (h) **Harm to the community** ((b)(v) above) distinguishes the interests of the state from the community at large and provides justification for offences such as:
  - (i) those which protect the integrity of the financial markets; and
  - (ii) those which save the community from the trouble and cost of having to take action to rectify the consequences of acts which cause harm to the actor (*eg*, taking drugs or attempted suicide), which is also justifiable under the welfare principle described under (e) above).

4 If we follow these principles to their logical conclusion, this should lead us to re-examine why certain offences remain on the statute books and whether they should be repealed or modified.

5 The point of this analysis is that we should not criminalise conduct which we simply consider to be immoral unless harm also results from the conduct. We can argue about what “harm” means for this purpose, but the essential principle should be: no harm, no criminal offence.

6 That is not to say that morality has no place in the criminal law. All criminal laws must be rooted in morality in the sense that they must have the moral support of the majority of the community, otherwise it becomes the rule of the oligarchy, who think they know what is best for us all. We cannot criminalise conduct if the majority of the people think that the conduct is not wrong enough to require state enforcement (*eg*, adultery). But the converse argument does not follow as a matter of logic: to enforce morality for its own sake cannot be justified by legal arguments. Hence, the arguments about prohibiting the consumption of alcohol or the practice of homosexuality need to focus on the actual or potential harm caused to the persons involved, especially if they are vulnerable (by reason of age or mental incapacity) and not capable of making a fully-informed decision as to whether they understand what harm they might suffer from the conduct in question.

7 All the above is not original thought; it is largely reproduced in the standard criminal textbooks, and I am simply reminding people who

have a say in the revision of our criminal laws to take the above into account.

8 We need to apply intellectual rigour to our attitude to criminalisation of human conduct, and not simply argue for criminalisation of conduct which offends us personally for reasons which do not fall within the objective criteria set out above.

9 So let us clear our minds of cant, think logically and progress towards a more rational theory of criminal law.

10 In next month's message, I will deal with what I consider to be the relevant principles determining the imposition of penalties for criminal behaviour.

## **CRIME AND PUNISHMENT (PART 2)**

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11 Following on from last month's message, I want to share my views on the purposes of punishment in so far as they should be reflected in the sentences imposed by criminal courts.

12 The old view (which is still maintained by many) holds that there is a necessary moral connection between wrongdoing and punishment (variously called "ethical or moral retribution", "retributive justice" or the "desert justification"). This theory is a refinement of the "revenge theory" best expressed in the "an eye for an eye" principle.

13 An alternative view (which I prefer) is that offenders are punished only for social reasons, looking forward rather than to the past. This principle is best expressed pithily in the words of the utilitarian philosopher Jeremy Bentham, who wrote: "All punishment is mischief; all punishment in itself is evil ... it ought only to be admitted in as far as it promises to exclude some greater evil."

14 Retributive justice looks to the past when it seeks to punish the offender for what he has done, while the utilitarian looks to the future to justify the imposition of punishment. The utilitarian justification for punishment is not to take revenge on the offender for his wrongdoing but to prevent future offences of a similar kind, whether by that offender or others. In short, the principle of deterrence should underpin a rational policy of sentencing. The sentence should be determined by its effect upon the person punished (particular deterrence) or by serving as a warning to others (general deterrence). In addition, the penal process can have a certain educational effect on the offender as well as the community at large in reinforcing the social values of the community as expressed through its criminal laws. However, the educational process should only be regarded as a side effect of punishment, and not as its primary justification. To that extent, I would therefore respectfully disagree with Lord Denning, who once famously said: "The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime."

15 As I pointed out in last month's message, the purpose of the criminal law is not to enforce the moral standards of the community as such, but only to protect the community and individuals from tangible harm. Accordingly, punishment should not be based on moral denunciation as its primary justification.

16 But utilitarianism does not provide a self-contained justification of punishment, as there are cases where utilitarianism would provide too harsh a penalty, or where it would not justify a punishment at all where clearly punishment is necessary.

17 If one carried utilitarianism to its logical conclusion and make deterrence the sole criterion for punishment, there would be times where the easy way to abolish a socially undesirable practice would be to impose extremely harsh penalties, *eg*, to impose huge fines or even imprisonment for parking offences. The community would (rightly) reject such penalties because they would violate another principle that is commonly accepted as a necessary ingredient of a rational sentencing policy, *viz* the principle of *proportionality*. That principle reflects the correct place where retribution ought to be reflected in punishment – in the distribution of justice, rather than as its primary justification. The extent to which an offender ought to be punished cannot be determined solely by the need to stamp out future repetitions of the same offence; there is a moral limit to the law's power to make an offender an example for others to fear.

18 Conversely, there may be occasions where an offence may result in no overt harm, but may attract such moral outrage that a failure to punish (or punish adequately) such an offence will lead to those outraged to take physical action to vent their feelings. This is the basis for laws and punishment against those that express views which give serious offence to religious or racial groups. Indeed, this was the original justification for having laws at all, because, in the absence of the government having a system of law and order and punishment for violation of those laws, victims of wrongs committed against them would have to resort to self-help to gain redress for the loss and suffering they had sustained. It is to this extent that Lord Denning's

dictum can be justified, but only as a postscript to any thesis on the purposes of punishment.

19 On a more practical note, Singapore is sadly lacking a principled and transparent penal policy. Our universities barely cover the study of criminology, and even less the more important study of penology. Possibly, this is because the Government has not published detailed statistics of crime and punishment so that social scientists can undertake adequate research on the causes of crime and the effects of current penal policies on prisoners (especially recidivists). One traditional justification for the lack of such statistics is that these are sensitive figures which could be interpreted as indicating that certain communities might be more prone to commit certain crimes, but we cannot continue to put our heads in the sand and hide important social facts which need serious study by objective scholars in order to improve our society. Only rigorous research with full access to relevant information can help us determine important penological questions such as:

- (a) Is the death penalty effective in preventing murder and other capital crimes?
- (b) Do strict liability offences achieve their object of deterring anti-social behaviour?
- (c) What kind of punishments best deter what kind of behaviour?
- (d) Should we follow the UK in adopting indeterminate sentences?
- (e) Is corporal punishment an effective deterrent against the crimes for which it is imposed as a penalty?

20 So I end with the message that we need to re-think our policies on crime and punishment at a more fundamental level than hitherto, so as to base our laws and sentences on a proper jurisprudential as well as practical basis.

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## APATHY AND INDEPENDENCE\*

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Michael HWANG†

1 We are often accused of not looking beyond our own narrow interests and the interests of our clients, and this is one kind of apathy. But apathy is a Singaporean trait not confined to lawyers, and even when we as lawyers want to act in the interests of Singaporeans as a whole, our efforts are not appreciated. My theme tonight is therefore not only apathy among lawyers but also apathy among the clients we serve, and I hope to develop this theme through three stories.

2 My first story takes place in the 1970s. My friend Terry opened a Japanese restaurant in Hotel Negara (now Pan Pacific Orchard) called Steakery Matsuzaka. He decided it would be a good idea to install karaoke in his restaurant and let his customers sing after dinner. *The Sunday Times* carried a picture of happy diners warbling away around a jumbo teppanyaki table. The next day the police asked him to apply for a public entertainment licence. I duly made the application on his behalf but to our surprise, the application was denied by the licensing officer. When challenged, the licensing officer gave the following reasons:

- (a) people go to a public place to be entertained; they should not entertain themselves; and
- (b) there is a rule against singers sitting with customers; if customers become singers, then we will not be able to distinguish the singers from the customers.

3 We then made representations and pointed out that there were other karaoke lounges and we were told that they were all run by Japanese for Japanese, but Singaporeans should not indulge in this habit. We appealed to the Minister for Home Affairs under the Public

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\* This was the speech delivered by the president of the Law Society of Singapore at the Edu Dine dinner on 14 August 2009.

† President, Law Society of Singapore.

Entertainments Act. The Minister (through his Permanent Secretary) confirmed the licensing officer's decision.

4 I encouraged Terry to go on national TV to air his grievances, thinking that when his story was made known to the public, there would be some outcry. He was then invited to a talk show called "Talkback" hosted by David Gabriel, who interviewed him in his restaurant and Terry read out the letter from the licensing officer with the two reasons given for denying him his licence. But there was absolutely no reaction from the Singapore public – no letters in the newspapers, no questions in Parliament. Yet within two years, there were karaoke lounges sprouting all over Singapore, run by Singaporeans for all Singaporeans. When I mentioned this anomaly to a senior civil servant, I was told that the Economic Development Board was instrumental in this change of policy, because it had been told that investors found Singapore lacking in nightlife and found that karaoke enlivened the scene, and that was what led to the change. Sadly, the change came too late for Terry, as he had to close his restaurant before karaoke became acceptable.

5 This of course illustrates the closed mind and lack of imagination of our civil servants of that generation, but also my own lack of courage in challenging this decision in the courts by way of judicial review. In fact, Terry was braver than I in going on national TV to criticise the Government in the 1970s, when this was rare. But if I am accused of lack of courage, then I would ask what support I would have received from our courts had I shown courage at that time.

6 Let me now fast forward to 2005 for my second story. I acted for a client whose bank account was debited with \$4m because of a forged account transfer form. He complained to the bank, which raised a defence that under the client's terms and conditions, the bank was not liable for forged cheques or instructions. In my reply, I raised the argument that such a clause was contrary to section 3 of the Unfair Contract Terms Act<sup>1</sup> ("UCTA") (which renders unenforceable any unreasonable clause in written standard form contract). The case law

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<sup>1</sup> Cap 396, 1994 Rev Ed.

was unclear on this point, but I was eager to have a crack at trying to get a standard banking term declared unreasonable. However, I was frustrated in this challenge because the bank settled for 100% of liability on the day of the trial, so we never got the chance to persuade a court to declare this clause contrary to section 3 of the UCTA.

7 But arising from this, I had a look at my own bank account terms and conditions and found that they also had the same exclusion clause. A further search revealed that all the major banks had the same clause in some shape or form. This time I had more courage and wrote to various bodies to ask the banks to reconsider the fairness of this clause, considering that:

- (a) they were reversing the effect of section 24 of the Bills of Exchange Act<sup>2</sup> which provides that a forged signature does not amount to a mandate from a customer permitting the debit of his account;
- (b) as between them and their customers, they could and did insure against the risk of forgery under a Banker's Blanket Bond policy but their customers could not (the real reason banks have such exclusion clauses is probably that such clauses can persuade their insurers to charge them a lower premium for their insurance policies); and
- (c) they did not highlight to their customers that over time they had excluded liability under section 24 of the Bills of Exchange Act, so hardly any customers in Singapore know that the risk of loss for forged cheques would be placed on them.

8 I raised this issue with everyone I could think of – the Law Society, the Association of Banks in Singapore, Consumer Association of Singapore, the Singapore Academy of Law, *The Straits Times*, at public talks and even with a Cabinet Minister. So far, I have had no success, but I am still persevering, and waiting for a test case to come along where I can try to set aside this clause.

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<sup>2</sup> Cap 23, 2004 Rev Ed.

9 In the meantime, I took the opportunity to write to *The Straits Times* in 2007 when a local charity found that its employee had signed dozens of forged cheques and left the charity with millions of dollars in losses. Someone wrote to *The Straits Times* to say that surely the bank would be held liable for honouring forged cheques, and I wrote to *The Straits Times* to point out that this was not the case in fact because it was likely that the bank concerned would have an exclusion clause. No one responded with shock and outrage, so my words continued to fall on deaf ears. Last year, I gave a speech at a Rotary Club and expounded on this subject. Again, there was hardly any reaction from the audience, which seemed almost to accept this as the natural order of things.

10 What I cannot understand about this apathy is that this is a winnable war. So long as a large enough segment of the public protests long and loudly enough like the DBS High Notes holders did, the banks will come to their senses and settle on their own or be forced by the Government to settle. But our people seem ready to accept their fate quietly. I sit on the boards of some public companies, and I tell them that they are at risk if someone forges their cheques or instructions. And I tell them that they may have sufficient clout to actually renegotiate their standard banking terms and conditions, but so far, while they agree with me in principle, they just do not think it is serious enough to upset their bankers.

11 But the risk is real. Where there is forgery, banks will disclaim liability as is happening now with the former partners of Sadique Marican & Z M Amin. Zulkifli Amin forged his partners' signatures on his firm's cheques and embezzled \$6m, leaving them with heavy liabilities to their clients. The bank is disputing liability for these forged cheques and I do not know how much difficulty they will have in finding good legal representation to fight the bank.

12 So why are we not fighting for banks to accept that it is their responsibility to either change their banking terms or buy insurance for their clients? The answer is apathy, on the part of the Bar as well as Singaporeans at large. Let me tell you that while such exclusion clauses are almost universal in Singapore, they are not generally used in Malaysia or Hong Kong, even by the same banks that are using these

clauses in Singapore. The market in those countries will not take it, but in Singapore our apathy has allowed the banks to change their banking terms by stealth, without highlighting the implications of this change so as to allow their customers the opportunity to be aware of their exposure to the risk of forgery.

13 Apathy is bad enough, but there is a related evil, namely the lack of independence. So we fast forward again to last year to my third story (which is actually a collection of stories).

14 At the height of the Lehman Brothers mini bond and high notes crisis, Tan Kin Lian (the man who stands on Speakers' Corner) was asking me to help him find lawyers for the thousands of investors who had lost substantial sums of money because of structured products. I could not act because my small firm did not have the resources. I also had incredible difficulty persuading more than a handful of senior litigators to take up the cases because of perceived conflicts of interest. And I do not mean conflict in the sense of breach of the Legal Profession (Professional Conduct) Rules,<sup>3</sup> but simply commercial conflicts. I practise as a barrister, so I have no problem suing anyone or acting for anyone, but every other competent senior litigator is a partner or a proprietor of a firm which is seeking to build up lasting relationships with long-term clients, such as banks or oil companies. So Singaporean lawyers do not generally believe in the English barristers' cab rank rule, meaning you act for any client who is willing to pay your fees. And believe me, it is not easy to get good senior lawyers to act against the local banks.

15 But if we do not have such a rule, it will always be difficult to find Singapore lawyers willing to act against the local banks. Fortunately, through the Law Society, I have managed to assemble a list of lawyers willing to act against the big banks or finance companies, and the Law Society will continue to consider it part of its mission to find lawyers willing to act for clients who have unpopular causes. This is in contrast to Hong Kong, which has an independent Bar and had no problem

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<sup>3</sup> The version currently in force being the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

finding Senior Counsel to act for needy investors in their Lehman Brothers cases against the local banks.

16 Speaking of independence, we only have to look north of the Causeway for a shining example. It is not often that I say that I admire the Malaysians, but we have to admit that, over the years, time and again, the Malaysian Bar has demonstrated fearless independence and courage. When the Lingam scandal broke in 2007, it was the Malaysian Bar which roused the people into action by its famous “March for Justice” on 27 September 2007 when more than 2,000 lawyers marched in the rain from Kuala Lumpur to Putrajaya to protest against corruption in the judiciary, ultimately leading to the dramatic election results the following year. (Actually, they only walked the last five kilometres, but that was forced on them when the police stopped their buses from entering Putrajaya.) But while I have publicly stated my admiration for their courage, I have also said that we in Singapore should thank our lucky stars that we do not have the same cause to have our courage tested, because, thankfully, we do not have the same evils that require us to take such a drastic stand. I have been careful not to say that, should such a situation arise in Singapore, we would follow the Malaysian example, because they did not apply for a permit for their march, and I cannot encourage any organised action by the Law Society in breach of the law (unless we want to demonstrate against the unjustness of that very law).

17 Some years ago, I was asked to act against a major local law firm which had innocently but negligently witnessed a signature of a purported mortgagor who turned out to be a fraudster posing as the owner of the mortgaged property. I asked myself whether I should take the case at all, bearing in mind that the law firm I would have to act against was on friendly terms with my firm. My answers to my own question was simple. There was no conflict of interest, and I intended to conduct the case with every respect for the other law firm and not make any allegation which I did not genuinely believe. But the real reason I wanted to do the case was that I had spent a lifetime litigating commercial cases where the issues were disputes of fact or law, and few opportunities had come to me of doing a case where the issue was a simple question of right and wrong. I needed to feel that I was on the

side of right and justice for a change, instead of just being a hired gun to argue a client's point of view.

18 How then did I conduct the case? I made an appointment with a few of the senior partners of the law firm concerned and sat down with them. I set out all the facts which my client had instructed me, and asked them to investigate and then tell me orally what their answers to my client's allegations would be (all on a without prejudice basis and without placing anything on record at this step). Eventually, we met again and they told me their version of the facts. While there were some discrepancies between my client's account and the law firm's responses, there were nevertheless clear admissions that one of their lawyers had been duped by a fraudster who impersonated my client and pretended to be the owner of a property which was being mortgaged. So with the law firm's lawyer witnessing the fraudster's signature and certifying that it was my client's signature, the law firm abetted (unknowingly of course) a forged mortgage, as a result of which my client lost her property by the mortgagee bank registering the fake mortgage with the Land Titles Registry. Eventually, I had to file a writ against the law firm and the bank, and the case was ultimately settled. But I know that the partners of the law firm appreciated the way in which I had conducted the case on behalf of my client, giving them every opportunity to demonstrate that my client had no case. Only when I was fully satisfied that she had been a genuine victim of fraud, for which the hapless law firm unfortunately had to take responsibility, did I file my writ. As the senior partner said to me after our initial meeting: "You are from the old school to come and speak to us before issuing the writ" (and I replied: "That is what I was taught by my seniors to be the correct way of acting against fellow lawyers").

19 So what are the lessons and hopes for the future? It is people like you in this room who need to change the mindset of our profession and of Singaporeans at large:

- (a) You must be unafraid of commercial conflicts of interest where the cause is deserving, and you should worry about clients who may not be able to find competent representation if you do not act for them.

- (b) You must care about justice and fight for justice where you see injustice, not just for your immediate client, but for the community at large.
- (c) You have to fight, or at least sound the alarm, against improper practices even though your efforts may be unappreciated by the people for whom you are fighting.

20 So I hope that all of you going into big firms with commercial practices will still retain that spirit that lawyers should feel the need that they are doing justice. Only then can we ensure that all Singaporeans who deserve legal representation for a worthy cause will get adequate and competent representation. In time, we will be able to educate Singaporeans to listen to us as members of the Bar and respect the Bar's leadership when we tell them that they must fight for their own rights and interests and not meekly accept the status quo where there are clearly wrongs to be righted.

21 There is nothing wrong with Singapore's legal hardware – we have a fine infrastructure and legal system; not even much wrong with our software either, as our law schools are good and our judges and lawyers of high intellectual quality. It is the “liveware” that could do with some improvement, the infusion of spirit and idealism that will put us on par with other First World countries. The future lies in your hands and I hope that you will each in your own way contribute to making the legal environment in Singapore a better one than what you find today.

## APATHY AND INDEPENDENCE – PART II

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*This month I am reproducing an exchange of correspondence between myself and an unnamed law student which I hope is self-explanatory. It is heartening to hear from the new generation of lawyers that they still have a passion for doing positive good rather than merely avoiding evil.*

Dear Mr Hwang,

My name is C, and I am a fourth-year undergraduate at the NUS Faculty of Law.

I wanted to thank you for the inspiring speech you gave at the Edu Dine dinner in August, the contents of which were also reproduced in the September issue of the *Law Gazette*. Your speech has been circulating around law school, and a number of my friends have been inspired to think deeper about lawyering and justice.

I wonder, though, how much of what you have exhorted us to do can be practised by junior associates such as my classmates and myself, who will graduate in less than half a year. I will be doing my training contract at a major law firm, and I wonder how I will be able to exercise such courage if that might entail going against the opinion of lawyers of far greater competence and seniority than myself, and perhaps at the risk of my career at the firm and at the Bar. Mr Gregory Vijayendran also spoke at the law school a couple of weeks ago to the Jurisprudence class and exhorted us to not be afraid to speak up against unethical behaviour, or, if necessary, to leave the firm. I find his suggestion to be more practical for a junior associate, since it is more morally clear that we should not tolerate unethical behaviour. What you exhort us to do, though, is not merely to avoid that which is bad, but to pursue that which is good. Is the pursuit of such good possible as a junior associate? Or are we resigned to work until we gain sufficient seniority to pursue what we independently think is good? If so, I fear that my conscience might be seared by that time.

I would be deeply indulged by any thoughts you may be inclined to share.

Best regards,

CP

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Dear C,

Thank you for your thoughtful letter.

You correctly point out that most of our current professional ethics rules are proscriptive rather than prescriptive and ask how we lawyers can actively do good rather than simply avoid doing evil.

First of all, if you look closely at our Legal Profession (Professional Conduct) Rules, several of them do impose positive duties on lawyers, consistent with our claim to being an honourable profession. To take only a few examples:

- (a) rule 14 (completion of work within time), rule 19 (keeping clients informed of the progress of their case), rule 20 (responding to clients' phone calls) and rule 26 (disclosure of personal interest) require us to maintain high standards of professionalism in serving our clients;
- (b) rule 54 exhorts us to act in the best interests of our clients in handling a case but in such a way as not to conflict with the interest of justice, the public interest and professional ethics;
- (c) rule 72 tells us that we have a duty to defend criminal defendants regardless of our personal opinion of their guilt or innocence; and
- (d) rule 60 imposes on us a positive duty to assist the court in citing all relevant decisions and legislative provisions.

If we comply with these rules, we are well on the way to being lawyers who are setting standards for ourselves that may exceed those our clients are accustomed to. That should give us pride in ourselves as human beings and where we stand in society, as principled professionals and not merely technically-skilled persons who would do anything to advance our clients' interests.

Next, having set your own standards as a principled professional, you could consider how you might be a force for good in society apart from undertaking your assigned legal tasks to the best of your ability. Lawyers are meant to be advisers to their clients, and while we must be careful not to advise outside our area of competence (*eg*, on the commercial aspects of a problem), it is sometimes possible to inject a moral bias into our advice.

Let me give you a practical example. Many years ago, I used to act regularly for a motor insurance client, advising it on motor claims and insurance issues. This client would insist that I point out every available defence that it could use to resist a claim by its insured driver, which I dutifully did. Then I started to act for a second insurer and, true to my practice, proceeded to advise the second insurer as to how it could repudiate liability against one of its insured. To my surprise, the second insurer told me: "We don't rely on technicalities to deny liability – these are our customers who have paid good premiums over the years and deserve our support unless they have done something which has prejudiced us in some way." That attitude impressed me so much that I told all my friends that they should change their insurance company to the second insurer. And that got me thinking that I could have gently advised my first insurance client that it might be good business for it to be more generous to its insured clients who might have unknowingly violated the terms of their insurance policies (*eg*, late reporting of an accident) because in the long run, it would become known as a caring insurance company, which would have been a good marketing angle. Alas, I was too young and inexperienced to know how to handle a client other than to do what they wanted me to do, and continued to advise them on how to repudiate policies. Had I been a little more courageous and street-smart, I might have done something to improve the lot of many car owners who might not have realised that their insurance

company was happy to take their premiums but not to pay out on their claims.

So the moral of the story is that when you start practice, you will inevitably have to practise your pure technical skills for a while and earn the respect of your clients for those skills. When you have built up a relationship with a client, you will have earned sufficient goodwill that the client will take your advice seriously, and you could then make gentle suggestions about what might be in their best ultimate interests, which might not be the “take every legal point approach”. For example, corporate social responsibility (“CSR”) is no longer a dirty term, and it is something legitimately within the province of lawyers to encourage their clients to follow as part of good governance – this ultimately must be in the clients’ own interests, even if they might not immediately see the point of CSR. Lawyers who advise listed companies do in fact constantly remind clients not only of the letter but the underlying spirit of the law in the various legislative and quasi-legislative rules that govern their corporate behaviour. If clients understand the moral imperatives that underpin the bare legal rules, they are likely to develop good legal antennae to sense when they might be sailing close to the wind even if there is no black-and-white rule to cover a particular situation. And if you have contributed to those legal antennae, you will have made our society a better place with better and more responsible corporate chieftains in charge.

And in the field of litigation, we can also (and often do) advise clients on how to behave with a fair sense of moral responsibility in an ongoing litigation situation. We can (and should) advise them that their behaviour will ultimately be the subject of comment in court (particularly in family law cases), as judges will be influenced in their attitude to persons who do not behave in accordance with accepted social norms even if they have acted within the letter of the law. So our advice to our clients can be tinged with a moral perspective because this is often in the client’s best interests in his legal battle.

I can, in this letter, only begin to suggest how you might approach your legal career with the aim of not only being a good lawyer, but a responsible one as well, who will eventually be recognised not only for

your contributions to the law, but also to the improvement of society as a whole. I wish you well on your voyage of discovery.

Warmest regards and best wishes,

Michael

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## C C TAN AWARD ACCEPTANCE SPEECH

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Michael HWANG SC

1 When I stand here as the immediate past president of the Law Society, I feel like I am the Man from Yesterday. That title I am happy to hand over to Wong Meng Meng as from the beginning of next year. But what will that leave me? I suppose I will have to be called The Man from the Day before Yesterday. But that word “Yesterday” has a special meaning for me, as I will explain at the end of this speech. I have read citations for previous winners of this award, so I am especially gratified that I have been recognised by my peers for maintaining certain standards of honour in the conduct of my professional practice. When I started practice many years ago, I remember being asked what kind of honours I was aiming for. I replied that I was looking for honour rather than honours, and all I wanted was to be held in high esteem by my peers for the quality of my work and the integrity of my conduct. In the practice of law, while I have always acted in the best interests of my clients, I am not one who will do anything to advance my client’s interests; in other words, I do not have a “my client (is) right or wrong” or “win at any cost” mentality. Whatever I do at work, I still have to feel proud of myself as a person and judge myself not only by what I did, but how I did it in the furtherance of my client’s cause, be it in court or in a transaction.

2 Let me illustrate by stories rather than by lectures. When I think back over my career, three or four things said to me about the way I practised stand out in my mind.

3 **First story.** I cross-examined a defendant in a civil trial for half a day. While I cannot recall what the cross-examination was about in a cross-examination of that length, it is not easy to avoid some personal allegation or other about the witness’s memory, accuracy, veracity or worse. At the end of the day, the defendant came up to me outside the court and said, “That was a very fair cross-examination.” And I thought to myself that either I was the greatest gentleman advocate this side of

the Straits of Johor, or I had somehow let him off the hook. However, since he settled the case the next day, I decided to elect for the greatest gentleman theory.

4 **Second story.** I had to cross-examine a legal expert from Indonesia (let me call him Prof X) and had to rely on the input of my own Indonesian legal expert to demonstrate that Prof X's expert's opinion was wrong. At the end of the cross-examination, my own legal expert said to me: "I am glad you were not too hard on Prof X." I replied: "But his opinion was wrong, wasn't it?" And his answer was: "Yes, of course, but he is an old man, very distinguished, and treasures his dignity, and I would not like him to have been humiliated, so I am glad that you did not do that to him." And that gave me food for thought as I realised that cross-examiners hold the power to embarrass and even humiliate the person being cross-examined and we should never exercise that power unless it is absolutely necessary to do so, and not as a matter of course. In fact, I once cross-examined (rather gently) a lady witness, and her husband later engaged me to furnish an advisory opinion to his company, so being gentlemanly can sometimes have a positive effect on your practice.

5 On the other side of the coin, I also remember several clients (invariably in matrimonial cases) who discharged me on the grounds that I was not being aggressive enough to their spouse. Indeed, one client told me, "You are being far too gentlemanly." And I treated that as a badge of honour. Somehow, I cannot bring myself to say everything that such clients want me to say on their behalf to their spouses, because I do not believe in being hurtful for its own sake if that does not advance my client's case or objectives any further.

6 That leads me to the final story. I was once asked to sue a prominent Singapore law firm for helping to commit a fraud on my client. The fraud had been perpetrated by taking a false mortgage of my client's property purportedly signed by my client but which had actually been forged by another party, and this forged signature had been witnessed by a lawyer in this prominent law firm. These were serious allegations, and I had no intention of filing a writ making these allegations without giving the firm a chance to explain its side of the

story. I made an appointment with its senior partner, and in fact met several partners of the firm where I explained my client's instruction. They gave me their version, which was basically that their lawyer had witnessed in good faith, believing that the person signing was indeed my client (as her identity card was shown to the lawyer). I told them that while I accepted that there was no conspiracy between the fraudster and the law firm, I would have to advise my client to sue them for negligence, which I eventually did. But on my way out, the senior partner said to me: "You are from the old school to come and speak to us before issuing the writ." And the senior partner was right. I did not learn this from the books because I had seen this done when I was a young lawyer – the courtesies exchanged between very senior lawyers and the proper way to further your client's interests while giving due consideration to the interests of our fellow practitioners had left a lasting impression on me.

7 These four statements I will remember for the rest of my career. And this gets us back (finally) to the meaning of the Man from Yesterday, a title which I will wear proudly to the extent it reflects the values of Yesteryear that I hold and which I hope will percolate down to our younger lawyers from watching other oldies in action. C C Tan was a fine example of such an oldie who left us a legacy of honourable conduct to emulate, and I hope I have in a small way carried on that tradition for others to follow. Thanks again to the Law Society for giving me this honour, and thanks to all of you for your warm response this evening.

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## THE C C TAN AWARD

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*This citation by Vice-President Mr Lok Vi Ming SC, was made in honour of Mr Michael Hwang SC, who was conferred the prestigious C C Tan Award for 2012.*

1 For members of the profession who have had the privilege of knowing Mr Tan Chye Cheng, or C C Tan as he is fondly remembered by the Bar, they would likely say that he had, throughout his long professional life, embodied and exemplified the virtues of the legal profession – honesty, fair play and personal integrity.

2 The Council of the Law Society inaugurated the C C Tan Award in 2003 in memory of C C Tan and presents this award annually to a member of the Bar who exemplifies these qualities, which are valued highly by all members of the Bar.

3 I am pleased to announce that the council has decided to present this year's C C Tan Award to Senior Counsel Michael Hwang.

4 Michael was educated at undergraduate and postgraduate levels at Oxford University, where he was a college scholar and prize winner. After graduation, he took up a teaching appointment at the Faculty of Law at the University of Sydney before returning to Singapore to commence private practice in 1968 with Allen & Gledhill and helped build it into one of Singapore's largest and most prestigious law firms.

5 In 1991, he was appointed a Judicial Commissioner of the Supreme Court of Singapore for a term of two years. In 1997, he was amongst the first batch of 12 Senior Counsel to be appointed in Singapore.

6 Michael holds a string of international honours and titles; it will take me two courses of food to read them all. So here is a PowerPoint of a sampling. You understand what I mean!

7 But it is Michael's work with the Law Society and his contribution to the legal profession here that we wish to honour today.

8 Michael's long association with the Law Society stretches back over 30 years. In that span of time, he chaired, directed and inspired the work of numerous committees including:

- (a) Legal Workshop Committee from 1982 to 1985;
- (b) Legislation Committee from 1983 to 1985;
- (c) Legal Workshop & Continuing Education in 1986 to 1987;
- (d) Continuing Legal Education in 1998 to 1999 and again from 1993 to 1995;
- (e) Legislation & Special Assignments (Civil) Committee in 1990;
- (f) Ethics Committee from 2006 to 2007; and
- (g) International Relations Committee from 2011 to date.

9 It is an association that culminated with his presidency of the Law Society from 2008 to 2010.

10 Ask anyone who has ever appeared against Michael Hwang in court about what he or she thinks of the man and the response would invariably be, "Oh yes, a real gentleman." A gentleman who is always fair, honest and, unfortunately for his opponent, also someone who almost always gets the result he wants.

11 Michael has a reputation somewhat as a "smiling assassin". He deploys a potent combination of charm and wit first to disarm his opponent and then a bluster of keen legal firepower to ultimately vanquish his opponent. Typically, the opponent is lulled and before he knows it, he is defeated. I am told Michael, as a footballer, once deployed similar tactics to devastating effect. Apparently, Allen & Gledhill, when it was a much smaller outfit of perhaps 50 lawyers some 25–30 years ago, used to have regular sports sessions pitting pupils against lawyers; young lawyers against the senior ones. Michael, never one to back down from a challenge, signed up to play football against a team of pupils and young lawyers. With the game finely balanced, Michael apparently had the ball in midfield and, in a dazzling display of speed and dribbling craft (which only Ryan Giggs was able to emulate many years later in an FA Cup semi-final match for Manchester United against Arsenal), took on the entire defence of the younger team. As Michael dribbled, the entire defence defended backwards. Apparently, no

one in that defence had the heart or the conviction to tackle Michael Hwang, and he scored.

12 Convinced he was amply gifted in football, Michael (I was told) volunteered to play for Allen & Gledhill in a couple of editions of the Wednesday Shield, and again none of his colleagues had the heart to counsel him otherwise. Everyone heaved a collective sigh of relief when Michael soon decided to hang up his boots and return fully to the pursuit of law in his career.

13 Another ex-colleague of his tells me that Michael is the only lawyer he has known in private practice who would insist that his bundle of authorities be provided (not exchanged) to the other side before the hearing date. Michael's view is that the authorities are all there and, in any event, it is the advocate's duty to provide all authorities (whether in one's favour or not) to the judge.

14 How accurately this describes Michael as an advocate of the highest standard. And how true to form; he in fact provided me with a copy of his acceptance speech even before I have given him a copy of my citation for this award!

15 Ladies and gentlemen, these qualities of honesty and fair play have made Michael what he is today: an internationally renowned and respected jurist and arbitrator, and one of our best known and best-loved lawyers. But what has made him really special to many of us at the Law Society has been his interest in and commitment to teaching and training young lawyers and ensuring that the best efforts go into imparting the best skills to them.

16 One event amply illustrates this. Michael was scheduled to speak at a Law Society event, "Legal Writing for Arbitrators", in February 2011. He kept his date at the event and, to everyone's surprise, turned up with one entire arm in a sling. He had fractured his arm/wrist the day before the event. Despite this unexpected accident, Michael proceeded to deliver a wonderful seminar for the next hour and a half. It was an act reminiscent of Franz Beckenbauer's valiant efforts for the West German football team in the semi-finals of the 1970 World Cup.

17 But unlike Beckenbauer, Michael was not fighting pain to carry the hopes of a nation. Not quite as lofty a duty, but to Michael, no less significant or meaningful. He was doing this because he had promised the Law Society he would do the seminar and because he believed in keeping the faith with our young lawyers; no broken arm was going to be allowed to fracture that faith and commitment.

18 Ladies and gentlemen, Michael Hwang personifies the values celebrated by the C C Tan Award and he is an excellent model for younger lawyers to aspire to.

19 It is my honour now to welcome Michael Hwang Senior Counsel on stage to receive the C C Tan Award 2012!

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## THE GOOD OLD DAYS REVISITED

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Michael HWANG SC

1 At the beginning of the 1970s, I had been in practice for only a few years. I had just been made a salaried partner in Allen & Gledhill, which gave me a good pay rise without the responsibilities of full partnership (“good pay rise” is of course a relative term: my income as a salaried partner was significantly less than that of a present first-year associate in the same firm). My firm was one of the biggest in town (with about a dozen lawyers), yet it was still small enough that I knew the name of every person in the firm (peons included), and partners would lunch with legal assistants on a regular basis.

2 The legal world was still dominated by the “Big 4” firms which had been founded by expatriates, namely, Donaldson & Burkinshaw, Drew & Napier, Rodyk & Davidson and Allen & Gledhill. However, their dominance was being challenged by two “local” firms, Shook Lin & Bok (which was founded by Malaysians) and Chor Pee & Hin Hiong (which later fell into difficulties with the prosecution and conviction of Khoo Hin Hiong). There were only about 300 practising lawyers at the Bar at the beginning of the decade, so the sense of camaraderie was strong.

3 Legal practice was relatively leisurely, compared to today’s pace. I thought I was working hard by not going home till after 6.00pm, and usually had time to go home for a shower before an evening engagement. There was time for an active social life after work despite having to go to the office on Saturday mornings. I even had time to join The Sceneshifters (an amateur operatic society) with Woo Tchi Chu and together we formed part of the tenor chorus for operettas like “Land of Smiles” and “Rose Marie”.

4 When we went to the High Court on summons in chambers days, we would walk back to Raffles Place, and have coffee at the G H Café in Battery Road (which is now part of 6 Battery Road) together with its sinfully delicious kaya cake. If we missed coffee, we could always go

there for lunch and sit at a table reserved for lawyers (a sort of “mess table”). There I lunched with some of the legal giants of the day (such as David Chelliah, K C Chan, Goh Heng Leong, Tan Tee Seng, Tan Wee Kian, Sachi Saurajen and Koh Eng Tian). None of them had any airs and were happy to talk to junior lawyers as equals and share their knowledge and experience with them. Another favourite haunt of lawyers was the Polar Café in High Street, whose curry and cream (custard) puffs were legendary.

5 When we appeared in the traffic courts against police prosecutors, the magistrates (like Giam Chin Toon) would invite us back into their chambers for coffee after the case was over and we would chat with the magistrate as well as the prosecutor. Relations between Bench and Bar were much closer then with such regular exchanges, culminating in the Bench and Bar Games against the Malaysians, which really roused the camaraderie of the Singapore lawyers. Our motto when we left for our biennial trips to Malaysia was *kalah tidak apa, wang tidak apa, semua tidak apa, style mau*.

6 Some of the major legal events that happened in the 1970s included the following:

- (a) The Law Society was still known as the Advocates and Solicitors Society of Singapore until it became a statutory body known as the Law Society of Singapore on 12 June 1970.
- (b) The Supreme Court of Singapore was established on 9 January 1970 when it formally became independent of the Malaysian court.
- (c) In 1970, the revised edition of the Laws of Singapore was published, replacing the Laws of the Colony of Singapore (1955 edition).
- (d) The then Prime Minister, Mr Lee Kuan Yew, addressed the Law Society twice in this decade. The first occasion was at our annual dinner in 1970, when he criticised the Stock Exchange of Singapore (“SES”) and urged the Law Society to pay heed to the weaknesses he had identified in the SES. He also defended the abolition of the jury system which had taken place at the end of the previous decade. The second occasion was at our annual dinner in 1977 when he castigated us for not heeding his earlier warning and gave notice of the Government’s intention to:

- (i) make voting at Law Society elections compulsory;
- (ii) appoint a nominee to the Law Society's council.

(Although smoking had not yet been abolished inside air-conditioned buildings at that time, there was an informal ban on smoking when the Prime Minister was in a room, and the ballroom on these two occasions was noticeable for extended bathroom breaks by large sections of the audience, who disappeared into the lobbies outside for a puff or two.)

- (e) In 1971, the Attorney-General's Chambers moved from the present Family Court building in Havelock Road to High Street, next to Parliament House.
- (f) In 1971, Prof Tommy Koh became Dean of the Law Faculty and Prof S Jayakumar became our Head of Mission to the United Nations.
- (g) In 1974, the Singapore Association of Women Lawyers was founded with Farideh Namazie as its first president.
- (h) In 1975, the Board of Legal Education was established by the Legal Profession Act (Cap 217).
- (i) In 1975, the Subordinate Courts Complex was completed.
- (j) In 1979, Phyllis Tan became the first female president of the Law Society and in the same year, TPB Menon became the first local graduate to serve as vice-president.

7 Lawyers who worked in the Raffles Place area used to visit the office-cum-showroom of the Malayan Law Journal in Raffles Place next to Robinsons to browse through the latest law books. Bashir Mallal was an amazing man who had no formal legal training but taught himself law to such an extent that he could give legal opinions and was conferred an honorary LLD by the then University of Singapore. His death in 1972 marked the passing of an era.

8 Another enduring memory for all lawyers who worked in the Raffles Place area was Robinsons Department Store in Raffles Place (now occupied by OUB Centre) where we would go for lunch or simply window shopping during lunchtime. One day in 1972, I set out for court in the morning and, when I returned, I found that Robinsons had been destroyed by a fire which also killed the kindly liftman who would say hello to me whenever I visited the store. My office (which was next

door) had not been damaged by the fire, but suffered damage from the water pumped into the building by firemen anxious to protect it from the flames. I found that my carpet had shrunk by several feet owing to the water, and made an unsuccessful claim on our insurance company, which denied liability on the grounds that our fire insurance policy only responded to claims for damage from fire, not water which put out the fire.

9 My own work experience was being gained incrementally, as I counted many “firsts”. My first (and only) murder trial was in 1974 where Amarjeet Singh and I were assigned to defend two robbers who had killed the victim of their crime. Both our clients were convicted and were eventually hanged. My client was most reluctant to appeal against his conviction, and I was only able to persuade him to sign the appeal papers by telling him that his wish to be executed early could not be fulfilled until his co-accused’s appeals had been disposed of. In 1973, I argued my first case in the Court of Appeal which was for a sum of \$1,400. Even then, that was not a large sum, and I was fearful of the reception I might receive from the Court of Appeal. To my relief, they heard me out patiently, and gave judgment in my client’s favour which established that the right of a buyer to reject defective goods could be lost after a reasonable time.<sup>1</sup> I later this discussed in an article published in the *Lloyds Maritime and Commercial Law Quarterly* in 1992.<sup>2</sup>

10 I was also doing a good deal of corporate finance work, as my firm was acting for about a third of the new merchant banks in Singapore, which were at the vanguard of the new kind of corporate work that we were seeing for the first time. Initial public offerings, or flotations, as they were then called) were starting to become popular, and lawyers were beginning to understand the urgency that such work demanded, which would change the pace of legal life (at least in corporate work) forever. I assisted in the first IPO in Singapore of a close-ended investment trust (Harimau), and the first take-over of a publicly listed company under the new Companies Act (Haw Par of M&G).

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<sup>1</sup> *Eastern Supply Co v Kerr* [1971–1973] SLR(R) 834.

<sup>2</sup> Michael Hwang, “Time for Rejection of Defective Goods” (1992) 3 *Lloyd’s Maritime and Commercial Law Quarterly* 334.

11 In the early 1970s the property market was as hot as it is now, and I was fortunate to have a big client from Hong Kong who went on a spending spree in Singapore, buying several large properties and thus underwriting my introduction to conveyancing practice. I also undertook my first experience as a developer's lawyer for sales of units in an apartment block (Cavenagh House). The market remained on the boil until the Prime Minister announced on 10 September 1973 that only Singaporeans could purchase residential property. Overnight he brought the property market down from its giddy heights (again, this is a relative term: the best apartments were then selling for less than \$100 per sq ft) and killed the conveyancing market for almost the rest of the decade. I then switched to acting for landlords in granting commercial tenancies (ICB Building and Shing Kwan House) as well as acting for finance companies financing purchases of commercial units (Katong Shopping Centre).

12 On the extracurricular front, I began my practice of family law when I was asked to teach the subject at the University of Singapore as a part-time tutor. This led to my being appointed to a committee to advise the Ministry of Social Affairs on reforms to the Women's Charter, after which I continued my interest in the subject by actively practising in this area for the rest of my career.

13 I also committed myself to *pro bono* activities. With my experience in family law, I volunteered for the panel of lawyers to assist the Legal Aid Bureau. More interestingly, I also joined the Samaritans of Singapore ("SOS") as a consultant, advising their clients who felt suicidal because of legal problems. I served under their first chair, Margaret Jeyaretnam, wife of Ben and mother of Philip, and a wonderful person in her own right. Eventually, I became chair of the SOS and served for three terms in that office.

14 The 1970s were therefore a decade when lawyers led a busy (but not too busy) and eventful life and had time for each other. We were certainly a lot poorer than lawyers are now, but (arguably) we enjoyed our lives a little more.

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## **Part V**

### **SELECTED BIBLIOGRAPHY OF LEGAL WRITINGS NOT INCLUDED IN THIS COLLECTION**

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## SELECTED BIBLIOGRAPHY OF LEGAL WRITINGS NOT INCLUDED IN THIS COLLECTION

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