YSIAC Publications Subcommittee:
Darius Chan, Foo Yuet Min, Jonathan Lim, Nicholas Lingard, Julie Raneda

Page 2
Exclusive Interview with Emmanuel Gaillard
by Darius Chan, Kenny Lau and Yap PeiYin

Page 9
Lesotho Sets Aside Award Before the Singapore High Court
by Darius Chan

Page 12
Enforcing Foreign Diktat: Puncturing the Stereotype
by Moazzam Khan and Shweta Sahu

Page 16
The Call to Remove Unilateral Appointments: Seven Years On
by Andrew Battisson and Cheryl Teo

Page 20
More Transparency in International Commercial Arbitration is a Good Thing
by Amy Seow
Exclusive Interview with Emmanuel Gaillard

by

Darius Chan, Ascendant Legal LLC,
Kenny Lau, WongPartnership LLP and
Yap Pei Yin, Chancery Law Corporation

1. Where did you grow up?
I grew up in Chambéry, in the Savoie region, which is not far from Geneva. I went to Paris to study law when I was 18. This is why whenever I am in Geneva for arbitration cases – which is quite often – I feel a great sense of familiarity and comfort. I also very much enjoy the lake environment in Geneva.

2. What made you decide to be a lawyer?
I actually started specialising in mathematics when I was in high school. I was not particularly interested in my studies, however, I later decided to study law. My interest in the law started when I was 16. I was then at a ski resort with a friend and we were having dinner with a number of guests. There was a young lawyer among us, who was sharing anecdotes about his work in criminal law, which he was very enthusiastic about. Now that I think of it, some of what he had said may not have been completely accurate! However, I remember finding the discussion fascinating. This was an important event for me, as it is due to this encounter that I decided to study law.

3. Can you share what was said at this event?
The conversation was about the question of whether a person who had his or her tank filled with gas and left without paying had committed the offence of theft. The argument was that one of the conditions of the offence – namely, that something was taken from someone else – was not met: the person who owned the car and refused to pay was not the same person who filled up the tank. This is actually why, years later, the parliament adopted a provision targeting specifically this type of conduct. The conversation was very interesting to me, as it was my first exposure to the structure of the rule of law, which combines conditions and effects. Oddly enough, I can still remember exactly what was said at that dinner despite this being so long ago. Not that I would want to steal gas [laughs], but it made me realise how a legal rule operates. I may not have conceptualised it this way at the time, but I found it extremely interesting.

4. What do you enjoy doing in your free time?
I read a lot, which may sound surprising as one may think that lawyers already read too much. I can easily read two books per week, although my ratio has gone down with my newfound interest in Netflix! I also enjoy travelling – Asia is great and I enjoy Africa in particular. I also play squash, which I find to be a great sport as it allows for the expulsion of all of one’s anger [laughs]. I have a keen interest in architecture as well, especially architecture from the 1930s.

5. Whereabouts in Africa have you been?
I went to Senegal when I was 15 for community work. This was in Casamance, which is located in South Senegal, just past Gambia. As for leisure, more recently I have travelled to Tanzania, Kenya, Botswana, Namibia, Zimbabwe, Cameroon, South Africa and Rwanda. I like the landscapes and wildlife very much and the strong and direct relationship with nature. I find Africa to be extremely addictive.

6. Where does Singapore rank in your list of favourite countries?
Well, Singapore is not very close to nature [laughs], but I love coming to Singapore. I like its diversity and vibe. I generally like cities that have such a high energy level. What I like about Asia more generally is
7. Who do you consider your personal or professional mentor, and what was the single most important lesson that you learnt from him or her? In an interview with YSIAC early last year, in response to a similar question, Mr John Savage said that the single most important thing he had learnt from you was to surround himself with people who are better than him (although he identified himself as an exception).

For John Savage, I did succeed! What I like about this profession is that you are surrounded by people who are very smart and who, possibly more importantly, come from very different backgrounds. This ensures that there is diversity within each team that is working on the same matter and putting its mind to the same task. At my firm, we generally work in teams from very different backgrounds, both culturally and legally. In Paris, for instance, we have 50 lawyers working exclusively in international arbitration. Within that group, we have lawyers of over 25 nationalities and 24 languages. It is great in one’s professional life to work with talented people from so many different backgrounds.

8. Was there any one person who was your mentor professionally?

Berthold Goldman was very important to me. He was always very keen to help younger lawyers and he was the one who secured me my first internship in New York. This was after I took the competitive examination in France to become a full professor, known as the Agrégation. Although I had an academic career, after I became a full professor I wanted to try something else. Berthold Goldman introduced me to a small boutique firm in New York, which did arbitration. The firm was called Layton & Sherman and it no longer exists. It was a very interesting experience and I worked there for a few months.

Later in 1984, I taught at Harvard Law School as a Visiting Professor. This was a turning point in my career, as it was important for me to be exposed to another environment. There, I taught a course on international commercial treaties and a seminar on comparative private international law with Professor Trautmann. In the comparative choice of law class, Professor Trautmann and I would take a French and a U.S. case on the same topic – a car accident, for example – and we discussed with the students how the same situation would be tackled by each system. It was fascinating. Professor Trautmann was very important to me as well. I met him and Professor Arthur von Mehren at The Hague Conference of International Law sometime in 1982 – I was then a secrétaire rédacteur at the Conference and was part of a team that reported on the travaux préparatoires of The Hague Conference on Trusts. We discussed extensively all kinds of choice of law issues and they invited me to continue these conversations with their students at Harvard. I vividly remember the wonderful debates I had with Professor Arthur von Mehren on mandatory rules, lois de police and international public policy for example. Professor Arthur von Mehren’s views on these questions varied enormously depending on whether one appears before a court or an arbitral tribunal and he was one of the first to recognise, albeit implicitly, the autonomy of the arbitral system.

9. Your treatise “Legal Theory of International Arbitration” has been described as an “intellectual tour de force” and as “indispensable” to all
international arbitration practitioners. Do you feel that your treatise has stimulated greater intellectual discourse on the philosophical underpinnings of international arbitration law amongst practitioners?

Thank you for your kind words. It has certainly prompted heated debates, including a recent debate organised by the French Court of Cassation between me and Lord Mance. A number of articles and books have subsequently discussed the notion of “arbitral legal order”, which is one of my core proposals, and my description of international arbitration through the prism of three competing mental representations.

I have always been struck by the fact that people from the same school of thought end up reaching the same conclusions, whatever the legal question before them. This consistency is not random, but has a lot to do with one’s accepted premises about the field. This is what the book addresses.

I have jokingly said that, after tackling the legal theory and the sociology of international arbitration (with my 2014 Freshfields lecture on the topic), I should dedicate a study to the psychoanalysis of international arbitration. That is a vast and rich topic!

10. How would you respond to those who criticise the transnational vision of international arbitration as not being grounded in practical reality?

There is nothing more practical than a good theory. Neither a party that has to defend an anti-arbitration injunction, nor a party that wishes to put forward as a witness a company representative but is prohibited from doing so by the law of the seat of the arbitration, nor a party that has to enforce an award that has been annulled in the country of the seat of the arbitration, will find these questions theoretical. Yet, the answer to each of these questions will depend on the arbitrators’ or the courts’ vision of international arbitration, what I call their “representation” of the field.

Let’s take the first example, that of anti-arbitration injunctions. Take for example an arbitral tribunal that is sitting in a given country and has to adjudicate a dispute between a foreign private party and a local State-owned entity. The latter rushes to its national courts and gets an injunction against the tribunal that is plainly unfair. In this example, the tribunal is deemed by the local court to be partial for having refused a tenth extension of time for a submission by the State-owned entity, which plainly has been attempting to delay the proceedings. What should the arbitrators do: should they still go ahead and issue the award? This is extremely practical. Those who believe that the source of their power is found in the law of the seat should, if they are consistent, have a hard time disregarding the decision of the local
Another feature of contemporary arbitration is its standardisation. The adoption of guidelines and the codification of practice have certainly contributed to that phenomenon. court, however unfair it may be. At the same time, I do see that experienced arbitrators – whether they are from a common law or civil law tradition – often find a way to resist or a way around such situations and find a solution that they deem fair. This shows that the source of their power cannot exclusively lie in the law of the seat. In other words, if you tell the oil company which consented to arbitration in Nigeria that the question of whether or not the arbitrators will proceed to issue the award despite a local anti-arbitration injunction is theoretical, they will tell you this is lunacy. Theory in arbitration is extremely practical – in this example, it is the difference between obtaining and not obtaining an award.

On the same topic, I recently received a noteworthy email from Stephen Drymer, the Canadian arbitration expert, with the subject, “How some international arbitration knowledge can save the day”. One of his young colleagues, Alex Dobrota, was stopped at the United States border on the way to an arbitration proceeding. The customs officer asked him what allowed him to work in the United States as a lawyer without a visa. He replied that while he would be working physically in the United States, he was not working legally in the United States – this is because international arbitration is a delocalised dispute resolution process, and so he would not be working inside U.S. jurisdiction but under the international arbitral jurisdiction [laughs]. The customs officer looked at him quizzically but after a few more explanations about the nature of international arbitration, he let him pass. The conclusion of Stephen’s young colleague, when he texted Stephen, was that he never thought that my theory of international arbitration could be of such practical use [laughs]!

11. How has arbitration and the role of arbitration counsel evolved from the time you started practice?

Arbitration has evolved enormously. Arbitration has become much more adversarial, and the style has also changed significantly. Document production and the cross-examination of witnesses are now routine, whereas twenty years ago they would have been the exception, at least in civil law jurisdictions.

Today, an essential part of my activity as counsel is oral advocacy, and in particular conducting cross-examination of witnesses and experts. Last year, for example, I cross-examined over 20 witnesses or experts. This is probably the exercise I enjoy the most. What I also like particularly, of course, is determining the strategy of the case. Since the field is very academic and intellectual, structuring the arguments can be challenging. In the field of investment arbitration, you often have to confront cases of first impression – arguing an umbrella clause for the first time; arguing whether you can import
at a certain level of the chain where the same interests and the same individuals had prompted an action below (which ultimately settled), but they continued the arbitration at the higher level of the chain. The tribunal chaired by Gabrielle Kaufmann-Kohler ultimately dismissed the action as abusive.

I guess litigators are litigators. They use the system as it is. They use the loopholes where they exist. Arbitration has become the normal means to resolve international disputes, so you cannot expect it to always be friendly. There are high stakes and litigators will make every possible argument. It is the task of arbitrators to avoid abuses. Ultimately, they are the ones who are in a position to protect the integrity of the system.

Another feature of contemporary arbitration is its standardisation. The adoption of guidelines and the codification of practice have certainly contributed to that phenomenon. For better or for worse, today, an arbitration conducted in Singapore, London, Paris, Stockholm, or Mexico would unfold in pretty much the same way. While harmonisation is a good thing, standardisation is not.

12. You recently published an article in the ICSID Review on the abuse of process in international arbitration, where you noted that the increased incidence of litigation strategies “of the very worst kind” threatened to undermine the reputation of international arbitration as an effective and reliable mode of dispute resolution. What do you think sparked the increase in the use of such tactics in international arbitration and what would it take to curb this trend?

I recently obtained an award, in a case where I represented the Republic of Algeria, where the arbitrators dismissed the action on the basis of its abusive character although they had the jurisdiction to hear the case. The action started at a certain level of the chain where the same interests and the same individuals had prompted an action below (which ultimately settled), but they continued the arbitration at the higher level of the chain. The tribunal chaired by Gabrielle Kaufmann-Kohler ultimately dismissed the action as abusive.

I guess litigators are litigators. They use the system as it is. They use the loopholes where they exist. Arbitration has become the normal means to resolve international disputes, so you cannot expect it to always be friendly. There are high stakes and litigators will make every possible argument. It is the task of arbitrators to avoid abuses. Ultimately, they are the ones who are in a position to protect the integrity of the system.
13. What are some of the challenges you see facing international arbitration today and in the next 10 years?

The challenges are different in the field of investment arbitration and traditional commercial arbitration.

In investment arbitration, the main challenge is whether the system should be fundamentally reformed. I personally do not agree with the premise that the system is broken and unfair because it is supposedly not transparent or it somehow creates regulatory chill. Those in the civil society who criticise the system often point to claims as they have been brought by investors, not the actual outcome of specific cases. To assess the fairness and efficiency of a system, one must look at the results, not at the position of the parties. No one ever suggests that, to evaluate the Singaporean or French legal systems, one should look at the claims brought by private parties before the courts in those countries, as opposed to the decisions actually rendered by those courts. That said, the perception of a need for change is such that we will continue to see fundamental changes in the years to come. For example, the European Union is actively pursuing the establishment of a permanent investment court, in addition to reforms that have already been adopted, such as the introduction of an appeal mechanism. Irrespective of their chances of being adopted by Member States of the EU, the CETA or the EU-Vietnam FTA are perfect examples of this evolution. While a permanent investment court is not necessarily a bad idea, it needs to be adopted and implemented on a truly global basis and not in a fragmented manner. I also think that those who value this type of reform underestimate its social cost.

In the field of commercial arbitration, the major challenge is to avoid excessive standardisation. A certain level of harmonisation of arbitral proceedings is welcomed in that a proceeding would be conducted in a similar manner regardless of where it occurs. On the other hand, standardisation means that the same procedural features would be adopted for every case irrespective of its size, complexity or nature. Increasingly, arbitrators are proposing their standard form of "Procedural Order No. 1" at the beginning of the case; they just need to change the parties' names — that is important, one should never forget to change the names [laughs]. Certain arbitrators also expect the proceedings to always unfold in the same manner, with systematic document production after the first exchange of written submissions, or a post-hearing brief following the final hearing. In those cases, it takes both parties to depart from the arbitrators' proposal. This standardisation is the greatest challenge because it increases the costs and decreases the efficiency and flexibility of the process, which, by the way, is one of the reasons why parties generally resort to arbitration in the first place.

More generally, the greatest challenge is to never forget that arbitration is meant for the users. It is not for the "stakeholders", whoever they may be, to be the judges of how an arbitration should unfold. Arbitration is ultimately a dispute resolution mechanism meant for the parties and tailored by the parties.

14. Do you prefer acting as arbitrator or counsel and why?

I enjoy both. The exercise is very different in nature for each activity. As counsel to a disputing party, one has to determine the strategy of a case and structure it in an optimal manner, having in mind the ultimate goal, namely prevailing in the case. As arbitrator, one has to view and assess the case in an objective manner and reach a decision that is fair through a process that itself is fair and compliant with due process. It is a different type of gratification.

As to the criticism you hear in certain quarters about perceived conflicts of interests due to what is now commonly referred as "double hatting", I think such criticism is entirely misguided. First of all, I do not believe that there is any conflict in exercising both activities at the same time. In fact, the mix makes practitioners better at what they do in each of these roles. In particular, arbitrators who are or have been counsel have a much better sense of what a
The party may expect from the process and how this translates in terms of fairness. Second, this is yet another aspect of the standardisation phenomenon, which is that you should choose once and for all one of these functions. I think this goes against the spirit of arbitration, for which the parties should be free to select the arbitrator(s) they see fit. The parties expect experienced arbitrators who know the field or industry at play, who can understand the stakes and who respect and appreciate parties’ and counsels’ constraints. At the same time, if diversity (by gender, ethnicity, geography or generation) is today a highly appreciated value, and if one needs to enlarge the circle of those who act as arbitrators — which in my mind is an absolute necessity — I do not see how the system can promote this value and these goals by excluding from arbitrator appointments the younger and more diverse generation of practitioners and, more generally, all of those who act as counsel. Are we expecting that they drop their practice and wait until they get arbitrator appointments? From a purely economic perspective, the pool of arbitrators cannot rejuvenate and breathe if you expect arbitrators to be full-time arbitrators. Finally, the notion that a person acting in his or her capacity as arbitrator somehow uses that function to promote the interests of his or her clients is a misperception. From a purely practical standpoint, what value as a precedent would a decision have before that tribunal?

That said, the value of any arbitrator is a function of his or her reputation and, first and foremost, his or her ethical reputation. In this respect, it is not acceptable for an arbitrator to drop a case midway because another business opportunity arises. Ensuring that transparency and the disclosure requirement are satisfied at all times is also a key consideration in this type of situation. It is for the parties (or, in case of disagreement, the appointing authority) to assess, in full knowledge of the circumstances, whether or not they wish to entrust someone with the task of adjudicating their dispute.

Finally, I remain a true academic. In that capacity, I like to reflect on the system and on the many fascinating issues raised by arbitration law, which is an increasingly complex field. I also tremendously enjoy teaching and sharing my research and experience with my students.

15. What are some of the challenges you see facing young lawyers who wish to establish themselves as arbitration practitioners and what advice would you give to them?

This is a difficult question. International arbitration is a hugely specialised field. As a result, I think it is important to start in arbitration directly so as to specialise, learn and be trained early on, rather than rotate from other practices. You can now study arbitration in school and I think that is a great thing.

That said, I would caution against specialisation in only arbitration law. Young lawyers who aspire to practice international arbitration on a full time basis must be aware that, in every arbitration case, pure arbitration questions may make up only a small fraction of the issues that need to be resolved. The rest will be company law, contract law, mergers and acquisitions, oil and gas, etc. As a result, having training or practical experience in other fields may also be very useful.

Finally: distinguish yourself from the rest. Over time, maybe within international arbitration, find a niche. If you become a lawyer and maybe you are interested in, say, numbers and economics, you can develop a sub-specialisation, for instance, quantum – a niche within a niche.
Lesotho sets aside award before the Singapore High Court

by Darius Chan, Ascendant Legal LLC

In a 172-page judgment, the Singapore High Court in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited* [2017] SGHC 195 (*Lesotho*), set aside an investor-state arbitration award rendered against Lesotho after an extensive review of international investment jurisprudence.

This was the second investor-state matter that had confronted the Singapore courts following *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 (*Sanum*).

Similar to *Sanum*, the dispute in *Lesotho* had no connection to Singapore other than the fact that, with the benefit of parties’ submissions, the Tribunal in *Lesotho* had decided on Singapore as the seat of arbitration.

**Background**

In *Lesotho*, the investors contended that their mining leases in Lesotho, a member of the Southern African Development Community (SADC), had been unlawfully expropriated between 1991 and 1995.

The SADC was established by the SADC Treaty. Under the SADC Treaty, a regional tribunal was established to hear disputes regarding adherence to and interpretation of the SADC Treaty. In 2006, SADC signed a Protocol on Finance and Investment which granted protections to investors. Under Annex 1 to the Protocol, investors could commence international arbitration against signatory States if the dispute arose after 16 April 2010. The precise scope of the arbitration agreement in Annex 1 to the Protocol extended to “disputes between an investor and a State Party concerning an obligation of the [State] in relation to an admitted investment…after exhausting local remedies”.

In June 2009, the investors commenced a claim before a SADC tribunal constituted under the SADC Treaty and a Protocol on Tribunal in the SADC. However, that SADC tribunal was dissolved by resolution at a summit of the SADC before the claim could be heard.

In response, the investors commenced arbitration against Lesotho in 2012, this time before the Permanent Court of Arbitration (PCA) under Annex 1 to the Protocol. The investors alleged that Lesotho had breached its obligations under the SADC Treaty after 16 April 2010 by contributing to, or facilitating the shuttering of the SADC tribunal, without providing alternative means of recourse.

By a majority, the PCA Tribunal rendered an award in favour of the investors, and directed the parties to constitute a new tribunal to hear the expropriation claims. Lesotho applied to the Singapore courts to set aside the award on the basis that the PCA Tribunal lacked jurisdiction and/or the award exceeded the scope of the submission to arbitration.

**Singapore High Court’s decision**

The Singapore High Court, applying a *de novo* standard of review, set aside the award in its entirety under Article 34(2)(a)(iii) of the Model Law. Among other things:

1. The Court disagreed with the Tribunal that the investors’ right to submit disputes to the SADC tribunal qualified as an “investment” under Annex 1.

2. The Court disagreed with the Tribunal that the dispute before the PCA Tribunal involved an “obligation of the [State] in relation to” the investors’ right to submit disputes to the SADC tribunal.

3. The Court disagreed that the investors had exhausted local remedies.
There were at least three take-away points for readers.

1. The first point concerned whether Lesotho had invoked the correct grounds to set aside the award.

The Court, following a previous decision, held that Article 16(3) of the Model Law did not apply to an award that dealt with the merits of the dispute, however marginally. Additionally, the Court rejected the investors’ reliance on various textbooks for the proposition that Article 34(2)(a)(iii) of the Model Law was only applicable in cases concerning excess of jurisdiction (rather than the absence of any jurisdiction at all). The Court clarified that any argument concerning the existence and validity of the arbitration agreement belonged to the specific province of Article 34(2)(a)(i). On the other hand, any argument concerning the scope of the Tribunal’s jurisdiction, as in the present case, belonged to the province of Article 34(2)(a)(iii).

2. The second point concerned the definition of “investment”. Readers would immediately appreciate that the question of what qualified as an “investment” has attracted much ink in Bilateral Investment Treaties (BIT) jurisprudence. Typically, “investment” is widely defined to mean “every kind of asset, including ...”. In this case, the Court placed significant weight on how the definition of “investment” in this case was narrower; an “investment” means “the purchase, acquisition or establishment of productive and portfolio investment assets, and ... includes ...”.

Readers would also recall the case of White Industries Australia Limited v India, where the Tribunal, citing Mondev v USA, Chevron Corporation v Ecuador and Frontier Petroleum Services v Czech Republic, held that awards made by tribunals arising out of disputes concerning investments made by investors represented a “continuation or transformation of the original investment”. Such awards “constitute part of the investor’s original investment”, being a crystallisation of its rights.

By dint of reasoning, the investors’ argument in this case was that the mining leases created a bundle of rights which were protected, and that bundle included “secondary rights to seek remedies”. The majority of the Tribunal in Lesotho accepted the investors’ argument. However, the Court was not persuaded, reasoning that the purported “secondary right” was not reciprocal with the investors’ contractual obligations under the mining leases; the investors’ right of recourse to the SADC Tribunal arose much later in 2001 when the Protocol on Tribunal in the SADC entered into force.

Yet, at the same time, the Court observed that it did not matter whether an “investment” arose before or after the entry into force of Annex 1 to the Protocol. If that were the case, it is suggested here that, even if the investors’ right of recourse to the SADC Tribunal arose only in 2001, that would not ipso facto preclude that “secondary right” from forming part of the bundle of rights, that would, in turn, qualify as an “investment” for the purpose of Annex 1 to the Protocol.
3. The third point concerned the exhaustion of local remedies.

Applying Articles 14 and 15 of the ILC Draft Articles on Diplomatic Protection on the basis that they were reflective of customary international law, the Court held that the local remedies to be exhausted must be reasonably available to provide effective redress. In the Court’s view, whether local remedies have been exhausted ought to be referenced with reference to the shuttering dispute, and not the underlying expropriation claim.

The Court accepted that Lesotho’s domestic courts recognised a tortious claim for pure economic loss, known as an “Aquilian” action. Although Lesotho identified an Aquilian action as a potential remedy, in the words of the Court, “what was less clear or even unclear [was] whether such an [Aquilian] action [was] available in a case such as this”.

Consequently, what was noteworthy for readers was that this issue had been ultimately decided based on the burden of proof. The investors bore the burden of establishing that they had exhausted local remedies. To discharge this burden, the investors had to, in the words of the Court, adduce “evidence positively demonstrating” that an Aquilian action was unavailable or ineffective with reference to the shuttering dispute. With the Court recording that the investors had acknowledged that no steps had been taken in Lesotho’s legal system regarding the shuttering dispute, this would have been a tall order.
India has long been regarded as an unappealing centre for arbitration, be it as the seat of arbitration or as the place for final enforcement of the arbitral award. The Indian judiciary is often said to be over-interfering in matters of arbitration and enforcement. In the last decade, Shylock would have had a hard time enforcing his rights to his money and claiming a pound of Antonio’s flesh. The Indian courts would not have shied away from reopening and rehashing proceedings which had already happened before the Duke of Venice, a twist in the tale that would have made Shakespeare rewrite the famous climax and made Portia’s wit of little consequence. While this reputation may have been well-deserved in the past decade, the ground reality has since seen a galactic shift. India’s legislature and judiciary have together taken upon themselves to ensure this course correction.

In this article, we bust the myth of India’s recalcitrance in respect of the enforcement of foreign awards.

The various steps in enforcement of a foreign award are illustrated below:
A. The ever-shrinking scope of resisting enforcement of foreign awards in India

The legislature and judiciary have restricted the grounds for refusing the enforcement of a foreign award to only established grounds under Section 48 of the Arbitration and Conciliation Act 1996 (Act) and, in keeping with the views of arbitrarily-progressive jurisdictions, have held that executing courts cannot review the award on merits.

Some (the authors included) would even argue that under the present regime, it is easier to enforce a foreign award in India than a domestic award.

i. Foreign-seated awards – no longer open to challenge in India

The myriad of challenges to enforcement of foreign awards in India had become a nightmare for parties seeking enforcement in India. The uncertainty associated with enforcement of foreign awards reached its peak in Bhatia International\(^1\), which held that Indian courts had jurisdiction in international commercial arbitrations, regardless of the seat of the arbitration. The resulting jurisprudence saw Indian courts not only refusing enforcement, but even setting aside foreign awards.

The time was ripe for the proverbial hero to emerge and save foreign-seated arbitrations from the unwelcomed interventions by Indian Courts. In September 2012, a five-judge bench of the Honourable Supreme Court of India delivered its much celebrated decision in BALCO\(^2\) which ousted the jurisdiction of Indian courts in a foreign-seated arbitration. Post BALCO, foreign awards cannot be challenged in India.\(^3\)

ii. “Patent illegality” no longer a ground for resisting enforcement of foreign awards

The introduction of the test of “patent illegality” to the already infamous ground of “public policy” as interpreted in ONGC v. Saw Pipes\(^4\), meant that enforcement of a foreign award in India could be challenged on the basis that the foreign award was contrary to the substantive law of India or in contravention of contractual terms. However, such determinations ought to be in the sole remit of the arbitrator.

After almost a decade, the scope of challenge was restricted in Shri Lal Mahal Ltd. v. Progetto Grano SPA\(^5\) (Shri Lal Mahal Ltd), wherein “public policy” under Section 48(2)(b) of the Act was narrowly interpreted and recourse for challenging enforcement of foreign awards, under the ground of “patent illegality”, was abolished.

The pro-arbitration shift in the judicial mindset could also be gleaned from the fact that in the Supreme Court judgment in Shri Lal Mahal Ltd., the Honourable Justice R.M. Lodha overruled his earlier ruling in Phulchand Exports Limited v. O.OO. Patriot\(^6\), where he had decided that a party could resist enforcement of a foreign award on grounds of “patent illegality”).

As the statute reads today, even domestic awards would not be vitiated on grounds of being patently illegal in India-seated international commercial arbitrations.\(^7\)

---

\(^2\) BALCO v. Kaiser Aluminium (2012) 9 SCC 552
\(^3\) However, this judgment could only be applied prospectively to arbitral agreements executed after 6 September 2012 (i.e. the date of the judgment in BALCO).
\(^4\) (2003) 5 SCC 705
\(^5\) (2014) 2 SCC 433
\(^6\) (2011) 10 SCC 300
\(^7\) Arbitration and Conciliation Act 1996, section 23(2A)
iii. A foreign award need not be stamped under the Indian Stamp Act

A domestic award may be refused enforcement, if it had not been adequately stamped in accordance with the laws of India. However, resisting enforcement of a foreign award on the ground that it was not stamped, has been rejected as a frivolous ground for delaying and obstructing enforcement of foreign awards (following the case of Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd\(^9\)).

iv. Intention to arbitrate was paramount

In a recent appeal, the Supreme Court upheld the finding of the Bombay High Court that in a foreign-seated arbitration (and resultant award), an arbitration agreement that was not signed would not be a ground for refusing enforcement of the award.\(^9\) In construing arbitration agreements, the court preferred to give primacy to the intention and conduct of parties, over the mandate of the parties’ signatures required in the agreement.

v. Burden of proof on the resisting party

Similarly, in a recent ruling\(^10\), the Bombay High Court placed a “higher burden on [the] party resisting enforcement of giving necessary proof which stands on higher pedestal than evidence”. In contrast, the party seeking enforcement of a foreign award was only expected to produce necessary evidence.

vi. No third party or the Government could object to enforcement of a foreign award

With the Supreme Court taking the lead in a consistent pro-enforcement approach of foreign awards, the High Courts have also been keeping up with the pace, with the High Court of Delhi being the harbinger in this respect. In NTT Docomo Inc. v. TATA Sons Ltd\(^11\), the Delhi High Court allowed enforcement of a London Court of International Arbitration (LCIA) award, after rejecting the Reserve Bank of India’s (RBI) objections that the underlying terms of settlement (wherein the Indian entity, Tata Sons, was required to pay $1.17 billion to NTT Docomo, a Japanese company) would be against the public policy of India. The Delhi High Court held that since RBI was not a party to the award, it could not maintain any challenge to the enforcement of the award.

vii. Reciprocating countries for enforcement of foreign awards outnumbered the ones for foreign judgments

48 countries have been notified by the Central Government of India as “reciprocating countries” under the New York Convention, while only 12 nations have been recognised as reciprocating countries under Section 44A of the Code of Civil Procedure for the execution of foreign court judgments. In respect of court judgments emanating from the remaining countries, the parties seeking execution would have to file a suit in India and place in evidence the underlying foreign judgment.

B. The legislative intent: Arbitration and Conciliation (Amendment) Act 2015

Consistent with the pro-enforcement approach adopted by Indian courts, the recent legislative changes to the Act have, through the Arbitration and Conciliation (Amendment) Act 2015, clarified the extent to which a foreign award could be said to be in conflict with the public policy of India. Subsequent to these amendments, only the following cases amount to violation of “public policy” under Section 48 of the Act:

i. the making of the award was induced or affected by fraud or corruption, or was in violation of section 75 or section 81 of the Act; or

ii. the award was in contravention with the fundamental policy of Indian law; or

\(^8\) (2009) 163 DLT 391 (Del)
\(^9\) Govind Rubber v Louis Dreyfus Commodities Asia P. Ltd. (2015) 13 SCC 477
\(^10\) Integrated Sales Services Ltd., Hong Kong v. Arun Dev s/o Govindvishnu Uppadhyaya & Ors. (2017) 1 AIR Bom R 715
\(^11\) 2017 SCC OnLine Del 8078
iii. the award was in conflict with the most basic notions of morality or justice.

The tests for these grounds have been summed up by the Supreme Court in *Associate Builders*. It has been further clarified that “the test as to whether there was a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.” Such amendments were strong measures in response to the perception that India was liberal in its treatment of challenges to enforcement of arbitral awards on grounds of “public policy”.

Furthermore, subsequent to these amendments, even after the making of the arbitral award, a successful party entitled to seek enforcement of the award, could, pending enforcement of the foreign award, apply to the court under section 9 of the Act.

C. Protectors of the realm: commercial courts in India

The Indian legal system continued to face criticism on the time taken in disposal of cases. Thus, with the objective to accelerate disposal of high value commercial disputes, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 (*Commercial Courts Act*) was enacted.

Under this regime, specialised commercial courts were set up for speedy and effective dispute resolution of all commercial disputes. The Commercial Courts Act also provided that proceedings emanating from arbitrations (both foreign and domestic) would also be heard and disposed of by the Commercial Courts if they involve commercial disputes. The statute had further amended the application of the existing Code of Civil Procedure 1908 to apply to commercial disputes, provided for a mechanism for speedy resolution, and a much needed requirement of appointing only judges who have had experience in dealing with commercial disputes.

“Change is the end result of all true learning”

The liberalisation of policies and clarified norms of doing business in India had made investments more lucrative and attractive. However, to sustain India’s growing global credibility, India needed to deal with the elephant in the room.

In 1982, His Lordship Justice D. Desai, of the Supreme Court of India had, in relation to the then existing arbitral laws, observed that “the way in which the proceedings under the Act were conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep.” India has since come a long way. In the face of the legislative and judicial changes, and the evident shift in the judicial mindset, India’s current reputation of being an enforcement unfriendly jurisdiction is largely undeserving and a remnant of the past decade— the Bhatia Raj. India is no longer emerging as a pro-arbitration and pro-enforcement jurisdiction. It has already arrived. Sit-up and take notice!

---


13 See *Arbitration and Conciliation Act 1996*, Section 2(2).


15 *Commercial Courts Act*, section 10

16 *Commercial Courts Act*, sections 4, 5

17 *Guru Nanak Foundation v Rattan Singh* (1982) SCR (1) 842
In April 2010, Professor Jan Paulsson delivered his inaugural lecture as holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law, where he expressed the view that the practice of unilateral appointments (or nominations) of arbitrators was a moral hazard which should be removed.¹ This lecture sparked debate amongst commentators as to whether the practice of unilateral appointments of arbitrators should be abolished.

Seven years on, arbitration users have responded to Professor Paulsson’s call for the practice of unilateral appointments to be removed with a resounding “no”. Far from being removed, the practice of unilateral appointments remains standard practice in international arbitrations.

Whether the practice of unilateral appointments should be allowed to remain in international arbitrations turns on two key questions:

- Whether unilateral appointments undermine the legitimacy of the arbitral process and its outcome in the eyes of the parties; and
- Whether there are sufficient safeguards to protect against the risk of partiality and bias by unilaterally appointed arbitrators.

### Unilateral appointments enhance, not undermine, the legitimacy of the arbitral process and its outcome

Professor Paulsson had argued that “unilateral appointments were inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators”. According to Professor Paulsson, unilateral appointments had resulted in the appointment of arbitrators who were not trusted by both sides. On the other hand, where each arbitrator was chosen jointly by the parties or appointed by a neutral institution, each arbitrator “[was] invested with an equal measure of confidence and an equal claim to moral authority”.

However, it would seem doubtful that an equal measure of confidence and an equal claim to moral authority (even if that could be achieved by joint appointment or appointment by a neutral institution, which is itself doubtful) would necessarily translate to greater confidence in the tribunal or in the arbitral process as a whole.

As observed by a number of commentators, party involvement in the appointment of arbitrators have ensured that the parties were invested in the creation of the tribunal, legitimising the decision-making process in the eyes of the parties.²

The following are some examples which indicate a clear preference by arbitration users for unilateral appointments.

- According to the 2012 International Arbitration Survey by Queen Mary University of London, 76% of the respondents (comprising private practitioners, in-house counsel and arbitrators) said that for three-member tribunals, they preferred for the two co-arbitrators to be selected by each party unilaterally. This method of selection was favoured by all three categories of respondents, but notably more by private

---

¹ See http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.
³ http://www.arbitration.qmul.ac.uk/docs/164483.pdf
practitioners (83%) as compared to in-house counsel (71%) and arbitrators (66%).

• According to the 2015 International Arbitration Survey by Queen Mary University of London, respondents ranked "selection of arbitrators" as the fourth most valuable aspect of arbitration (with the three most valuable aspects of arbitration (in decreasing order) being "enforceability of awards", "avoiding specific legal systems/national courts" and "flexibility”).

• Under the LCIA Rules, the default rule was that all arbitrators were selected and appointed by the LCIA Court, unless the parties agreed otherwise. The LCIA statistics showed that parties agreed to depart from the default rule in the majority of cases: of the 469 appointments made by the LCIA in 2016, only 197 (or 39% of the total appointments) were selected by the LCIA Court (with the other appointments selected by the parties or co-arbitrators).

Professor Paulsson himself had also recognised that the practice of unilateral appointments was "popular, in the sense of being perceived as a valuable opportunity on which many parties insist".

As such, if arbitration users considered the practice of unilateral appointments to be a valuable aspect of arbitration and had insisted on it, how then can it be said that this practice had undermined the legitimacy of the arbitral process or its outcome?

Further, in a later article published in 2013, Professor Paulsson appeared to have no objection to unilateral appointments even though parties had expressly stipulated that there should be unilateral appointments. Professor Paulsson clarified that his proposal was merely that the "default rule (to be applied whenever the parties have neither jointly nominated the entire tribunal nor expressly stipulated that there were to be unilateral appointments) should be that all arbitrators were to be appointed by the neutral appointing authority".

This appeared to be a shift from Professor Paulsson’s original position. Consider the following situations where three arbitrators were to be appointed (and the parties were properly advised):

• There was an express agreement to arbitrate under rules which default procedure was that each party was entitled to nominate an arbitrator (for example, the ICC Rules or the SIAC Rules) and no express agreement by the parties to the contrary.

• There was an express agreement to arbitrate under rules which default procedure was that all three arbitrators were to be appointed by the institution (for example, the LCIA Rules) and an express agreement, contrary to the default procedure, that each party was entitled to nominate an arbitrator.

Was there really a material difference between these two situations, such that unilateral nominations in the former situation should not be allowed whilst unilateral nominations in the latter situation should be allowed? An agreement to arbitrate under particular rules is an agreement on the default procedure of appointment under those rules. In both situations,

---

4 http://www.arbitration.qmul.ac.uk/docs/164761.pdf
the parties, with the benefit of legal advice, had agreed that each party be entitled to nominate a co-arbitrator. Indeed, in both situations the principle of party autonomy dictated that the parties' agreement that the co-arbitrators were to be selected by unilateral nominations must be upheld.

**Safeguards against bias and partiality**

Professor Paulsson had also argued that parties would exercise their right of unilateral appointment with the overriding objective of winning, which would result in "speculation about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side".

In a similar vein, Professor Martin Hunter had written, "when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias." This was admittedly an honest and largely accurate description of the approach which many take when looking for a party-appointed arbitrator.

However, there had been little (beyond anecdotal) evidence of a material risk of bias and/or partiality by party-appointed arbitrators. In any event, contrary to Professor Paulsson’s view that existing checks and balances were inadequate to guard against the "menace" of unilateral appointments, there had been sufficient safeguards (both formal and informal) to protect against the risk of bias and partiality by party-appointed arbitrators:

- First, most institutional rules required arbitrators to disclose any circumstances that would give rise to doubts as to the arbitrator’s impartiality and/or independence.

- Second, most institutional rules allowed parties to challenge and remove an arbitrator, if circumstances existed that gave rise to doubts as to the arbitrator’s impartiality and/or independence.

- Third, an award may be challenged if the tribunal had failed to act fairly and impartially (under the English Arbitration Act) or if
a party had been denied its right to be heard (under the UNCITRAL Model Law and most national arbitration laws).

• Lastly and importantly, the other members of the tribunal were helpful and effective checks against any improper behaviour by a party-appointed arbitrator which may not be apparent to the parties (for example, attempts by a party-appointed arbitrator to improperly influence the decision of the tribunal during the tribunal’s deliberations). It was unlikely that such behaviour would go unnoticed by the other members of the tribunal (unless such behaviour was so subtle as to go unnoticed, in which case its effect on the decision of the tribunal would be highly questionable). It was not simply that the other members of the tribunal may exclude a biased and partial arbitrator from its deliberations. Indeed, such exclusion would itself be improper. Rather, arbitral rules could provide for a procedure by which members of the tribunal may bring to the attention of the parties and/or the institution any improper behaviour which constituted impermissible bias or partiality by any member of the tribunal. The parties and/or the institution could then take the appropriate steps to remedy the situation.

**Conclusion**

There was admittedly some truth to the criticisms which have been levelled against the practice of unilateral appointments. However, abolishing the practice of unilateral appointments would be an overreaction to these criticisms. It would also undermine the principle of party autonomy, which was undeniably the cornerstone of international arbitration. We should have a little more faith in the decision of parties on their preferred method of constituting a tribunal, the ability of arbitrators to abide by their duties, and the safeguards which protect the arbitral process from impermissible bias and partiality.
More Transparency in International Commercial Arbitration is a Good Thing

by Amy Seow, Rajah & Tann Singapore LLP
1st Runner Up of the YSIAC Essay Competition 2017

1. This essay argues that the need for increased transparency in international commercial arbitration (ICA) must be evaluated from the viewpoint of the consumers of ICA, namely the disputing parties. Increased transparency is supported by two arguments, the first being the increased accountability of the arbitrators, and the second being the role which ICA plays in perpetuating the rule of law with predictability and certainty, allowing commercial actors to organise their commercial dealings. The most practical and effective means by which increased transparency in ICA proceedings can be achieved is by publishing ICA awards which identify the arbitrators who contributed to the award, but which redact information that could identify the disputing parties.

2. To assess why transparency would be useful to ICA and at what standard this transparency should be pitched, we must examine the needs of those for whom ICA exists to serve. The ICA industry is funded and sustained by its consumers, the parties. These are the corporations and individuals who have chosen to submit their disputes to arbitration rather than national courts. The directing minds behind the parties are commercially minded business people and in-house counsel. Realistically speaking, the parties are principally interested in their own commercial advantage, the success of their own cases, and the eventual amount of damages which they would either gain or be out of pocket for. Without the parties, there would be no need for ICA. The parties’ needs and concerns are therefore paramount in the assessment of the relationship between transparency and ICA.

3. It should also be recognised that if disputing parties want greater transparency than what ICA is able to offer, there are other options available. In the Singapore International Commercial Court (SICC) for instance, proceedings are by default held in open court, and judgments published in full with no automatic concession to confidentiality of the parties. The SICC, and not the parties, appoints the presiding judges. Parties may prefer such transparent proceedings, whether because of a mistrust of arbitration proceedings or because they wish to have certain rights vindicated openly and publicly. Indeed, the Committee formed to study the viability of establishing the SICC in its 2013 report recognised that transparency in dispute resolution is attractive to some parties, and would be important to the branding of the SICC. In the light of such options, the question remains as to whether there are benefits that transparency would offer to parties who nevertheless prefer recourse to ICA.

4. Increased transparency is sometimes considered inimical to confidentiality in ICA. Confidentiality is unquestionably one of the key factors that attracts users to arbitration. 62% of all respondents to the Queen Mary University of London 2010 International Arbitration Survey said that confidentiality was “very important” to them, the highest available metric for response. Another 24% said that confidentiality was “quite important”, the second highest metric. The 2010 survey also found that if arbitration was not a confidential process, only

---

2 Queen Mary University of London School of International Arbitration, 2010 International Arbitration Survey: Choices in International Arbitration, at p 29. The survey does not appear to be limited to international commercial arbitration.
35% of respondents would not use arbitration. This suggests that confidentiality is not the “but for” causation factor behind parties’ use of arbitration and that there were other reasons, such as the ability to appoint arbitrators, and the absence of appeals, that attracts users to arbitration.

5. That said, a more recent edition of the survey in 2015, which broke certain results down according to the profiles of the respondents, found that in-house counsel listed “confidentiality and privacy” as the second most valuable characteristic of arbitration (as compared to this being the fifth most valuable characteristic across the pool of respondents generally, which included inter alia private practitioner counsel, arbitrators and academics). It is clear that to its users, confidentiality remains a very attractive feature of ICA.

6. Calls for increased transparency in ICA typically revolve around three strands of argument. These were well articulated in a 2015 speech made by Lord Thomas, Lord Chief Justice of England and Wales, which strongly criticised the opacity of ICA proceedings. First, the argument from the development of the common law, in that arbitration diverted decision making from the courts, reducing the potential for the courts to develop and explain the law, transforming the common law from a living instrument to a dead “ossuary”. Second, the argument from accountability, in that the closed doors of arbitration insulate arbitral decisions from public and Parliamentary scrutiny and legislative revision. Third, the argument from the rule of law, in that unpublicised decisions prevent the wider public, markets and market actors from understanding the development of legal principles, their rights and obligations, and organising their affairs and business arrangements accordingly. Lord Thomas’ eventual recommendation was for the courts to play a greater role in international arbitration. This could be done for example if parties to arbitration apply to court for determination of preliminary points of law.

7. As to confidentiality, Lord Thomas said that this is “overrated” in ICA, and practically speaking, an illusion. Lord Thomas said that information leaks in the markets and amongst industry players typically means that the identity of parties involved in arbitration and the subject

---

3 Queen Mary University of London School of International Arbitration, 2010 International Arbitration Survey: Choices in International Arbitration, at p 30.
4 Queen Mary University of London School of International Arbitration, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration at p 6.
5 The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration, 9 March 2016 at paras 11(b), 11(c), 22.
matter of the arbitration is no secret; and copies of awards may even be obtained through the appropriate connections. Furthermore, when the award requires recognition and enforcement, entry into the public arena occurs. Yet, regardless of the extent to which Lord Thomas’ observation is in fact true, that is not a reason for doing away with the normative value of confidentiality in ICA and the reassurance this principle would offer to the arbitrating parties. The majority of ICA proceedings are unlikely to be of such great interest as to support industry-wide information leaks, and keeping the principle of confidentiality in place would ultimately dissuade widespread dissemination of information about particular ICA proceedings.

8. The first strand of argument for increased transparency, which advocates for the development of the common law through incremental decision-making, comes from a place of altruism and concern for the direction of the common law. Lord Thomas in the same speech asked if parties would be prepared to waive arbitration in cases where there were significant points of general interest, and to appreciate that the right sort of case involving significant legal issues might be better determined in a court. According to Lord Thomas, the wider interests of their industry and the common law in general would be better served by having more issues resolved in court and the law thus developed and clarified. Commercially minded arbitrating parties however, are unlikely to take up this mantle of selflessness. Bifurcating issues in dispute for resolution between the courts and an arbitration tribunal will increase the time and cost necessary to the resolution of a dispute. Furthermore, parties who had opted for arbitration in the first place are unlikely to agree to the courts’ jurisdiction if there is no commercial reason to do so. This argument is also concerned only for common law parties and practitioners, and would be largely irrelevant to parties and practitioners involved in proceedings governed by civil law.

9. This first argument therefore, is not necessarily a strong basis for greater transparency in ICA proceedings from the parties’ point of view. The concerns it reflects however, can nevertheless be addressed by the publication of ICA awards, which would allow for arbitral decision making to contribute to the evolution of common law principles. Lord Neuberger in 2015 also recognised the need for the development of the common law, but considered that the publication of arbitral awards would advance this purpose. Even if such decisions have no precedential or binding effect on common law courts or other arbitral tribunals, the intellect and reasoning behind these decisions would be available for persuasive value and open to analysis by academics and commentators. Lord Thomas in a later speech in 2017 moderated his stance on the relationship between arbitration and the courts, and recognised that the publication of arbitral awards could also advance the development of the common law.

10. The second argument for increased transparency in ICA speaks to the increased accountability of the arbitrators. Lord Neuberger argued that this would enhance the quality of arbitral decisions, as arbitrators would feel greater pressure to get the law right, given that their decisions would be

---

6 Ibid at para 38.
7 Ibid at 58.
subject to public scrutiny just as court judgments are. This concern was echoed by Justice Steven Chong in 2015, who also considered that increased transparency would raise the standard of arbitrator ethics.

11. This second argument is one that recognises the needs of commercial parties. Given the high costs of arbitration and the lack of appeal from arbitral decisions, the parties would want the eventual decision to be of as high a quality as possible. Commercial parties therefore have a real interest in evaluating how arbitrators decide and perform, as was also recognised by Sir Bernard Rix in an article written in 2006.

12. Moreover, it should not be forgotten that by the parties’ sides are their counsel, on whom the parties depend for advice on the appointment of arbitrators and the conduct of the arbitral proceedings. It is squarely in the interests of counsel to have visibility on how arbitrators make their decisions, what arguments would persuasive, and what types of evidence would be decisive in certain types of disputes. It would also be in the interests of both counsel and client to be able to trace the lineage of jurisprudence produced by a particular arbitrator under consideration for potential appointment in arbitration proceedings.

13. This dovetails with the third argument for increased transparency in ICA, which stems from the rule of law and the need for predictability and certainty in the law to guide commercial behaviour. Legal counsel also advise their clients on their commercial dealings before disputes arise, and counsel would be better able to advise their clients if they have the resources to evaluate how arbitral tribunals are likely to interpret certain commercial clauses or arrangements, or decide on the consequences of particular commercial events such as in situations of force majeure. These resources are to be found in the publication of arbitral awards, which would give counsel insight into the reasoning of an arbitral tribunal.

14. The above shows that from the point of view of consumers of ICA, arguments from the accountability of arbitral tribunals and the rule of law provide the best basis for increasing transparency in ICA proceedings. Additionally, the publication of ICA awards would satisfy the concerns addressed by both arguments. The next question that arises is whether the parties need to be convinced in this regard.

15. In the 2010 edition of the Queen Mary survey referred to above, respondents were asked about the key aspect of arbitration that they thought should be kept confidential. 69% of respondents wanted to keep the “full award” confidential, which was the third most popular aspect after the “amount in dispute” (76%), and the “pleadings and documents submitted” (72%). Notably however, the survey found that some respondents wanted access to more awards, in order to better understand the arbitral process and evaluate previous decisions of potential arbitrators, but nevertheless recognised that this might be inconsistent with their desire for the confidentiality of their own awards.

16. The survey results show that parties want access to arbitral awards because they see the benefits of having access to information that would allow...
them to evaluate the quality of arbitrators and obtain the full value of the money which they would be spending on the arbitral proceedings. Yet, and as reflects the typical self-interested commercial party, they would not want to have their own awards published. What is necessary for the parties to understand however, is that the publication of awards does not necessarily compromise the confidentiality for which they sought recourse to arbitration. The redaction of party names, other identifying information, and commercially sensitive information from awards before publication would preserve confidentiality as a matter of practice and maintain that beneficial feature of arbitration for the parties.

17. The balance in this regard is perhaps properly struck by requiring party consent before an award is published. The major institutional rules differ in this regard. The International Chamber of Commerce (ICC) publishes redacted awards without necessarily obtaining party consent, three years after the arbitration proceedings close; whereas the Hong Kong International Arbitration Centre (HKIAC), London Court of Arbitration (LCIA), and Singapore International Arbitration Centre all (SIAC) require party consent before awards can be published. In the light of the clear concern that parties for the confidentiality of the proceedings, party consent is probably an significant requirement for publication. Finally, none of the major arbitration institutions currently identify the arbitrators in the published awards. It would, as argued above, benefit both parties and counsel, and enhance the quality of arbitration proceedings if the individual arbitrators are identified in the published decisions, such that the quality of arbitrator output could be evaluated and taken into account when counsel advise their clients.

18. In sum, increased transparency is undoubtedly of benefit to ICA for reasons of both the increased accountability of the arbitrators, and also to strengthen the role of ICA in the rule of law. Publication of redacted arbitral awards, which identify the arbitrator(s) who contributed to the award, would go a long way to advancing these benefits of transparency to ICA.

---

| 17. The balance in this regard is perhaps properly struck by requiring party consent before an award is published. The major institutional rules differ in this regard. The International Chamber of Commerce (ICC) publishes redacted awards without necessarily obtaining party consent, three years after the arbitration proceedings close; whereas the Hong Kong International Arbitration Centre (HKIAC), London Court of Arbitration (LCIA), and Singapore International Arbitration Centre all (SIAC) require party consent before awards can be published. In the light of the clear concern that parties for the confidentiality of the proceedings, party consent is probably an significant requirement for publication. Finally, none of the major arbitration institutions currently identify the arbitrators in the published awards. It would, as argued above, benefit both parties and counsel, and enhance the quality of arbitration proceedings if the individual arbitrators are identified in the published decisions, such that the quality of arbitrator output could be evaluated and taken into account when counsel advise their clients. | 18. In sum, increased transparency is undoubtedly of benefit to ICA for reasons of both the increased accountability of the arbitrators, and also to strengthen the role of ICA in the rule of law. Publication of redacted arbitral awards, which identify the arbitrator(s) who contributed to the award, would go a long way to advancing these benefits of transparency to ICA. |