ASIAN INTERNATIONAL ARBITRATION CENTRE
(MALAYSIA)

# ALTERNATIVE DISPUTE RESOLUTION

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# Preface

We are proud to introduce our first publication of the AIAC Alternative Dispute Resolution Journal: Issue 1, May 2022. This first issue feature five articles, augmenting a variety of topics on ADR.

As an independent and neutral arbitral institution, the AIAC has been promoting effective dispute resolution mechanism services for the last 40 years. As it takes center stage on innovative products and services in ADR, the COVID-19 outbreak accelerates the digital transformation for continuous development and dynamics in ADR field, in providing facility services of up-to-date technology and continuous commitment in knowledge-sharing in the field of ADR.

In line with the AIAC's commitment towards the development of ADR and with the aim to provide an accessible platform for ADR knowledge-sharing in a professional and scholarly standard, the AIAC is dedicated to lead the industry by providing accurate, comprehensive and a reliable compendium of ADR Journals.

The AIAC ADR Journal pursues unique and different perspectives from ADR practitioners, academicians, jurists, and young practitioners from around the world, with the intention of developing a diverse platform for discussion and to serve as a research tool on ADR. The AIAC ADR Journal will cover a wide range of pertinent and contemporary issues for the ADR fraternity and will be available online. These will include, amongst others, international and domestic arbitration, mediation, construction adjudication, Islamic finance and domain name dispute resolution.

The AIAC takes this opportunity to invite ADR practitioners, academicians including research scholars, young practitioners, jurists and experts from both within and outside the legal community to submit manuscripts on interdisciplinary fields of ADR. We are hopeful that the AIAC ADR Journal will attract more ADR practitioners to share their views on evolving ADR practices by documenting their experience in the AIAC ADR Journal.

The AIAC ADR Journal is subject to a comprehensive double-blinded peer-review process by members of the AIAC ADR Journal Peer Review Board before they are published. This ensures that the chapters have undergone a comprehensive and thoughtful analysis that will serve as a reference guide for all ADR stakeholders.

I thank each author for their time in putting their individual chapters together. I also wish to convey my heartfelt gratitude to the members of the AIAC ADR Journal Peer Review Board for sharing their vast knowledge, skills and experience in reviewing the articles for the AIAC ADR Journal. My appreciation also goes out to the Editorial Team for their commitment in seeing this inaugural publication through.

I sincerely hope that the AIAC ADR Journal will benefit every reader as a vade mecum for our stakeholders across the world.

**TAN SRI DATUK SURIYADI BIN HALIM OMAR**
Director of the AIAC

# Table of Contents

## ARTICLES

# Mandatory Mediation in Malaysia – Be My Guest

## Removing 'Alternative' from Alternative Dispute Resolution

*by Long Chay Jo • MH Law*

## ABSTRACT

*Mediation was once described as an 'invited but unwelcome guest' in litigation. In Malaysia, mediation is invited into the judicial system through, among others, promotion under the auspices of the Bar Council of Malaysia. In addition, various contracts, particularly standard construction contracts incorporate the availability of mediation as an option before commencement of other forms of dispute resolution. Prominence of mediation is even elevated during the pandemic, through Section 9 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 Act 2020 and the establishment of COVID-19 Mediation Centre in November 2020. However, the voluntary nature of mediation renders it nothing more than a toothless tiger. Its importance is reduced to mere court-annexed or court-assisted mediation and adopted as a matter of procedure rather than a pragmatic solution.*

*Scholarly arguments to introduce mandatory mediation is not novel. Here comes the unwelcome part. Opposition finds that such a movement is synonymous with a hindrance to access to justice and making mediation mandatory appears oxymoron given the supposedly voluntary nature of mediation. The purpose of this paper is to examine the merit of such arguments and whether mandatory mediation has a place in Malaysia by referring to outside jurisdictions. This paper further aims to look at potential reforms to better implement mediation as part of the dispute resolution process.*

**KEYWORDS**

Voluntary Mediation, Mandatory Mediation, Court-annexed Mediation, Selective Mandatory Mediation, Quasi-mandatory Mediation, COVID-19 Mediation, Dispute Resolution, Future of Mediation.

## 1 The Need for an Alternative

> *"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough"*

As early as 1850, Abraham Lincoln had advised fellow lawyers to adopt a more amicable approach in dispute resolution.[1] Avoiding litigation is advantageous on many accounts. Firstly, and as acknowledged in the excerpt, it saves time and costs for parties. Secondly, it maintains good-working relationships which is particularly important in a commercial context. This has world-wide and long-standing application. To illustrate, the People's Republic of China (PRC) upholds the principle of encouraging transaction; whereby parties are encouraged to maintain continuous contractual obligations through negotiation and fair revision to avoid litigation. In fact, this is ingrained in the legal system of PRC which prefers an internal model of law (*li*) rather than rules of law (*fa*). The sentiment for amicable dispute resolution as opposed to litigation is succinctly reflected in the old Chinese proverb: "*Avoid a court of law while alive and never go to hell after death*".[2] Thirdly, an overwhelming volume of litigation has already overburdened the capacity of the courts. This has resulted in a huge backlog of cases. Continuous addition of litigation potentially handicaps the judicial system. To put matters into perspective, Justice Azahar bin Mohamed (as His Lordship then was) identified that in 2009, there were 6,490 commercial cases pending in the Kuala Lumpur High Court. Most of the cases had been delayed for more than 5 years and some were even 10 to 12 years old.[3] Even with the implementation of various court reform programs and the utilisation of technology, the backlog of cases in court did not appear to have improved. The monthly statistic reports released by kehakiman.gov[4] (Statistic Report) shows continuous balance carry forward cases in the region of 50,000 cases throughout 2019, with December 2019 recording carry forward of 56,276 cases. Implementation of the movement control order in 2020 and 2021 to curb the spread of Coronavirus (Covid-19) has further increased the backlog

1 RP Basler, 'Abraham Lincoln's Notes for a Law Lecture' (Abraham Lincoln Online, 2018) <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm#:~:text=Persuade%20your%20neighbors%20to%20compromise,will%20still%20be%20business%20enough.> accessed 16 February 2022

2 HW Chan, *Amicable dispute resolution in the People's Republic of China and its implications for foreign-related construction disputes* (Construction Management and Economics 1997) 15, 539 – 548.

3 A. Mohamed, *Court reform programmes: the Malaysian experience* (Amicus Curiae, Journal of the Society for Advanced Legal Studies 2015) Issue 102

4 Office Of The Chief Registrar Federal Court of Malaysia, 'Statistics Civil and Criminal Cases' <https://www.kehakiman.gov.my/en/statistics> accessed 16 February 2022

of court cases. Not only were the courts closed for physical proceedings[5], but the requirements to adhere to strict standard operating procedures, testing and quarantine further derailed the efficacy of litigation. Remember, as hackneyed as it may sound, *justice delayed is in fact, justice denied*. This is particularly so when urgency is of utmost importance, or when the cash-flow of the plaintiff prevents lengthy litigation.

## 2 Implementation of Mediation in Malaysia and Its Efficacy

In recognition of the statistics on the backlog of cases in Malaysia, the Malaysian judicial system has taken cognizance as early as 2005, that mediation is an alternative to clear such backlogs.[6] This prompted the increased use and promotion of court-annexed or court-assisted mediation. This simply refers to a mediation session whereby the presiding judge (or in most situations, other officers of the court) takes an active role to mediate parties towards settlement, after their legal action has been filed in court. Active encouragement for utilisation of mediation can be seen through Practice Direction No. 5 of 2010[7] (Practice Direction) which came into effect on 16 August 2010. Accordingly, courts may give directions to facilitate parties towards settlement through mediation. Parties are given the choice of: (1) judge-led mediation or (2) appointment of a mediator jointly agreed by parties. The function of Bar Council Malaysian Mediation Centre (MMC)[8] and the benefits of mediation are explained at length as well. In response to the Practice Direction, a seminar was conducted in the presence of, among others, the then Chief Judge of Malaya with Judge John Clifford Wallace on 1 October 2010. Aside from a reminder on the benefits of mediation and its advantages over litigation, there are a few pertinent points from this seminar to highlight: (1) direction for mediation may be given by the court during pre-trial case management under (the then) *Order 34 rule 4 of Rules of High Court 1980*[9] but mediation may be suggested at any stage, even when trial has commenced; (2) there are cases which may be settled more easily through mediation, such as road accident cases, defamation,

5 Ahmad Naqib Idris, 'Physical civil, criminal cases to be postponed, civil cases to be conducted online', *The Edge Market*, (Kuala Lumpur, 29 May 2021) <https://www.theedgemarkets.com/article/physical-civil-criminal-cases-be-postponed-civil-cases-be-conducted-online> accessed 16 February 2022

6 Aniza Damis, 'Go Mediate!: Mediation may be ordered to clear cases', *New Straits Times* (Kuala Lumpur, 18 June 2007) <https://www.malaysianbar.org.my/article/news/bar-news/news/go-mediate-mediation-may-be-ordered-to-clear-cases> accessed 15 February 2022

7 Practice Direction No. 5 of 2010 is superseded by Practice Direction No. 4 of 2016 which contains similar contents

8 MMC has been promoting the adoption of mediation in dispute resolution since its establishment on 5 November 1999 under the auspices of the Malaysian Bar Council

9 Under the current *Rules of Court 2012*, *Order 34 rule 2 (2) (a)* allows direction for mediation to be given in accordance with any practice direction for the time being issued

matrimonial disputes, commercial and contractual disputes; (3) the judge hearing the case should not be the mediator unless agreed by parties; (4) the mediator's main role is to facilitate amicable settlement between parties and does not function to protect the interests of any parties; and, (5) the mediator may take the '*sign them up*' approach[10] or the '*let me tell you*' approach.[11] To better provide guidance on the procedure for court-annexed mediation, reference may be made to the *Rules of Court Assisted Mediation 2011*[12] (*RCAM 2011*). In brevity, *RCAM 2011* suggests that cases such as personal injury, family dispute, and goods sold and delivered cases should be automatically referred to mediation. The roles, functions, limitations, and authorities of a mediator are similarly explained. One pertinent aspect in *RCAM 2011* worth highlighting, as it should be, is that consent and the voluntary nature of parties' involvement in mediation are vital.

Up until this point, promotion of mediation takes the form of active encouragement, directions, and guidelines. One learned author noted that mediation would be more popular if it is placed on a statutory footing.[13] This cannot be too far from the truth. Whilst *RCAM 2011* provides guidelines for court-assisted mediation, *Mediation Act 2012* (*MA 2012*) is enacted to provide guidance for mediations led by independent third-party mediators. *MA 2012* came into effect on 1 August 2012 and does not deviate from established understanding on the procedure and purpose of mediation. However, there are certain aspects of legal issues which are not within the purview of *MA 2012*, such as judicial review, proceedings involving questions on the provisions of the Federal Constitution or election petitions under *Election Offences Act 1954*.[14] *MA 2012* provides procedures for the appointment[15] and termination of mediator[16], role of mediator,[17] confidential and privileged nature[18] of mediation sessions. It is also made clear that mediation does not stop commencement of litigation, nor does it operate to stay the litigation proceeding.[19] Mediation may be concluded through a settlement agreement, which shall be

10 Under this approach, a mediator may intervene by reminding the parties to seek advice from their lawyer or seek for legal representation on a specific matter. Other than that, the mediator does not take any step further to consult or provide advice and allow parties to discuss and settle on their own terms

11 Under this approach, a mediator may intervene to remind parties, and even give advice to parties on legal issues that may have been overlooked or misunderstood

12 *The Rules of Court Assisted Mediation 2011* was posted in the official website of the High Court in Sabah and Sarawak by The Honourable Justice Tuan Ravinthran a/l Paramaguru. Nonetheless, they can be referred to as guidelines for all mediators, including those in the Peninsular Malaysia. The page is accessible at <https://judiciary.kehakiman.gov.my/portals/web/home/article_view/0/330//1>

13 SW Lee, *Mediation in Construction Contracts: Mediation, Adjudication, Litigation and Arbitration in Construction Contracts,* (Current L.J.,2006)

14 Mediation Act 2012, s 2

15 Mediation Act 2012, s 7

16 Mediation Act 2012, s 8

17 Mediation Act 2012, s 9

18 Mediation Act 2012, s 15 and s. 16

19 Mediation Act 2012, s 4(2)

binding on parties and may be recorded as a form of consent judgment before the court.[20] In essence, the five golden threads running through the mediation may be summarised as follows: (1) voluntary; (2) private; (3) communications are confidential and 'without prejudice'; (4) if mediation is successful, settlement agreement or consent judgment may be entered; and, (5) if mediation is not successful, cases will be continued in court.[21]

The implementation of mediation transcends beyond directions of the court or legislative provisions. Perhaps as an acknowledgement of the advantages and time-cost efficacy of mediation, parties have incorporated mediation as a form of dispute resolution in contractual agreements. For example, the standard form of contracts for the construction field has incorporated various means of alternative dispute resolution (ADR). Mediation is one of them. Reference may be made to Excerpt 1 below.

**EXCERPT 1**

Clause 34.0 of PAM Contracts 2018 (With Quantities)

| | | |
|---|---|---|
| | 34.0 | Mediation |
| Mediation under PAM rules | 34.1 | Upon the written agreement of both the Employer and Contractor, the parties may refer any dispute for mediation. if the parties fail to agree on a mediator after twenty one (21) Days from the date of the written agreement to refer the dispute to mediation, any party can apply to the President of Pertubuhan Akitek Malaysia to appoint a mediator. Upon appointment, the mediator shall initiate the mediation in accordance with the current edition of the PAM Mediation Rules or any modification or revision to such rules |
| Mediation shall not prejudice the parties' rights to adjudication or arbitration | 34.2 | Prior reference of the dispute to mediation under Clause 34.1 shall not be a condition precedent for its reference to adjudication or arbitration by either the Contractor or Employer, nor shall any of their rights to refer the dispute to adjudication under Clause 36.0 or arbitration under Clause 37.0 of these Conditions be in any way prejudiced or affected by this clause. |

As highlighted in the above, Covid-19 has disrupted the court's operation and inevitably derailed the progress of court cases. This is one of the many detrimental impacts of Covid-19. The pandemic has spread across the world within months of it being discovered.[22] Various movement control measures implemented by

20 Mediation Act 2012, s 14
21 *Alex Nandaseri De Silva v Sarath Wickrama Surendre [2016] 7 MLJevi 52* (HC).
22 Covid-19 originated in Wuhan, China in late December 2019

the Government around the world to curb the spread of the virus has caused serious business disruption and economic nosedive. Malaysia is not spared. In August 2020, Malaysian economy has contracted 17.1% in the second quarter of 2020.[23] To cushion the impact of Covid-19 in Malaysia, the *Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 Act 2020* (*Covid Act 2020*) is enacted. Mediation is again welcomed as a form of ADR. Disputes arising from parties' inability to perform any contractual obligation[24] may be settled by way of mediation.[25] In tandem with *Covid Act 2020* and as an enhanced promotion for utilisation of mediation –

(1) The Government of Malaysia will bear the cost of mediation for eligible individuals, microenterprises, and small medium enterprises.[26] In this regard, it is reported that no less than RM29 million has been allocated for such mediation service to the public.[27] [28]

(2) In a media statement dated 11 November 2020,[29] the Prime Minister's Department announced the establishment of specific centre to oversee mediation proceedings commenced under the Act: Pusat Mediasi COVID-19 (PMC-19). PMC-19 commenced from 16 November 2020 and governed by the PMC-19 Mediation Rules. The dispute sum referred to PMC-19 must not exceed RM500,000.00. There are only nine types of contractual disputes falling within the purview of PMC-19. This includes construction, events, professional services, and tourism.

Despite active encouragements, it is regretful to note that mediation is not fully utilised in Malaysia. In a research conducted between 2000 and 2008, it is revealed that less than 1% of mediation cases was on construction (Ismail et al., 2009). It is agreeable that the data may not be very relatable given the lapse of time. Surely,

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23 NST Business, 'Malaysia's economy shrinks 17.1pct on Covid-19 impact' *New Strait Times Online, New Strait Times* (Kuala Lumpur, 14 August 2020) <https://www.nst.com.my/business/2020/08/616534/malaysias-economy-shrinks-171pct-covid-19-impact> assessed 19 February 2022

24 Such obligations have to be within the categories of contracts enlisted in the Schedule of the Act

25 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 Act 2020, s 9

26 Shannon Rajan and Laarnia Rajandran, 'An Overview of Mediation under the Pusat Mediasi Covid-19' (*SKRINE Alert*, 20 November 2020) <https://www.skrine.com/insights/alerts/november-2020/an-overview-of-mediation-under-the-pusat-mediasi-c?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 16 February 2022

27 Cost of mediation was borne by the Government of Malaysia for a period of one year from 1 October 2020 to 30 September 2021

28 Martin Carvalho, Hemananthani Sivanandam and Rahimy Rahim, 'Special mediation centre to be set up to help resolve Covid-19 related contractual disputes' *The Star* (Kuala Lumpur, 25 August 2020) <https://www.thestar.com.my/news/nation/2020/08/25/special-mediation-centre-to-be-set-up-to-help-resolve-covid-19-related-contractual-disputes> accessed 17 February 2022

29 Takiyuddin Haji Hassan, 'Kenyataan Media Pusat Mediasi Covid-19 (PMC-19)' (*Official Website Legal Affairs Division (BHEUU) Prime Minister's Department*, 11 November 2020) <http://www.bheuu.gov.my/index.php/en/media/press-statement/1890-kenyataan-media-pusat-mediasi-covid-19-pmc-19> accessed 20 February 2022

mediation has picked up significantly since then. However, statistics on mediation for family disputes between 2012 to 2018 in the Kuala Lumpur High Court (KLHC) and Shah Alam High Court do not show hopeful progress either.[30] In 2017, out of 406 family dispute cases registered in KLHC, only 30 went through mediation. Slight improvement was observed in 2018, whereby 113 out of 536 registered cases went through mediation. This is unsurprising given the challenges that the mediation process has to deal with: (1) difficulty in obtaining parties' consent to mediate; (2) parties' opinion that mediation is less affirmative or lacks finality; and, (3) lack of trained or expert mediator who is able to handle different variety of mediation cases with sufficient experience and knowledge. As a form of an ADR, we see a common theme in all practice directions, rules, or legislations: the parties' involvement has to be voluntary. Such mutual consent is hard to obtain, and it is even harder to be hopeful that parties have given their consent with a genuine intention to settle. This dampens the efficacy and prospect of mediation. This has an unfortunate effect which renders mediation a white elephant or an invited but unwelcome guest.[31]

## 3 Mandatory Mediation: The Dispute Revolution

As discussed under Part 2, mediation in Malaysia has two-limbs: (1) that it is an *alternative* to dispute resolution; and, (2) participations have to be wholly voluntary. The component of voluntariness has been repeated on numerous occasions but the discussion on this component becomes crucial if mediation can truly be mandatory. In opposition, it had been argued that mandatory mediation creates a barrier to access to justice.[32] This notion of *access to justice* may encompass a wider spectrum of social and economic justice but for the present context, it refers to the man-made justice that one should expect from a civil justice system. Simply put, it is for the disputants to have their day in court. Indeed, civil justice system does more than just dispute resolution. For an instance, it aims to ensure justice and orderly working of the society and dispute resolution is achieved merely as a by-product.[33] For this reason, mandatory mediation may not be able to achieve the functions of the civil justice system. The outcome of mandatory mediation may be *just* but it is not equivalent to *justice* within the context of a civil justice system.

30 HL Nair, *Mandating Mediation in Resolving Family Disputes in the Malaysian Civil Courts* (Legal Network Series, 1 LNS(A) cxviii 2021)

31 Jennifer Winestone, 'Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process in Their Adversarial Systems' (*Winestone Mediation,* 2 February 2015) < https://www.mediate.com/articles/WinestoneJ4.cfm#_ftn23> accessed 19 February 2022

32 C. A. McEwen. L. William, *Legal Policy and Access to Justice Through Courts and Mediation* (Ohio State Journal on Dispute Resolution: Volume 13, Issue 3 1998)

33 S Vettori, *Mandatory mediation: An obstacle to access to justice?* (African Human Rights Law Journal 2015) 355-377

Firstly, mediation is a private and confidential process. This is illustrated in the *MA 2012*. Accordingly, there will be no publication of precedents which are required to establish societal norms and legal certainty. Secondly, when parties are *made* to mediate, they may push through the process with the sole intention of a settlement or to simply end the lengthy, dreadful process by taking a huge compromise. This can hardly be *just*. However, this notion of justice within the meaning of *access to justice* has been challenged. Scholars have raised questions on the capacity of courts and formal adjudicatory processes to delivery justice. On the contrary, *justice* is the empowerment of individuals to be able to make decisions pertaining to their disputes by being given the liberty to identify conflicts which are significant to them. Decisions made by in the course of mediation can be purely personal and subjective and very often, detached from legal rights and entitlement. As such, when reference is made to *access to justice*, it must involve the access to available procedures for ADR such as mediation and not merely to the courts. It has to be emphasised that mandatory mediation does not permanently block disputants from proceeding or returning to the court. For this reason, there is a fallacy to the argument that mandatory mediation amounts to an obstacle to access to justice. This will be further discussed with reference to two jurisdictions below: United Kingdom and Australia.

## A. *United Kingdom*

Lord Justice Dyson agreed that parties may be strongly encouraged to mediate but to refer unwilling parties to mediation would amount to an obstruction to their right of access to the court. This is a violation of *Article 6 of the European Convention on Human Rights* (*ECHR*).[34] Almost 10 years later, Lord Justice Dyson's remark was revisited by Sir Alan Ward[35] who questioned if it was about time to review that rule. Such restrain certainly did not sit well with Sir Anthony Clarke, who suggested that the remark on the contravention of *Article 6 of ECHR* might have been wrong. Accordingly, direction for mandatory mediation did not necessarily require parties to waive their right to a fair trial.[36] It is necessary to appreciate that the role of ADR has evolved greatly within a decade. It is convenient to start by analysing on the nuance of *compelling parties to mediate* and *compelling parties to settle*. Mandatory mediation is the former. Parties are at liberty to enter into any form of settlement as they wish; or otherwise, walk out of the mediation process. It is not an obstruction to justice, but a suspension of access. At most, it is an extra step that parties have to take in their pursuit of *justice.*

34 *Halsey v Milton Keynes General NMS Trust* [2004] EWCA Clv 576

35 *Wright v Wright Supplies Ltd* [2013] EWCA Civ 234

36 David Pope, 'Mediation: Alternative dispute revolution', (*Law International Edition*, 17 September 2008 <https://www.law.com/international-edition/2008/09/17/mediation-alternative-dispute-revolution/?slreturn=20220123061347> accessed 26 February 2022

The power of the court to compel mandatory mediation is revisited by Lord Justice Moylan in 2019,[37] pertaining to the effect of *Rule 3.1(2)(m) of the Civil Procedure Rules 1998* which empowered the court to conduct, among others, hearing for an Early Neutral Evaluation (ENE). In deciding whether the court was empowered to direct for ENE despite the unwillingness of parties, the Court of Appeal considered the remark of Lord Justice Dyson. However, it was concluded that the wording of *Rule 3.1(2)(m)* did not contain express requirement of consent before ENE might be ordered. Accordingly, ENE did not prevent parties from having their day in court if they were not able to reach for a settlement during ENE. For this reason, parties' access to court was not obstructed in any ways. Before overzealous reliance is placed on this judgment in support of mandatory mediation, it has to be highlighted that the court was more concerned on the interpretation of the power enshrined under *Rule 3.1(2)(m)* and the court's attitude in dealing with ENE as part of the court's process. Arguably, this is distinct from the generality on the obligation of (unwilling) parties to go through mandatory mediation.

Perhaps a giant leap in confirming the footing of mandatory mediation is the publication of a report on compulsory ADR by the Civil Justice Council on 12 July 2021 (CJC Report).[38] There are pertinent points under the CJC Report to highlight–

(1) Procedural rules or directions from the court which require parties to attempt ADR do not violate *Article 6 of ECHR*.[39]

(2) Parties may be compelled to go through ADR by a judge through the exercise of the judge's case management power; or through an automatic requirement before commencement of litigation.[40] It may be appropriate to include ADR as a pre-condition before claim can be issued.

(3) The civil justice system in England & Wales has incorporated procedural rules to engage ADR as an additional step in litigation.[41] Such procedural rules involve certain extent of compulsion. For examples, (1) ENE which allows an independent third party to express his or her opinion on the subject matter; (2) financial dispute resolution appointment, a compulsory procedure which requires parties in family disputes to sit before District Judge to facilitate potential settlement; and, (3) the new RTA small claims protocol which requires claimant in road traffic accidents for claims below £5,000.00 to go through an offer-to-settle procedure before initiating a claim.

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37 *Lomax v Lomax (as Executor of the Estate of Alan Joseph Lomas, Deceased)* [2019] EWCA Civ 1467

38 United Kingdom Courts and Tribunals Judiciary 'Mandatory (alternative) dispute resolution is lawful and should be encouraged', (*Judiciary.UK*, 12 July 2021) <https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/> accessed 17 February 2022

39 Civil Justice Council Compulsory ADR Report (June 2021) paras 10

40 Civil Justice Council Compulsory ADR Report (June 2021) paras 18 and 19

41 Civil Justice Council Compulsory ADR Report (June 2021) paras 54

(4) Other jurisdictions within Europe have incorporated various forms of compulsory ADR.[42] For examples: (1) in Italy, certain disputes such as family matters would require parties to attend an initial mediation session before pursuing their claims; and, (2) the *Greek Mandatory Mediation Scheme 2020* requires mandatory initial mediation session for, among others, family disputes and disputes arising from contracts with a valid mediation clause.[43]

(5) Compulsory ADR has to be given more emphasis. Parties who refuse to follow directions for compulsory ADR may be sanctioned or even have their claims struck out.[44]

Even though there is yet a universally applicable provision on mandatory mediation, we can observe that the essence or effect of mandatory mediation has manifested in various means and forms. At least from the face of the CJC Report, United Kingdom is prepared to give due recognition to the significance of mandatory mediation in the civil justice system. The readiness to impose sanction for failing to attend mandatory mediation shows the bold approach that United Kingdom is taking to prevent the procedure from being a mere toothless tiger.

## B. *Australia*

It is convenient to start by highlighting that mediation has always been well-received in Australia. The emphasis has always been on the positive outcome that mediation can achieve. Justice Bryson[45] described the benefit of mediation as: (1) comparatively low in cost, (2) being able to maintain good relationship between parties; and, (3) peaceful resolution of conflict is advantageous to the public. Instead of questioning if mediation restricts access to justice, Australia promotes mediation as a form of access to justice.[46] In 2008, the Attorney-General noted the barrier to justice in the context of civil court and tribunal proceedings and questioned the National Alternative Dispute Resolution Advisory Council (NADRAC) on ways to promote greater use of ADR. In addition, instead of questioning if mediation has to be voluntary, Australia prefers to put the focus on whether the outcome is voluntary. It is argued that '*there is a difference between coercion into mediation*

42 Civil Justice Council Compulsory ADR Report (June 2021) paras 55

43 Vassiliki Koumpli, 'Greece: Institutionalizing Mediation Through Mandatory Initial Mediation Session (Law 4640/2019)' (*Kluwer Mediation Blog,* 20 January 2020) <http://mediationblog.kluwerarbitration.com/2020/01/20/greece-institutionalizing-mediation-through-mandatory-initial-mediation-session-law-4640-2019/#:~:text=The%20Greek%20Mandatory%20Mediation%20Scheme,court%20judgment%20for%20its%20resolution.> accessed 19 February 2022

44 Civil Justice Council Compulsory ADR Report (June 2021) paras 63

45 *Browning v Crowley* [2004] NSWSC 128

46 For instance, the Access to Justice Advisory Committee, Access to Justice: An Action Plan (Commonwealth of Australia, 1994) recommended ADR to be utilised as a manner to improve access to justice as it provides wider spectrum of available remedies and cost efficient

*and coercion in mediation*'.[47] This echoes the earlier discussion on the importance of understanding the nuance of *compelling parties to mediate* and *compelling parties to settle*.

The utilisation of mediation in Australia dated back in the 1980s, through voluntary services provided by Community Justice Centres established in New South Wales. The services were reported to produce promising results, which resulted in an exponential increase on the use of mediation.[48] Following thereto, legislations have implemented mediation as a procedure in different types of disputes or claims. For an example, as early as 1994, the *Farm Debt Mediation Act* requires a creditor to provide written notice to the defaulting farmer of the creditor's intention to take enforcement action of a farm mortgage and the availability of mediation in respect of the farm debts.[49] Wordings of provisions may even expressly highlight the nature of a mandatory mediation. *Section 26(1) of the Civil Procedure Act 2005* clearly provides that the court may order for mediation either *with or without the consent* of the parties to the proceedings concerned. Practice directions issued by the Supreme Court in New South Wales further reinforce that the power of the court to direct parties to attend mediation does not depend on the consent of the parties.[50] To this end, Justice Macready refers to Justice Hamilton's comments[51] which perfectly summarise the role of mediation, where His Lordship said that there are circumstances whereby the court may decline to order for a mediation. However, the court is empowered to order for mediation against the wishes of parties and there are instances in which mediations are successful. Parties may be unwilling to go for mediation as they fear that this may be indicative of weakness but yet, engage in successful mediation when the process is conducted. It is for this reason that the court has to give parties this opportunity to reap such benefit and to allow parties to deal with the issues at hand in a more intimate and confidential platform.[52]

Upon such context, mediation is no longer an extra procedural step to take in litigation. Various legislations provide that mediation has to be attempted before civil proceeding may be instituted. A good reference on this would be the *Family*

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47 Q. Anderson, Dorcas, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program* (Cardozo Journal of Conflict Resolution Vol. 11.2 Spring 2010)

48 M. Hanks, *Perspective on Mandatory Mediation* (UNSW Law Journal Volume 35(3) 2012)

49 The Law Society of New South Wales, Factsheet on Farm Debt Mediation <https://www.lawsociety.com.au/sites/default/files/2018-04/FARM%20DEBT%20MEDIATION.pdf> accessed 19 February 2022

50 Supreme Court of New South Wales, 'Practice Note SC Gen 6 – Mediation', (*Practice Note,* 10 March 2010 <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fc1007ce9d398164ca25824b00017416?OpenDocument> accessed 19 February 2022

51 *Remuneration Planning Corporation Pty Ltd v Fitton* [2001] NSWSC 1208

52 Justice R Macready, '*Construction Law Disputes In The Supreme Court of New South Wales – Issues and Innovations'* (Australian Construction Law Newsletter #107, March / April 2006)

*Law Amendment (Shared Parental Responsibilities) 2006*. *Section 60I* requires parties in dispute to make a *genuine effort* to resolve the dispute through family dispute resolution before an order under the said act may be applied for. The requirement of making *genuine effort* towards settlement pre-action is then incorporated in *Section 3 of the Civil Dispute Resolution Act 2011 (CDRA 2011)*. As to what amounts to *genuine steps*, examples provided under the CDRA 2011 include notifying the other person on the dispute and offer to negotiate and to attempt resolution through ADR.[53] Statements on the steps taken to resolve the dispute have to be filed upon commencement of a claim[54] which may be taken account by the court in the exercise of direction in awarding costs.[55] Lawyers are also obligated to advise and assist clients to take such *genuine steps*[56] failing which, costs may be ordered against the lawyer personally.[57] At this juncture, it is interesting to note that the award of costs or sanctions is a useful tool to compel parties to adopt mediation or other form of ADR. In a mechanism widely referred to a quasi-mandatory mediation, court may retrospectively penalise party through adverse costs order if any party does not institute pre-action mediation. The concept behind this mechanism is understandable. It changes the basic understanding in the allocation of costs in court (usually, costs to follow event) to a wider discretion depending on the attitude and procedural compliance of the parties.[58] When the parties are at risk of having to pay high costs, they may be encouraged to participate in mediation. This is irrespective as to whether they end up being the eventual winner or loser. Such discretion on allocation of costs is nothing new and has been implemented in other jurisdiction. Notably, *Rule 44.2(5) of the Civil Procedure Rules 1998* of the United Kingdom which allows the court to take into account the conduct of parties in any relevant pre-action protocol in the allocation of costs.

## 4 Mandatory Mediation in Malaysia – Are We Ready?

A questionnaire was conducted in January 2022 on the prospect of mandatory mediation in Malaysia (Questionnaire). There were 33 respondents (Respondents), in which 44.5% of the Respondents had more than 10 years of experience in the legal profession. A quick summary that can be drawn from this Questionnaire is as follows –

53 Civil Dispute Resolution Act 2011, s 4
54 Civil Dispute Resolution Act 2011, s 6
55 Civil Dispute Resolution Act 2011, s 12
56 Civil Dispute Resolution Act 2011, s 9
57 Civil Dispute Resolution Act 2011, s 12(2)
58 P. McNamara, '*Mandatory and quasi-mandatory mediation*', (Australian Bar Review (ABR) Volume 47 Part 3) 215.

(1) 100% of the Respondents believe that mediation plays an important role in dispute resolution but unfortunately, 97% believe that mediation has been under-utilised as an ADR in Malaysia.

(2) When asked if mandatory mediation is ideal in Malaysia, 27.3% of the Respondents believe that it is not ideal. Of these Respondents, 55.6% believe that mandatory mediation is not ideal due to the under-developed mediation process or structure in Malaysia. However, 88.9% of these Respondents believe that mediation may be made mandatory for certain type of disputes (and not for all types of disputes). Family disputes are believed to be the most suitable for the implementation of mandatory mediation.

(3) The remaining 72.7% believe that mandatory mediation is ideal. They believe that the main attraction of mandatory mediation is that it can reduce unnecessary litigation. Secondly, it saves time and costs. However, they further opine that it will be an up-hill task to make mediation mandatory in Malaysia given the lack of understanding or appreciation of mediation; and, also (again) under-developed mediation process or structure in Malaysia. When asked on the best way to implement mandatory mediation, 62.5% believe that it should be done through legislative amendments. See Figure 1 below.

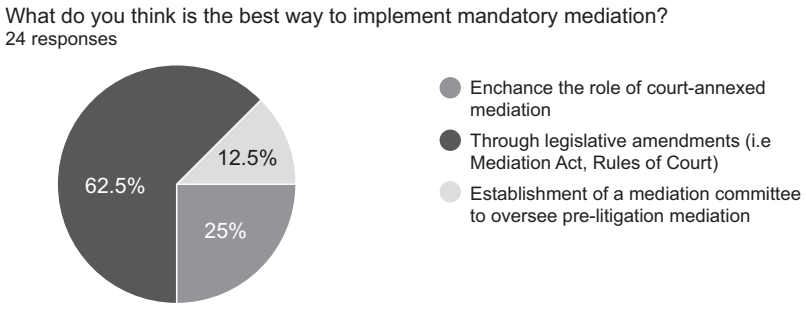


**Figure 1**

(4) In closing, Respondents are asked on the best approach for mediation in Malaysia. A slim majority of the Respondents believe that mediation may be made mandatory for certain classes of dispute only. See Figure 2 below.

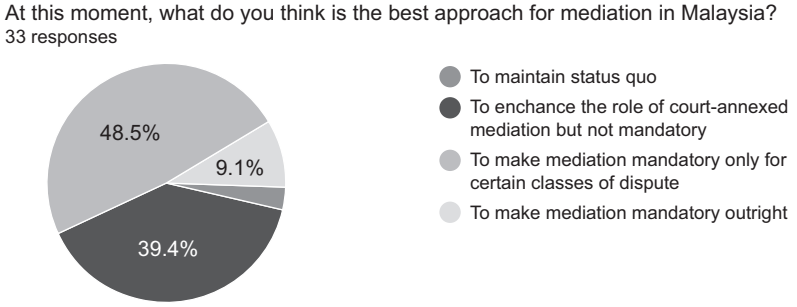


**Figure 2**

(5) Respondent 11 remarked that lawyers do not appreciate the effectiveness of mediation and believe that mediation only assists parties to negotiate on the settlement sum. This is a very restrictive view on the functions of mediation. Respondent 11 further believes that awareness has to be first created amongst lawyers and it is for the lawyers to impress upon their clients on the "*existence of mediation*". The importance of the role played by lawyers is echoed by Respondent 22.

As discussed, mediation may be conducted in Malaysia by way of: (1) a court-annexed mediation whereby the presiding judge or other officer of the court may facilitate as the mediator; or (2) an appointment of an independent third party as mediator, in which event, establishments such as MMC or PMC-19 may be helpful. The concern in this part relates to how mandatory mediation may be implemented in Malaysia. From the analysis of the position in various jurisdictions, it can be concluded that the options may take the following forms (arranged from the lowest to the highest level of coercion).

## A. *Encouragements*

Parties may be encouraged to participate in mediation through practice direction or order of the court during case management stage. As discussed in the above, such encouragements have been adopted and implemented throughout the years. For examples, through the recent Practice Direction No. 4 of 2016 and discretionary power of the court under *Order 34 r. 2(2)(a) of the Rules of Court 2012* (RoC). However, under Practice Direction No. 4 of 2016, it is expressly stated that parties will have to complete a mediation agreement form before mediation may be conducted. This underlying pre-requisite indicates that mediation may not be ordered against the consent of the parties, unlike the position in United Kingdom and Australia. The power of the court in this regard is stifled. Continuation of encouragement for participation in mediation is equivalent to maintaining the status quo and not progressive in the promotion of mandatory mediation in Malaysia. For this reason, it is proposed that encouragement from the court has to be more proactive.

## B. *Honouring contracts with mediation as dispute resolution*

This relates to contractual disputes whereby one of the terms of the agreement refers to mediation as the preferred mode of dispute resolution by the contracting parties. In such instance, the non-defaulting party may not commence litigation against the defaulting party until parties have attempted mediation. The claimant may be required to produce proof of mediation attempts and the reason for failed attempts if litigation is commenced. In the event that the court is not satisfied with the reason for not attempting mediation, or that no proof is submitted at the

commencement of litigation, the court may strike out the proceeding or refer the proceeding to mediation before further directions are given in case management. For this reason, the drafting of the mediation clause becomes crucial. Justice Ramsey[59] identified that for such clause to be enforceable, the process must be sufficiently clear and that there should not be need for further agreement at any stage. This would include clarity on the administrative process for selecting the party to resolve the dispute and payment. Justice O'Farrell in *Ohpen Operations UK Ltd v Invesco Fund managers Ltd*[60] further guided on the importance of clarity. The intended ADR clause has to be clearly expressed to be a condition precedent to court proceedings or arbitration, and not merely an invitation for parties to negotiate in good faith. In that case, the court stayed the proceedings which were commenced in breach of an enforceable dispute resolution agreement.

## C. *Quasi-mandatory mediation*

Parties will not be compelled to mediate but their conduct and refusal to do so will be taken into account at the end of the proceeding in the order of costs. This is particularly essential when parties act unreasonably or conduct themselves with the intention to prolong the matter to the detriments of the opponent or refuse to participate in court-directed mediation without good justification. In fact, the RoC does provide consideration in allocating costs against parties for introduction of issues improperly or unnecessarily[61] and cause delay in the proceedings.[62] However, amendments are proposed to the current drafting of the RoC to expressly allow order of costs to be made against parties who refuse to participate in mediation. Similar to the position in CDRA 2011, costs may also be ordered against lawyers who have failed to advise their clients to consider mediation as a mode of dispute resolution.

## D. *Direction for mediation against parties' consent*

The first three forms of implementation merely involve encouragement with low or negligible level of coercion. Consent is prerequisite before mediation may take place and this has been a consistent element of mediation in Malaysia. The fourth form of implementation removes the element of consent. In the words of Jacqueline Nolan-Haley, there are two forms of mediation consent: '*front-end, participation consent*' and '*back-end, outcome consent*'.[63] The crucial aspect of mediation consent relates to the liberty given to parties to take ownership of their dispute and their right to decide its outcome. This refers to the latter form of consent. Arguably,

59 *Holloway v Chancery Mead Ltd* [2008] EWHC 2495
60 *Ohpen Operations UK Ltd v Invesco Fund managers Ltd* [2019] EWHC 2246
61 Rules of High Court 2012, O. 59 r. 5(2)
62 Rules of High Court 2012, O. 59 r. 5 (2)(c)
63 J. Nolan-Haley, *Mediation Exceptionality* (78 Fordham L. Reb. 1247, 2009)

taking away the *participation consent* will not prejudice the parties in any way. Jacqueline Nolan-Haley points out that even in situations where parties voluntarily agree to participate in mediation, they may not have enough information to make an informed decision, thus, rendering their willingness nugatory in any event.[64] What is more important is the retention of the autonomy in decision making and the flexibility to return to the court after unsuccessful mediation. There are a few recommendations to properly implement this reform. Directions to mediate may come from the judge's own accord. In situation where both parties refuse to mediate, the court would have to take charge. However, in situation where one party is willing to mediate but the other is not, such willing party may issue a notice of intention to mediate and seek for direction from the court. This would require issuance of new practice direction to identify the power of the court to direct mediation against the will of the parties, and potential amendments to RoC to provide specific guidelines on the mediation procedure.

## E. *Pre-action protocol*

Legislative provisions may be amended to require participation of mediation as a **pre-action protocol**. This is the highest form in the implementation of mandatory mediation. As drastic as it may sound, pre-action protocol is no stranger to the jurisdiction of Malaysia. Under *Section 106 of the Law Reform (Marriage and Divorce) Act 1976*, petition for divorce may not be filed unless the petitioner has first referred the matrimonial difficulty to a conciliatory body. Although this appear to be ideal in implementing mandatory mediation, the weakness of this system soon becomes apparent. It has been indicated that the officers who handle the reconciliation procedure are not able to handle them expeditiously and not adequately trained. It is also said that parties attend the session by merely taking them as an additional step towards divorce, and not to achieve reconciliation.[65] Without proper training, adequate knowledge, and awareness on the benefit of mediation, and the common intention to reap such benefit, it may be counter-productive for Malaysia to adopt any mandatory mediation as pre-action protocol. Otherwise, it will only function as additional dead weight to further burden the judicial system.

64 M. Hanks, *Perspective on Mandatory Mediation* (UNSW Law Journal Volume 35(3) 2012)
65 HL Nair, '*Mandating Mediation in Resolving Family Disputes in the Malaysian Civil Courts*' (Legal Network Series, 1 LNS(A) cxviii 2021).

## 5 Conclusion

There is an enormous untapped potential of mediation as a dispute resolution process in Malaysia. Such potential should not be given a restrictive perspective or too focused on the chances of parties reaching an out of court settlement. It has to be appreciated that parties often gain much from a mediation session, regardless of whether they manage to reach for a settlement or otherwise. For an instance, in large and complex matters, parties may be able to reach an agreement on many aspects, thus reducing time and cost at trial. In order to benefit from the advantage of mediation, higher level of coercion in the implementation of mediation has to be adopted. However, before then, there are steps to be taken. Firstly, awareness and knowledge on the prospect of mediation has to be created among the stakeholders, especially the legal practitioners. Secondly, a proper structure of mediation process has to be in place so that public at large is well informed and know what to expect. As we take a look at how mediation is positioned in other jurisdictions, we may find that this process is no longer a form of ADR. In fact, this is not a recent or breakthrough development in the ADR field. It is about time for Malaysia to recognise and adapt to this change.

# Arbitration Agreement – What is the Law?

*by Ir. Lai Sze Ching • Lai Teh Adjudication & Arbitration Chamber Plt*

## ARBITRATION AGREEMENT – WHAT IS THE LAW?

### 1 Introduction

It is common for parties to specify the governing law for the underlying contract in commercial contracts. However it is rarely for the parties to indicate the governing law for the arbitration agreement. This is understandable as the arbitration agreement or arbitration clause is always embedded as one of the terms of the underlying contract. It is reasonable and in fact justifiable to assume that the law for the arbitration agreement is the same as that of the main underlying contract as the parties have chosen that particular law to govern the substantive issues of the contract. There is no reason to choose a different law for the arbitration agreement which is merely one of the clauses in the contract. Therefore, unless there are strong evidences to prove otherwise, logically the parties should have chosen the same law to resolve their disputes via arbitration. However this assumption may not be correct and is subject to challenge when the disputes arise later. Should the governing law follow the governing law for the underlying contract or that of the seat?

There has been some confusion in the past as the courts had adopted different reasonings and approaches to resolve this problem. The Supreme Court of United Kingdom, however, had answered this question affirmatively lately and provided some guidelines in its decisions. This decision will assist the contracting parties when drafting an arbitration clause in their contracts. This paper shall discuss the approaches adopted by the courts from the early days and the grounds of decision by the Supreme Court lately.

## 2 Choice of Law in Commercial Contract

A majority of international commercial contracts will contain choice-of-law or applicable law provisions which will address the laws applicable to the parties' contract. The reasons for parties to include such a choice-of-law clause in the contract are obvious as it provides predictability, certainty, security and efficiency in the performance and interpretation of the terms of the contract entered into by the parties. The said clause will be important when the parties wish to enforce their rights and obligations under the contract later.

There is no much problem if the contracting parties are from the same country and the subject matter is in the same country. The parties will have no problem to agree to adopt the law of the residing country as the governing law for the main contract and also for the arbitration agreement. Afterall the parties are residing in the same country and familiar with the law of the said country. However much uncertainty will inevitably exist when the contracting parties are from different countries where each with its own substantive laws and conflict-of-laws rules. Therefore a contractual provision specifying in advance the applicable law and also the forum in which the disputes shall be litigated or arbitrated is an important precondition in order to provide certainty and predictability of the contracts which are extremely important and in fact absolutely necessary to any business transaction, be it domestic or international transaction. Certainty and predictability are extremely important and essential to contracts entered into by the commercial parties in any business dealings because of the significant differences between each respective national laws.

International arbitration, unlike the domestic arbitration, usually involves more than one system of law or legal rules as the parties are from different countries. In practice, there are at least three systems of laws governing the performance of the contract, namely:

(a) the law governing the substantive issues in dispute in the underlying contract;

(b) the law governing the arbitration agreement and the interpretation and performance of that agreement; and

(c) the law governing the arbitration procedures, also known as *lex arbitri* or arbitration law.

## 3 Law Governing the Arbitration Agreement

A contract which provides for the choice-of-law clause will normally stipulate the laws applicable to the main underlying contract and also the seat of arbitration. If

a seat of arbitration is provided then the law of the seat will govern the procedural laws of the arbitration proceeding. It is rarely that the contract will provide for the governing law for the arbitration agreement. In fact most of the model clause on arbitration in the standard form of construction contracts or as proposed by arbitral institutions do not provide for the law governing the arbitration agreement, such as London Court of International arbitration (LCIA), Singapore International Arbitration Centre (SIAC) and Asia International Arbitration Centre (AIAC). As at to-date, only one major arbitral institution, namely the Hong Kong International Arbitration Centre (HKIAC) proposes a model arbitration clause which provides clearly a law for the arbitration agreement[66].

If there is no provision for the governing law of the arbitration agreement, it becomes necessary to determine the relevant applicable law and legal rules to the arbitration agreement. So what are the choices for the parties to decide which law should apply? Though there may be many other possibilities, the principal choice, in the absence of any express or implied choice by the parties, lies between the law that governs the underlying main contract and the law of the seat of arbitration.

Ascertaining the relevant law applicable to the arbitration agreement is very important because certain matters are not arbitrable in some countries. In China, for example, there are two types of disputes that are expressly stated not to be arbitrable:

(a) Disputes relating to family matters, such as marriage, adoption, guardianship and inheritance; and

(b) Administrative disputes, such as disputes between government agencies or disputes involving a government department in the course of exercising public administrative power.[67]

In Malaysia, the Arbitration Act 2005 expressly provides that disputes may be determined by arbitration "*unless the arbitration agreement is contrary to public policy*".[68]

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66 The model arbitration clause from HKIAC provides:
"*Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
*The law of this arbitration clause shall be ... (Hong Kong law).**
*The seat of arbitration shall be ... (Hong Kong).*
*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).*"

67 Arbitration Law of PRC 1994, Art 3.

68 Arbitration Act 2005, s4.

In addition, it is important to determine the applicable law for the arbitration agreement as it may affect the recognition and enforcement of arbitral award later. In Article II(1) of New York Convention 1958, recognition and enforcement of an arbitration agreement is subject to the condition that the subject matter is "capable of settlement by arbitration". It is pertinent and in fact crucial to apply the relevant law in order to determine the arbitrability.

## 4 Approaches of Ascertaining of the Law of Arbitration Agreement

### A. *Literal interpretation of terms of contract*

There are different approaches to the issue of which law is applicable to the arbitration agreement. In construing the terms of the arbitration agreement, courts will, in the first instance, adopt the literal rule of interpretation, i.e. to give the words the natural meanings that they bear.

The basic legal principle that the courts will adopt is the autonomy of the arbitration agreement and the parties. The autonomy of the arbitration agreement means that the agreement can survive whatever disputes on its validity the underlying contract may have under the doctrine of separability. Therefore, even if one party is challenging and disputing the validity of the contract such as the contract is invalid due to fraud or forgery, the arbitration agreement is treated as a separate contract and it survives even if the underlying contract is not valid. This is also known as doctrine of separability. In this case, if the law for the arbitration agreement is expressly provided, then the courts will give effect to it and enforce the agreement.

However, if the contract is silent on this matter, then the court has to ascertain the parties' intention by the provisions in the underlying contract or the arbitration agreement itself. Though there may be many possibilities, two principal arguments are that the law applicable to the arbitration agreement is either the law of the underlying contract or the law of the seat.

### B. *Law of the underlying contract*

When the law for the arbitration agreement is not expressly stated in a contract, then the court have to resort to determine the law impliedly agreed by the parties as to the arbitration agreement. In this case it is reasonable for a court to conclude that the parties intend to apply the same law for the whole contract, including the arbitration agreement, since the arbitration agreement is only one of many clauses in the contract. Unless proven otherwise, this assumption is reasonable and justifiable. There is no logical reasoning for parties intend to have one system of law for some clauses and the other system of law for the other clauses in the same

contract. Therefore it is reasonable to imply that the law governing the underlying contract should also govern the arbitration agreement. It is logical to deduce that if the parties have not chosen any law to be applied to the arbitration agreement, then there is no reason why shouldn't any other law in which the parties have chosen for the main underlying contract to be the implied choice of law for the arbitration clause?

In fact there is a strong presumption that the law governing the substantive issues of the agreement which contains the arbitration clause also govern the arbitration agreement. Therefore, when determining the implied choice of law of the parties, there is a rebuttable presumption that the law of the main underlying contract applies. This is so because the fair and natural inference is that the parties intended the proper law chosen to govern the substantive contract to also govern the agreement to arbitrate.

In ***Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG***[69] the court when discussing the likelihood of having different systems of law governing the underlying contract, the arbitration agreement and the arbitration proceeding, opined:

> *"Where the laws diverge at all, one will find in most instances that the law governing the continuous agreement [sc. the arbitration agreement] is the same as the substantive law of the contract in which it is embodied and that the law of the reference is the same as the lex fori."*

At page 456, the court stressed:

> *"In the ordinary way, this [the law of the arbitration agreement] would be likely to follow the law of the substantive contract."*

In ***Arsanovia Ltd & Ors v Cruz City 1 Mauritius Holdings***,[70] The Court held that the phrase 'this Agreement is governed by the law of UK' should be interpreted as that the Agreement includes the arbitration agreement shall be governed by the same UK law. At para 22, the Court stated:

> *"[22] …..When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me*

69 [1982] 2 Lloyd's Rep. 446, 455
70 [2012] EWHC 3702 (Comm),

*strongly arguable that that is the ordinary and natural meaning of the parties' express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that these foreign companies are to be taken to have known about the developments in 2008 when they concluded the SHA).*

## C. *Law of the seat of arbitration*

In some cases, the court adopts the approach that if there is no express choice of law for the arbitration agreement, then the law of the seat shall be relevant and applicable. This approach to determine the law of the arbitration agreement has been adopted in the London Court of International Arbitration Rules, which provides under Article 16(4) that:

*"The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat".*

In Article V(1)(a) of the New York Convention 1958, it is stipulated that the agreement under which the award is made must be valid '*under the law to which the parties have subjected it'*, or, '*failing any indication thereon, under the law of the country where the award was made*'. In short, under New York Convention, if the contract does not stipulate any applicable law to the arbitration agreement, then the law of the seat shall apply.

UNCITRAL Model Law On International Arbitration 1985 has similar provision under Article 34(2)(a)(1) which stipulates that the law of the seat shall apply to the arbitration agreement if the contract does not provide expressly for the law.[71]

In ***XL Insurance Ltd v Owens Corning***,[72] the dispute relates to a claim under an insurance policy which contained an arbitration clause for arbitration to be held in London under the provisions of the Arbitration Act 1996. However the contract also provided that the governing law for the underlying contract shall be New York state law. New York state law incorporated the provisions of the United States Federal Arbitration Act which mandated that the arbitration agreement must be

71 *34 (2) An arbitral award may be set aside by the court specified in article 6 only if:*
*(a) the party making the application furnishes proof that:*
*(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State*;

72 [2001] 1 All E.R. (Comm) 530

in writing. The plaintiff commenced court proceeding in New York and seek for a declaration that the insurers were liable to indemnify it for losses suffered. At the mean time the insurers brought another court proceeding in London seeking an injunction restraining the plaintiff from pursuing those proceedings. The Court held succinctly that the choice of law clause did not necessarily affect the validity and the enforceability of the arbitration agreement. In fact these two provisions had to be read and construed in harmony with each other. Therefore, by providing for arbitration to be held in London the parties had impliedly chosen the English law to govern matters and issues fall within the ambit of the UK Arbitration Act 1996. This clearly includes the determination of the validity of the arbitration agreement and also the jurisdiction of the arbitrators. Therefore, the parties had impliedly chosen English law as the law to govern the arbitration agreement.

In ***C v D***,[73] this case concerned a claim based on an insurance policy governed expressly by New York law. The policy also contained a clause providing for arbitration to be held in London "under the provisions of the Arbitration Act 1950 as amended." At paragraph 43, the Court of Appeal held as follows:

> *"The authorities show that in many cases the law will be the same for each of these contracts but that this is not always the case and that it is by no means uncommon for the proper law of the substantive contract to be different from the curial law. There is general agreement that it would be rare for the law of the Arbitration Agreement and the law of the Agreement to Refer to differ".*

The claimant commenced an arbitration proceeding in London against the insurer and subsequently secured an arbitral award in its favour. Thereafter the respondent commenced another proceeding for an injunction restraining the claimant from commencing court proceeding in New York and also to oppose the enforcement of the arbitral award. The Court held that the agreement by the parties to have London as the seat of arbitration implied that the parties had also agreed that any challenge to the enforcement of the arbitral award has to be carried out in accordance with the English law. The Court then granted the injunction sought. The decision of the High Court was subsequently affirmed by the Court of Appeal which decided that "*a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award*".

73 [2007] EWCA Civ 1282, [2008] 1 All E.R. (Comm) 1001.

## 5 Three-Stage Enquiry in Sulamerica v Enesa

The Court of Appeal in ***Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and Others***,[74] after analysing various past decisions by the Court, proposed an analysis involving application of three stages of enquiry in order to determine the applicable law for the arbitration agreement.

This case involved two insurance policies covering risks that may arise in the construction of a hydroelectric generating plant in Brazil known as the Jirau Greenfield Hydro Project. In March 2011 certain incidents occurred and Enesa filed claims for losses suffered under the policies. However Sulamerica declined liability on the grounds, among others, that the losses were uninsured or excluded by express terms of the policies. The policies contained clauses stating that the policies were to be "*governed exclusively by the laws of Brazil*" and also contained exclusive jurisdiction clause in favour of the Brazilian courts. The seat was stated as London. The Court of Appeal held that English law was the governing law of the arbitration agreement even though the arbitration agreement was part of the substantive contract which was governed by the law of Brazil. The Court decided on the basis that the law of the seat is most closely related to the arbitration agreement although the court did accept the fact that it is reasonable to start with the assumption that the parties intended the arbitration agreement to be determined by the same law as the underlying contract itself.

The Court at paragraph 25 explained the approach to the determination of the law for the arbitration agreement as follows:

> *"Although there is a wealth of dicta touching on the problem, it is accepted that there is no decision binding on this court. However, the authorities establish two propositions that were not controversial but which provide the starting point for any enquiry into the proper law of an arbitration agreement. The first is that, even if the agreement forms part of a substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract. The second is that the proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be*

74 [2012] EWCA Civ 368

> *an important factor in deciding whether the parties have made an implied choice of proper law: see Dicey, Morris & Collins, op. cit. paragraph 32-006. Much attention has been paid in recent cases to the closest and most real connection, but, for the reasons given earlier, it is important not to overlook the question of implied choice of proper law, particularly when the parties have expressly chosen a system of law to govern the substantive contract of which the arbitration agreement forms part.*

In summary, the Court of Appeal held that the law of the arbitration agreement was to be determined by undertaking three-stage enquiry in the following order:

(1) If the parties made an express choice of law to govern the arbitration agreement, then give effect to it and that choice would be effective and binding, regardless of the law applicable to the substantive contract ("Express Choice-of-Law Analysis").

(2) Where the parties did not specify expressly the governing law for the arbitration agreement, it was essential to consider whether the parties had intended an implied choice of law ("Implied Choice-of-Law Analysis"); and.

(3) Where it was not possible to establish the law of the arbitration agreement expressly or by implication, it was necessary to consider what would be the law with the 'closest and most real connection' with the arbitration agreement.

Therefore "*in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate*." In the situation where the contract did not provide for an express choice of law, the court opined that it was fair to assume that "*the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion*". In short it is reasonable to assume that the parties intend the law chosen to govern the substantive contract will also govern the arbitration agreement.

However, in the present case, the court found that there were two factors which lead to the conclusion that the parties did not intend to apply the Brazilian law to the arbitration agreement. Firstly, under the law of Brazil, the arbitration agreement was valid and enforceable only with the consent by Enesa. In the present case, however, there is nothing to indicate that the parties intended to enter into a one-sided arrangement of that kind. Secondly, the stipulation of London as the seat of arbitration in the contract also implies that "*the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators*".

Thereafter the court proceeded to conduct the three-stage analysis and concluded that the relevant stage was the third stage enquiry. The court eventually held that, in the circumstances of the case, the arbitration agreement had its closest and most real connection with the law of the place where the arbitration was to be held, namely London, which would exercise the supporting and supervisory jurisdiction necessary to ensure the effectiveness of the arbitral procedure.

In summary, the court held that, in the absence of any indication to the contrary, the law for the arbitration agreement will follow the law for the substantive contract. It is noted the court also accepted that the law of the seat may, in some circumstances, constitute such an "indication to the contrary". However, it is not clear how much significance should be attached to the law of the seat before it constitutes an "indication to the contrary". It all depends largely on the circumstances and facts of the case.

The three-stage enquiry propounded by the Court of Appeal had added further confusion to the law when the concept of "closest and most real connection" was introduced. What is the level of contrary evidence that is sufficient to overturn the presumption in favour of the law of the substantive contract? This will lead to the application of stage three enquiry and the logical deduction from this enquiry is that, unless compelling evidence is provided otherwise, it will favour the law of the seat.

## 6 Subsequent Supreme Court Decisions

### A. *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*[75]

The claimant, Enka, was a Turkish engineering company with substantial operation in Russia. The dispute arose with regard to the construction of a power plant in Moscow. The owner of the plant engaged a main contractor for the works who in turn sub-contracted part of the building works to Enka. The contract was silent as to the law for the arbitration agreement which provides that "*the place of arbitration shall be London, England*". In addition there is no express provision for the governing law for the substantive contract. In February 2016 a fire broke up at the power plant and a claim under the insurance policy for about USD400 million was made against Chubb Russia.

75 [2020] UKSC 38

## *Decisions*

### Commercial Court decision

At first instance, the court held that the stipulation of London as a seat in the contract did not imply that the English law will apply for the arbitration agreement.

### Court of Appeal decision

The Court of Appeal overturned the commercial court decision and in departure from ***Sulamerica v Enesa***[76] held that the general rule is that parties are assumed to have decided to adopt the law of the seat to govern the arbitration agreement by implication. Further the law governing the substantive contract has little bearing on the law for arbitration agreement.

### Supreme Court decision

Upon appeal, the Supreme Court decision was split 3 – 2 and the majority upheld the Court of Appeal's decision but on different grounds and disagreed with the approach taken by the Court of Appeal. However it is important to note that all five judges agreed that an express choice of the law for the underlying contract would, save for exceptional circumstances, be an express or implied choice of law for the arbitration agreement as well.

The Supreme Court helpfully summarized the law[77] and held as follows:

(a) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract unless there is a strong justification and good reason to depart from this principle.

(b) The choice by the parties to have a different jurisdiction as the seat of the arbitration is not sufficient to negate any inference that the law governing the underlying contract was intended to apply to the arbitration agreement.

(c) The Supreme Court identified two factors that may negate the inference:

    1. Contracts where applying the above general principle would mean that there is "*a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective*";[78] and

76 [2012] EWCA Civ 368
77 At para 170 of the decision.
78 At para 170 (vi) of the decision.

2. *"Any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law*[79]*".*

(d) In the absence of any choice of law to govern the arbitration agreement, it will be governed by the law with which it is most closely connected. Generally this will likely to be the seat chosen by the parties, even if this differs from the law applicable to the main contract.

For the dispute in this case, the Supreme Court concluded as follows:

(a) As the relevant substantive contract, properly construed, contained no express or implied choice of Russian law, the arbitration agreement was governed by the law of the "seat" of the arbitration, being the law with which it was most closely connected.

(b) As the "seat" was London, the majority upheld the Court of Appeal's decision that English law governed the validity and scope of the arbitration agreement.

The majority preferred the position of an implied choice for the law governing the main contract as the law for the arbitration agreement as it provides certainty and consistency. It will also avoid complexities, uncertainties and artificiality[80]. The commercial approach of the majority, that, for the commercial parties, a contract is a contract, and that they would reasonably expect a choice of law to apply to the whole of that contract, is sensible. It is also consistent with the principle affirmed by the House of Lords in ***Fiona Trust & Holding Corpn v Privalov***,[81] that the "*construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship into which they have entered or purported to enter to be decided by the same tribunal*"[82].

## B. *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*[83] *("Kebab-Ji")*

Kebab-Ji SAL ("KJS") is a Lebanese restaurant who entered into a Franchise Development Agreement ("FDA") with Al Homaizi Foodstuff Company ("AHFC") for the operation of the franchise in Kuwait for 10 years. Under the FDA, KJS and AHFC entered into 10 Franchise Outlet Agreements. The arbitration clause

79 The Supreme Court gave the example of section 6 of the Arbitration (Scotland) Act 2010 which states that, where an arbitration agreement provides that the arbitration shall be seated in Scotland but does not specify the law that governs the arbitration agreement, then the arbitration agreement is to be governed by Scots law, unless the parties agree otherwise.
80 See para 53 to 54 of the decision.
81 [2007] UKHL 40
82 See para 107 of the decision.
83 [2021] UKSC 48

provided that the seat of arbitration would be Paris, whereas the governing law for the FDA would be English law.

In 2005, AHFC underwent a corporate restructuring and a new holding company, Kout Food Group ("KFG") was established and AHFC became a subsidiary of KFG. A dispute arose between the parties under the FDA and this has caused KJS to commence an arbitration against KFG under the rules of International Chamber of Commerce ("ICC") in Paris, France.

The ICC arbitral tribunal unanimously decided that French law, as the law of the seat, to determine whether KFG was bound by the arbitration agreements, but English law shall apply to decide the substantive issues under the FDA. Eventually the arbitral tribunal decided that KFG was in breached of the FDA and awarded a principal sum of USD6,734,628.10 to KJS. Thereafter KJS brought an action in England to enforce the arbitral award under s101 of the Arbitration Act 1996. On the other hand, KFG applied under s103(2)(b) of the Act for an order that recognition and enforcement of the award be refused and this requires the consideration of position under Article V(1)(a) of the New York Convention rather than the common law.

**Commercial Court decision**

The judge held that there was an express choice of English law as governing the arbitration agreement.

**Court of Appeal decision**

The Court of Appeal upheld the decision of the Commercial Court and held that the FDA had provided for an express choice of English law to govern the arbitration agreement. It is immaterial that the arbitration agreement itself did not expressly refer to the application of English law.

**Supreme Court decision**

The Supreme Court upheld the decisions of both the Commercial Court and Court of Appeal and held that the law governing the arbitration agreement is English law. Therefore the recognition and enforcement of the arbitral award was refused.

In ***Enka v Chubb***[84] (*"Enka"*), the Supreme Court applied common law rules in order to determine the law for the arbitration agreement before an arbitration commenced. In the present case, the Court had to consider, pursuant to the New

84 [2020] UKSC 38

York Convention, the principles to be applied to determine the law for arbitration agreement at the stage of enforcement.[85]

The Supreme Court affirmed the earlier decision in *Enka* and confirmed that, pursuant to Article V(1)(a) of the New York Convention, the primary rule is that the validity of the arbitration agreement is governed by '*the law to which the parties subjected it*'. In other words, this was the law chosen by the parties. The second default rule as suggested, applies in the situation where no choice had been indicated in the arbitration agreement. In this case, the applicable law was that of '*the country where the award was made*'. Therefore where the parties have chosen the seat of arbitration, the place where the award was made will be (or be deemed to be) the place of the seat.[86]

In the present case, the Supreme Court held that the effect of the provision on the governing law of the FDA, which provided that "this Agreement" shall be governed by the laws of England was clear – the "*phrase is ordinarily and reasonably understood to denote all the clauses incorporated in the contractual document*" including, therefore, the arbitration agreement itself. "This Agreement" must have included the arbitration agreement. The Court further held that there was no good reason to infer that the parties intended to apply the English law to govern all the terms of their contract except the arbitration clause.[87]

The Supreme Court's reasoning on the determination of the governing law for arbitration agreement is consistent with its decision in *Enka*, which had considered a similar dispute. It also confirms that the principles propounded in *Enka* also applicable in the context of enforcement under the New York Convention. The case of *Enka* and *Kabab-Ji* have undoubtedly provided much needed certainty for those with existing arbitration agreements. Therefore, unless the agreement explicitly states otherwise, the English courts will interpret that the law chosen by the parties to govern the substantive contract will also be applied to the arbitration agreement.

## 7 Subsequent Supreme Court Decisions

The controversy of applicable legal principle to determine the relevant law for arbitration agreement is now finally resolved by two Supreme Court decisions. With this latest development the parties and the courts will be guided by the legal principles laid down by the Supreme Court and will provide more certainty and consistency in all future contractual dealings.

85 Para 29 of the decision.
86 Para 26 of the decision.
87 Para 39 of the decision.

However many of the standard arbitration clauses suggested by the standard form of construction contracts and the model arbitration clauses as recommended by major arbitral institutions do not provide any law to govern the arbitration agreement. As a result, arbitration agreements tend to lack an express governing law provision. This had created many problems to the contracting parties when disputes arise and the parties have to resort to arbitration to resolve the disputes.

Although ***Kabab-Ji*** and ***Enka*** have clarified the English law position on this, in order to minimise the risk of involving in complex and costly cross-border disputes in relation to governing law and inconsistent judgments between jurisdictions, it may be helpful for parties to take note of the following steps when drafting the contract and the arbitration agreement:

(a) The Parties must consider to state clearly and expressly the governing law for the arbitration agreement, especially if this is not provided in the standard form of construction contracts or the recommended model arbitration clause;

(b) The parties have to state clearly that the law governing the contract also apply to all the provisions of the contract, including the arbitration agreement; and

(c) If the parties do not intend the arbitration agreement to be governed by the law applicable to the underlying contract, it must be stated expressly that the law for the underlying contract does not apply to the arbitration agreement and also to state expressly the relevant law applicable.

# IPR Arbitrations: Addressing Issues in Indian Jurisprudence through a Comparative Lens

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## ABSTRACT

*The issue of arbitrating Intellectual Property disputes has received much attention in the recent past owing to legislative amendments in prominent arbitration destinations such as Hong Kong and Singapore. These amendments clarify that firstly, IPR disputes are arbitrable, and secondly, that arbitrating or enforcing IPR disputes would not be contrary to the public policy of these respective jurisdictions. This seems to be on a different footing than that of countries like India, where there is no legislative clarification on the issue. While Indian courts have had the opportunity to remark on the issue, there has not been a consistent trend in these decisions.*

*A careful reading of the parliamentary debates relating to both the Hong Kong and the Singapore amendments reveal that these statutes are merely clarificatory in nature, and that they do not confer any specific or novel rights regarding IPR arbitration.*

*The single-most pertinent question is that of the erga-omnes effect that IPR arbitration and the subsequent enforcement of these awards may have. In this respect, both Singapore and Hong Kong have clarified that insofar as these awards relate to inter-partes issues, or adjudicate rights in-personam, they would not affect statutory IP registers, with the effect that there would be no erga-omnes effect. Insofar as these issues relate to rights in-rem, there is hardly any legislative clarity offered, and it remains to be seen on a case-by-case basis as these issues arise over the course of time. It is a peculiar position for these jurisdictions to clarify that issues as broad as scope and validity of IPR would be arbitrable, and at the same time not offer clarity on the public effect of these decisions. On the other end*

*of the spectrum, Switzerland provides for changes in the statutory IP registers on the basis of arbitral awards.*

*In the foregoing context, this paper examines inter alia three arguments that have conventionally been perceived as posing a problem to IPR arbitration: First, IPR arbitration vis-à-vis public policy. Second, the dichotomy presented by rights in-personam issues as opposed to rights in-rem issues, and the contours of the erga-omnes effect. Third, the exclusivity granted to certain public authorities to adjudicate in respect of IPR matters, thereby making IPR objectively inarbitrable.*

*Finally, the paper concludes with recommendations for India and other similarly placed jurisdictions as to evolving a comprehensive IPR-arbitration policy, drawing on lessons from prominent arbitration destinations such as Switzerland, Hong Kong and Singapore.*

**KEYWORDS**

Intellectual Property Rights, Public Policy, *Erga-omnes* effect, *Inter-partes* effect, Arbitrability.

## 1 Introduction

Increasing complex issues in IPR assignment, licensing and infringement necessitate the use of a quicker and more expert oriented dispute resolution system. Parties across the globe are, therefore, turning to the frameworks of arbitration in order to resolve their disputes concerning IPRs. IPRs may take many forms, such as patents, trade marks, copyrights, geographical indications, protected designs of integrated circuits among others. This paper seeks to address the arbitrability of all forms of IPR, of whatever nature.

The single largest obstacle across most jurisdictions around the world to arbitrating disputes relating to intellectual property is that most of the subject matter of these intellectual property rights is recorded in public registers administered by statutory authorities specifically established for that purpose. It is in this context that arises the question of if there is any utility to allowing parties to arbitrate those issues such as validity and scope, which have conventionally been seen as falling under the exclusive domain of the above-mentioned statutory authorities. This paper will seek to answer this question through a cross-jurisdictional analysis, taking a utilitarian approach in proposing amendments to the Indian position.

The first section will enumerate the Indian position in general, which is the standard distinction between cases with a public flavour and those that squarely fall within the scope of arbitration (*in rem-personam* test). The second section will examine jurisdictions such as Switzerland, USA, Singapore and Hong Kong which

have statutorily clarified that all IP disputes may be the subject of arbitration, and understanding the implications of such awards vis-a-vis the public IP register. In the third section, the authors postulate that there is utility to be had for jurisdictions like India and similarly placed countries, to follow the Singaporean and Hong Kong models, and discuss some scenarios in which IP issues could be subject to arbitration, and why it would not be contrary to the public policy of these countries to allow and enforce such arbitration.

## Part 1 Arbitrability of IP in India

When does a dispute become subject to arbitration? It is trite that for a subject matter to be arbitrable, it must be *firstly*, covered under the scope of the arbitration agreement; *secondly*, the party/parties to the dispute must have referred the same to arbitration; and *finally*, the dispute must be capable of adjudication and settlement by arbitration. This is where the conundrum of arbitrability sets in, or, whether or not a subject matter can be referred to arbitration in the first place, with *caveats* pertaining to public policy, *erga-omnes* etc.

In India, the primary law pertaining to arbitrability has been laid down by the landmark case of *Booz Allen* v. *SBI Home Finance.*[88] Herein, the Supreme Court of India provided a substantive test in order to determine the arbitrability of a subject matter, the *in rem-personam test.* If the dispute concerns *in-rem* rights, or rights which can be enforced against the world at large, then the dispute ought not to be arbitrable. While those rights which are to be enforced against a single person, or *in-personam* rights, can be enforced. The rationale for this distinction is discernible: settled principles provide that the arbitral tribunal is a creature of the contract of the parties,[89] and hence, it cannot affect legal relationships beyond the parties. Importantly, the Court observed that *"actions in-rem refer to actions determining the* title to property and the rights of the parties*, not merely among themselves but also against all persons at any time claiming an interest in that property"*. Further in *A. Ayyasamy* v. *A. Paramsivam*,[90] the Supreme Court also held that patents, trademarks and copyrights are generally non-arbitrable. However, the authors opine, as do many others,[91] that this was merely *obiter dicta* of the judgement and not a comprehensive decision of law on the point.

Furthermore, in the *MD Frozen Foods v. Hero Fincorp*,[92] the Court reiterated its decision in *Booz Allen,* holding that all disputes relating to rights *in-personam*

88 (2011) 5 SCC 532.
89 Gary Born, *International Commercial Arbitration*, (3rd edn, Kluwer Law International 2021) 2817.
90 (2016) 10 SCC 386.
91 *Lifestyle Equities CV (LE CV) v Qdseato*, 2017 SCC OnLine Mad 7055 [5(s)].
92 (2017) 16 SCC 741.

are arbitrable, and that it was for the parties to choose this alternative forum of arbitration. The Delhi High Court subsequently in *HDFC v. Satpal Singh Bakshi*,[93] has also held that disputes having an *inherent public interest* would not be arbitrable. However, issues of passing-off in trademarks and copyright infringement issues are disputes *in-personam*, the outcomes of which do not affect the rights of third parties.[94]

This section will examine the current position of law in India with respect to various stages in Intellectual property jurisprudence where the arbitration can set in, namely, oppositions to registrations, infringement actions and licensing and assignment of IPRs.

## A. *Oppositions to registrations*

If one were to apply the aforementioned standard plainly to intellectual property disputes, read with the sole power provided to Registries in the special IP statues of India, disputes pertaining to oppositions of registration of IP are rendered non-arbitrable *de facto,* as they are concerned with determination of title towards an intangible property i.e., the relevant IP, amongst all persons claiming it. Although Indian courts have not been tasked with answering this limited question, it can be reasonably alluded that oppositions to registrations of IP such as u/s 9 and 11 of the Trademarks Act, 1999 or pre-grant oppositions as u/s Section 25(1) of the Indian Patent Act, 1970 along with Rule 55 of Patents Rules, 2003, cannot be arbitrated. This is because the statutory right to adjudicate these disputes has been granted to the Registry. For instance, this is the case with the registrar of Trade Marks under Section 11(6), Trade Marks Act 1999.

In *Hero Electric Vehicles* v. *Lectro E-Mobility*,[95] although the Delhi High Court was tasked with a different issue that shall be later covered in the article, the Court allowed the commencement of arbitration, *inter alia* holding that, *"the dispute in the matter does not relate to grant, or registration, of trademarks. The trademarks already stood granted, and registered".* Therefore, by this dictum of the Court, the question of whether grant or registration can be arbitrated, has been answered to some effect.

93 (2012) 193 DLT 203.

94 Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999); Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration: Student Edition* 586 (6th ed OUP 2015); See also n4 at [5(p)].

95 (2021) 86 PTC 81.

## B. *Infringement*

Infringement of IPR will entail parties claiming rights on the ownership and use of an IP, and subsequent litigation over the claim to such right. Under the Copyright Act, there is an express provision which attributes jurisdiction to the district court of the relevant jurisdiction, for all *'civil proceedings in respect of infringement'*.[96] A similar ouster clause has been provided under Section 134 of the Trademarks Act, 1999. In light of these provisions, the natural jurisdiction of all infringement disputes ought to be the Civil Court. Yet, parties through their arbitration agreements, may make arbitration a remedy to be exercised prior to the suit for infringement in civil courts.

Therefore, Indian law on arbitration over infringement claims is vacillating. The Bombay HC in *Eros* v. *Telemax*[97] held that under infringement or passing off claims, the underlying rights that rise are essentially rights *in-personam* and not otherwise. It also held that the outcome of copyright disputes between two claimants had no consequence on third parties and therefore, they are rights *in-personam*. In contrast, in *Mundipharma v. Wockhardt Ltd.*,[98] the Delhi High Court held that owing to the ouster clause in the Copyright Act, all subject matter concerning infringement must be raised in a civil court and not before an arbitral tribunal.

## C. *Licensing and assignment*

IPRs are intangible assets/ property of the registered user/proprietor. Therefore, due to the inherent structure of the rights involved, IPRs give the registered user the right to exploit the IP concerned. This right of use may be assigned or granted to someone else as a natural corollary of ownership of the IPR, through the process of assignment or licensing.[99] Since this is necessarily completed by *means of an agreement* between the assignor/licensor and assignee/licensee, the role of contractual dispute resolution comes into play. Arbitration is usually the preferred form of dispute resolution in agreements of assignment or licensing IPRs. Hence, if disputes arise in use, grant, scope of grant, quality control etc. with regards to assignment or licensing, then the dispute may eventually be referred to an arbitral tribunal, rather than a court, for quicker resolution and expert adjudication.

With this background, it may be pertinent to note the stance of Indian courts on arbitrating claims arising out of IPR licensing or assignment agreements, as the claims arising of out these are essentially issues *in-personam,* i.e. between the

96 Indian Copyright Act 1957, s. 62.
97 (2016) 6 Bom CR 321.
98 ILR (1991) 1 Del 606.
99 Jacques de Werra, 'The Expanding Significance of Arbitration for Patent Licensing Disputes: from Post-Termination Disputes to Pre-Licensing FRAND Disputes' (2014) 32 ASA Bull 692. See also for instance, s 38 Trade Marks Act 1999.

parties of the contract. In Golden Tobie v. Golden Tobacco Ltd.,[100] the Delhi High Court was tasked with answering the question whether there can be reference to arbitration as under Section 8 of the Indian Arbitration Act (*Pari Materia* to Art. 8 of the UNCITRAL Model Law), of a dispute which involved trademark licensing agreements. Drawing a distinction to the settled laws of *Booz Allen* and *Vidya Drolia*,[101] the Court held that the present case did not involve any *erga-omnes* adjudication and was merely concerned with the scope of use of the subject matter i.e., the impugned trademark. Therefore, the party cannot take the ground of inarbitrability to escape contractual obligation of arbitrating. Further, it was opined that under licensing or assignment agreements, the right to use of the licensee/ assignee flows from the right of the licensor/assignor and not from the trademark office.[102] Therefore, the settled law in India, as it stands according to the authors is, one can arbitrate IPR disputes arising out of contractual agreements, as long as they do not offer or interfere with *erga-omnes* decisions, which involve affecting rights of other users, in line of the *ratio* of Eros v. Telemax.[103]

## Part 2 A Cursory Look at other Jurisdictions: Singapore, HK, Switzerland and USA

Singapore clarified by way of the Intellectual Property (Dispute Resolution) Act 2019, that the subject-matter of an IPR dispute is capable of settlement by arbitration with the arbitral award having inter-partes effect. The Act amended the Arbitration Act (Singapore)[104] as well to define "IPR dispute" in inclusive terms, and the definition includes issues relating to validity, scope, ownership and infringement.

As regards disputes relating to infringement of IP Rights, it is clear that there need not be questions of erga-omnes implications, unless the validity of the IP itself is put in question by a party seeking to raise that defence in the infringement dispute. However, when questions of validity or scope of the IP itself are subject to arbitration as provided for by the Intellectual Property (Dispute Resolution) Act, 2019 of Singapore, questions arise as to the implications of the award to third parties, as well as the world at large, since IP rights are by nature granted to the proprietor to exploit against the world at large. These questions tending to have erga-omnes implications are discussed herein.

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100 (2021) 87 PTC 71.

101 *Vidya Drolia v Durga Trading Corpn.*, (2021) 2 SCC 1.

102 Kapil Wadhwa, 'Is Sub-Licensing of Trademarks Permitted under Indian Law?: An Alternate Interpretation' (*SpicyIP,* April 29, 2020) <https://spicyip.com/2020/04/sub-licensing-of-trademarks-is-permitted-under-the-indian-law.html> accessed 28 Feb 2022. See also Rounak Doshi, 'Delhi High Court Clarifies Law on Arbitrability of Trademark Disputes' (*SpicyIP,* June 28, 2021) <https://spicyip.com/2021/06/arbitrability-of-disputes-concerning-trademarks-a-perspective-from-m-s-golden-tobie-private-limited-v-m-s-golden-tobacco-limited.html> accessed 28 Feb 2022.

103 (2016) 6 Bom CR 321.

104 Arbitration Act 2002 (Singapore).

## A. *Effect as to Third-party licensees who would be affected by the arbitral award*

Section 44(1) of the Arbitration Act (Singapore) provides that an award is binding on the parties as well as those claiming under them. Therefore, to mitigate any *erga-omnes* implications, an amendment was inserted into the Act by way of Section 52C (2), which provides that the fact that an entity is a third-party licensee in respect of the IPR does not of itself make the entity a person claiming through or under a party to the arbitral proceedings for the purposes of section 44(1).

The implication of this clarification is that third-party licensees will have to be added as proper parties to the arbitration where the award would have an effect on the rights exercisable by such licensees under the IPR license. Therefore, even in respect of third-parties claiming under the parties, the award would have only inter-partes effect.

Further, the Patents Act of Singapore[105] for instance, had provided that the validity of a patent may not be put in issue in any other manner except as provided in the statute itself. This was by way of bringing proceedings before the IPOS for validity issues and before the General Division of the High Court for infringement issues. The amendment in essence acts as a non-obstante provision enabling the arbitration of IP disputes which were reserved for the IPOS or the High Court.

The position in Hong Kong is much the same, with the Arbitration (Amendment) Ordinance 2017 (Hong Kong) clarifying that all disputes over intellectual property rights may be resolved by arbitration and that it is not contrary to the public policy of Hong Kong to enforce arbitral awards involving IPRs.

Specifically with regard to patents, this is also the case in the United States, where 35 U.S.C. Section 294 expressly states that parties may agree to arbitrate issues relating to *validity* of a patent. Section 294(c) limits the effect of such award to an inter-partes capacity only, reversing the position that resulted owing to the Supreme Court decision in *Blonder Tongue v. University of Illinois Found*[106]*.*[107] While there is no legislative clarity in the US regarding the arbitrability of copyright validity issues, a US Court of Appeals in *Saturday Evening Post Co. v. Rumbleseat Press, Inc*[108] held that US Federal law did not prevent copyright validity issues from being arbitrated, at least when such validity issue arose during the course of a contractual dispute. The Court further observed that since arbitral awards are not

105 Patents Act 1994, s. 82 (Singapore).
106 402 US 313 (1971).
107 Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* vol 2 (Arbitration in Context Series, Kluwer Law International 2010) 64.
108 816 F.2d 1191 (7th Cir. 1987).

published, an award invalidating a copyright would not even assist in establishing the validity or lack thereof of the copyright against the world at large, and that the award would be applicable only to the parties in the dispute.

## B. *Inter-partes or erga-omnes effect?*

While adopting the Singaporean approach has its utility, the question of modifying public IP registers as a result of an arbitral award also arises, which is the position in Switzerland. In 1975 the Federal Office of Intellectual Property of Switzerland held that arbitral tribunals are empowered to decide on the validity of patents, trademarks and designs.[109] Awards relating to the validity of IPR are given the *erga-omnes* effect that they contain by necessary implication, provided that the award is accompanied by a certificate of enforceability issued by the Swiss court at the seat of the arbitral tribunal in accordance with Article 193 para 2 of the Swiss Private International Law statute.[110]

The distinction between the position in India and that of Singapore lies in that: While India disallows *in-limine* arbitrating any dispute that may tend to have an *erga-omnes* effect, the Singaporean approach seems to be one where even questions that could have an *erga-omnes* effect may be arbitrated. However, the Singaporean approach converges with the Indian position inasmuch as it provides that these awards are binding only between the parties to the arbitration.

Therefore, in jurisdictions that follow the Singaporean approach, we are faced with the question of reconciling the fact that an award containing *erga-omnes* implications have only inter-partes effect. Why at all must a statute provide that the validity of intellectual property may be arbitrated, and yet provide that an award doing so would only have an inter-partes effect? This is a peculiar position for the simple reason that awards containing *erga-omnes* effect by necessary implication would have to be enforced against the world at large to have any meaningful impact. That is to say that an award containing any *erga-omnes* implication would have to necessarily be reflected in the public IP registry. However, it is also understood that doing so would be tantamount to allowing a private tribunal dictating the rights of the public at large, which is also not a sound proposition.

We must pause here for a moment to reflect then, as to if there is any utility in enacting a statute with this glaring internal inconsistency. And it would appear that there are, and for the following reasons:

109 Robert Briner, *The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland* <www.wipo.int/amc/en/events/conferences/1994/briner.html> accessed 28 Feb 2022.

110 ibid.

(a) First, by disarming parties of the conventional grounds under the New York Convention to repel the enforcement of an award, the legislation inspires confidence in parties choosing Singapore as the arbitral seat that their arbitral awards would not be set aside at the enforcement stage merely because the award *seems* to contain decisions on matters that have been conventionally viewed as *objectively* inarbitrable. This was the intended effect, as the amendment came in light of the Singaporean government's efforts to foster an IP-friendly environment, as part of its "IP Hub Master Plan".[111]

(b) Second, any apparent "awkwardness" that may result from having a statute with an internal inconsistency as regards the *erga-omnes* effect of awards, may not entirely warrant concern. This is because situations in which parties would want to voluntarily resort to arbitration to challenge the validity of an IPR rarely arise,[112] as also discussed in Part 3. This is because, as many commentators note, parties seeking to resolve issues relating to validity of the underlying IP through arbitration understand that they run the risk of having the award set aside at the enforcement stage, owing to intellectual property rights not being arbitrable in the country where enforcement is sought.[113]

(c) Therefore, the benefits derived from providing certainty to parties wanting to arbitrate disputes such as infringement and licensing greatly outweigh the risk of having an award that will have any *erga-omnes* implication. This is especially so since an arbitral award is *not* given erga-omnes effect despite its contents under the amended Arbitration laws of both Hong Kong and Singapore.

## Part 3 Why the Benefits Outweigh the Costs – An Illustration-based Analysis

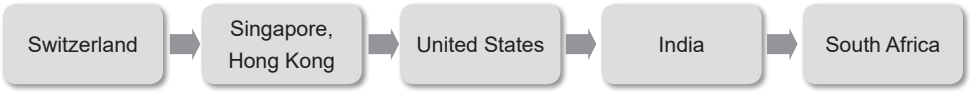
As discussed above, there is utility to adopting the model that countries like the United States and Singapore have. If a spectrum were to be drawn up with the IP Arbitration policy of the abovementioned countries, it would be safe to state that Switzerland would be on one end of the spectrum with a liberal IPR policy that allows effecting changes in the public IP register the results of a private arbitral award, albeit with a certificate of enforcement granted by a State Court. On the other end of the spectrum, we would find countries such as South Africa that

111 IP Steering Committee, *Intellectual Property Hub Master Plan - Developing Singapore as a Global IP Hub in Asia* <https://www.mlaw.gov.sg/files/IP-HUB-MASTER-PLAN-REPORT-2-APR-2013.pdf/> accessed 28 Feb 2022.

112 John V H Pierce and Pierre-Yves Gunter, *The Guide to IP Arbitration* (1st edn, Global Arbitration Review 2021) 65.

113 See Fincantieri v. M., ATF 118 II 353 (1992); See also n 16 para 2.4.3.

prohibit arbitrating any dispute involving IPR.[114] And here, the positions of a few other countries are mapped to provide context:




From most liberal to least liberal IPR Arbitration policies

In this section, we argue that India and similarly placed jurisdictions have much to gain from adopting a model alike the Singaporean and US approach to arbitrability. Especially in India, Law Minister Kiren Rijiju has expressed the need for India to overhaul its arbitration policies so as to become an arbitration hub in the region.[115] He has also aptly stated that doing so would also aid in increasing the ease of doing business in India.[116] These are almost lofty goals for India, a jurisdiction that has been criticised for being overly eager in interfering with the arbitration process, a criticism that the Indian government has acknowledged as well.[117] Therefore, in addition to the utility stated above, India stands to gain much from clarifying that any dispute relating to intellectual property may be arbitrated, even if only with inter-partes effect. Regardless, to allay concerns regarding the rights *in-rem* distinction that the Indian Supreme Court has subscribed to, we discuss some scenarios in which IP may be the subject matter of arbitration, and why it would not be opposed to public policy to enforce those awards. Due to the confidential nature of arbitration, only general examples and hypotheticals are considered in this section, since these awards are not as accessible as court decisions published in official reporters.

## A. *IP arbitration in context: some scenarios*

In a seminal paper[118] discussing arbitrability vis-a-vis public policy, William Grantham provides illustrations as to the scenarios in which IP issues arise in arbitration.[119] Insofar as infringement scenarios are concerned, it is settled now that these disputes are generally arbitrable in most jurisdictions since they generally do not contain any *erga-omnes* implications. This is because infringement actions

114 n 25 at 26.

115 The Economic Times, '*India becoming hub of international arbitration will also promote ease of doing business: Kiren Rijiju' (India, 15 Jul 2021)* <https://economictimes.indiatimes.com/news/india/india-becoming-hub-of-international-arbitration-will-also-promote-ease-of-doing-business-kiren-rijiju/articleshow/84449793.cms?from=mdr> accessed 28 Feb 2022.

116 ibid.

117 Justice B. N. Srikrishna, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 28 Feb 2022.

118 William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley Journal of International Law <https://lawcat.berkeley.edu/record/1115585?ln=en> accessed 28 Feb 2022.

119 ibid at 199.

generally arise out of a contractual relationship subsisting between the parties. When there is no contractual relationship between the parties, the question of arbitration does not arise in the first place because there is no valid arbitration agreement.

Further, it is common for parties to raise ownership and validity issues as defences to infringement actions.[120] In this respect, Grantham argues, and we concur that the arbitrator must be allowed to decide those issues as well, without any defect to the public registry. The implication is that the tribunal would be empowered to rule on those issues with inter-partes effect only. Should any of the parties wish to seek an objective change in the public register, nothing prevents such party from approaching the statutory authority established in this regard.

## B. *Lessons from Hong Kong: providing for arbitration without erga-omnes implications*

These issues were also raised by the Hong Kong Bills Committee in 2017 in light of the amendments to the Arbitration Act. The Government's response[121] to these issues provides further clarity:

(1) An *inter-partes* arbitral award recording a finding as to the invalidity of the underlying IP would not automatically provide the basis to amend the public IP registers. The Government reasoned that this was because there was no certainty that the public registrar would also arrive at the same conclusion in a public invalidity proceeding. Arbitration being a creature of contract, parties may be free to adopt rules of procedure and evidence convenient to them.

(2) In result, even when the tribunal records a finding that the underlying IP is invalid, there would have to be separate proceedings before the appropriate statutory authorities before the IP can be invalidated in the public register.

(3) Such a result is the natural consequence of the confidential nature of arbitration, owing to which parties are not under an obligation to disclose the findings of any expert report or any other technical findings. To force parties to forgo the confidentiality of the process would be counterproductive. This is also in alignment with WIPO Arbitration Rules Arts. 54 and 75–77.

120 ibid at 197.

121 Bills Committee on the Arbitration (Amendment) Bill 2016, *Government's Response to the Issues Raised by the Bills Committee at the Meeting of 5 January 2017, LC Paper No. CB(4)555/16-17(01)* <https://www.legco.gov.hk/yr16-17/english/bc/bc101/papers/bc10120170220cb4-555-1-e.pdf> accessed 28 Feb 2022.

In addition, Grantham argues that enabling the arbitral tribunal to rule on these awards lead to the benefits of public efficiency and economy, other than stimulating commercial activity.[122]

As to how these amendments would impact cross-jurisdictional issues, The utility of choosing arbitration over litigation in a given issue need not be reiterated. Especially in the case of SEP/FRAND disputes, clarifying that these disputes are arbitrable and would not be set aside at the enforcement stage reduces cost for parties tremendously since the alternative is to institute infringement proceedings in the respective courts having jurisdiction across several countries, given the territorial nature of IP protection. For instance, the Apple-Samsung SEP/FRAND dispute involved independent proceedings initiated in 10 countries.[123]

Further, it is important to note that while the proposed amendments would make arbitration an avenue for resolving disputes relating to intellectual property for parties seeking to do the same when they realize the benefits (reduced time and cost etc), it creates no mandate for arbitration of disputes involving IP issues. Therefore, parties would be free to make an informed decision about the forum of their choice, and would further be well aware of the risks of entering into arbitration when the ultimate right to strike a registered IP such as a patent off the registry lies with the national registrar.

In *Saturday Evening Post Co. v. Rumbleseat Press*,[124] it was argued before the U.S. Court of Appeals that there was inherent danger in allowing a private tribunal to adjudge matters relating to the legal monopoly granted by IPR protection against the public at large. The Court observed that the amendments to 35 U.S.C. § 294 allowing the arbitration of patent validity despite such danger was only evidence that the utility of arbitration outweighed any such danger present, especially given that those awards would only be binding with *inter-partes* effect. The Court reasoned that to prevent arbitration in such a case would only interfere with the proceedings of a validly constituted tribunal even in infringement issues, merely because issues of validity of the underlying patent are brought up in defence.

## 2 Conclusion and Recommendations for India

As Prof. Gary Born opined in reference to infringement of trademarks, “The fact that one party may have fraudulently misrepresented the quality of its goods or

122 n 31 at 199.

123 ‘Australian Court to Fast-Track Samsung Appeal on Tablet Ban’ (*Reuters,* October 27, 2011) <https://www.reuters.com/article/us-apple-samsung-australia-idUSTRE79Q0SN20111027> accessed May 13, 2022.

124 816 F.2d 1191 (7th Cir. 1987).

services, does nothing to impeach the parties' agreed dispute mechanism". On a similar line of thought, the authors opine that India must adopt a contemporary approach in dealing with arbitrations in IPR Disputes: Providing for the arbitrability of *any* aspect of intellectual property, regardless of hitherto having been perceived as inarbitrable, does not necessarily have to lead to the awkward position of privately constituted arbitral tribunals dictating rights *in-rem* registered in public registers maintained by statutory authorities.

To the contrary, it provides an efficacious means of resolving disputes to parties seeking to do the same. To prevent third-party licensees who may not have been party to the proceedings from being bound by the award, the legislature may clarify that being third-party licensees *ipso-facto* does not make such persons "persons claiming under" the parties to the award. In result, such third-party licensees would have to be necessarily added as parties to the arbitration proceedings under a valid and subsisting arbitration agreement before their rights can be conclusively determined. Such an approach also ensures the confidentiality and integrity of the arbitral process.

For all the reasons mentioned above, we propose that India effect legislation to clarify:

(1) that any aspect relating to IP may be arbitrated, with the definition IPR including IPR of whatever nature.

(2) that an award rendered by such a tribunal would not have any *erga-omnes* implication.

(3) that a third-party licensee does not necessarily qualify as "persons claiming under" the parties to the proceeding, and are therefore not bound by the proceedings unless they were added as parties to the proceeding.

(4) that there are no obligations upon parties to deposit or submit any technical findings or any other findings of the tribunal with any statutory authority, and a party seeking to invalidate an IP on the public register is yet bound by the all-pervading concept of confidentiality of arbitration proceedings. Such a clarification becomes important when the tribunal decides on issues of validity, and the prevailing party seeks to invalidate the IP on the public register subsequently.[125]

(5) that the arbitral award may not be used as the ground for invalidating the IP in the public register, and also that such an award may not act as res-judicata for the purposes of such proceedings before the respective statutory authorities or Courts. This is the natural consequence of not allowing awards to have erga-omnes effects.

125 text to n 34.

Such amendments would be in line with the Indian Government's objective of making India an arbitration hub in the region. It would incentivize parties to choose arbitration as an effective means to resolve their disputes, and provide conclusive clarity to parties that their awards would not be set aside at the enforcement stage. For India and similarly placed jurisdictions, the benefits of providing such clarification greatly outweigh the costs for the above-mentioned reasons.

# Can Facilitative Mediation Break a Deadlock in Expert Evaluation of Construction Claim Disputes?

*by Wong Weng Long @ John Wong • Charlton Martin, Construction Contract Consultants*

## ABSTRACT

*This paper seeks to examine whether an expert evaluation plays a role in assisting parties to reach a successful mediation/negotiation. Based on the author's experience in preparing expert evaluation for parties' negotiations or mediation, the author is of the view that expert evaluation serves to give an indication as to a possible outcome of a dispute resolution if disputed construction claims were referred to arbitration, adjudication or litigation. The outcome of expert evaluation helps the parties make informed decisions in the process of negotiations or mediation. However, the outcome of expert evaluation is only effective if the expert is well-versed in construction law and has present or prior experience as an arbitration/litigation counsel, claims expert witness, adjudicator or arbitrator. Before the parties embark on a mediation/negotiation process, it is recommended that the parties understand their contractual positions: rights and liabilities. For this purpose, the parties may jointly appoint a suitable candidate to carry out the expert evaluation. Alternatively, one party may unilaterally appoint its own expert to carry out an expert evaluation report for the party alone who will then decide whether to disclose the report to the other party.*

**KEYWORDS**

expert evaluation, disputed construction claims, parties' positions, informed decisions, negotiation and mediation

## 1 Introduction

Since COVID-19 pandemic hit Malaysia in March 2020, the effect thereof has been felt throughout the construction industry where contractors' cash-flow has been disrupted by closures of construction sites following the Malaysian Government's declaration of Movement Control Order and other restrictions in connection therewith. As a result, contractors and sub-contractors alike are mostly in a worse financial status than they had been prior to the pandemic. When disputes arise, the author has observed a trend where parties in dispute are opting for quicker and cheaper methods of dispute resolution instead of what used to be common methods of dispute resolution, such as, arbitration.

## 2 Negotiation as the Cheapest Method of Resolution

Negotiation is a part of the tapestry of life in Asia where a negotiation is almost a subconscious reaction when parties encounter a dispute. Accordingly, in most, if not all, disputes, the parties will invariably attempt to negotiate a settlement not only because negotiation is seen as the cheapest method of resolving disputes but also the most expedient. However, negotiations, more often than not, break down. A negotiation requires a give and take. Any miscommunication or lack of communication can cause mistrust or end one party's interest in working with another. Negotiating requires more than simply one party telling the opposing party what the former wants. Before entering into a negotiation, it is prudent for the parties to prepare a strategy of negotiation including determining one's bottom-line offer, setting an opening offer, demonstrating good faith, creating bargaining chips which the parties can offer during the negotiation and demonstrating the value of the offer in the context of the opposing party's interest.

## 3 Is Negotiation Alone Sufficient?

No doubt negotiation is a way of life in Asia but is negotiation alone sufficient? A lack of preparedness on the part of a party in ascertaining a realistic bottom-line offer will invariably spell doom to the negotiation even before it begins. If the gap between two disputing parties' bottom-line offers is too wide, a settlement is, without a doubt, unattainable. This begs a question: what influences the bottom-line offers? A variety of factors come into play but the most significant of all is the party's perception of its own rights and liabilities in respect of the dispute. Such a perception is often fuelled by the party's own staff who only sees the dispute from a fixed angle as opposed to a bird's eye view. It is in this event that some parties seek an external assistance in the form of an expert evaluation.

## 4 What is Expert Evaluation?

Unlike an expert determination which is binding upon the parties who have agreed to appoint an expert to make a determination of the disputes, an expert evaluation is essentially similar to an expert determination except that the expert evaluation is non-binding but is merely advisory in nature.

The author relies on a definition of 'expert evaluation' found in a website by Arts Law Centre of Australia as follows:

> *"Non-Binding Expert Evaluation is an 'advisory' ADR process in which an ADR practitioner with expertise in the subject matter disputed considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Their conclusions are not binding on the parties but in many cases, an impartial third party view can help the parties re-evaluate their own positions and then resolve the dispute themselves. The expert evaluation may be in relation to the whole dispute or just some issues. Similar to expert determination it may be the entire dispute or particular critical issues. If settlement isn't reached, this evaluation does not preclude either party from initiating litigation or pursuing other forms of ADR."*

In contrast, according to Andrew Burr in ***Delay and Disruption in Construction Contracts*** (Burr, 2016), in an expert determination forum, "the expert is appointed for his (or her) knowledge and understanding of the particular issues in dispute in the field in which he is an acknowledged expert. The essence of expert determination is that the expert should act inquisitorially, to ascertain for itself the relevant facts and law, in relation to the issues in dispute, to make its own inquiries, tests and calculations, form its own opinion and decide upon the merits of the parties' position."

## 5 What Added Value does Expert Evaluation Bring?

In expert evaluation, the expert is often a person who is already an expert in construction claims and disputes. Thus, the expert is familiar with the disputes and is able to not only carry out an evaluation of the merits of the parties' claims and counter-claims but also apply both the applicable law of contract and construction law to the disputes. Because expert evaluation is inquisitorial in nature, more often than not, where there are gaps in the documentary evidence, the expert will interview the relevant staff of the parties in order to sieve and arrive at a factual matrix of the disputes. In this respect, in the same manner as an arbitrator, after

the expert has assessed the evidence, both oral and documentary, and assigned weight to it, the expert determines what facts have been established on the balance of probabilities The skill in applying the standard of proof is part and parcel of an expert's forte particularly, if the expert is well-versed in construction law and has prior experience in arbitration either as a counsel, an expert witness or an arbitrator. Consequently, the end product being the expert evaluation report sets out clearly the parties' rights and liabilities from a bird's eye view.

Based on the author's experience in preparing expert evaluation for parties' negotiations or mediation, the author is of the view that expert evaluation serves to give an indication as to a possible outcome of a dispute in construction claims albeit the expert evaluation lacks the due process of natural justice found in an arbitration, adjudication or litigation. Such a due process would naturally include a party's right to be heard and to present factual evidence to support its case and the opposing party's right to cross-examine the factual evidence. Nevertheless, because the expert evaluation is entirely inquisitorial and that particularly, the expert has prior experience in arbitration, the expert's interview of key factual witnesses of the parties is modelled at drawing factual evidence from the witnesses in the same manner as what a party's counsel would draw from its witnesses before presenting the same to an arbitrator, and at to filtering the factual evidence.

Accordingly, the possible outcome in the expert evaluation opinion in the form of a report helps the parties to attain a better-informed perception of the parties' positions in terms of their rights and liabilities so that the parties are enabled to ascertain a realistic bottom-line offer prior to beginning a negotiation. The parties may jointly appoint a suitable candidate to carry out the expert evaluation. Alternatively, one party may unilaterally appoint its own expert to carry out an expert evaluation report for the party alone who will then decide whether to disclose the report to the other party.

## 6 How does an Expert Evaluation-Mediation Hybrid Come into Play?

Notwithstanding the advisory role of the expert's report in assisting the parties to make informed decisions in their respective realistic bottom-line offer for the purpose of negotiation, there will still inherently be a gap between the parties' respective offers. If a few negotiation attempts still yielded no success, then it would be prudent to bring in a facilitator called the mediator.

Andrew Burr in ***Delay and Disruption in Construction Contracts*** (Burr, 2016) defines mediation as "the participation of a neutral third party as go-between to assist the parties in reaching a settlement" and "mediation does not involve the

intervention of a third party to decide a dispute". Ideally the mediator should be a person different from the expert. The rationale being that in a post-expert evaluation stage, the parties would need a facilitator to bridge the gap between the parties. In particular, the mediator is known as "a facilitative mediator'. Zumeta (Zumeta, 2022) describes the duties of the facilitative mediator as follows:

> *"The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome".*

Accordingly, the mediator does not necessarily has to be an expert in construction claims but will help each party see the weaknesses of each party's own position and the strengths of the opposing party's position so as to draw them closer together with a view to executing a settlement agreement. The mediation process is usually conducted in private and without prejudice just like in any private negotiation.

## 7 How Different is 'Expert Evaluation-Mediation' Hybrid from 'Evaluative Mediation'?

Evaluative mediation (Zumeta, 2022) is defined as follows:

> *"Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practicing "shuttle diplomacy". They help the parties and attorneys evaluate their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process, and directly influences the outcome of mediation".*

Unlike the facilitative mediator, because an evaluative mediator is concerned with the legal rights of the parties, and evaluate based on legal concepts of fairness, the evaluative mediator needs to be a person who has expertise in construction claims and law which are related to the substantive area of dispute.

In summary, the facilitative mediator is in charge of the mediation process but the parties determine the outcome, whilst the evaluative mediator is in charge of the mediation process and directly influences the outcome by making recommendations to the parties as to the outcome of the issues.

Although an evaluative mediator is in essence an amalgamation of both an expert evaluator and a facilitative mediator, there are many reasons why parties elect to proceed with an expert evaluation with no initial intention of mediation. The parties may have an anticipation that an expert evaluation would suffice to reach a resolution in a quick and economical way. However, where resolution is not possible, then the parties will have to consider engaging a separate facilitative mediator to achieve an outcome in the resolution process. Nonetheless, in hindsight, the parties could have proceeded straight to evaluative mediation rather than to expert evaluation first then followed by a contingent facilitative mediation.

## 8 Conclusion

Expert evaluation is essential to enable parties in dispute to draw up a realistic bottom-line offer for the purpose of negotiation. This would narrow the gap between the parties' positions. If negotiation still yields no success and there is still a deadlock, then facilitative mediation has the potential to draw the parties closer and close the gap between them.

## BIBLIOGRAPHY

1. Arts Law Centre of Australia, 'ALTERNATIVE DISPUTE RESOLUTION – BINDING EXPERT DETERMINATION AND NON-BINDING EXPERT EVALUATION' <https://www.artslaw.com.au/information-sheet/alternative-dispute-resolution-binding-expert-dermination-and-non-binding-e> accessed 15 May 2022
2. Andrew Burr, 'Delay and Disruption in Construction Contracts' 5th Edition, Informa Law, 2016
3. Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' (Mediate.com) <https://www.mediate.com/articles/zumeta.cfm> accessed 15 May 2022

# Determining the Proper Law of the Arbitration Agreement in an International Arbitration

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## 1 An Overview

There has been much debate about which proper law in an international arbitration is applicable to arbitration agreement in a situation where a contract expressly specifies the law governing the substantive contract and the place or 'seat' of arbitration but is silent as to the law governing the arbitration agreement in the contract.

Whilst domestic arbitration operating one single system of law usually applies the law governing the substantive contract to the arbitration agreement, this is not so in international arbitration since it involves foreign elements interacting with a system of law in the jurisdiction where the contract was made and performed. On that basis, international arbitration operates under the presumption that arbitration agreement can be governed by a different system of law from the one governing its contract. This presumption stems from the doctrine of separability where an arbitration agreement is severable from the contract, in the sense that the validity and effectiveness of the arbitration agreement is not affected by invalidity or illegality of the contract.[126]

As noted in the landmark English case of Channel *Tunnel v Balfour Beatty Ltd*,[127] Lord Mustill explained that international arbitration may contain various systems of law governing substantive rights of the parties to the contract from which the dispute has arisen (lex loci) and the arbitration agreement that the parties to submit the dispute to arbitration. They may even differ from the procedural law to the

126 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20
127 [1993] AC 334

arbitration (lex arbitri), which is determined by the place or 'seat' of the arbitration. That procedural law may also differ from the law of the place where hearing of the arbitration takes place, the latter being an operational and geographical choice.

In view that there are different systems of law inherent in international arbitration, and the potential complexities posed to the conduct of the proceedings in dealing with different systems of law in an arbitration, arbitral tribunal and the courts are often faced with difficulties in determining the proper law applicable to the substantive contract, arbitration agreement, and procedure governing the conduct of arbitration and the award.

This article will discuss how the courts in the United Kingdom deal with the situation where the contract nor the arbitration agreement is silent as to the choice of law governing the arbitration agreement in the realm of the conflict of law rules.

Before discussing the main topic of this article, it is important to understand the basic notion of arbitration agreement, substantive rights and conduct of arbitration.

## 2 Law Governing Arbitration Agreement

An arbitration agreement is a private agreement of dispute resolution forum chosen by the parties to settle through a final and binding decision rendered by an arbitral tribunal. Because an arbitration agreement is severable from the law of the substantive contract under doctrine of separability, it has its own law governing the validity of arbitration agreement, such as interpretation of an arbitration agreement, existence of a valid arbitration agreement, capacity of the parties, lack of consent, infringement of public policy etc. The effect of an invalid arbitration agreement is that the arbitral tribunal's jurisdiction to deal with the dispute does not exist or is rendered ineffective. Without a valid arbitration agreement, the courts would refuse an application for a stay of the court proceedings pending reference to arbitration; or in a case where the arbitral proceedings have been concluded and an arbitral award has been rendered, annul or refuse enforcement of the arbitral award.

## 3 Law Governing the Substantive Contract

The law applicable to a substantive contract governs the contractual rights of the parties and is used to determine the merits of the disputes arising from the contract. In international commercial contract, the parties are free to agree on different parts of the contract to be governed by different systems of law. That said, this often leads to confusion as to which law chosen by the parties that precisely governs each relevant part of the contract even though an arbitral tribunal has the power

to determine the applicable substantive law under the rules set out in section 46 of Arbitration Act 1996, England and Wales.[128]

## 4 Procedural Law

Conduct of arbitration requires an established legal framework for its effectiveness. Procedural law is essential to govern the relationship between the parties, arbitral tribunal and the courts that have supervisory jurisdiction over the arbitration and the arbitral award. Where arbitration agreement stipulates the place or 'seat of arbitration or opts for an institutional arbitration, then it is understood that the conduct of arbitration shall be governed by the procedural law of the chosen place of arbitration, or the place by default named in institutional arbitration rules.[129]

In *Atlas Power v National Transmission and Despatch Company Ltd*,[130] the institutional arbitration rules adopted for the conduct of arbitration was the London Court of International Arbitration ("LCIA"). It was held that the seat of arbitration was in London under LCIA Rule 16.2 even though the governing law of arbitration agreement was the national law (Pakistan) and that the supervisory jurisdiction to determine the choice of juridical seat was from the national law, and not in England. This case demonstrates that by stipulating London being the seat of arbitration, it gave effect to the parties' choice of law governing the procedural law is Arbitration Act 1996, England and Wales and conferred the power on the English courts being the exclusive supervisory jurisdiction over the arbitration matter. The law of the seat is therefore crucial as this is where it gives jurisdiction to the seat/ supervisory court to deal with anti-suit injunction and determine the applicable law of arbitration agreement.

## 5 Determining the Law of an Arbitration Agreement

A good case to start is the notable English case of *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA*.[131] This case concerned competing anti-suit injunctions over which supervisory jurisdiction, namely the English courts whereby the London was the chosen seat of the arbitration, or the Brazilian courts which have the exclusive jurisdiction over any dispute arising from the Policy, to determine the law to be applied to the arbitration agreement. In this case, the Policy was silent as to the law governing the arbitration agreement contained in the Policy. Despite the presence of a strong indicator pointing to the Brazilian law being the choice

128 Similar to section 30 of Arbitration Act 2005, Malaysia
129 *C v D* [2007] EWCA Civ 1282
130 [2018] EWHC 1052
131 [2012] EWHC 42 (Comm)

of law for the arbitration agreement, Cooke J in first instance determined that the closest connection to the applicable law to the arbitration agreement should be the law of the seat i.e. English law. Cooke J applied the conflict of law rules in determining the applicable law to arbitration agreement using a 'three-stage enquiry', to viz (i) express choice; (ii) implied choice; and (iii) closest connection. The determinative-factor in deciding that the English law had its closest connection to the arbitration agreement was the parties' choice of supervisory jurisdiction. In this case, the chosen seat of arbitration in the Policy was London.

Moore-Bick LJ in Court of Appeal[132] upheld this decision and provided a more sophisticated analysis as to why the third enquiry, namely, 'closest connection', would not necessarily always be the law of the seat. The Court of Appeal propounded a two-pronged approach in determining the law to be applied to an arbitration agreement:

(a) Firstly, one cannot assume that the proper law of arbitration agreement will be the same as the substantive law governing the contract.

(b) Secondly, there should be a 'three-stage enquiry' as per Cooke J to determine the proper law of arbitration agreement.

Although Court of Appeal gave an idea of the proper law applicable to arbitration agreement in the absence of an express choice of law governing arbitration agreement, they recognised that, in the absence of other factors, the implied choice of law governing arbitration agreement would often be the same as the substantive law governing the contract.

Drawing by the analysis of Moore-Bick LJ in Court of Appeal of Sulamerica, English law has moved away from the assumption of treating the choice of law governing arbitration agreement and the contract as being the same. However, it is still in a state of confusion as to what are the 'other factors' to be considered during the second and third enquiries in the 'three-stage enquiry' in determining the proper law applicable to arbitration agreement.

Subsequently, in the recent case of *Enka Insaat Ve Sanayi A.S v OOO Insurance Company Chubb*,[133] Supreme Court held that, where there is no express choice of law for arbitration agreement, the law governing the substantive contract would be the applicable law to arbitration agreement. Where there is no express choice of law governing the contract, then the closest connection to the law of arbitration agreement would, by default, be the governing law of the seat.

132 [2012] EWCA Civ 638
133 [2020] UKSC 38

This decision appears to have clarified the position in the Sulamerica case particularly in respect of the requirement for consideration of the 'other factors', namely, in a case where the parties have chosen the law governing the contract, that would be a strong factor for the presumption that the parties would intend or expect their contract to be governed by one single system of law i.e. the same law governing the substantive contract should also apply to arbitration agreement, even if the procedural law (derived from the seat) is different. The basis of the Supreme Court's decision was to provide certainty, consistency and give effect to the parties' intention or expectation of one single system of law to govern all contractual rights and obligations which includes the arbitration agreement.

However, Supreme Court also clarified that the inference that the chosen law governing the contract was intended to also apply to arbitration agreement could be overruled by two factors, namely:

(a) If there are provisions in the law of the seat which indicated that the arbitration agreement is also governed by that law.

(b) If there is a serious risk that if arbitration agreement is governed by the law of the contract, the arbitration agreement would be ineffective.

## 6 Conclusion

The Supreme Court's decision has somewhat resolved the confusion in English law on the determination of the proper law applicable to an arbitration agreement. However, decision in the Supreme Court may create a conundrum to business people in international aspect as they may not always desire for one single system of law particularly when the dispute arises, a neutral jurisdiction and arbitration-friendly system of law become essential. Nevertheless, it is still prudent for the parties to expressly set out their choice of law governing the arbitration agreement to avoid protracted litigation involved in the resolution of which law should be applied, particularly in international arbitration involving cross-border transactions.

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