2017 Year-in-Review: Top 5 in International Arbitration

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2017 was a busy year for international arbitration. Taking a walk down memory lane, we saw new players and new industries entering the game, institutions adopting new rules, and we have some new challenges to tackle.

This note summarizes some highlights and low lights in international arbitration during 2017 from across the globe.

Happy Holidays and Happy New Year!

1. *New Players*: third party funders arrive in Singapore and Hong Kong

Third party funding involves a third party funder paying for the costs of a legal proceeding, in return for a share of the proceeds if the claim is successful.

Previously, Singapore prohibited third party funding and Hong Kong did not have a legal framework expressly permitting it.

In 2017, third party funding expanded its footprint to both markets. This is a welcomed development, bringing Singapore and Hong Kong in line with other common law jurisdictions.

Singapore was first to establish a framework for third party funding in March 2017, adopting legislation which (i) abolished the common law torts of maintenance and champerty, and (ii) provided that third party funding by qualifying third party funders in relation to international arbitration and related court or mediation proceedings is not contrary to public policy or illegal.

Shortly thereafter, in June 2017, Hong Kong passed long-awaited legislation making it clear that third party funding of arbitration is permitted under Hong Kong law. Unlike Singapore, though, the Hong Kong legislation has not yet come into force: watch this space in 2018.

2. *New Industries*: arbitration continues to aim at financial industry disputes (with the rise of expedited and summary procedures)

Arbitration is widely used in some sectors, such as the oil and gas industry, but less widely used in others, such as the financial industry. The reason for this relative lack of popularity of arbitration in the financial services sector is partly because, among financial institutions, there are perceived shortcomings of arbitration: at the core of those shortcomings is the perceived lack of availability of

"summary judgment" or similar mechanisms for early disposition of simpler cases.

Arbitration institutions continuously have been refining their procedural rules in order to address this issue. SIAC was a leader, having introduced its expedited procedure rules in 2010, and last year having made available a summary disposition procedure. Tribunals have arguably always had the authority and discretion summarily to dispose of cases, pursuant to their broad case management powers. However, concerns about due process and the enforceability of arbitration awards, which is sometimes criticized as "due process paranoia," appear to have deterred many tribunals from exercising that power.

Other institutions have met critiques of the efficiency of the arbitral process by including provisions for early dismissal or summary determination. In January 2017, the Stockholm Chamber of Commerce (SCC) adopted a new procedure which allows for summary proceedings when certain conditions are met.

In August 2017, the HKIAC also invited practitioners to weigh in on whether it should adopt a similar new procedure for the early determination of disputes.

The latest effort that has led to new rules came in March, with the ICC Arbitration Rules revisions incorporating expedited proceedings which apply automatically to any arbitration in which the amount in dispute is less than USD$2 million. Notable features of this procedure include: (i) the dispute is normally decided by a sole arbitrator; (ii) the Terms of Reference phase is dispensed with; (iii) awards must be made within six months; and (iv) the Tribunal has discretion to decide the case with no hearing, no document production and no witness examinations.

Elsewhere, in January 2017, Russia's most prominent arbitral institution, the Moscow-based International Commercial Arbitration Court at the Chamber of Commerce and Industry, and the Vietnam International Arbitration Centre also introduced similar expedited arbitration procedures in their revised rules.

It remains to be seen whether these changes in arbitration rules will influence parties in the financial services sector to choose arbitration as their preferred method for dispute resolution.

3. *New Rules*: investment arbitration rules

"Investment arbitration" refers to investment disputes between a foreign investor and a host State under a treaty between the host State and the investor's home State. Even as debates about the legitimacy and future of investment arbitration have raged, there has been a steady increase in the number of investment arbitrations around the world. Historically, investment arbitrations have been administered mainly by ICSID under the ICSID rules, as ad hoc arbitrations under the UNCITRAL Arbitration Rules, or administered by the SCC.

In an effort to increase the number of investment arbitrations it administers, in January 2017, SIAC released separate rules for investment arbitration: the SIAC Investment Arbitration Rules (SIAC IA Rules). In recognition of the differences between commercial and investment arbitrations, the SIAC IA Rules include unique features such as (i) the possibility of submissions by third parties, (ii) discretionary publication of the Tribunal's decisions and award, and (iii) different time limits for certain filings, for the challenge of arbitrators, and for the decisions by the Tribunal.

The SCC also introduced a separate set of investment arbitration rules in Appendix III of the 2017 SCC Rules.

SIAC and the SCC were the first major arbitration institutions to offer rules for commercial arbitrations

and specialized rules for investment arbitrations, but they are not the only ones. In August 2017, the HKIAC also invited practitioners to weigh in on whether it should develop its own investment arbitration rules. On 1 October 2017, in preparation for "One Belt, One Road" disputes, CIETAC also adopted new rules for investment disputes.

4. *New Challenges*: TPPA and NAFTA trumped

Sticking with treaties and controversy: President Donald Trump lived up to his campaign promise and on his first full day in office, took action to withdraw the US from the Trans-Pacific Partnership Agreement (TPPA). Trump described the move as a "great thing for the American worker."

The TPPA is a free trade agreement signed on 5 October 2015 by 12 States responsible for an estimated 40% of the global economy: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. It is (or, was) intended to create major links between the Americas and Asia ex-China. It includes investor-State dispute settlement protection through binding arbitration.

As currently drafted, the TPPA can only enter into force if it has been ratified by the US. Thus, Trump's withdrawal from the TPPA scrapped those plans…or so it seemed. The remaining 11 TPPA Member States are still considering whether to abandon the TPPA or to find a way to preserve it, without the US. In October and November 2017, they held formal negotiations. It remains to be seen whether a new deal will be reached, but there is indication the 11 TPPA Member States are serious about it.

Trump has also lived up to his promise to go after NAFTA. Trump's Administration started renegotiations of NAFTA in August. It remains unclear whether the Administration will keep the investor-State dispute settlement in its current form or whether it will reform or replace it.

5. *The Next Big Thing*: IA meets AI?

Many say the legal industry, including the practice of international arbitration, needs updating. With the rise of new technology, it is undergoing a technological revolution. This is particularly apparent in Singapore where the importance of technology is impressed upon lawyers by the government in its effort to position Singapore as a legal hub and make it a "Smart Nation."

The buzz phrase in the legal industry in 2017 was certainly "technological innovation," including artificial intelligence (AI).

Legal technological innovation tools have been used in litigation and corporate work for some time, with software used to review large sets of documents for document production or due diligence, to do legal drafting or research through automated processes, for general case management and document organization, and to complete such mundane tasks as proofreading, formatting and editing legal documents. It is also making its way into ADR proceedings, with the latest being the use of DRExM in Egypt to resolve construction disputes. In March 2017, the Swiss Chambers Arbitration Institution held its first legal innovation conference where technological innovation in the practice of international arbitration was discussed.

Legal technological innovation has been and can be highly beneficial in international arbitration, providing numerous benefits for a more efficient and effective way of working, including by reducing costs, avoiding mistakes, and lowering lawyer stress, saving time and identifying risk early on. The demand for quality work at a reduced price to be done within a limited time frame requires the right base systems in place so that lawyers can add value where it matters most.