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**Speech**

# CHALLENGES AND FASCINATION: A MESSAGE TO NEOPHYTES IN THE ARENA OF ARBITRATION*

***Nigel N.T. Li & Joyce W. Chen*****

**ABSTRACT**

*The discussion over twenty years ago about the role of an arbitration institution sparked a systemic reform in Taiwan. The reform in Taiwan as well as the worldwide movement from the New York Convention to UNCITRAL Model Law prompted a rethink of the nature of arbitration and the necessity of distinguishing between domestic and non-domestic arbitration in the modern reality. The essay discusses the four international arbitration theories, namely, the jurisdictional theory, the contractual theory, the hybrid theory, and the autonomous theory, all of which leads to a deeper understanding of the nature of arbitration. An in-depth look at the relationship between the parties, arbitrators and arbitration institutions follows. Two special cases are highlighted; one from Taiwan and the other from Austria. They represent diametrically opposite points of view. Judicial immunity on arbitration fee decisions is also touched on. The different roles a counsel could play in arbitration are inherently fascinating. The role shift from a counsel to an arbitrator can be intellectually demanding and stimulating. Furthermore, in international arbitration, arbitrators may work with peers from multiple jurisdictions. That means performing their jobs properly entails dealing with cultural differences and both common and civil law systems from time to time. They will also have to learn to harness the flexibility built into arbitration, applyingLexMercatoriaor amiable composition where appropriate, rather than adhering dogmatically to substantive laws. These features and challenges of arbitration naturally lead one to ponder how justice can best be served.*

**Keywords:** *international arbitration theories, arbitration in Taiwan, arbitration institution, institutional arbitration, language, civil law, common law, med-arb, theKeeneyecase*

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** Nigel N. T. Li, President of CAAI Court of Arbitration; Joyce W. Chen, Senior Attorney, Lee and Li, Attorneys-at-Law.

## I. ARBITRATION AS A GLOBAL ADR MECHANISM

This essay is particular to the arbitration universe in Taiwan. The particularity is not just merely due to the fact that the authors are Taiwanese but also Taiwan because occupies a special place in international arbitration. Taiwan is not a signatory to the New York Convention, but it is a vibrant regional center and home to vast assets of many sophisticated players in international commerce. Although political complications prevent it from being a signatory, Taiwan is committed to aligning itself with the international practice, and the local courts are consistently pro-arbitration and in principle grant the enforcement or recognition of foreign arbitral awards.

Over twenty years ago, there was discussion about the role of an arbitration institutions in an arbitration with foreign elements in Taiwan.[1] The intent then was to somehow ignite systemic reform in Taiwan, eliminating, if at all, possible, at all the dual track of domestic and "non-domestic" arbitration. The conventional way was to sort arbitration into domestic arbitration and non-domestic arbitration. However, why should arbitration be sorted by national borders? Will it serve dispute resolution worldwide if we do not limit ourselves to a single jurisdiction?

In 1958, the "Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards," or the "New York Convention" was enacted. It applies to the recognition and enforcement of *foreign* awards.[2] It uses the word *foreign*, drawing a clear line between non-domestic arbitral awards and domestic arbitral awards. According to the New York Convention, with limited exceptions a nation should recognize and enforce foreign arbitral awards, with limited exceptions.

However, twenty-seven year later, in 1985, the UNCITRAL Model Law on International Commercial Arbitration heralded a different direction. The United Nations Commission on International Trade Law ("UNCITRAL") was established on 17 December 1966. Its UNCITRAL Model Law was intended as a framework to help the member states modernize their arbitral laws. The Model Law can be adopted in its entirety, but member states also have the latitude to depart from it.[3] Paragraph 1 of Article 1 reads: "This Law applies to *international* commercial arbitration, subject to any agreement in force between this State and any other State or States." Clearly, the UNCITRAL Model Law applies to international arbitration.[4] Whereas non-domestic arbitration used to be labeled "foreign arbitration" in the New York Convention, there is now "international arbitration", a term that goes a long way towards erasing national boundaries and the factor of sovereignty, although only to a limited extent.

This shift was fueled by the debate over "delocalized", "a-national" and "floating" arbitration.[5]The delocalization of arbitration means that an arbitration should be free from the procedural safeguards imposed by national legal systems.[6] Delocalized arbitration leads to a "floating" award. Similarly, "A-national" describes awards that do not owe their validity to a particular national law and thus are not subject to review under national laws.

Looking at the arbitration laws around the world, the variance in arbitration systems from jurisdiction to jurisdiction becomes readily apparent. Some jurisdictions adopt dual tracks, one for domestic arbitration, and one for non-domestic arbitration. But other jurisdictions do not. For instance, Britain has only one law for both domestic and international arbitration.[7] Taiwan's Arbitration Act, however, still has

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1 Nigel Li, *Function of the Chinese Arbitration Association in Foreign-Related Arbitration*, *in* THRIVING ARBITRATION MECHANISM IN TAIWAN 106, 107 (Lin-Lin Wang ed., 1995).

2 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

3 *74 Jurisdictions Have Adopted the UNCITRAL Model Law to Date*, INT'L ARB. L. (Mar. 1, 2017), http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/.

4 UNCITRAL Model Law on International Commercial Arbitration (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

5 ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 89-91 (2004). William W. Parker, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 684 (1989).

6 Parker, *id.* at 650-51.

7 United Kingdom Arbitration Act, 1996; *see also England & Wales: International Comparative Legal Guides, International Arbitration 2018*, ICLG.COM, https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/england-and-wales (last visited Aug. 29, 2018); ANGELINE WELSH, ARBITRATION GUIDE – ENGLAND & WALES 5 (2018); *see* Li Guei-Ying, *1996 Nien Ying Guo Hsin Zhong Tsai Fa Pin Hsi* [Review of the New 1996 United Kingdom Arbitration Act], 43 L.J. 54, 56 (1998);

a chapter named "*Foreign* Arbitral Awards". As of the time of writing, there is an ongoing discussion in Taiwan to amend the law to meet the standards of the UNCITRAL Model Law. One of the more prominent debates concerns whether Taiwan should continue the dual system of local and foreign awards, or treat all awards equally. If Taiwan adopts the second approach, the law needs to be modified as there is even a chapter called "foreign award" in the current Arbitration Act. It is worth observing which path Taiwan will take, and any developments will be an important point of reference value to many countries in the trend of delocalization.

Laws distinguishing between domestic and non-domestic arbitration still exist. But a close contemplation of the arbitration theories and the necessity for distinguishing between domestic and non-domestic arbitration in the modern reality leads to the conclusion that there is little need for the distinction. The characteristics of arbitration, like confidentiality and flexibility, remain unchanged for domestic arbitration and non-domestic arbitration. Hopefully, the world will move toward a system that draws no line between domestic and non-domestic arbitration. And only through the process of denationalization will arbitration evolve into an ADR mechanism that accommodates the continuing changes of contemporary disputes in the 21st century and beyond.

Since the UNCITRAL Model Law was introduced over thirty years ago, legislation based on it has been adopted in 80 States and 111 jurisdictions at the time of writing.[8] Meanwhile, after more than sixty years, the Convention now has 159 state signatories.[9] These numbers are indicative of a global trend to adopt the UNCITRAL Model Law and the New York Convention. Despite Taiwan's enthusiasm towards this trend, the country is not yet permitted to adopt the Convention. The United States once refused to recognize an award made in Taiwan, citing the principle of reciprocity and the fact that Taiwan is not a signatory to the New York Convention.[10] But the fact remains that Taiwan generally enforces foreign arbitral awards to observe the spirit of the Convention.

Under the New York Convention, whether or not an arbitration award is a foreign award is determined by the seat of arbitration. Because Taiwan is not a signatory state of the New York Convention, cross-border enforcement of local arbitral awards is a real concern as it may encounter judicial resistance.[11] Likewise, recognition and enforcement of foreign awards in Taiwan may require explanations from the applicant. To enhance the enforceability of local arbitral awards abroad, Taiwan must be as practical and flexible as it is in recognizing foreign awards. On December 7, 2018, the first foreign branch of the Chinese Arbitration Association, Taipei (hereinafter "CAA"), namely, the CAA International Arbitration Centre (hereinafter "CAAI"), was founded in Hong Kong. Article 19 of the CAAI Rules provides clearly that the seat of arbitration will be Hong Kong if and when parties are silent on this point. As such, CAAI awards as awards made in Hong Kong can be enforced in accordance with the New York Convention, which helps obviate the difficulties of enforcing Taiwanese awards across the borders.

## II. REFLECTION ON THE NATURE OF MODERN ARBITRATION—INTERNATIONAL ARBITRATION THEORIES

Modern arbitration is driven by the evolution of theories on international arbitration agreements theories. According to Julian Lew, there are four such theories: the jurisdictional theory, the contractual theory, the hybrid theory, and the autonomous theory.[12]

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*see also* CHUNG-HUA INST. FOR ECON. RESEARCH, *Ying Guo, Mei Guo, Jui Shih, Shin Jia Po, Niu Hsi Lan Yu Wo Guo Zhong Tasi Fa Ji Ji Bi Jiao Yen Jiu* [Comparative Research of England, U.S., Switzerland, Singapore, New Zealand and R.O.C. Arbitration System], at 5 (2013).

8 *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts /arbitration/1985Model_arbitration_status.html (last visited Feb. 24, 2019).

9 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, WIKIPEDIA, https: //en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards (last visited May 17, 2019). For list of contracting states, *see Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited May 17, 2019).

10 Clientron Corp. v. Devon IT, Inc., 125 F. Supp. 3d 521 (E.D Pa. D. 2015). *See* Chen Wei-jen & Li Chien-fei, *Jo Gan Zhong Tsai Wen Ti Yu Tai Wan Fa Yuan Zhi Jin Chi Shih Jian* [Recent Court Practices of Various Arbitration Issues in Taiwan], 107 ARB. Q. 60, 66 (2018).

11 That being said, Taiwan has voluntarily incorporated the contents of the New York Convention into its Arbitration Act, which establishes a friendly mechanism for recognizing and enforcing foreign awards locally.

12 *Chapter III Internation Arbitration Agreements Theories,* at 68, http://shodhganga.inflibnet. ac.in/bitstream/10603/175169/17/12_chapter%203.pdf.

The jurisdictional theory was once the mainstream theory. It emphasizes the significance of the supervisory powers of a state. Under this theory, arbitration is thought to be an extension of the sovereignty, and tended to exercise the jurisdiction of a state. Arbitration is deemed a substitute for litigation; parties can choose to refer their dispute to court or arbitration, reducing the burden of the court. Furthermore, an arbitrator in arbitration is like a judge in court, and because of the powers conferred upon arbitrators by the state, the arbitral awards they make have the same effect as court judgments.[12] At the same time, the court also has the right to control or supervise the arbitration mechanism. It can interfere in an arbitration by refusing or granting the recognition or enforcement of an award. Essentially, the supervisory power of the court over arbitration resembles an appeal mechanism in arbitration.

Some believe that the jurisdictional theory has been adopted in Taiwan. An arbitrator is deemed an extension of the jurisdiction, and its role resembles that of a judge's in national courts. Article 124 of the Criminal Code of the Republic of China reads, "A public official vested with judicial functions or *an arbitrator who renders an illegal decision or arbitral award shall be sentenced to imprisonment* for not less than one year but not more than seven years [emphasis added]." The powers of the state and the supervision of the authorities concerned are evident in the regulations of Taiwan. Article 19 of the R.O.C. Arbitration Act states: "Where this Law is silent, the arbitral tribunal may adopt the Code of Civil Procedure mutatis mutandis or other rules of procedure which it deems proper." In addition, Paragraph 2, Article 54 of the R.O.C. Arbitration Act reads: "Regulation(s) or guideline(s) of organization, establishment approval, revocation or repeal of approval, arbitrators' registration, cancellation of arbitrators' registration, arbitration fees, mediation procedures and fees of an arbitration institution shall be jointly provided by the Executive Yuan and the Judicial Yuan."

The jurisdictional theory stirred up controversy because arbitrators are not judges appointed by the state. The state has no legal relationship with arbitrators. In an international arbitration, the arbitrators may even be foreigners. It also ignores the fact that the adoption of arbitration in lieu of litigation is based on party autonomy.

Unlike the jurisdictional theory, the contractual theory claims that arbitration is a contract or agreement between the parties. The tribunal is appointed by the parties. Even if the arbitrator is like a judge, the person is still not a judge. However, under this theory an award the tribunal makes has only the effect of a contract. That is to say, an award is not compulsory, and if one party does not observe it, the other party will have no right to directly enforce the award, and may need to refer their dispute to court. However, such development would only prolong the proceedings.

Since neither the jurisdictional theory nor the contractual theory satisfies the modern framework of international commercial arbitration, a compromise theory was developed after some compromise—the hybrid theory. This theory suggests that international commercial arbitration is a mechanism with a dual characteristic. The parties can choose the arbitrators and the governing rules owing to the nature of the private agreement between them. At the same time, the arbitration has to be conducted within national legal regimes to determine the powers of the parties, the validity of the arbitration agreement and the enforceability of the awards.[13] While some scholars believe the hybrid theory is more complete than the first two theories, others think that the first two theories are not compatible at all and that any attempt to reconcile them is like trying to square the circle.

Owing to the differences in opinion, the autonomous theory was developed and is widely adopted around the world. It offers a mechanism by which the parties decide how they want their dispute to be resolved. The state respects and supports the parties' choice, and supervises the arbitration only when it deems it necessary. Under this theory, the state has no right to monopolize the dispute resolution system, and parties have the right to refer their dispute to courts, but that does not mean the court is their only resort. Instead, the court and the arbitral tribunal are both options for the parties. It is the parties that decide where and how their dispute should be resolved.

A state has several reasons to adopt the autonomous theory. One is that the parties would have the right to choose their own procedure, which the state has to respect. Another reason is that it is economical. Arbitration can effectively lighten the caseload of the court and conserve litigation resources. The mechanism can attract foreign investment because it is a reliable cross-border dispute resolution

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[12] JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 52-61 (1st ed. 1978).

[13] *Id.* at 83-84.

mechanism. When the state respects the parties' decision to resolve their dispute via arbitration and gives arbitral awards the same effect as court judgments, disputants will be motivated to choose alternative dispute resolution rather than litigation.

### III. Relationship Between the Parties, Arbitrators and Arbitration Institutions

If international arbitration agreements govern the relationship between the parties and the state, how about the relationship between the parties, arbitrators and arbitration institutions? There is a rare case in Taiwan dealing with the issue. In 2006, the CAA was sued for excessive arbitration fees. The arbitration in question was for a construction contract dispute, and the claimant was claiming for the construction fee and machinery plus rental. Despite the claimant's challenge, the tribunal ordered payment of arbitration fees based on the claim amount, inclusive of rentals. After the tribunal rendered an award unfavorable to the claimant and ordered the claimant to bear the cost, the claimant sued the institution, the CAA, for the excessive arbitration fees on the basis of unjust enrichment. The claimant did not name the arbitrators as co-defendants.[14]

In this action, the Taiwan Supreme Court ruled that there was no unjust enrichment, and that the court could not intervene with the arbitration institution's decision. However, the court left the door open for a future claim by stating: "This court by no means implies that the construction company cannot sue the association on the grounds of contractual relationship." A second action was subsequently brought to the court, asking for damages and compensation based on contract of mandate.[15]

In the second action, the judgment states that in an arbitration contract, arbitrators are instruments of the institution. Since the arbitrators are instruments of the CAA, by Article 224 of the Civil Code the CAA should be responsible for the tribunal's decision. In the court's opinion, the amount of the fees was decided by the arbitrators for the benefit of the institution. The fees were collected by the institution, with the arbitrators taking a portion and the institution keeping the remainder. The relationship between the arbitrators and the institution was mutually beneficial, and the institution could exercise quality control through the ethical committee's disciplinary power over the arbitrators. The court opined that it had the power to intervene in the determination of the fees to prevent self-seeking by the arbitrators. Despite the fact that the court can intervene, it concluded that there were still no grounds to challenge the tribunal's fee calculation as a violation of law.

Austria, on the other hand, embraces a different view. In one case where an arbitrator sued the institution for insufficient fee payment, the court held that it made more sense to assume that there was an arbitration contract (Schiedsrichtervertrag) between the parties and the arbitrators. If an arbitration contract was established between the parties and the arbitrators, the parties were obligated to pay the arbitrators their fees. Demanding and safekeeping the advance payments, and determining the payment of the fees by the institution were deemed a service provided by the institution. The Austrian court's finding implies the existence of a separate service contract between the institution and the parties or arbitrators.[16]

Another Austrian judgment is about an *ad hoc* arbitration proceeding in which the court held "to the extent that an arbitration contract's character 'is not opposed,' the rules on 'Werkvertrag' [hire of work] and 'Bevollmächtigungsvertrag' [contract of mandate] shall apply." The judgment also reads: "Performance by the individual, not the element of time, is the key component of the arbitration contract, and for that reason alone, it can already be seen not a contract of employment."[17]

It is evident from the cases above that Taiwan and Austria diverge on the relationship between the parties, arbitrators and arbitration institution. In Taiwan, the institution is the primary party to the arbitration contract, whose objectives include ensuring the quality of the arbitration; while in Austria, the

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[14] Taiwan Taipei District Court Judgment 95-Su-Zi No. 1391; Taiwan High Court Judgment 95-Shan-Zi No.573; Taiwan Supreme Court Judgment 96-Tai-Shan-Zi No.1112; Taiwan High Court Judgment 96-Shan-Geng-Yi-Zi No.110; Taiwan Supreme Court Judgment 97-Tai-Shan-Zi No.782; Taiwan High Court Decision 97-Shan-Geng-Erh-Zi No.59; Taiwan High Court Judgment 97-Shan-Geng-Erh-Zi No.59; Taiwan Supreme Court Judgment 98-Tai-Shan-Zi No.430; Taiwan High Court Judgment 98–Shan-Geng-San-Zi No.43.

[15] Taiwan Taipei District Court Judgment 100-Su-Zi No. 707; Taiwan High Court Judgment 100-Shan-Zi No.1030; Taiwan Supreme Court Judgment 102-Tai-Shan-Zi No.2018; Taiwan High Court Judgment 102-Shan-Geng-Yi-Zi No.99; Taiwan Supreme Court Judgment 104-Tai-Shan-Zi No.1145.

[16] OGH 18.09.2012, 4 Ob 30/12h (2012) (Austria).

[17] OGH 30.11.2006, 6 Ob 207/06v (2006) (Austria) (X. v Austrian Federal Economic Chamber).

institution is deemed not to be a party to the arbitration contract but a service provider. In Taiwan, parties to the arbitration contract are the disputants and the institution, with the arbitrators as instruments of the institution; while in Austria, parties to the arbitration contract are the disputants and the arbitrators.

In *ad hoc* arbitration, where there is no institution, the relationship may be different. In Taiwan, while the arbitration contract is between the parties and the institution in institutional arbitration, it is between the parties and the arbitrators in *ad hoc* arbitration. In Austria, however, the arbitration contract remains between the parties and the arbitrators in both institutional and *ad hoc* arbitration. The difference reflects the conceptual conflict between the autonomous theory and the jurisdictional theory. Austria adopts the autonomous theory. It thinks the relationship depends on the agreement between the parties with regard to the arbitration proceedings, in the spirit of private autonomy. Where the parties fail to reach a consensus on the appointment of an arbitrator, appointment by the institution is concluded according to the arbitration rules the parties have tacitly accepted and can also be deemed a decision of the parties, based on their right of private autonomy. On the other hand, since the current regulations of Taiwan seem to adopt the jurisdictional theory, arbitrators resemble judges and arbitration institutions resemble courts. All arbitration procedures are to be regulated by law (the state), including arbitration fees. The courts supervise arbitration, which justifies their intervention in the determination of fees—albeit limited out of judicial courtesy.

Some may ask whether there is any immunity on fee decisions. This issue has not yet been heard by Taiwan courts because the arbitrators were not sued in the Taiwan case above. However, according to *Butz v. Economu* of the United States,[18] judicial immunity can be extended when the role of the individual is "functionally comparable" to that of a judge, and when immunity is necessary for the individual to perform his or her role without harassment or intimidation. *Butz v. Economu* allowed judicial immunity to be extended to government officials or any individuals acting in a judicial capacity. The prerequisites for extending immunity are laid out below.

In *Corey v. The New York City Stock Exchange* (hereinafter "*Corey v. NYSE*"),[19] the court held that extending immunity to arbitral institutions is a "natural and necessary product of the policies underlying arbitral immunity," otherwise, "immunity extended to the arbitrators would be illusory." *Corey v. NYSE* allowed the extension of arbitral immunity to the institutions or the "boards who sponsor arbitration".[20] This was based on the rationale given in *Butz v. Economu*. An arbitral institution's role fits the prerequisites laid out in *Butz v. Economu* and thus immunity should be extended to the institutions as well.

In *Austern v. Chicago Board Options Exchange*,[21] the court held that immunity could apply to both the discretionary and administrative tasks of the institution, and that immunity also extended to an arbitral institution's violation of internal procedures. The Second Circuit in this case rejected the argument that immunity can cover only the discretionary tasks performed by the institution and not others. The court held that immunity should apply to both the discretionary tasks and the administrative tasks that an arbitral institution performs over in the course of an arbitration. The court opined that whether a task was to be covered by arbitral immunity depended on the "function it protects and serves". Therefore, going back to the determination of arbitration fees, if the fee's function is to ensure and secure the contractual relationship between the parties and the arbitrators/institution, that would make it an essential part of the arbitration and therefore should therefore be protected by arbitral immunity.

To conclude, according to the American view, judicial immunity extends to arbitrators for their semi-judicial roles. Arbitrator immunity extends to the institution that sponsors the arbitrators. One can assume that in the United States, *ad hoc* arbitrators enjoy the same immunity as institutional arbitrators. Both U.S. and Taiwan courts recognize the semi-judicial role of an arbitrator, and that reflects the application of the jurisdictional theory. Meanwhile, U.S. courts seem to suggest that the institution is an instrument of the tribunal, not vice versa, adopting a view similar to that of Austrian courts.

## IV. FASCINATING DUALITY OF COUNSEL—ARBITRATOR

In Taiwan and perhaps many other jurisdictions, to be a judge, one has to pass a formidable test. That means most litigators play the same role throughout their careers, and can only imagine what it is

[18] Butz v.Economu, 438 U.S. 478, 516 (1978).
[19] Corey v. New York Stock Exchange, 691 F.2d 1205, 1209-10 (6th Cir. 1982).
[20] *Id.*, at 1209, 1211.
[21] Austern v. Chicago Board Options Exchange, 898 F.2d 882, 886 (2nd Cir. 1990).

like to be in the judge's shoes. However, in arbitration, the same person who acts as a counsel in one arbitration may act as an arbitrator in another. And going from an arbitration counsel to an arbitrator is a well-known, time-honored path. It is almost a "destiny", and the likelihood of it increases with the time spent in the practice of arbitration.

In arbitration, an arbitrator is like a judge. One of the beauties of being an arbitrator is that you can act as an "*ad hoc* judge". However, unlike in litigation where judges are bound by a set of rules in the civil procedure laws, national laws and institutional rules rarely "tell" the arbitrators what to do. Instead, the arbitrators have the leeway to issue procedural orders to make sure the proceeding goes smoothly and efficiently.

Forum shopping, which refers to the situation where a claimant choosing a court most favorable to his or her case, is sometimes a major concern in litigation.[22] But in arbitration this problem is easily sidestepped. The seat of arbitration can be a place not related to the dispute or the parties; it can be anywhere as long as both parties agree on it. For instance, even Hawaii can be a great seat of arbitration because it sits between where the parties respectively operates, far from each other, and since it is a tropical setting where all arbitrators, counsels and parties can resolve whatever dispute is at hand in a cheerful atmosphere. For the same reason, I believe Taiwan is an ideal place as well, if not a better one!

Moreover, unlike litigation in most civil law jurisdictions, the parties can agree on a schedule for when to undertake document discovery, when to exchange or submit their pleadings, when and how long the hearing will be, and even when the tribunal should issue the arbitral award. The arbitrator and the parties have the privilege to establish an arbitration proceeding that suits all participants' needs. When there are differences between the parties over the way the arbitration should be conducted, the arbitrator is the one to settle them and make an order to resolve that difference.

Also, unlike litigation, which is usually strictly bound by national law, arbitration is flexible enough to accommodate *Lex Mercatoria* or amiable composition. *Lex Mercatoria*, usually known as *merchantile law*, refers to trade habits and business rules that are gradually established in international business.[23] In *Eagle Star insurance Co v. Yuval insurance Co. Ltd*,[24] Lord Denning upheld the equity clause, freeing the tribunal from the strict meaning of the contract. He wrote: "The clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the court. It only ousts technicalities and strict constructions. This is what equity did in the old days and it is what arbitrators properly do under such a clause."[25] In the decision on *Halpern & Ors v. Halpern & Anor*,[26] the court wrote: "If parties wish some form of rules or law not of a country to apply to their contract, then it is open to them to so agree, provided that there is an arbitration clause. The court will give effect to the parties' agreement in that way."[27] *Lex Mercatoria* is not mandatory, and it applies only when the parties mutually agree on it, sometimes even at the suggestions of arbitrators.[28]

Another option is amiable composition, which refers to an arbitration where arbitrators are empowered to deviate from the application of law and decide the case on the basis of what arbitrators think is fair and reasonable, and helps to forge better business relations between the parties. That is to say, arbitrators are allowed to forgo strict legal interpretation and can decide the dispute according to justice and fairness based on equable and equitable considerations.[29] As an "*ad hoc* judge", arbitrators

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[22] Tahsin Najam, *Forum Shopping: Arbitration Provisions and An "Action Against Insurer" Clause*, CLYDE & CO (Jan. 16, 2018), https://www.clydeco.com/insight/article/relying-on-arbitration-provisions-in-the-presence-of-an-action-against-insu.

[23] Li Fu-Dien, *Lex Mercatoria Zai Zhong Tsai Shan Zhi Shih Yong* [Application of *Lex Mercatori* in Arbitraion], *in* MA HAN BAO JIAO SHOU BA JI HUA DAN JU SHO LUN WEN JI – FA LU JO LI YU JI DU: GUO JI SHI FA [PROFESSOR MA HANBAO'S 80TH BIRTHDAY COLLECTION: LEGAL PHILOSOPHY AND SYSTEM—PRIVATE INTERNATIONAL LAW] 107, 116-17 (Harro von Senger eds., 2006).

[24] Eagle Star Insurance Co Ltd v. Yuval Insurance Co 1 [1978] Lloyd's Rep 357 (Eng.).

[25] *Lex Mercatoria in International Commercial Arbitration*, LAWTEACHER (Feb. 2, 2018), https://www.lawteacher.net/free-law-essays/commercial-law/lex-mercatoria-in-international-commercial-arbitration-commercial-law-essay.php#ftn18.

[26] Halpern & Ors v. Halpern & Anor [2007] EWCA (Civ) 291 (Eng.).

[27] *Lex Mercatoria: Can the Principles of European Contract Law be Regarded As Constituting An Autonomous Lex Mercatoria or, If Not, Can They Be Regarded As Part of A Universal Lex Mercatoria?*, LAWTEACHER (Feb. 2, 2018), https://www.lawteacher.net/free-law-essays/ contract-law/lex-mercatoria.php.

[28] Anthony Connerty, *Lex Mercatoria: Reflections from an English Lawyer*, 30 ARB. INT'L 701, 714 (2014).

[29] Hong-lin Yu, *Amiable Composition – A Learning Curve*, 17 J. INT'L ARB. 79, 80 (2000).

may derive satisfaction from finding ways more suitable, more sufficient, more flexible and sometimes perhaps more humane for the parties to resolve their disputes.

Another aspect of the work of an arbitrator that is tremendously enjoyable is cooperation with arbitrators from different backgrounds. International arbitrators often come from different jurisdictions, after being recognized as true players in various professions. Part of the work will entail meeting preeminent figures, with character and style and tremendous experience, in arbitration or ADR. Discussing the case with them can be highly instructive and inspirational. These experiences are more than rewarding.

## V. CHALLENGES

An international arbitrator faces diverse challenges. The four most common ones are the constant mix of common and civil law systems, the application of multiple disciplines, language, and cultural differences. They will test an arbitrator's equanimity and understanding of the very nature of law and justice.

A defining feature of common law is the adversarial system. Meanwhile, civil law is characterized by the inquisitorial system. It is clear cut for a litigator. But in international arbitrations, the adversarial system usually mingles with the inquisitorial system. Arbitration counsels and arbitrators have to nimbly move back and forth between common and civil law systems. For most of the time, arbitrators do not choose one of them and use it throughout the entire arbitration process. Rather, they may need to marshal the spirits of both systems to the extent needed in each case. What this requires is a strong grasp of how these two systems work. Arbitrators also need to think differently in different circumstances to decide the most appropriate proceeding. One example is the document discovery. Unlike the full set of discovery adopted in litigation of most common law jurisdictions, limited discovery is often adopted in arbitration.

Arbitrators very likely need to deal with multiple disciplines, including the institutional rules of arbitration, law of the seat of arbitration and the substantive governing laws. They also have to be familiar with the institutional rules the parties refer to, sometimes including the code of arbitration ethics. In extreme cases, they may find themselves in a situation where an *ad hoc* arbitral tribunal is established with an arbitration institution involved only to assist with the logistics, or even more complicated, the parties agreed to the administration of one arbitration institution with the arbitration rules of another arbitration institution. There is an infamous case where the parties referred their dispute to SIAC, but using ICC rules. The losing party applied to set aside the award. While the Singapore High Court upheld the award, the case is hotly debated.[30] This case is probably one that should not have gone the way it did. How to avoid similar difficulties in similar situations that may confront arbitrators and practioners from time to time remain a challenge awaiting players in the arena.

Again and again, arbitrators will have to contend with different local laws, even when they are not familiar with them before taking up the case. For instance, because the winning party will apply for enforcement of the award after the arbitration proceeding is concluded, during the proceeding the arbitrators or the counsel may need to become familiarized with, and correctly apply, the law of the seat of arbitration, which may not be their home jurisdiction, so as to ensure the enforceability of the award.

Language is another challenge arbitrators are bound to face. The choice of language is crucial to whether an arbitration can go smoothly. It does not need to be the language used at the seat of arbitration. The language of the evidence and the language the arbitrators, counsels, and the parties have chosen to speak will all be considered in determining the language of arbitration. In addition, arbitrators may need to contemplate not only which language to use, but also how many languages should be involved and be effectively managed through a well-composed team in the proceedings and how they are adopted at different stages in the arbitration.[31] The translation costs and the misunderstanding that might accompany faulty translations in crucial moments must be taken into consideration too.

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[30] Richard Hill, *Hybrid ICC/SIAC Arbitration Clause Upheld in Singapore*, KLUWER ARB. BLOG (June 10, 2009), http://arbitrationblog.kluwerarbitration.com/2009/06/10/hybrid-iccsiac-arbitration-clause-upheld-in-singapore/ .

[31] Sally A, Harpole, *Language in Arbitration Procedure: A Practice Approach for International Commercial Arbitration*, 9 CONTENP. ASIA ARB. J. 274, 274 (2016).

Sooner rather than later, arbitrators are going to face cultural differences, in particular when operating in this exciting region of East Asia. Arbitration was called "Gongduan" in ancient China.[32] Historically, Gongduan was actually a delegation of political authority. The head of the family conducted Gongduan and used his power without the consent of the parties. The disputes were often over someone's noncompliance with the code of conduct honored or enshrined by the family.[33] This is a very different idea from the contemporary concept of arbitration, where parties' consent is required to arbitrate. Nonetheless, that traditional Asian concept may still preoccupy some parties in arbitrations nowadays.

Such cultural differences may explain the dissimilar perceptions of "med-arb" in the West and the East. Med-arb is a form of dispute resolution in which the arbitrator starts as a mediator, or switches roles from arbitrator to mediator in the midst of arbitration, but imposes a binding decision in the event of a failure of mediation. In the West, such seamless transition between arbitration and mediation is generally not accepted. Mediators are not deemed suitable to hear the case as an arbitrator if the mediation fails. In contrast, in the East, "med-arb" is a generally acceptable method in the field of alternative dispute resolution. One example is that such mechanism is explicitly stipites in the Mediation Rules of the Chinese Arbitration Association in Taiwan.

In 2011, the Keeneye case sparked off considerable debate over the compatibility of arbitration and mediation in Asia.[34] In that case, the parties agreed to mediation after the first arbitration hearing. Consequently there was a "mediation" held in a hotel, where the mediators dined together. They included an arbitrator nominated by the claimant, the Secretary General of the Xian Arbitration Commission, and an affiliate of the respondents. The affiliate was told to "work on" a RMB 250 million proposal with the respondents. The respondents eventually refused and proceeded to arbitration. The arbitral award amounted to RMB fifty million only. The respondents applied to have the award set aside. The Xian court dismissed the application for there was no evidence of bias and no breach of the arbitration rules. The claimant then applied to enforce the award in Hong Kong. The presiding judge of the Hong Kong Court of First Instance refused to enforce the award and held that to enforce the award would breach Hong Kong's public policy. He stated that it was self-evident that the impartiality issue and the risk of apparent bias arose from an arbitrator also acting as mediator. However, upon appeal, the Hong Kong Court of Appeal upheld the award, stressing that the Xian court was in a better position to decide whether mediation by way of a dinner in a hotel would be acceptable in China. The HK court's view is controversial because it upheld an award that might be against the public policy in Hong Kong, but did not run afoul of the public policy in China. These conflicts do exist and a good arbitrator needs to know how to deal with them to serve the best interests of both the parties, and the arbitration public. The parties may find themselves agreeable to the arbitrator's role shift to mediator for cost-effectiveness and for the trust already placed in the presiding arbitrator. It is advisable to acquire the knowledge and expertise required for acting not only an arbitrator but also a mediator, so as to have full appreciation of the relevant considerations and to make a proper decision. After all, both mediation and arbitration are indispensable means in the field of ADR.

## VI. SERVING JUSTICE IN ARBITRATION

All the intricacies of arbitration discussed so far have but one purpose, which is to resolve the dispute and to ensure justice is served. "定分止爭" (*ding-fen-zhi-zheng*) is a Chinese idiom coined by the great Chinese philosopher Han Fei. The first half of it, "定分" (*ding-fen*), means to determine or allocate entitlements, which is the typical objective of litigation and arbitration. The second half, "止爭" (*zhi-zheng*), means to resolve disputes and settle differences, which is the purpose of mediation and settlement. Together, the idiom means once a resolution is reached, entitlements are decided. "定分止爭" (*ding-fen-zhi-zheng*) has both procedural and substantial meanings.

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[32] Nigel Li & Angela Lin, *How Confucianism Asserts Itself in Modern ADR Development in East Asia: A Revisit*, in LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL LEGAL ORDER 507, 511-16 (Chang-Fa Lo et al. eds., 2016).

[33] *Id.* at 512-13.

[34] Weixia Gu & Xianchu Zhang, *The Keeneye Case: Rethinking the Content of Republic in Cross-Border Arbitration Between Hong Kong and Mainland China*, 42 HONG KONG L.J. 1001 (2012); Robert Rhodes QC, *Mediation-Arbitration (Med-Arb)*, 79 ARB. 116, 117 (2013); Lan Ying-Fan, Tiao Jei Yu Zhong Tsai Cheng Hsu Jei He Cheng Hsu Wen Ti Tan Tao [Research of the Combination Process of Mediation and Arbitration], 104 ARB. Q. 2, 4-5 (2017).

Article 736 of Taiwan's Civil Code states: "A compromise and settlement is a contract whereby the parties by making mutual concessions terminate an existing dispute or prevent the occurrence of a future dispute." When the parties are trying to compromise, the law is not necessarily or strictly followed to solve the problem or settle the dispute. Such compromise, or making mutual concessions, is a unique virtue under Confucianism. This virtue is a contribution of the Eastern society to the universe of alternative dispute resolution.

While parties do not seek justice of law in settlement and mediation, amiable composition is a method of alternative dispute resolution that does not necessarily seek justice of law but may instead accommodate the relationship between parties' ("關係"[*guan-xi*]). On the contrary, the goal of litigation and other arbitration is to seek justice in substantive laws. Among them, arbitration by law is a way to seek justice that offers greater flexibility.

"定分" (*ding-fen*) and "止爭" (*zhi-zheng*) are twin tasks that mirror each other and that move toward conjoined ends in the ADR world. The role arbitrators play in arbitration is critical to completing these twin tasks satisfactorily. There is an old saying: "An arbitration is only as good as the arbitrator."[35] Arbitrators steer the proceedings, and whatever decision they make makes a huge difference. For the parties, this difference may affect how they draft their next contract or whether they should go for arbitration or litigation when another dispute arises. Consequently, it is advisable to proceed impartially and prudently.

In handling disputes, one issue that is on everyone's mind is the cost of justice. Arbitration, especially cross-border arbitration, is plagued by the perception that it is sometimes if not always too costly. Does justice have to come at a high price in cross-border arbitration? Keep this question in mind while searching for the fairest way to settle the dispute and weigh the parties' interests evenly. After all, arbitration is not the goose laying the golden egg. Don't kill it! For both arbitrators and counsels, ensuring that justice is served, and at a reasonable cost, is a common objective. Such objective can also be found in Article 12 of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, which states that arbitrators can be settlement facilitators.[36] The same should apply to counsels in arbitral proceedings when appropriate. Counsels and arbitrators alike should strive to resolve disputes in a way that is appropriate and satisfactory to all parties.

The intersection of law and emerging new fields creates new chances of shaping justice and the rule of law for the world. The line between public law and private law is being blurred, its necessity not absolute anymore. For example, there are now investment disputes involving issues around sovereignty, the environment, and human rights being submitted to arbitration. These issues are seldom seen in traditional litigation, and arbitrators have the opportunity to touch the "very hem of the garment of God"[37] so as to chase the "global private justice" in international arbitration.[38]

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[35] The article *Why Arbitration?* noted that "The arbitration is only as good as the selected arbitrator.", http://caib-biac.ro/wp-content/uploads/2017/03/Why-Arbitration.pdf (quoting LALIVE, JEAN–FLAVIEN, MELANGES EN L'HOENEUR DE NICOLAS VALTICOS – DROIT ET JUSTICE 289, Editions Peodne, Paris (1989).).

[36] Lan Ying-Fan, *supra* note 31, at 4-5; UNCITRAL Notes on Organizing Arbitral Proceedings (2016), http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e-pre-release.pdf.

> 12. Amicable settlement: 72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.

[37] KAHLIL GIBRAN, SAND AND FOAM (1926): "He who can put his finger upon that which divides good from evil is he who can touch the very hem of the garment of God."

[38] YVES DEZALAY & BRYANT G., DEALING IN VIRTUE : INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 3 (1996).

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