

# Transparency and Efficiency in International Commercial Arbitration

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## I. Introduction

There are few for whom the tribute that they ‘spoke truth to power’ could be more apt than Derek Roebuck. Throughout his life, from Manchester to various posts in Asia Pacific and back to Oxford, Derek delighted in speaking out against injustice wherever he found it. We say ‘delighted’, because no matter how serious the cause, and how seriously he took it, it was always accompanied by an irresistible air of mischief. This invigorating sense of adventure took him from being charged with inciting sedition (for his acts of protest against the war in Vietnam) to founding what was to become the law faculty of the City University of Hong Kong to uncovering stories of arbitrators and arbitrations stretching back two millennia into history. And it attracted comrades and co-conspirators, a number of whom have contributed to this volume, but the greatest of whom was Susanna Ho. Together, Derek and Susanna waged war on the most pernicious of injustices – ignorance – with their scores of volumes containing stories of arbitration, of women, and generally of things that we are all better off knowing. There was an optimism about the good that comes of being well informed that stands as an inspiration to all those who love life and learning.

It is in this spirit that we offer a critical review of the transparency movement together with our thoughts of what good might come of knowing more about what really goes on in a commercial arbitration – how it is run by the arbitrators, how it is managed by the institutions and how it is staffed by tribunals. Mindful that efficiency has been a more prominent concern for parties to commercial arbitrations, we ask whether increased transparency causes more harm or good to the process. As will be seen, we reach a conclusion with which we hope Derek would have concurred: that despite the disruption that it might cause, knowing more about international commercial arbitration could serve to improve it and maintain its legitimacy.

Turning to the subject of transparency, much of the debate in recent years on investor-state dispute settlement (‘ISDS’) has been preoccupied with its legitimacy. It is an area of dispute resolution that is inextricably linked with issues of policy and the rights and

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obligations placed upon States.<sup>1</sup> Many agree that these matters of public interest should not be decided behind closed doors by mysterious tribunals that are capable of binding governments yet are not subject to review by state courts.<sup>2</sup> What is needed is greater transparency. The calls for transparency have spread to international commercial arbitration, prompting a range of efforts to increase transparency in all aspects of commercial arbitration, from the process, to the awards, to the arbitrators themselves. This paper will consider the impact of this developing transparency on international commercial arbitration, and the improvements in efficiency that greater transparency can bring.

In this paper the term ‘transparency’ is not restricted to the public availability of hearings or to the arbitral proceedings themselves. Instead this paper will consider transparency in arbitration in a broader sense, by considering the availability of information about the process and those who participate in it, which occurs both before and after the hearing. By increasing access to this information, the quality, efficiency and legitimacy of the process of international commercial arbitration can be improved.

Increased transparency has the potential to redress longstanding complaints associated with international commercial arbitration, including unnecessary costs and delay.<sup>3</sup> Greater access to information will result in increased predictability of outcome and aid the development of law, allowing parties to make informed decisions on a variety of issues. These include selecting arbitration as a form of dispute resolution, appointing proficient arbitrators, and deciding which arguments to run in their submissions. These decisions, made easier by the availability of information, will allow parties to efficiently dispose of their dispute, either through a binding dispute process, or by settlement.

The importance of international commercial arbitration as a dispute resolution forum is being challenged by the emergence of new alternative mechanisms.<sup>4</sup> In the Asia-Pacific region, the Singapore International Commercial Court (‘SICC’), established in 2015,<sup>5</sup> and China International Commercial Court (‘CICC’), established in 2018,<sup>6</sup> are two additions to the dispute resolution system which provide alternative forums for commercial dispute resolution, particularly in relation to infrastructure disputes.<sup>7</sup> The use of international commercial arbitration is widespread and has been considered for many years as the preferred method of resolving disputes between parties from different jurisdictions undertaking international

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<sup>1</sup> UNCITRAL Working Group III Draft Paper, "Possible reform of investor-State dispute settlement (ISDS)", 7 September 2018, p. 2.

<sup>2</sup> Walker (2019).

<sup>3</sup> Queen Mary University of London Research Survey 2019, p. 9 (“QMUL Survey 2019”).

<sup>4</sup> Walker (2019).

<sup>5</sup> SICC.gov.sg (2020).

<sup>6</sup> CICC.court.gov.cn (2020).

<sup>7</sup> Jones (2019).

commercial transactions. However, the continued importance of this mechanism is contingent on its ability to continue to meet commercial expectations by innovating and evolving.

A core component of this evolution requires international commercial arbitration to adapt to the information age, where access to material about virtually everything is a mere click away. For arbitration, this means its users demand more data on the process, the arbitrators and their decisions, than ever before. There is uncertainty as to whether the current practices in international commercial arbitration will remain satisfactory to users as time goes on.<sup>8</sup> Indeed, the 2018 QMUL survey results confirmed that participants would like to "have access to arbitrators' previous awards, know more about their approach to procedural and substantive issues and have a clear picture of their availability to take on new cases."<sup>9</sup> Evidently, the issue of transparency is yet to be adequately addressed. To retain its position as the preferred method of international dispute resolution, arbitration must not only respond to these calls for transparency, but do so in a way that promotes efficiency, thus increasing the legitimacy of the overall process.

This paper will discuss the interplay between transparency and efficiency by addressing three key topics. First, the publication of arbitral awards as a mechanism for improving transparency and efficiency. It will then consider areas in need of elucidation with respect to arbitral procedure, which is often only known to the participants of each arbitration. Finally, the role arbitrators themselves will be considered, particularly the need for more objective material on their capabilities, as efficiency is directly linked to arbitrator performance. The relevant starting point in this analysis requires an understanding of the fundamental difference between commercial arbitration, which is generally between two private parties (albeit sometimes between private parties and states) on the one hand and ISDS on the other.

#### *A. Differences between ISDS and ICA*

The process that has been adopted to-date in ISDS has followed processes akin to those generally used in commercial arbitration. It follows that some of the criticisms in the ISDS debate are framed around procedures that are commonly adopted in international commercial arbitration.

However, there are fundamental differences between the two forms of dispute resolution, based on their distinct purposes and audiences. International commercial arbitration arises directly from party autonomy, having its very existence dependent upon the agreement of two or more parties to have their disputes resolved by independent arbitrators. Its purpose is to resolve disputes between private parties, arising out of commercial transactions.<sup>10</sup> The private nature of this process remains, even if the one of the parties is a state entity.

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<sup>8</sup> Hay (2018), [3.3].

<sup>9</sup> Queen Mary University of London Research Survey 2018, p. 9 ("QMUL Survey 2018").

<sup>10</sup> Allsop (2018), [21].

This form of arbitration differs from the juridical concept of ISDS, although there exist theories which emphasise some commonality of source of jurisdiction. Investor-state arbitration arises out of an investment treaty existing in public international law. The claimant is an investor while the respondent is a state. ISDS decisions therefore often have heavy public interest implications, due to questions of sovereignty, domestic issues, the expenditure of public funds and governmental decision-making processes. These are all features that militate towards greater transparency. As a former Chief Justice of the Australian High Court observed, the significant impact of ISDS awards on national economies has "raised questions about the consistency, openness and impartiality of decisions made in ISDS arbitrations".<sup>11</sup> This movement has paved the way for key developments such as the Mauritius Convention and the work undertaken by UNCITRAL Working Group III.<sup>12</sup>

Many argue that different, but equally important, public policy concerns exist in international commercial arbitration. There is judicial support for the notion that there may be circumstances in which "the public has a legitimate interest in knowing what has transpired in arbitration",<sup>13</sup> a statement of Mason CJ which was met with criticism at the time.<sup>14</sup> Demands for greater transparency with respect to the arbitrators, procedure and awards have grown, with many believing that greater transparency will increase the legitimacy of the process.<sup>15</sup> Others believe transparency is needed to assist in the development of the law, as arbitral awards have the potential to contribute to law-making by creating a soft form of precedent.<sup>16</sup> In addition to this, transparency may promote greater efficiency in international commercial arbitration by addressing existing complaints of cost and delay. It is clear that a shift towards greater transparency is needed in order to ensure arbitration remains the preferred method of international dispute resolution.

## II. Arbitral awards

The relevant starting point in an analysis of the shift toward transparency requires consideration of the end of arbitral proceedings. This necessitates consideration of the arbitral award itself, the publication of which is said to be to be a useful mechanism to address the information deficit in international commercial arbitration. While the publication of awards has obvious benefits with respect to transparency, it will also increase the overall efficiency of the arbitration. This is because access to information about the decision-making process undertaken by the tribunal will allow the parties to make decisions, based on previous awards, that best suit their dispute and will facilitate its efficient disposition. It will also hold arbitrators

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<sup>11</sup> French (2014).

<sup>12</sup> UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014).

<sup>13</sup> *Esso Australia Resources v Plowman* (1995) 183 CLR 10, p. 31 (Mason CJ).

<sup>14</sup> Bennett (1996), p. 16.

<sup>15</sup> Allsop, *supra* note 10; Neuberger, (2015), p. 430-431; Rogers, (2006), p. 1312.

<sup>16</sup> Thomas, (2016), p. 2.

accountable, incentivising them to render well-reasoned and timely awards. This topic begs consideration of two questions: first, what value can be derived from publishing awards; and second, what has been achieved in this space to-date.

### A. *Why publish awards?*

Awards are the product of the arbitral process. Their publication is therefore an important means of providing the public with insight into the decision-making process undertaken by the arbitrators, which is usually cloaked by confidentiality. Most awards detail the Tribunal's reasons, the facts, the parties' submissions and the evidence considered, thus providing users with a roadmap of the steps taken by the arbitrators to reach their decision. Awards also provide parties with the views of Tribunals on matters of law and practice which might inform them in the process of predicting the outcome of disputes.

An oft-cited criticism of the confidentiality of international commercial arbitration is its impact on the development of the common law. Many areas of law are almost entirely dealt with by arbitration, of which the maritime and construction industries are prime examples. This issue has generated significant controversy in the international arbitration community and has prompted some to question the legitimacy of international commercial arbitration.<sup>17</sup>

In 2016, the Lord Chief Justice of England and Wales at the time contentiously described arbitration as being a "serious impediment" to the development of English law and called for a reform of award appeal mechanisms to allow English courts power to review questions of public importance decided in arbitration.<sup>18</sup> His Lordship expressed his dissatisfaction toward the status quo where "great legal minds...retired from the bench, are giving awards and setting out principles which are known only to the cognoscenti".<sup>19</sup>

It is clear that great benefit can be derived from accessing the awards in which arbitrators decide issues of law, related in many cases to commercial practices. In addition to contributing to legitimacy, the development of arbitral law will be a useful reference point for arbitrators, potentially reducing the time taken to render an award. Parties can use the law decided in earlier awards to understand their own prospects of success. They can devise their strategy effectively and deal with the process efficiently knowing what has succeeded in previous arbitrations, rather than floundering in the dark trying to run a case, the outcome of which is unpredictable and uncertain.

Arbitration is not always as simple as interpreting contracts and applying the facts to reach a conclusion on the dispute. It will often require the development of relevant principles, commercial terms to be fixed for the future, and applying those principles to the contract in

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<sup>17</sup>Allsop, *supra* note 10; Neuberger, *supra* note 15; Rogers, *supra* note 15.

<sup>18</sup> Thomas, *supra* note 16.

<sup>19</sup> *Ibid.*

question, in conjunction with the facts.<sup>20</sup> As a result, arbitrators have decided issues at the forefront of many areas of commercial activity (for example infrastructure, shipping, commodities, resources, insurance, and capital markets), which could inform the way in which parties conduct their commercial activities in the future.

Although awards are not subject to a system of common law precedent, the decisions of arbitral tribunals may certainly have persuasive value insofar as they can usefully contribute to the development of law in a range of areas. Awards can therefore act as a reference point for lawmakers and parties alike. For instance, the ICC Dow Chemical award, a leading decision that recognised the group of companies’ doctrine, which was upheld by French courts.<sup>21</sup> While the position of this doctrine at common law remains unsettled, the decision has sparked lively legal and academic discussion of the group of companies doctrine.<sup>22</sup>

Substantive issues may be clarified by the publication of awards, as arbitrators are often tasked with deciding questions of law, ranging from novel questions in particular factual scenarios to substantial issues of law.<sup>23</sup> One industry in which commercial arbitration remains the preferred method of dispute resolution is construction, and thus arbitrators are well-positioned to contribute to the development of law in this area. Awards dealing with topical issues such as good faith, penalties or liquidated damages provide guidance for construction law decision-makers. Had these cases been decided by national courts, they would be regarded as major developments in the law.

Arbitrators are also uniquely placed to make decisions on arbitration law issues such as jurisdiction questions, choice of law and arbitrability. Accordingly, if these awards were systemically published, greater guidance could be provided to arbitrators, parties and national courts alike.

In the 2019 QMUL Survey, however, ‘confidentiality and privacy’ was one the top three most frequently chosen characteristics of arbitration which led parties in the construction industry to favour arbitration over court processes.<sup>24</sup> However the same survey also identified the need for reform, as 35% of respondents chose not to pursue an international construction arbitration because of concerns about its efficiency at least half the time.<sup>25</sup> While arbitration must adapt to allow the development of law, it must also preserve this key feature which attracts parties to the privacy of the process.

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<sup>20</sup> Jones, (2017a), p. 3.

<sup>21</sup> *Dow Chemical France, The Dow Chemical Company and others v. Isover Saint Gobain*, Zwischenschiedsspruch v. 23.09.1982, ICC Case No. 4131, Y. Comm. Arb. 1984, 131. See decision of Paris Court of Appeal, 21 October 1983, Rev. Arb. 1984, p. 98.

<sup>22</sup> Ferrario (2009) p. 669; see *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd’s Rep 603 for circumstances where a non-signatory party had been bound to proceedings under the group of companies doctrine and an appeal successful to the England and Wales Commercial Court.

<sup>23</sup> Jones, *supra* note 7, p. 1.

<sup>24</sup> QMUL Survey 2019, *supra* note 4, p. 22.

<sup>25</sup> *Ibid.*

The award may also provide suggestions for procedural options. The majority of arbitral awards contain a procedural history, giving insight into the procedural issues raised and the arbitrator's decision on these issues. Questions of costs and interest are also decided in the award, which, if published, may give future tribunals guidance on contested questions such as the calculation of post-award interest. These procedural questions arise time and time again in arbitrations, and thus, it is in the interests of transparency and efficiency to have them aired in the public arena. Later on, these questions can be dealt with quickly, assisted by reference to earlier arbitral awards.

The publication of awards is therefore an important step in increasing the legitimacy of international commercial arbitration. However, the question that this paper seeks to answer is whether the publication of awards effectively promotes greater *efficiency* in international commercial arbitration?

The information that can be gleaned from awards can also be used to address longstanding challenges including time, cost and efficiency. Sometimes the efficiency of an arbitration is hindered by diligent advocates who, in seeking to advance their client's case, persist with submissions that are marginally relevant or peripheral to the main issues in dispute. If awards are increasingly made available to the public, this may change. An informed party could rely on previous awards to ascertain which lines of argument have been most successful and deploy those that relevantly address the issues genuinely in dispute. The analysis of previous decisions in awards could allow parties to see what arguments have succeeded and how issues have been dealt with. Not only could this make the party's case more persuasive, but it could also increase the efficiency of the arbitration, reducing cost and time.

Further, access to previous awards could provide parties with insight into an arbitrator's case management skills (including their level of proactiveness) and an understanding of how he or she dealt with procedural and substantive issues.<sup>26</sup> These insights will allow users to make an informed decision in selecting their arbitrator - a participant in the process who could ultimately prove critical in enabling efficiency.

Increased transparency in respect of awards provides greater certainty and predictability for parties. This will also increase the efficiency and legitimacy of the process as information about the manner and quality of an arbitrator's decision-making will be publicly accessible. The more information available about an arbitrator's capabilities, the better equipped parties are to appoint arbitrators that are well placed to fairly and efficiently dispose of their dispute.

For these reasons the publication of arbitral awards is one method that could address this issue and contribute to the overall efficiency and legitimacy of the process.

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<sup>26</sup> QMUL Survey 2019, *supra* note 4, p. 21.

### ***B. Developments in publication of awards***

It is important to pause here to consider developments thus far with respect to the publication of awards that have paved the way for further reform. This is a topic that has generated significant discussion, and while no solution as to the systematic publication of awards has been established, significant consideration has been given to this important topic.

Commentators are divided on how to best increase transparency through publication, with many calling for the organised publication of arbitral awards by institutions, while some go further and say that states should publish awards and enshrine such a principle into their national law.<sup>27</sup> Irrespective of the school of thought to which one subscribes, institutions are undeniably a key player in this discussion. Generally, arbitral institutions have taken up the important role of promoting efficiency and transparency in international commercial arbitration. The legitimacy of the arbitral process is aided by developments pioneered by these institutions, particularly in relation to the publication of awards.

It is necessary to consider some of the responses of institutions to the legitimacy “crisis”, which varies across each institution. The movement to publish awards has most comprehensively been implemented by the International Chamber of Commerce (‘ICC’). In addition to articles and statistical reports, the ICC has published 800 awards and a number of procedural decisions on its Dispute Resolution Library.<sup>28</sup> The institution introduced changes in December 2018 providing for the publication of awards on an opt-out basis, in the hope that this will increase the dissemination of information on international commercial arbitration over time.<sup>29</sup> Although these decisions are published several years after the arbitration and are only available to ICC Digital Library subscribers, they serve as an important reference point for users seeking to understand the process undertaken by arbitrators. While the London Court of International Arbitration (‘LCIA’) does not publish awards, even in redacted form, it may publish abstracts of decisions by the LCIA Court on challenges to arbitrators and caseload statistics.<sup>30</sup> In a similar vein, anonymised decisions on arbitrator challenges are also published by the Arbitration Institute of the Stockholm Chamber of Commerce (‘SCC’). Korean Commercial Arbitration Board (‘KCAB’) has taken steps to promote efficiency and transparency by implementing provisions in the 2016 KCAB Rules that allow the KCAB Secretariat to publish redacted arbitral awards, if the parties do not explicitly object to such disclosure.<sup>31</sup>

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<sup>27</sup> Comrie-Thomson (2017), p. 284.

<sup>28</sup> 800 awards as at July 2020, ICCWBO.org (2020).

<sup>29</sup> *Ibid.*

<sup>30</sup> LCIA.org (2020).

<sup>31</sup> KCAB Rules 2016 Art 57(3).

The Singapore International Arbitration Centre ('SIAC') has, for some time, indicated to newly appointed arbitrators that it intends to publish awards and has asked them to indicate whether they consent to having their name noted in the published award.

The award scrutiny process, undertaken by leading institutions including the ICC, SIAC, KCAB, and Hong Kong International Arbitration Centre ('HKIAC') deserves mention. This process increases the legitimacy and efficiency of the arbitral process. The confidential review undertaken by the institution ensures that arbitrators conduct the arbitration and render an award to a certain standard, knowing that it will be rigorously reviewed by their peers at leading arbitral institutions.<sup>32</sup>

The publication of arbitral awards is commonplace in investor-state arbitration. The parties to an ICSID arbitration may agree to publish the entire award and other case material on the ICSID website. If the parties do not agree, then ICSID will publish excerpts of the legal reasoning contained in the award. Evidently, even absent party agreement to publish the award, information can be accessed that gives interested third parties access to important legal reasoning. The *UNCITRAL Rules on Transparency*<sup>33</sup> enhance legitimacy by requiring the publication of documents,<sup>34</sup> open hearings<sup>35</sup> and by allowing third parties to file and make submissions.<sup>36</sup>

Confidentiality, not to be confused with privacy, varies across jurisdictions. In many, including the US and Sweden, the presumption that confidentiality in international commercial arbitration applies as a blanket rule has come under fire.<sup>37</sup> Regardless of the outcome of this continuing debate, it is clear that confidentiality remains important to users. This is reflected in the results of the 2018 QMUL survey on international arbitration, with the majority of respondents saying confidentiality should apply on an opt-out basis.<sup>38</sup> It follows that arbitration in responding to calls for greater transparency, must also preserve the features that make it a desirable form of dispute resolution.

It is open for similar transparency practices to be adopted in international commercial arbitration, with necessary changes to account for the distinct purposes of ISDS and international commercial arbitration. It is clear that there is no simple solution to the legitimacy challenges that have flowed from investor-state arbitration into international commercial arbitration. A careful balance must be struck between the private interests of parties seeking

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<sup>32</sup> Walker, *supra* note 3, p. 9.

<sup>33</sup> UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (New York, 1 April 2014).

<sup>34</sup> *Ibid*, Article 3.

<sup>35</sup> *Ibid*, Article 6.

<sup>36</sup> *Ibid*, Article 4-5.

<sup>37</sup> Hay, *supra* note 8.

<sup>38</sup> QMUL Survey 2018, *supra* note 9, p. 3: "87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature."

confidentiality and the public interest in seeing increased transparency with respect to the process, arbitral awards and the arbitrators themselves. It should be noted that securing legitimacy does not require a blanket approach to transparency: measures can still be taken to protect the legitimate needs of parties for confidentiality, including keeping it intact when this is agreed, redacting sensitive information or protecting the identities of the parties where necessary.

Evidently, published awards can offer persuasive value and may address criticisms that arbitration undermines the development of law. While the trend is gaining momentum, further work is needed to determine the best path forward. For the publication of awards to achieve its desired effect, support from the parties, institutions and arbitrators will be necessary. It remains to be seen whether parties will encourage further transparency by consenting to the systematic publication of awards. Greater efforts from arbitral institutions will also be required to devise a uniform approach to publication across institutions. If some of the larger institutions engage in regular publication of redacted awards, many of the smaller, regional institutions will do so too in order to remain competitive. Finally, the publication of awards poses many challenges in balancing the confidentiality required by the parties and the need to release an award of sufficient value to be a soft form of precedent.<sup>39</sup> Due consideration must therefore be given to the manner in which publication occurs.

By making these decisions publicly available and attaching to the award the names of arbitrators and counsel, efficiency is also encouraged. These developments will also serve to enhance the quality of arbitral awards, as arbitrators are incentivised to handle the parties' dispute effectively and efficiently, in anticipation that the award will be published. As the database of published awards grows, there will emerge a benchmark or standard against which new awards can be compared, increasing the overall quality of the process.

### III. Procedure

The publication of arbitral awards alone, while important, is not enough to address the challenges of transparency and efficiency. No single document, including the award, provides a roadmap or toolbox for procedure of international commercial arbitration. This is in stark contrast to domestic court proceedings, in which court procedure is usually clearly defined by a uniform set of rules. The flexibility of procedure in arbitration can, if skilfully handled, ensure that a dispute is resolved both fairly and efficiently, and indeed is a quality of arbitration that parties value highly. In the 2018 QMUL survey, flexibility was ranked the third most valuable characteristic of arbitration.<sup>40</sup> This flexibility provides scope for innovation, as arbitrators can create unique procedures tailored on a case-by-case basis. However, confidentiality is an equally important tenet in arbitration and a similar number of respondents placed confidentiality and privacy as their most valuable characteristic of arbitration.<sup>41</sup> The challenge

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<sup>39</sup> Jones, (2017b).

<sup>40</sup> QMUL Survey 2018, *supra* note 9, p. 7.

<sup>41</sup> *Ibid.*

posed by confidentiality is that the procedural innovations developed for one case are inaccessible to the next. While confidentiality is an important feature of arbitration, it should not operate to prevent the dissemination of procedural innovations which have proved successful in efficiently resolving disputes. Drawing on the framework provided by existing soft law instruments, arbitrators still need to fill in the gaps and tailor the procedure to the dispute. Greater transparency is needed with respect to this process, as increasingly efficient procedure cannot continue to benefit all users if innovation is occurring behind closed doors.

### A. *Soft law*

It is instructive to first consider the major soft law instruments used by arbitrators as a starting point for setting the procedure. The UNCITRAL Notes on Organising Arbitral Proceedings is an exceptionally useful “toolbox”, providing an array of options for consideration.<sup>42</sup> There is also a growing range of soft law instruments that have, to some degree, elucidated the arbitration process. Soft law guidelines continue to inform the development of best practice and can also aid in the development of a procedural framework. In the interests of brevity, this paper will discuss two: the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (‘IBA Rules’),<sup>43</sup> as well as the recently developed Rules of the Efficient Conduct of Proceedings in International Arbitration (‘Prague Rules’).<sup>44</sup> Some of the respective procedural features offered by each will be highlighted, as well as areas requiring further reform.

International commercial arbitration provides a forum for resolving disputes between parties from around the globe. In addition to the physical geography which often separates parties and lawyers, so too are they separated by ‘legal geography’. The particular domestic legal history and culture from which participants and practitioners come often informs their procedural approaches to international arbitration. One broad distinction in this field is between the common law system and the civil law system. While the common law traditionally favours an adversarial system, the civil law prefers, generally, an inquisitorial approach. In order to craft a successful arbitral procedure, attempts are often made to form an amalgam of common law and civil law procedural traditions, drawing together the best aspects of both systems.

The IBA Rules 1999, as revised in 2010, are the commonly adopted benchmark for dealing with evidence in arbitral proceedings. The IBA Rules attempt to strike a balance between the common law and civil law traditions. They affirm the Tribunal's broad discretion to decide procedural matters but go some way in providing predictability in the taking of evidence. The IBA Rules provide mechanisms for the presentation of documents, the handling

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<sup>42</sup> UNCITRAL, Notes on Organising Arbitral Proceedings (2016).

<sup>43</sup> International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) (‘IBA Rules’).

<sup>44</sup> Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018) (“Prague Rules”).

of lay and expert evidence, as well as the conduct of evidentiary hearings.<sup>45</sup> The 2010 revisions have modernised the rules and enhanced the efficiency of procedure, particularly making changes which account for advances in technology.

There has, however, been criticism of the absence of soft law instruments which offer civil law procedural options. Historically, this may have been the result of the tendency for common law practitioners to form the majority of those practicing in the field of international commercial arbitration. However, with the growing use of arbitration in the Asia Pacific region between participants both from civil law and common law countries, there has been an increasing demand for more arbitral procedural options suited to the traditions of their participants. The civil code, inspired by Roman law principles,<sup>46</sup> has survived since Napoleon's time to become the most widely practised system of law. Indeed, the civil law system represents over 60% of the world's population.<sup>47</sup>

Against this backdrop, a working group of predominantly civil law lawyers conducted a survey on procedural traditions in international arbitration in their respective countries, in order to develop soft law guidelines on arbitral procedure, oriented on the civil law tradition.<sup>48</sup> Following a rigorous review process in which the draft rules were debated at conferences held around the world, on 14 December 2018, the working group released the Prague Rules.<sup>49</sup> The Prague Rules provide a procedural system with a range of tools derived from the inquisitorial system adopted in the civil law. The Prague Rules actively encourage the Tribunal to adopt a proactive approach to case management.<sup>50</sup> In line with the inquisitorial approach, greater powers of case management are granted. In particular, the Prague Rules provide greater scope for the Tribunal to provide preliminary views on the issues in dispute,<sup>51</sup> and greater powers for the Tribunal to assist the parties to reach an amicable settlement, subject to objection by either party.<sup>52</sup> The Prague Rules further recommend the use of tribunal-appointed experts rather than party-appointed experts.<sup>53</sup>

These are just some of the many aspects in which the Prague Rules differ from the IBA Rules and standard international arbitral practice more broadly. Each arbitration presents its own set of unique procedural problems calling for the adoption of a bespoke approach to address the real issues of the dispute as efficiently as possible. When tailoring procedure, arbitrators should make use of the wide array of procedural tools at their disposal and parties

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<sup>45</sup> Prague Rules, Note from the Working Group, p. 2.

<sup>46</sup> Bell, (2015), 45.

<sup>47</sup> Juriglobe.ca (2019).

<sup>48</sup> Prague Rules, Note from the Working Group, p. 2.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* Art 3.1.

<sup>51</sup> *Ibid* Art 2.4(e).

<sup>52</sup> *Ibid* Art 9.

<sup>53</sup> *Ibid* Art 6.

should consider these instruments when drafting arbitration agreements, should they wish to prescribe a particular soft law instrument.

It is without doubt that the present range of soft law instruments has improved arbitral academic discourse on procedure. The arbitrator's toolkit grows with the addition of new materials, which both add to the currently existing range of procedural tools as well as remove those which are no longer functional. In order to move from a soft law guideline to a workable procedure, significant work must be done by arbitrators and the parties. Much of this crucial work remains largely opaque, requiring skilful handling to ensure that the dispute is resolved efficiently, through a process that is often unknown to the uninitiated, and sometimes eschewed by them. Taking document production as a case study, consideration will be given to areas of case management where the need for transparency is at its greatest, demanding a wider dissemination of information to improve the efficiency of arbitration.

### ***B. Case study: Document production***

An example of where greater transparency would result in greater efficiency is in the area of document production. As identified above, arbitration is a key dispute resolution mechanism in international infrastructure projects. The QMUL Survey 2019 shows that the two factors that most differentiate international construction arbitration from international arbitration generally are: (i) factual/technical complexity (chosen by 73% of respondents); and (ii) the large amounts of evidence involved (chosen by 66% of respondents). Improving efficiency in this area, while important to international arbitration more broadly, is of particular importance to the Asia-Pacific region given the large number of international infrastructure projects in the region.

Document production is a procedure borne out of the common law, and is not common practice in the civil law system.<sup>54</sup> The distinction between the two legal systems is reflected in the IBA and Prague Rules: the IBA Rules demonstrating a more common law approach, and the Prague Rules tending towards civil law practices. The problem is that neither instrument performs adequately in the uniquely hybrid legal environment of arbitration, thus leaving it to arbitrators to develop their own innovations to arbitral procedure.

The IBA Rules, on the one hand, provide that the admissibility of evidence is to be determined with reference to the relevance and materiality of the evidence which the party seeks to produce.<sup>55</sup> While these rules of evidence have attempted to strike a balance between the wider approach to disclosure adopted in the common law and the generally narrower approach in civil law, in their application, document production tends to closer resemble the

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<sup>54</sup> ALI/UNIDROIT, *Principles of Transnational Civil Procedure* 12-13 (2004) (proposed final draft of 9 March 2004); Reymond (1989), p. 357.

<sup>55</sup> IBA Rules, Art 9.

common law practice.<sup>56</sup> However, if it is not carefully handled, time delays and massive cost expenditure will result. This is perhaps a consequence of document production being of common law origin, and a challenge with which the common law world has attempted to grapple over the years.<sup>57</sup>

It has further become usual practice to prescribe the use of a "Redfern Schedule", with the aim to concisely summarise document requests to narrow the disputed issues between the parties as to what should be produced and why.<sup>58</sup> However, this approach is often fraught with challenges.

The Prague Rules, on the other hand, adopting civil law procedural approaches, discourage document production. Under the inquisitorial system, disputes are predominately controlled by the court. Accordingly, the ability for parties to demand documents from each other or third parties is virtually non-existent.<sup>59</sup> Where document production is necessary, the Prague Rules provide that document production should be addressed at the first Case Management Conference ("CMC"). In principle, CMCs offer a real opportunity to resolve issues much more expeditiously, and at an early stage, preventing the issue from escalating. However, this presents to the Tribunal the same temporal issue as that posed by the Redfern Schedule: that the pleadings to which these documents relate has not yet been ventilated before the Tribunal.

Arbitrators, with the challenge of having to manage parties and counsel from both civil and common law frameworks, must therefore develop their own innovative document production techniques to ensure efficiency in arbitral procedure. Anecdotal evidence would suggest that, short, focused hearings and teleconferences (rather than having people fly from all over the world) seem to be workable mechanisms to enhance existing practice in document production. However, the anecdotal nature of this suggestion is reflective of the lack of open discussion of arbitrator-driven procedural innovations, which hinders the development of arbitral procedure. It follows that the key change to drive efficiency is the greater dissemination of information in relation to procedural techniques.

### *C. Ongoing reform*

For arbitral best practice to remain flexible and efficient, close attention should be paid to domestic procedural reforms. One important distinction between common law and civil law traditions is the way in which the two procedures develop. In civil law systems, legal procedure is often debated at the highest academic levels, and it is from this academic level that procedural innovation occurs. In contrast, common law practice tends to favour practitioner-led procedural

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<sup>56</sup> Prague Rules, Working Group Note, p. 2.

<sup>57</sup> Ashford (2012), p. 5.

<sup>58</sup> Blackaby (2009), p.113.

<sup>59</sup> Born 2014, p. 2345; Borris (1995), p. 97; Rubino-Sammartano, (1986), p. 93; Triebel (1982), p. 227.

developments. Arbitrators should learn from both systems, and in doing so, they may find valuable techniques to add to their toolbox of procedural options.

The Asia-Pacific region continues to enjoy some of the highest levels of economic growth. Alongside this there has been a great deal of development in the domestic commercial legal practices in these countries. Domestic legal procedures have been forced to develop to meet the challenges of massive growth in economic activity within the region. Arbitrators deciding disputes originating in the region must stay abreast of these developments in order to deploy procedures which accord with the wishes of the parties and are most efficient in the circumstances.

One emerging phenomenon is the international commercial courts. Many of these courts provide information about their processes by making judgments publicly available online, as well as procedural guides, practice notes and of course open court proceedings. The SICC is demonstrating real leadership in this area, as is China with the relatively recent introduction of the CICC. On the SICC website,<sup>60</sup> users have access to extensive information on the procedures adopted by the court, as contained in the court rules, the SICC procedural guide,<sup>61</sup> and court forms which provide information on court fees and services. These features provide users with an understanding of the processes used by the courts managing a case to its conclusion. The effect of this transparency is that it gives users assurance of the overall quality of international commercial dispute resolution, providing predictability for parties and accountability for judges insofar as their decisions are capable of scrutiny by the public. Although complementary to international commercial arbitration, the development of international commercial courts presents a challenge for international arbitration to learn from these developments, and to increase the transparency of its own procedural innovations.

#### IV. Arbitrators

Unlike domestic courts or some international tribunals, arbitration does not have a fixed pool of decision-makers to whom disputes are assigned.<sup>62</sup> Instead, arbitration presents the opportunity for parties to have their say on who should constitute the arbitral tribunal. This choice has long formed an essential feature of arbitration. In *The Illiad*, Homer describes an 8th-century BC dispute regarding a blood debt in which the parties made a mutual choice as to a man "versed in the law" to preside over a tribunal of elders, to render reasoned oral opinions.<sup>63</sup> The efficiency and legitimacy of arbitration ultimately depends on the performance of arbitrators. Therefore, the availability of information upon which parties make the decision to appoint a certain arbitrator is of crucial importance. It is certainly true that the degree of

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<sup>60</sup> SICC.gov.sg (2020).

<sup>61</sup> SICC.gov.sg (2020).

<sup>62</sup> Born, *supra* note 58, p. 1364.

<sup>63</sup> Hammond (1985), p. 189 (citing Homer, *The Illiad* XVIII 497-508).

transparency in relation to the quality of arbitrators has greatly increased. Indeed, merely purporting to be “versed in the law” is unlikely to yield a great number of appointments in the contemporary marketplace. Despite these developments, there is still insufficient objective material on arbitrators, particularly on their quality and efficiency. It follows that it is necessary to briefly touch on the information that is currently available and then discuss the challenges that remain within the arbitrator appointment process.

### *A. Information on arbitrators*

There has been a massive increase in the availability of information on arbitrators, which is a step in the right direction. It takes three forms. First, there is the information provided directly by the arbitrator through publications, presentations delivered at conferences and information made available on the arbitrator's website(s). Second, there is information arising from referrals and through word-of-mouth exchanges in the arbitral community. Finally, there are third-party sources such as commercial directories and arbitral institution panel lists.

There has been a substantial increase in the amount of information provided by third parties, through commercial directories such as Who's Who Legal Arbitration<sup>64</sup> and Best Lawyers.<sup>65</sup> There are also paid subscription arbitrator tools such as the Kluwer Law International "Arbitrator Tool" and the GAR "Arbitrator's Research Tool" which rely to a lesser degree on information provided by arbitrators, and provide summaries of information on arbitrators' recent work.

However, while much has been done to improve access to information, there is a paucity of objective material regarding the performance of arbitrators. Many of the metrics listed do not give a comprehensive guide as to the quality and efficiency of arbitrators. Many have indicated that the available resources are too inconsistent and sparse to provide conclusive positions on a range of issues available.<sup>66</sup>

Additionally, on existing information there is limited ability to gain an insight into an arbitrators decision-making process.<sup>67</sup> For instance, it cannot be said, on the information available, whether arbitrators decide disputes on a legal model following the black letter of the law, or on a commercial model of what is commercially sound in the circumstances. While there are obvious reasons why this type of information should, to some degree, be more restricted, greater transparency in this regard may allow parties to have a more meaningful power when selecting arbitrators to decide their disputes.<sup>68</sup>

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<sup>64</sup> WhosWhoLegal.com (2020).

<sup>65</sup> BestLawyers.com (2020).

<sup>66</sup> Brekoulakis (2013), p. 562; Besaiso, Fenn and Emsley (2017), p. 290; Besasio and Fenn (2020), p. 200.

<sup>67</sup> *Ibid.*

<sup>68</sup> See Besasio and Fenn, *supra* note 66, empirical attempt to do so on the basis of interviews with 28 international arbitrators.

It may be said that a similar lack of information applies to national judges who may otherwise be adjudicating the dispute. However, such a comparison is misconceived, as, in the first instance, national judges find their authority not on the basis of the consent of the parties but rather on the force of that particular jurisdiction. As arbitrators are selected by the parties, it follows that information must be available to give meaning to that choice. Separately, national judges' decisions are generally subject to appeal. However, in most national jurisdictions the grounds to review arbitral decisions are extremely narrow.<sup>69</sup> This adds weight to the importance of publicly available information.

### ***B. Appointment process***

In virtually all jurisdictions, there are obligations on arbitrators to exercise independence and impartiality. This obligation is referred to in both the New York Convention<sup>70</sup> and the UNCITRAL Model Law.<sup>71</sup> One issue bedeviling ISDS is perceived bias in party-appointed arbitrators. There has been a debate run in the ISDS context, by both Jan Paulsson and Albert Jan van den Berg, that party-appointed arbitrators almost always decide in favour of the party who appointed them. In 2010, Paulsson argued that "unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators".<sup>72</sup> These sentiments, as shared by van den Berg,<sup>73</sup> have been reinvigorated by growing levels of data which show the tendency for party-appointed arbitrators to find in favour of their appointor in the context of investor-state arbitration.<sup>74</sup>

This debate does not apply to the distinct nature of international commercial arbitration, which is solely borne out of the agreement of commercial parties. While it is certainly true that partiality remains a real and central concern for ISDS, in the international commercial arbitration sphere, this issue does not arise to the same degree. Certainly, doubts regarding the legitimacy of international commercial arbitration do not exist to the same degree as they do in the ISDS context. Instead, it remains of fundamental importance that parties retain the ability to choose their arbitrators, with the chair either selected by them or by an institution. The centrality of this right to party autonomy with regard to the appointment of arbitrators is

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<sup>69</sup> The New York Convention Article V; UNCITRAL Model Law, Article 36; van den Berg (1981), p. 314.

<sup>70</sup> The New York Convention indirectly addresses the subject in Articles II(1), II(3) and V(1)(d); Born, *supra* note 58, p. 1762.

<sup>71</sup> Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc (A/40/17) (21 June 1985) (amended on 7 July 2006), Art 12.

<sup>72</sup> Paulsson (2010).

<sup>73</sup> van den Berg, *supra* note 68, cf Brower & Rosenberg, The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded.

<sup>74</sup> Strezhnev (2016).

demonstrated by Article 11 of the Model Law.<sup>75</sup> Results from the QMUL Survey 2018 provide empirical support for the importance of this choice. The survey identified the ‘ability to select arbitrators’ as respondents' fourth most valued feature of international arbitration.<sup>76</sup>

In light of the debate surrounding ISDS, discussion of alternative mechanisms for appointing arbitrators has arisen in international commercial arbitration. There does exist with the AAA-ICDR an alternative appointment mechanism, in which all of the members of the Tribunal are proposed by the institution and are appointed following a process of consideration by the parties. While parties retain the right to agree to an alternative mechanism for the appointment of arbitrators as provided by Article 11 of the Model Law,<sup>77</sup> this approach does not seem to be one which has found favor in the larger arbitration community.

Thus, the devising of systems for institutional appointment replacing the party-appointed model does not seem to be a burning issue in the minds of users.

The present challenge is thus ensuring that the best people are appointed to the Tribunal under the existing system. The best appointees will contribute to the fairness and efficiency of the process, and therefore also to its continuing legitimacy. It is suggested that more objective information must be made available, to increase transparency surrounding the quality and efficiency of arbitrators. This will ensure that disputes are handled by the appropriate decision-makers. Further transparency will also act as a catalyst for efficiency, as ultimately, the efficiency of an arbitral tribunal turns on the quality of its arbitrators.

## V. Conclusion

The legitimacy challenge presents a unique opportunity for international commercial arbitration to achieve greater efficiency. This has been the trend in recent times with increasing levels of transparency in relation to arbitral awards, arbitral procedure and the arbitrators themselves. Parties, equipped with more information than ever before, can then make informed decisions on the seat, institution or arbitrator, that allow them to efficiently resolve their dispute. Although steps have been taken, further work must be done to ensure efficiency and legitimacy are retained.

Transparency must be balanced against the confidentiality of arbitral proceedings. As Paulsson comments, "arbitration is not a spectator sport"<sup>78</sup> and many users select arbitration as a form of dispute resolution due to its privacy and confidentiality. However, these important tenets may still be preserved, notwithstanding the movement towards transparency. Transparency and confidentiality are not at odds with one another. They are two distinct

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<sup>75</sup> UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 23 (2008), Art 11.

<sup>76</sup> QMUL Survey 2018, *supra* note 9, p. 9.

<sup>77</sup> UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 23 (2008), Art 11.

<sup>78</sup> Editorial, (1995), p. 235.

concepts that operate in different ways.<sup>79</sup> It is therefore critical that they be pursued in ways that preserve the critical concerns of both, to increase the attractiveness of arbitration and address the current legitimacy crisis.

Ultimately, improving transparency is contingent upon the elucidation of information only where it is appropriate to do so with the consent of the parties. There are important developments which should be encouraged, including: (i) the publication of arbitral awards, (ii) illuminating arbitral procedure and (iii) improving access to objective information on arbitrator performance. Transparency will prove to be useful in improving the legitimacy and efficiency of international commercial arbitration, ensuring that it remains among the preferred methods of international dispute resolution in the future.

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<sup>79</sup> Jones, (2017b). p. 16.

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