CHAPTER 6

CAN JUSTICE BE SERVED WITHOUT TRANSPARENCY IN INTERNATIONAL COMMERCIAL ARBITRATION?

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I INTRODUCTION

Transparency is not to be construed as a waiver of the rights to confidentiality of the parties. The Rule of Law, Court Procedural Rules, accountability and transparent legal processes, undoubtedly have been the cornerstones of litigation, and foundation of the Courts, rendering justice to the disputants. The international commercial arbitration enshrined with party autonomy and confidentiality, is a forum with an objective of preserving business-sensitive information and identities of the parties, from the public domain. This feature of arbitration was neither designed to imply secrecy in arbitral procedure, nor in the administration by any institution. The transparency of litigation in Courts, if enhances the trust of the parties and provides a just and legal forum for the redress of their issues, shouldn't the parties then be expecting the same or better quality of transparency and justice, when they opt for arbitration, as an alternative dispute resolution forum?

The recent launch of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitrations [1] which focused on disclosure or publication of information related to an arbitration matter is a welcome step in setting the stage for future ICSID arbitrations. Now, the next step is the need to elaborate on the importance of transparency, in corporate governance of international commercial arbitral institutions ("AI"), in terms of their accountability to stakeholders. This Paper endeavours to set the stage for the development of "UNCITRAL Rules for Corporate Governance of International Arbitral Institutions," for ensuring

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1 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014.

transparency and accountability in administration of international commercial arbitrations. The objective is that AIs should also be aligned with some Principles of Corporate Governance, like OECD,[2] so as to make international arbitrations transparent and fair for the business entities. The transparent and fair governance of an AI will minimize avenues for pursuing trials in appeal courts after the arbitration as underlying secondary objectives of some parties, under the pretext of need for development or evolution of laws. The balance between privacy, confidentiality, transparency of the due process and development of arbitration law can only be achieved through a uniform framework of code of corporate governance for the AIs. The UNCITRAL is the most appropriate neutral body for the development of such a framework.

The interpretation of the term '*transparency*' is broad, contextual and subjective to a great extent, unless it is objectively defined. It is not to be construed as divulging from the need for privacy or confidentiality in a subject matter. On the contrary, if an international arbitration forum is meant to offer private and confidential dispute resolution service, then its transparency characteristic should be able to demonstrate how that forum is governed so as to deliver the promised assurances. The terms '*privacy*' and '*confidentiality*' are not free from controversies either. Privacy and confidentiality can be seen as two sides of the same coin.[3] In simple terms, "Privacy" is between the parties who have rights of authorship, ownership, access and or control, over its use and or disclosure, whether information or the subject matter. "Confidential" implies that the information or the subject matter is not known to third parties or is not in the public domain. The meaning of the term "confidential" and terms of confidentiality in international commercial arbitrations can be exercised by an agreement between the parties,[4] or as provided in the rules of arbitration, eg UNCITRAL Arbitration Rules 2010[5] or the *Lex arbitri*, eg Hong Kong Arbitration Ordinance.[6] Transparency as a see through characteristic of an object, which in

2 Organisation for Economic Co-operation and Development "G20/OECD Principles of Corporate Governance" (30 Nov 2015) <http://dx.doi.org/10.1787/9789264236882-en>.

3 *Esso Australia Resources Ltd v Sidney Janes Plowman*, 11-3 Arb Int'l, 235 (1995) cited in Smeureanu, Ileana M *Confidentiality in International Commercial Arbitration* (Wolters Kluwer, The Netherlands, 2011) pp 1-6.

4 See ICC Model Confidentiality Agreement and the ICC Model Confidentiality Clauses (2006).

5 UNCITRAL Arbitration Rules 2010 Article 28(3): Hearings shall be held in camera unless the parties agree otherwise…; and Article 34(5): An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

6 Hong Kong Arbitration Ordinance (Cap 609) s17: Restrictions on reporting of proceedings heard otherwise than in open court.

corporate governance and justice system, can imply modus operandi, access to policy or decision making information, integrity and accountability in implementation of a due process.

The term '*transparency*' may be viewed metaphorically as Carolyn Ball explains, in three or more broad ways: transparency as a public value embraced by society to counter corruption, which implies accountability and disclosure for public access; transparency synonymous with open decision-making by governments and non-governmental organizations & not-for-profit ("NGOs") for enhancing public confidence and responsible political system; and transparency as a complex tool of good governance in programs, policies, organizations, and nations.[7] In corporate governance metaphor, transparency often relates to disclosures, compliances with the regulations of the security exchanges and most significant of all is the directors' declarations to demonstrate the prevailing level of the respective corporate governance. In the context of judiciary, integrity and fairness in appointment and independence of judiciary, reasoning of court decisions, public confidence in the due process or rule of law and access to administrative information, are the hallmarks of transparency. In context of international commercial arbitration, which is an international dispute resolution forum as an alternative to national courts, the core values of a framework of ensuring just and fair resolution of disputes, cannot be expected as a subset or that of an isolated justice system. Furthermore, the quality of the arbitral awards should not be only apposite for the *Lex fori* but also of the standard, adequate for recognition and enforcement worldwide.[8]

The courts are the institutions of states for rendering justice and enforcement of law and maintaining public order. The governance of the courts is well regulated and monitored by the appropriate authorities of the state. The international arbitral institutions are largely independent organizations or NGOs, which may or may not be state sponsored, but are self-regulated. With globalization of commerce and trade, there have been an increasing number of new disputes, which are often referred to arbitration. These in turn have created a surge in the incorporation of new AIs in several states. Though the arbitration rules are developed in context of *Lex fori* or adopted as per UNCITRAL Arbitration Rules, there are no specific international guidelines or regulations for the corporate governance of such institutions. The AIs offer only administration services and are managed by a relatively lean management structure and a team of case administrators. In large commercial corporations listed

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7 Carolyn Ball "What is Transparency?" (2009) 11(4) Public Integrity 293, Researchgate, DOI: 10.2753/PIN1099-9922110400, accessed on 3rd November 2015.

8 Refers to the States which are signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958).

on stock exchanges, the Code of corporate governance is desired and partly mandatory, to protect the interests of the public and investors. However the nature of the AIs is of public service character similar to commercial courts. This reflects a serious need for a closer look on the governance structure for such institutions to maintain the confidence in arbitration and ADR forums by the international business entities.

This Paper evaluates and addresses the need for transparency in administration of international commercial arbitrations. The underlying objective is to inspire a dialogue and find if there should be a code of conduct, guidelines or a set of rules for the responsible, accountable and transparent governance of arbitral institutions. The UN Secretariat has rendered an excellent boost to the world trade and economies since 1958, by first providing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC 1958"), followed by the Model Law of Arbitration (Model Law") and UNCITRAL Arbitration Rules 2013 ("UNCITRAL Rules"), to the business community and the legal services providers. The latest contribution of UNCITRAL in launching "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration",[9] focused on disclosure or publication of information, provides an impetus for transparency and accountability in the matters of state and investors. The stage is now set for the development of "UNCITRAL Rules for Transparency in the Governance of International Arbitral Institutions." The context of transparency in this paper is towards a measure of accountability, compliance to the due process[10] in accordance with the rules of an Arbitral Institution ("AI"), L*ex fori* and openness needed in the administration of various stages of arbitration. Thus the fundamental objectives of transparency in this Paper are accountability and visibility to the stakeholders, for justice is not only served but is also seen to be served. The purpose of such Rules for Transparency in Governance of International Arbitrations ("TGIA") shall be to enhance the trust of the parties in international commercial arbitration, as a just, fair and transparent ADR forum.

II REFERENCE MODEL FOR CORPORATE GOVERNANCE

The regulated corporate governance models are common in the corporate sector, for all public listed companies. The compliance to these regulations is a preliminary requirement for listing on such exchanges. The regulations have been evolving with time, more often inspired by corporate scandals or failures. One such well-structured and evolving code of corporate governance was developed in 1999, by the

9 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

10 Matti S Kurkela, Santtu Turunen and Conflict Management Institute (COMI) *Due process in international commercial arbitration* (2nd ed, Oxford University Press, New York, 2010) pp 12-14.

Organization for Economic Cooperation and Development ("OECD"), acting as a neutral and trade promotion body. The OECD has also launched guidelines for corporate governance of the State Owned Enterprises ("SOEs"), for ensuring that SOEs operate efficiently, transparently and are accountable[11]. These principles and guidelines have since become a benchmark not only for public listed companies but also for a wide range of corporations, regulators and stock exchanges. Under the OECD purview, there are two similar but distinct models available for reference, one for state owned enterprises and second for public organizations. The quick survey[12] of about 65 AIs across five continents revealed that the AIs are commonly incorporated as a quasi-state or independently owned or membership based institutions or not-for-profit NGOs. There are number of AIs functioning within the auspices of Chambers of Commerce in their respective countries. The purpose for such institutions is to offer dispute resolution services to the international public and business entities. Therefore, either one of the OECD models can be a good reference for the governance of such AIs. The corporate governance framework developed under the auspices of the OECD is grounded on six broad principles, commonly known as OECD CG Principles.[13] All six principles are not directly relevant to the governance of AIs, except for the first and fifth principle, which is the subject matter of this Paper.

The first principle of OECD CG Model states: "The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement." This forms the founding principle for ensuring that despite the nature of business, an effective corporate governance structure must be in place. Such a structure encompasses a sound legal, regulatory and institutional framework that market participants can rely on when they establish their private contractual relations.[14] Applying the first principle to an AI implies that a proven and

11 Organisation for Economic Co-operation and Development "Guidelines on Corporate Governance of State-Owned Enterprises" 2015 Edition.

12 A brief survey of 65 international arbitration institutions and dispute resolution centers from 62 countries (in Asia, Europe, Americas, Africa and Middle East) was conducted between November 2015 to January 2016, by the author, for identifying types of governance and ownership structures. The survey also covered the search for information related to value of disputes per year, statistical reports and publication of administrative and decision making processes.

13 These principles were first developed in 1999, revised in the Year 2004 and the latest revision was completed in September 2015. The OECD CG principles are widely adopted by corporates, not only by 34 member countries of OECD but also by financial institutions like World Bank and Stock Exchange Regulators in Europe, Hong Kong and South East Asian countries.

14 See, above n 2.

robust management structure and processes are (flexible yet stringent as in judicial courts) established to provide confidence to the parties and related stakeholders.

The next broad principle relevant to the objectives of this Paper is the fifth OECD CG principle on "Disclosure and Transparency: The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company." There is an increasing trend of benchmarking corporations and multi-national organizations by measuring their governance transparency and ranking them, for example Governance and Transparency Index (GTI) [15] in Singapore and ASEAN CG Scorecard. The corporates with high scores in the index often encourage higher level of investor and stakeholders to trust in the management and the organization. There is no such measure of governance and transparency index for AIs at present, except as reported by some AIs in their respective marketing or promotional media. The volume of annual turnover or profitability of an AI is not of public concern, but the cumulative amount in disputes administered by an AI is often in the range of 100s of millions to billions of dollars per year;[16] this certainly calls for a reasonable degree of corporate governance and accountability. In accordance with the fifth OECD CG Principle, the "Disclosure and Transparency" is measured through twelve (12) categories of material information such as voting rights, independence of the board members, related party transactions, annual external audit findings, and channels of dissemination of information etcetera. When this Principle is applied to an AI, it will imply that the information regarding appointment of board members including their qualifications, declaration of independence and appointments as tribunal by the same AI, decision making process on issues emerging during the administration of any arbitration matter etcetera, will be transparent and disclosed, instead of shrouded behind the confidentiality banner. The disclosure of such information is crucial in educating the future users of the ADR forum and enhancing the level of confidence in the degree of neutrality and accountability, being practiced by an AI.

III SIGNIFICANT CHARACTERISTICS OF INTERNATIONAL COMMERCIAL ARBITRATION

The party autonomy, recognition and enforcement of international arbitral awards are the fundamental reasons for the parties engaged in international trade, to opt for arbitration as dispute resolution forum. Businessmen and their commercial entities, unlike their counterparts in legal services industry, are not inclined to finance the

15 Prepared by Centre for Governance, Institutions and Organizations, NUS Business School, for Singapore companies.

16 See, above n 12.

objectives of development of law, which is a normal evolution methodology in the hierarchy of courts and appeal processes. The international business organizations are willing parties to minimize disputes and maximize collaborations for higher returns. Their objective is often to find one-stop-solution for disputes or differences if and when it arises. The objective of the ADR framework is to ensure justice is served as per the applicable book of laws. Despite the subtle differences between common law, civil law and Sharia' law regimes, in their respective historical origins, the methodologies for the development of the laws is a dynamic process.

In the cases of litigation in courts, Court Procedure Rules ("CPR") or Rules of Court ("RoC") with transparent implementation of such rules and the laws are also often a subject of scrutiny by law making bodies and the public; so justice is seen to be served. In arbitration, due to absence of the common law feature of case precedent, rigidly prescribed CPR or RoC and lack of transparency in the implementation of the relevant arbitration rules, the question arises: can the justice be served without transparency? The parties may treasure autonomy, privacy and confidentiality, with international recognition and enforceability of the awards, yet they would like to understand the legal reasoning and due process adopted by the tribunal, whether a party is winning a case or losing a battle. This may not be of assistance in the development of case law but acts as a reference for future avoidance of such disputes. Such reasoning of the law which can help boost economy and reduce disputes has served the fundamental reason and the need of the law. This concept can be best expressed in the following quote of Sir Edward Coke:

> The reason of the law is the life of the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge, but when he findeth the right reason of the law and so bringeth it to his natural reason that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case but of many others.
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> Chief Justice Sir Edward Coke (1613 – 1616)

Another underlying objective of international commercial arbitration is finality to the decision of the tribunal. Ideally the parties to arbitration ought to be seeking finality in the resolution of their disputes and not a multi-tier appeal process. Due to the apparent lack of transparency or aura of the legal force of the courts, often the losing parties are tempted to try to get the law in their favor again in the courts, through applications for setting aside the awards. In a recent case of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*,[17] Chan Seng Onn J in the opening paragraph of his judgment, rejecting the application to set aside an award,

17 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd.* [2013] SGHC 186.

on the grounds of biasness by the tribunal, summarized the finality objective of arbitration as:

> However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is **final and binding**. This general proposition of law is a manifestation of the fundamental principle of interest *reipublicae ut sit finis litium* or **finality in proceedings**. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. As is well-established under Singapore arbitration jurisprudence, the power to intervene in arbitrations generally, and more specifically to set aside awards, must and should only be exercised charily, in accordance with the rules under the applicable arbitral framework.
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> … Although parties have a **right and expectation to a fair arbitral process** and the courts should give maximum effect to these safeguards in deserving cases, parties must not be encouraged to dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award. … [Emphasis added]

The international jurisprudence has accorded a strong mandate to the arbitral tribunals for rendering a final and binding award. This is followed by an obligation to ensure that the expectations of fair arbitral process are duly fulfilled. Thus the obligation is imposing the duty of care and accountability on part of the tribunal, and the arbitral institutions, in undertaking the task of implementing the due process. In order to demonstrate that the due arbitral process has been followed; transparency becomes a pre-requisite in the governance of the arbitral institution, and conduct of the arbitral proceedings, by the tribunal.

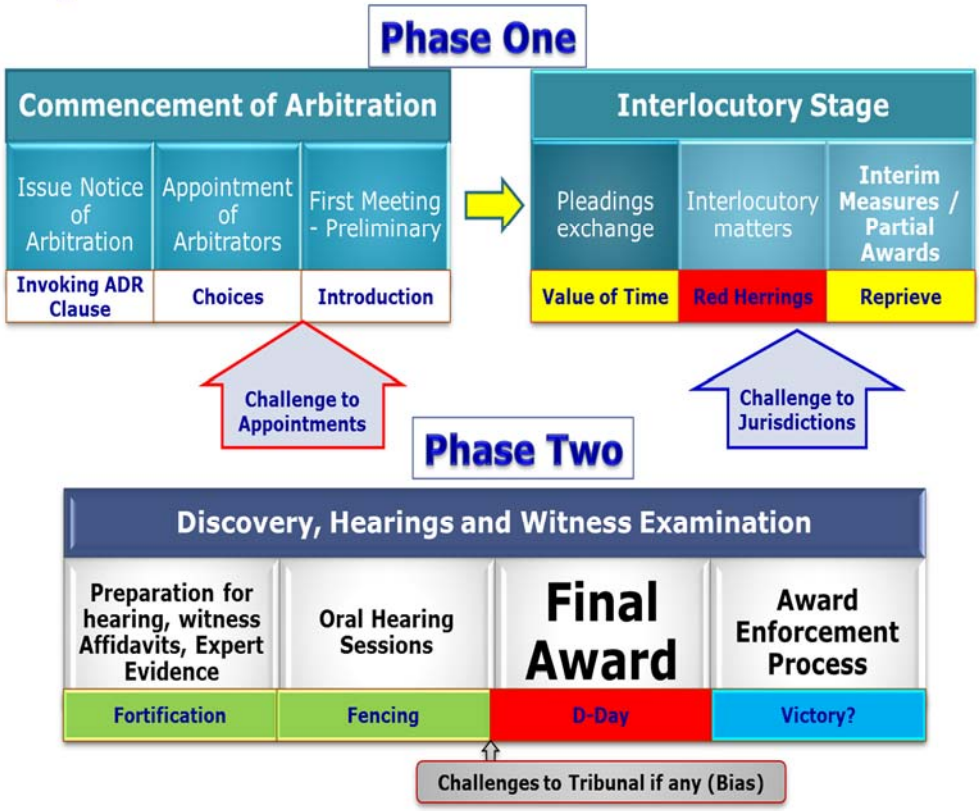
The question then arises, on how this duty differs from the requirement of the tribunal to be neutral, independent and impartial? The tribunal is expected to fulfil the obligation of transparency and responsibility through making an award for all issues submitted for resolution and provides the reasons for its decision. The arbitral institution ("AI") should demonstrate its accountability and transparency in administering the due process. The duty of care for an AI shall encompass not only the development of a comprehensive set of procedural rules, but also the composition of its supervisory boards, the functional committees or the courts, as relevant. The transparency of the tribunal's neutrality, independence and impartiality as the desired traits, will be reflected in the decision making process and reasoning given by the tribunal in the final award and procedural orders. The transparency of accountability of an AI will be gauged through evaluation of each stage of the arbitral process, from commencement to the publication of award, whether administered in compliance

with the due process or with an impropriety and procedural irregularity. The degree of involvement of an AI in the respective stages of an arbitration case, will illustrate the need, type and extent of transparency desired. The role of AIs worldwide is neither consistent nor uniform. The services offered by AIs varies from providing only the rules or appointment of tribunal and a venue for hearings, to as detailed as complimenting the arbitral process, through resolving procedural issues like, challenges to arbitrators, granting applications for extension of time for filing statements and other interlocutory matters (eg ICC). The AIs which do not provide services of tribunal appointment, administration and venues but only publish the rules (eg LMAA) are excluded from the scope of discussion in this Paper.

IV THE STAGES OF THE DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION

An arbitration process begins with the request for arbitration stage and ends at the publishing of an award. The post-award challenges and enforcement proceedings, if any, are generally through the courts and are subject to the transparency standards of the respective jurisdictions. Figure-1 provides a broad overview of the arbitral process. The issues arising and claims of breach of natural justice, or procedural irregularities or misconduct, raised by the parties, having to resort to the courts, during each stage, are the key motivations for developing the Rules for TGIA. The Rules of some of the AIs with supervisory courts, like ICC Court, do address such issues to albeit minor extent. In this section, challenges of some of the stages encountered in arbitrations under some AIs are briefly identified which can be managed by adopting Corporate Governance principles.

Figure-1: Arbitral Process Overview



4.1 Due Process in Arbitration

The "due process" as illustrated in figure 1 raises the fundamental questions: what is meant by the term "Due Process" and what is its source? Secondly, is it uniform or subject to variations given the diversity of international jurisdictions? Given the party autonomy as the main theme of the international commercial arbitrations, 'due process' also is to be agreed upon by the parties. The source in hierarchical order shall be through the *lex arbitri* of the Seat of arbitration and the rules of the administering institution. The applicable rules of the relevant AI are either referred to in the arbitration clause of the contract, or may be agreed by the parties subsequent to a dispute having arisen. Unlike the prescribed Rule of Court or CPR, the *lex arbitri* and the rules of an AI provide a number of options at various stages of the arbitration proceedings, by using phrases like "if the parties have not previously agreed," or if the parties have agreed,"[18] or unless otherwise agreed by the parties. The s4 of the

18 Article 7 and 8 of UNCITRAL Arbitration Rules (2010).

English Arbitration Act 1996 differentiates between the mandatory and non-mandatory provisions in the Act. The non-mandatory provisions allow the parties to make their own arrangement by agreement, but provide rules which will apply in the absence of such agreement.[19] The responsibility of implementing the agreed procedure or the rules in the absence thereof rests with the tribunal, as it considers appropriate.[20]

The undue challenges arise when a party is not satisfied with the due process adopted or the manner in which it is implemented by the tribunal. This drawback of the party autonomy coupled with a lack of consensus on the due process and objections to the tribunal's decisions often tend to derail the arbitral proceedings. Some of the AIs with supervisory courts like ICC address this situation to some extent, for example validity of ICC arbitration clause, challenge to jurisdiction and or tribunal, and consolidation or multi-party arbitrations.[21] The decision of the ICC court in such matters is binding on the parties. The court decision until recently would be given without reasons. However since 8 October 2015, ICC has announced that the International Court of Arbitration of ICC will communicate the reasons for many of the administrative decisions, by payment of a fee.[22] This is the first positive step towards the growing need for transparency in administration and governance of AIs.

In most of the jurisdictions and rules of various AIs, there are limited grounds for challenges after the initial appointment stage and during the arbitral proceedings, for example the challenge of a biasness of the tribunal. The party raising such challenges can approach the courts at the seat of the arbitration. In the English Arbitration Act 1996, there is an exceptionally wide range of avenues for a party to move between arbitration and English Courts. In the English Arbitration Act, matters during the proceedings ie pre-award stage are addressed in the sections: s9, s12, s13, s18, s19, s24, s44, and s45 etcetera. In the cases of unadministered arbitrations like under LMAA Terms[23] or the rules of AIs with minimal role of administration, the due process of arbitration becomes very fluid, especially when *lex arbitri* is either the English Arbitration Act 1996 or of similar provisions. In the absence of standard guidelines and code of governance of AIs, limited or no supervisory administrative role of an AI, the tribunal is the master of the arbitral process. Tribunals are expected

19 Section 4(2) of the English Arbitration Act 1996 (Cap 23).

20 Article 17, UNCITRAL Arbitration Rules (2010) and Article 19 of the Model Law (2006).

21 International Chamber of Commerce (ICC) Arbitration and ADR Rules (2012).

22 Announcement on ICC Website dated 8 October 2015.

23 London Maritime Arbitrators Association Terms 2012.

to exercise exceptional skills to keep the parties engaged in the due process till the publication of an award. These requirements of close supervision and administration of an arbitral process with minimal or no disruptions by a party seeking court interventions, transparency in administration by an AI and or a tribunal is an essential characteristic. Transparency is the key to continuous improvement. "There is no perfect set of procedural rules, and institutions should be astute enough to continuously review them. In doing so they must be alive to the difficulties experienced by arbitrators, the needs of the participants and the goals of the process."[24]

The rules of AIs as well as UNCITRAL Arbitration Rules provide that an arbitrator when challenged, the appointing authority shall take a decision. The decision making process, board members of the AI engaged in the decision making process and the criteria for review of a challenge application, are some of the missing features of accountability and transparency. The review of the latest cases relating to specific stages of the arbitral process was conducted to support the argument in favor of transparency and uniformity in administration. Some of the findings are described hereafter.

4.2 Determination of the Validity of an Arbitration Clause (Pathological Clauses)

The one-sided arbitration stage where it can be said that it had started on a wrong foot, shall be decided by the tribunal or the court or a supervisory council of an AI. One party initiates arbitration relying on the arbitration clause while the other party applies to a court for a stay order, on the grounds that the arbitration clause is defective. In some cases, unwilling party may even deny the existence of an arbitration clause or agreement to arbitrate. A case in point is a recent Singapore case of "*Malini Ventura v Knight Capital.*" The respondent made an application for an injunction to suspend arbitration that had commenced at SIAC and a second application for a stay order, on the grounds that there was no arbitration agreement as it was not signed and signatures appeared were forgery. "The plaintiff says that the question as to whether a valid arbitration agreement exists so as to convey jurisdiction on the tribunal in SIAC is an issue for the court. The defendants (Claimant) on the other hand argue that under the regime set up by the IAA[25] and the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), the existence of an arbitration agreement is pre-eminently an issue which

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24 Catherine A Rogers "Transparency in International Commercial Arbitration" (2006) 54 Kansas Law Review 1301; Bocconi Legal Studies Research Paper No. 06-10. Available at SSRN: <http://ssrn.com/abstract=888485> (Accessed on 25 Oct 2015).

25 Singapore International Arbitration Act (Cap 143A).

comes within the jurisdiction of the arbitral tribunal and only after the tribunal has rendered its decision on its issue can the court play a role." The application was unsuccessful on the grounds as Justice Judith Prakash stated in the judgment, "at this stage it is only necessary for me to be satisfied on a prima facie basis that an arbitration agreement exists."[26]

The background of the case is about a sales purchase agreement for Generator Sets between a seller from Singapore and a Buyer from (Kunshan) China, the contract was agreed in Chinese language and contained a brief arbitration clause without reference to any AI or applicable rules. The English translation of the arbitration agreement as taken from the judgment report[27] is:

> Any dispute or controversy arising out of or relating to this contract during performance shall be resolved by two parties through friendly consultation. The dispute or controversy, which cannot be resolved by two parties through consultation, shall be submitted to relevant departments for final arbitration.

A dispute arose and the Buyer obtained a judgment from the PRC Court in which the Seller did not participate. The Buyer successfully applied in the Singapore courts for the claim of debt outstanding under the PRC Judgment. The Seller then applied for a stay order on the basis of an arbitration clause. It was held that the plaintiff's application was for a debt arising under the PRC Judgment and not a dispute or claims under the contract between the parties.

In yet another Singapore case *HKL Group v Rizq International*, of an application for a stay order in favor of arbitration, due to a pathological arbitration clause stating ICC Rules of Arbitration to apply and administered by SIAC, a hybrid arbitration, the parties were directed to seek a clear ICC arbitration or SIAC arbitration, with liberty to apply.[28] There are several such cases in English courts and other jurisdictions where claimants have to take up applications for a stay order in favor of arbitration. Whether the stay order is granted or not, the next step of appeal is yet exploited by some parties seeking procedural advantages or adopting delay tactics. This practice of resisting arbitration leads to expensive and time consuming efforts by genuine claimants. The multiple layers of court applications and appeal process defeat the fundamental benefits of arbitration to be a one stop and expedient dispute resolution forum.

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26 *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225.

27 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2012] SGHCR 2.

28 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 ("the Judgment").

The arbitration rules of some of the AIs like CIETAC[29] and ICC[30] retain the power and jurisdiction to determine the existence and validity of arbitration agreement. While most of the international AIs' do not adjudge the question of the validity of an arbitration agreement, they will only accept a case when the relevant AI is explicitly or implicitly named in an arbitration agreement of the parties. This leaves the parties with uncertainty about smooth commencement of an arbitration proceeding especially in the sample cases discussed above. This is a significant avenue for the development of some international soft law or UNCITRAL Rules for TGIA and enhancing efficiency in international arbitrations.

4.3 Notice and Commencement of Arbitration

The criteria for a date of commencement of arbitration by a party (claimant) and the minimum requisites in terms of documents etcetera, are common across most of the major international AIs. The requirement to provide the Statement of Claim ("SOC") together with the notice of arbitration is generally not mandatory but optional. The time period before the constitution of the tribunal or default appointment of a tribunal (due to failure of a respondent to respond and nominate or agree for claimant's nomination of a tribunal) till the SOC is to be submitted, is fluid and remains unchecked by AIs. The responsibility for implementation of time-lines stipulated in the rules is delegated to the tribunal, for example as reflected in SIAC Arbitration Rules 2013 Article 17(2). In the absence of SOC and orders for directions from a tribunal, the arbitral proceedings become hazy. In the KLRCA Arbitration Rules 2013 (UNCITRAL Arbitration Rules 2010) Article 30 provides for the tribunal to issue an order for the termination of arbitration due to the default of the claimant in filing SOC. In ICC Arbitration Rules 2012, Secretariat may exercise the power to grant extension of time to claimant and respondent prior to passing the case files to the tribunal.[31]

In context of the prevailing rules of AIs, a lacuna remains when a tribunal busy with caseloads does not take any steps until the claimant has served the SOC. Should there be a timeline like in the KLRCA Rules, that the tribunal must enquire of and

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29 CIETAC Arbitration Rules (2012) art 6(1): CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case.

30 ICC Arbitration Rules (2012) art 6(3): If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to art 6(4).

31 ICC Arbitration Rules (2012) art 4(4) and art 5(2).

or terminate the proceedings due to default of the claimant in filing a SOC? In an alternative, like in the case of ICC, the Secretariat can only pass the file to a tribunal only after the SOC has been served, failing which arbitration is terminated. The efficient and proper commencement of arbitration is the first stage of due process, for which there is an apparent lack of international uniformity and transparency, both by some tribunals and the secretariats of AIs. The well governed AIs will be expected to maintain Standard Operating Procedures ("SOPs") with clearly defined time-lines, reckoning periods of time for submissions of applications and pleadings. This will ensure the proper commencement of an arbitration proceeding. The dissemination of the information about the SOPs and reasoned decisions for accepting a reference or terminating it, will remove ambiguities.

4.4 Appointment of the Tribunal and Challenges

This is the most significant step in the proper commencement and ensuring implementation of the due process of arbitration. The number of challenges, controversies and lack of transparency in appointment of tribunals plagues international commercial arbitrations irrespective of jurisdictions and AIs. It is ubiquitous that parties often provide for a sole arbitrator to be jointly nominated, but at the time of dispute, it is rare that consensus can be achieved on joint nomination. In the event of a disagreement on the nomination of arbitrator and or default situation where the President or Registrar of an AI is required to appoint the tribunal, the process of selection and appointment is not transparent. The rules of the AIs provide the authority of appointment[32] and the challenge procedures but do not publish the selection and appointment process. The exception of specifying a detailed nomination and appointment process can be noted in Article 27 of CIETAC Arbitration Rules[33] and the "list procedure" in Articles 8 to 10 of UNCITRAL Arbitration Rules.[34] However the methodology of execution of the duty of an AI in the selection and appointment process of the tribunal remains translucent. This is an area in need of proper governance and transparency for enhancing confidence in the due process and neutrality of the AI and the forum. The contracting parties often deliberate on the choice of the seat of arbitration and the relevant AI based on their respective perceptions about the governance and independence from undue influences.

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32 For instance Art 7.2 & 8 of HKIAC Rules; Art 13(3) of ICC Rules; Rule 4(7) of KLRCA Rules; Rule 6(4) of SIAC Rules etcetera.

33 China International Economic and Trade Arbitration Commission Arbitration Rules (2015).

34 UNCITRAL Arbitration Rules (as adopted in 2013).

In view of the role of an AI and the initial stages in an arbitration proceeding, the question arises on what should be transparent and where the governance is most critical. Thus as a minimum requirement, there is a need for transparent administration system and dissemination of information related to the decision making processes. This is to be followed with declaration of conflicts of interest and related party transactions. A good example can be found in the ICC Internal Rules of International Court of arbitration, in terms of appointment of board and committee members as tribunal.[35]

A sample of the dissemination of information about the governance and internal rules guiding the respective internal procedures of an AI can be found in the Appendices I & II of the ICC Arbitration Rules. In contrast with the "Principle V: Disclosure and Transparency" requirements of the OECD CG Principles, though there is a wide gap in the disclosure by ICC, it is none the less a good starting point for other AIs to review their respective governance systems. In order to benchmark or determine the gaps between the levels of transparency of an AI prevailing and those desired by the stakeholders, there are three most relevant references: 1) National Courts Governance System, 2) OECD Corporate Governance Principles, and OECD CG Guidelines for SOEs, and 3) Transparency International's recommendations on enhancing judicial transparency.[36]

V GOVERNANCE OF ARBITRAL INSTITUTIONS

The existing codes of governance or management styles of many of the reputed AIs have been evolving over time and with the needs of the trading industry. There are similarities between the management systems of AIs. However the governance and transparency policies are not as mooted in other international organizations providing dispute resolution services eg CIArb, ICSID, DRS of WTO and WIPO,[37] or international private-public law development forums, viz CIPE and Transparency International. The minimization of the gap between advocacy of the laws and implementation, in such international organizations, with transparency, is considered

35 ICC Arbitration Rules (2012), Appendix II: Internal Rules of the International Court of Arbitration, Article 2.

36 "Transparency International Policy Position 01/2007: Enhancing Judicial Transparency" (Transparency International, 2008) <www.transparency.org/whatwedo/publication/policy_position_01_2007_enhancing_judicial_transparency> accessed on 25 November 2015.

37 CIPE – Center for International Private Enterprise and Global Integrity; CIArb: Chartered Institute of Arbitrators; DRS: Dispute Resolution Services; ICSID: International Centre for Settlement of Investment Disputes; WTO: World Trade Organization; WIPO: World Intellectual Property Organization.

as an essential ingredient to accord legitimacy to their respective due processes.[38] In the UN-NGLS Publication on Debating NGO Accountability,[39] one of the key issues addressed was that, many NGO's lack the basic building blocks of organizational accountability, transparency and governance structure. The term *accountability* raises four questions as to: who is accountable, to whom, for what, and how. Thus the transparency of information related to these four questions will not only lead to the legitimacy of governance, it also enhances the confidence of international stakeholders in such an NGO or institution.

Therefore considering the first question, an AI is indeed accountable for administration of the due process of arbitration to the parties referring their case to the AI. This implies that the AI should have a sound administration and governance structure in place. In context of the OECD CG Principles, the governance structure should be in compliance with regulatory requirements of the jurisdiction or state, commonly referred to as Code of Corporate Governance for public listed corporates. The corporates are expected to either comply or explain, thus projecting a level of flexibility depending on the nature of its business operations. In the context of international benchmarking of governance standards of AIs the prevailing corporate standards in the jurisdiction and the level of interventions by the judiciary, should be taken into consideration. The OECD Assessment Methodology[40] can be a good reference from the corporate standpoint only. For instance, under principle I-B it states, "when codes and principles are used as a standard or as an explicit substitute for legal or regulatory provisions, their status in terms of coverage, implementation, compliance and possible sanctions (eg market or regulatory) should be clearly specified." Where an AI is incorporated as a society, then relevant legislation governing the societies will be applicable. If an AI is incorporated as a charity, then regulations set by the Registrar or Commissioner of Charities (as the case may be) will be applicable.

The common requirements are in terms of the declaration of organization structure, board composition, roles and responsibilities of standing committees, selection, qualifications, terms of appointment, independence, dual or multiple roles of any individual as CEO/CFO, Chairman and director etcetera. Some of the AIs like HKIAC and ICC for example declare on their websites the overview of the

38 Center for International Private Enterprise and Global Integrity "Improving Public Governance: Closing the Implementation between Law and Practice" (October 2012).

39 Jem Bendell *Debating NGO Accountability, UN-NGLS Development Dossier* (United Nations Non-Governmental Liaison (NGLS), Geneva and New York, 2006).

40 Organisation for Economic Co-operation and Development "Methodology for Assessing the Implementation of the OECD Principles of Corporate Governance" (2007).

organization structure, boards and committees with their respective roles, although the rest of the details are not made public. When assessing the compliance to CG principles, the assessor will have to use objective examination criteria. An example of such a criteria from the UK Corporate Governance of Code states, "There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision."[41]

5.1 Scope of Responsibilities of an Arbitral Institution in Future

In line with establishing a code of governance, the role of an AI is also in need of enhancement for rendering a full suite of services to the parties. The term full suite may encompass the following services as a minimum:

- Review of the Application for Commencement of Arbitration for prima facie evidence of an arbitration agreement and reference to the institution;
- Appointment of the tribunal;
- Decision on challenges to the appointment of a tribunal, at commencement stage;
- Decision on challenges to the tribunal during the proceedings, on other grounds, like biasness, procedural irregularity or competency;
- Applications for securities for cost if made prior to the constitution of the tribunal;
- Applications for extension of time for filing of statements of claim and defense or other documents, prior to the appointment of the tribunal; and
- Other support services like managing escrow accounts, secretarial services to the tribunal, authentication of documents and translation services etcetera which may vary among different institutions.

This may be an untested and controversial issue on whether an AI may be entrusted and empowered under the *lex arbitri* to give a decision or ruling on procedural issues like security for costs, extension of time, and challenges to a decision by the tribunal on interlocutory applications, by a party. When an AI takes on a proactive role, besides providing only administrative services, the parties will stand to gain in terms of time, cost and efficiency as shuttling between courts and arbitration will be reduced. The issues like challenges to the tribunal are managed by some AIs like ICC International Court of Arbitration. However, during the

41 Principle A.2: Division of Responsibilities, the UK Corporate Governance Code (September 2012).

commencement stage, the challenges to the appointment of the tribunal by an AI are dealt with by the respective AI, in accordance with the institutional rules of the arbitration. In the spirit of arbitration in support of international trade, the parties should be able to secure a resolution to their dispute under one roof, without the need for shuttling between court and arbitration. Any challenges after the award is an option open to any party. However from commencement to the award stage, the administering AIs should be able to govern the due process by supporting both the tribunal and the parties.

5.2 Transparency as a Necessity

In order to provide a full suite of services, an AI is not only expected to have corporate governance structures, sound policies, procedures and resources, it also must be transparent in decision-making processes, in dealing with challenges as well as in the tribunal appointment process. The OECD CG "Principle V: Disclosure and Transparency" will be as much applicable to an AI as it is to any commercial corporation. Analogous to the capital markets, and quoting from the OECD CG principle V with application to an AI, "a strong disclosure regime can help to attract *referrals of international cases* and maintain confidence in the *AI*. By contrast, weak disclosure and non-transparent practices can contribute to unethical behavior and to a loss of integrity at great cost, not just to the AI and the parties but also to the *seat of arbitration* as a whole."[42] (*Altered text added by the author*)

The decision-making committees or the courts (as termed in an AI) should be accountable for their decisions and transparent in the decision making process, albeit the need of confidentiality as expressly stated and agreed by the parties. The code of governance for such committees which deal with the arbitral matters being administered by the AI shall be stringently monitored and controlled. The composition of the committees or courts shall be free from any related party or self-interest members. In terms of compliance with dissemination of material information to the stakeholders or general public, it should be of sufficient detail and not as a part of any annual reports. There are statistical reports and promotional publications by some AIs in circulation, which do reflect on the broad framework of governance and cases dealt over a period. However the OECD CG Principle V provides 11 elements of disclosure,[43] which if applied in the governance of an AI, will certainly reinvigorate the confidence of the international business community in arbitration, as a just and transparent forum for disputes resolutions.

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42 See, above n 2 at 42, para 1.

43 See Annex-1 of this Paper.

5.3 Role of UNCITRAL

The growth in international trade from 1958 to 2015, despite wars and sanctions, is a testimony to the contribution by the United Nations Commission on International Trade and Law (UNCITRAL). The first instrument "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or NYC) was launched in 1958 as a lifeline for international trade. Since then there have been several significant development of internal private and public laws, guidelines, conventions like UNCITRAL Model Law 1985 (revised in 2006), UNCITRAL Arbitration Rules 1976 (revised in 2010 and 2013) and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) etcetera to support and boost global trade. In order to ensure the future of arbitration through enhancing efficiency, promoting just, fair and timely resolutions of disputes, it is therefore crucial to eradicate malignant elements and ambiguous practices. Noting the gravity of this significant task, UNCITRAL is the ideal institution to undertake this project of developing the "Model Rules for Transparency and Governance of International Arbitral Institutions" ("Model Rules for TGIAI") or "Code of Corporate Governance for International Arbitration Institutions."

VI CONCLUSION

The transparency in an international commercial arbitration should commence from the time of filing the notice of arbitration with an AI and shall be completed with the publishing of an award by the tribunal. The objective of transparency is to enhance confidence in the due process of the justice system in an ADR forum, and should not be mistaken as deviating from the need of confidentiality and party autonomy. The transparency and code of corporate governance shall be demonstrated by an AI in managing the referred cases. The core objective of each Arbitral Institution should be in supporting the international business community and industry to grow globally as one cohesive business, by providing timely, cost effective and finality of dispute resolutions, under one-roof. The rules of AIs with administered arbitrations shall be reviewed, to weed out any potential procedural irregularities during the pre-award stages. The AIs should consider providing supervisory and supportive roles through internal courts, committees or supervisory bodies, for dealing with challenges and issues faced by the parties, so as to limit or restrict the access to courts for procedural advantages by any recalcitrant party.

Each International Arbitral Institution should demonstrate transparency and accountability in its code of corporate governance and administration of arbitrations. The OECD Corporate Governance Principles I and V can provide a ready starting point for reinvigorating existing AIs. It is a matter of time when benchmarking of the AIs based on characteristics like accountability, transparency, efficiency and

quality of awards, will be sought after and a Global Transparency Index for AIs may be launched. The AIs which do not have a prevailing governance system may face challenges to stay relevant.

In order to promote uniformity across international AIs, UNCITRAL should consider developing the Model Rules for Transparency and Governance of International Arbitration Institutions (TGIAI). Such Model Rules for TGIAI may be adopted by the AIs which are dedicated to offering a just and transparent alternative dispute resolution forum to the global business community.

ANNEX – 1

Extract of OECD Corporate Governance Principles 2015 – Relevant for International Arbitration Institutions

Principle I: Ensuring the basis for an effective corporate governance framework

> "The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement."

Additional Recommendations by OECD for Implementation of CG Principle I

A. The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and well-functioning markets.

B. The legal and regulatory requirements that affect corporate governance practices should be consistent with the rule of law, transparent and enforceable.

C. The division of responsibilities among different authorities should be clearly articulated and designed to serve the public interest.

D. Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained.

E. Cross-border co-operation should be enhanced, including through bilateral and multilateral arrangements for exchange of information.

Principle V. Disclosure and transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

Additional Recommendations and Assessment Criteria in Implementation of CG Principle V

A. Disclosure should include, but not be limited to, material information on:

1. The financial and operating results of the company.
2. Company objectives and non-financial information;
3. Major share ownership, including beneficial owners, and voting rights;
4. Remuneration of members of the board and key executives;
5. Information about board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board;
6. Related party transactions;
7. Foreseeable risk factors;
8. Issues regarding employees and other stakeholders; and
9. Governance structures and policies, including the content of any corporate governance code or policy and the process by which it is implemented.

B. Information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial reporting.

C. An annual audit should be conducted by an independent, competent and qualified, auditor in accordance with high-quality auditing standards in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects.

D. External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit.

E. Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users.

(Source: G20/OECD Principles of Corporate Governance, OECD, 2015.)