FOREWORD: NEXT GENERATION INSIGHTS FOR DISPUTE SETTLEMENT

How can we develop next generation thinking for the Dispute Resolution ('DR') field that explores, expands, challenges and even redefines the contours of research platforms around the world?

What can we, as members of the professional DR community, do to make *a* difference that makes *the* difference?

These were two questions that we posed at the beginning of discussions on the next generation of DR, the 'NextGen Roundtable', a two-day event hosted at Singapore Management University in 2023. We were a small gathering of practical thinkers and thinking practitioners, coming from diverse cultures and bringing very different experiences to the table. Over the two days we engaged in a series of innovative interactions during which we shared and listened, reflected, brainstormed and eventually committed to writing projects, which are encapsulated in this special edition of the *Dispute Resolution Review*.

Since the NextGen Roundtable, and inspired by these conversations with colleagues from across the globe, the Singapore International Dispute Resolution Academy (SIDRA) has redefined and restructured its research and capacity-building work around three programme clusters: 1) empirical research; 2) international mediation and the Singapore Convention on Mediation; and 3) next generation DR. Going forward, our team of researchers and experts will work across all programmes in an effort to enhance linkages among the programmes and innovative outputs – a significant structural change inspired by the NextGen gathering.

The articles in this special issue are wide-ranging in terms of subject matter. They explore legal, procedural and political issues across both amicable and determinative forms of international DR. At the same time, when one steps back from the fascinating diversity of the contributions in this Special Issue, there is a larger DR picture to be perceived - and within this picture emerge compelling connections amongst the articles featured in this volume.

Whether examining procedural or political integrity, ethics and competencies, the shifting nature of cross-border conflict, or technical legal issues, our authors pose difficult and provocative real-world questions. How we as a DR community respond to these challenges will shape the future of our field; further it will have a profound impact on how disputants from all walks of life experience conflict and attempt to manage and resolve it.

Let us now give you, dear readers, a taste of what you will read in greater detail in the pages that follow.

Our Special Issue opens with Mark McLaughlin's article, 'Operationalising the Social Licence to Operate Along the Belt and Road: The Case for a Mediation-Focused Approach'. McLaughlin argues that the relationship nexus between local communities and foreign investors is a blind spot for international dispute settlement and investment arbitration. He identifies that while local populations are the people on whom investment projects have the closest impact, and local populations are therefore influential in the success or failure of large-scale mining or infrastructure projects, they are also largely absent from the mechanisms of international investment law and arbitration. This is identified as being particularly problematic in the context of infrastructure projects relating to the Belt and Road Initiative (BRI), where most of the projects concern large-scale infrastructure development. McLaughlin argues that Chinese enterprises and other foreign investors, whose investments carry a considerable social footprint, should consider their 'social licence to operate' (SLO) in addition to legal licenses granted by the central government. At present, the class of actors with which States are bound to engage is limited to foreign investors in international investment law.

However, cases such as *Crystallex v Venezuela,*[1] *Tecmed v Mexico*[2] and *Bilcon v Canada*[3] highlight the clear and unambiguous role for community stakeholders in relation to the failure of investment and resulting investor-State arbitration. Here, three key issues are relevant: first, any divergence in the position and interests of the host State's central government compared with local communities near to the investment; second, any reliance of investors on initial commitments from central governments rather than on widespread community engagement; and third, the lack of empowerment in terms of investment tribunals considering community interests in any other way than as non-legal motives informing governmental decision-making. McLaughlin suggests that the operationalization of SLOs can be done through investor-State mediation using a genuinely iterative and reflective process that establishes systems to preserve the socio-economic benefits of foreign investments where possible, protecting rights of foreign investors, and respecting the autonomy and rights of local communities. The focus of SLO-oriented mediation should be on substantive outcomes, with a mutual incorporation of feedback by both parties to the dispute. With a process that better integrates the rights of all stakeholders, McLaughlin posits that the broader goal of harmonising economic growth with social and environmental stewardship can be attained.

Continuing the mediation theme, Wooseok Shin's article entitled 'The Role of Mediation Institutions: Ensuring Enforceability Under Article 5 of the Singapore Convention on Mediation' considers the United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Convention'). Specifically, Shin analyses Article 5 of the Convention, which provides enforcing courts the discretion to refuse

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1 Crystallex International Corporation v Bolivarian Republic of Venezuela (2016) ICSID Case No. ARB(AF)/11/2, Award.

2 Tecnicas Medioambientales TECMED SA v The United Mexican States (2003) ICSID Case No. ARB(AF)/00/2, Award.

3 Bilcon of Delaware, Inc v Government of Canada (2015) PCA Case No. 2009-04, Award on Jurisdiction and Liability.

enforcement of an international mediated settlement agreement ('iMSA') when certain circumstances are met. Shin identifies that in relation to contract-related grounds under Article 5(1)(b)(i), (b)(ii), (c)(ii) and (d), the determination of legal validity and the interpretation of ambiguous terms may differ among legal cultures and systems, contributing to unpredictability in relation to enforcement. Further, the author notes that a challenge to the enforceability of an iMSA under Article 5 of the Convention may necessarily involve the disclosure of communications between parties and/or mediators that transpired during the mediation. However, the extent to which the veil of confidentiality can be lifted according to local law depends on the scope of the applicable law on confidentiality and related areas of evidence, and this varies across jurisdictions, thereby compounding uncertainty around the granting of relief.

Against this background, Shin argues that mediation institutions can play a useful role in enhancing legal certainty for the preservation of confidentiality in mediation and the enforceability of iMSAs under the Convention. The author posits that since parties can strictly protect their confidentiality by selecting an exclusive forum for enforcement of an iMSA, mediation institutions should address such an option during pre-mediation conferences. Mediation institutions may also aid in optimising the enforceability of iMSAs by (i) allowing a 'mediation officer' with expertise in the Convention to suggest ways to reduce enforceability risks during the pre-mediation conference; (ii) issuing guidelines or notes on best practices for mediation users; and (iii) generating specific provisions mandating that parties agree on the substantive law governing substantive obligations within the iMSA and the choice of law for the mediator's code of conduct.

In the next contribution, the focus moves from mediation to arbitration with Darius Chan and Amar Pandey exploring the issue of enforcing arbitral awards against State Owned Entity ('SOE') assets in their article 'Enforcement of Arbitral Awards Obtained Against States on the Assets of SOEs: Reformulation of the English Test'. The authors begin by noting that despite the fact that a recorded arbitral award is binding, including on a disputing party which is a State, it is common for State parties to fail to uphold their obligations under an award. In these situations, a party which has successfully obtained an award against a State may seek to enforce the arbitral award against SOE assets – a process which can be legally challenging. Chan and Pandey propose that in this context, strict adherence to the thick shroud of the corporate veil and the principle of separate legal personality need not be followed (as was held in the 2012 United Kingdom Privy Council decision of *La Generales des Carrieres et des Mines v F Hemisphere Associates LLC* ('*Gecamines*') [4]). The reasoning behind this position is that the policy considerations underpinning the doctrine of separate legal personality do not strictly apply to a State. The authors propose that determining whether an

4 La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC [2012] UKPC 27 ('Gecamines').

arbitral award against a State can be enforced against the assets of a SOE should be based on a two-stage inquiry, as was applied in the United States Supreme Court case of *Bancec*.[5] The *Bancec* inquiry involves two stages: first, determining whether the SOE is controlled by the State; and second, determining whether the SOE exercises sovereign functions.

The article begins with an explanation of the key international law principles that underpin this context, such as the principles, categories and nuances of State immunity. Next, the article analyses existing case law to explain the challenges existing in current legal approaches in relation to enforcing arbitral awards against SOEs. An analytical focus falls on the case of *Gecamines* because it held that a party seeking to enforce an arbitral award against the assets of a SOE has to successfully pierce the corporate veil between the SOE and the State. Chan and Pandey argue that such a requirement is an unduly high threshold in this context, that acts as a double-edged sword. This is because, while such an approach gives full effect to the separate legal personality of the SOE, it strips the SOE of State immunity from suit. The article then analyses the *Bancec* decision, as well as approaches in France and Canada, positing that although the *Gecamines* approach robustly preserves the separate legal personality of a SOE, the same justifications for separate legal personality from company law do not apply as strictly to States. Finally, the article argues that a move away from the strict *Gecamines* approach could improve commercial certainty and facilitate State commerce. On the basis of the suggested approach, States could adopt measures to avoid any over-exposure of assets, but they should not be able to escape liability by hiding behind the cloak of the corporate veil.

Having considered both mediation and arbitration, the next contribution examines combinations of DR processes. Zhang Yuying and Angela Ray T Abala's article, entitled 'Hybrid Dispute Resolution Processes and Due Process Concerns', identifies that a demand for discrete and creative solutions to disputes has given rise to an increased use of hybrid DR processes. The authors explore a range of significant issues that affect the integrity and effectiveness of hybrid DR processes, and in particular, the issue of whether the two hats of mediator and arbitrator can be taken on by the same third-party intervenor. Other issues analysed include: the confidentiality of mediation proceedings, potential bias from mediator-turned-arbitrators, and potential concerns about unfair arbitration proceedings. The authors acknowledge that these concerns can create due process paranoia which in turn can impact third-party intervenors and perceptions of the efficacy of hybrid DR proceedings. The article concludes by presenting potential solutions to circumvent concerns about hybrid DR mechanisms with an emphasis on the use of contractual mechanisms. Contractual terms can clearly express how parties wish for the proceedings to be conducted, including matters such as the treatment and use of confidential information

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5 First National City Bank v Banco Para el Comercio Exterior de Cuba, 462 US 611 (1983) ('Bancec').

from mediation proceedings at a subsequent arbitration stage, the appointment of third-party intervenors, and the roles of third-party intervenors in hybrid DR proceedings. The authors point out that these mechanisms all serve the key goals of informed consent by all parties, ethical procedural transparency and process integrity.

In their article 'Competencies for Professionals in Legal Disputes', Yael Efron, Sascha Ferz and Angela Ray T Abala shift the focus from DR processes to DR professionals. The authors examine the challenging professional responsibilities, ethical obligations and procedural complexities that DR professionals are required to manage in DR processes. With a view to informing approaches to training and addressing the complex needs of clients, the authors share their 'work-in-progress' research on the extent to which DR professionals are equipped with the necessary toolbox of skills to navigate the increasingly sophisticated spectrum of DR processes. The article draws upon the authors' analysis of three empirical surveys: the *Sonnleitner* and *Ferz* European Survey on mediator competency (2021),[6] the SIDRA survey and report (2022),[7] and the Institute for the Advancement of the American Legal System's ('IAALS') empirical research on clients' expectations of their lawyers from 2019.[8] Three areas of analysis are in focus: first, client expectations of diverse professionals in legal disputes; second, the importance of competencies from the perspective of professionals involved in DR processes; and third the effect of legal context and jurisdiction. The authors highlight apparent gaps between client expectations and professional DR training approaches. Here, two issues are considered: first, that DR professionals' communication skills need development, and second, that DR professionals need greater proficiency with technology and artificial intelligence tools. The article concludes by foreshadowing developments in the research project.

The final contribution to this Special Issue takes the idea of next generation DR to a new level. In their article 'A New Management System for a New Type of Conflict? Singapore's Possible Role in Managing Grey Zone Conflict in International Commerce', Chris Honeyman and Rachel Tan Xi'En explore 'grey zone conflict' (also known as 'hybrid warfare') as a matter of increasing public concern. Grey zone conflict involves assaults against nations and their private enterprises, as well as against public and non-governmental sectors. Honeyman and Tan advocate for the development of a comprehensive approach to understanding such conflicts so that they can be better managed at a meta level. Potentially helpful DR mechanisms include good offices and the invocation of regional groups and bodies. Mechanisms such as these can be employed on an *ad hoc* basis without requiring expensive

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6 Karin Sonnleitner and Sascha Ferz, 'Mediationskompetenz im Wandel. Ergebnisse der Erhebung 2021' in Karl Kreuser et al (ed), *Beratungskompetenzen für Mediation, Coaching und Supervision* (Waxmann, 2022) 27 ('European Report').

7 Singapore International Dispute Resolution Academy, 'SIDRA International Dispute Resolution Survey: 2022 Final Report' (August, 2022) ('SIDRA Report').

8 Logan Cornett, 'Think Like a Client' (Research Report, Institute for the Advancement of the American Legal System, University of Denver, October 2019).

or complex ongoing structure. Other modes of DR such as negotiation and mediation may be useful, as well as invoking the role of a convener. Countries that are part of geographical associations could also facilitate the resolution of disputes, and a number of jurisdictions are identified as potential venues. Singapore, for example, has an unusual advantage for this purpose in terms of being a founding member of ASEAN with a wide-ranging commercial relationship with both East and West. Further, Singapore's standing as an international commercial conflict management hub further highlights its appeal in resolving grey zone conflicts. Predictable problems in resolving grey zone conflicts are analysed. The authors express hope for a time when suitable proof-oriented, directly enforceable mechanisms will be devised for managing and addressing grey zone conflicts. In the meantime, they identify the need to develop better systems and structures for defending firms, non-profit organisations, local governments, hospitals, universities and others against such attacks.

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