# 10 Hot Topics for International Arbitration in 2017

**Kluwer Arbitration Blog**
February 18, 2017

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*Please refer tot his post as: Jonathan Mackojc, '10 Hot Topics for International Arbitration in 2017', Kluwer Arbitration Blog, February 18 2017, http://kluwerarbitrationblog.com/2017/02/18/booked/*

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2016 was an important year for international arbitration. Lord Chief Justice of England and Wales challenged the legitimacy of international arbitration, while supporters such as former Chief Justice of the High Court of Australia (Robert French AC) came forward to defend its coexistence with commercial courts. Several institutions such as ACICA, SIAC and KCAB updated their arbitration rules for 2016, while SCC and ICAC introduced new rules for 2017. SIAC also released its draft Investment Arbitration (IA) Rules, followed by a public consultation process and finally enactment of its new rules. Several institutions published detailed practice notes and statistics: HKIAC, SIAC, LCIA, SCC and the ICC updated its note on the conduct of arbitration. The year concluded with Hong Kong and Singapore reforming their respective laws in order to allow for third party funding arrangements – arguably one of the most important developments in 2016.

This article discusses 10 key areas which will continue to play a significant role in further developing international arbitration beyond 2020.

**1. Transparency**

In response to the 2015 Queen Mary International Arbitration Survey, several institutions were seen as leading the international arbitration arena by publishing detailed practice notes and statistics in 2016. It is highly likely that this will continue in 2017, as the purpose of these practice notes is to clarify certain provisions and respond to market changes – such as recent developments regarding third party funding in Singapore and Hong Kong. Both jurisdictions will need to supplement their existing rules with practice notes shortly. However, it is worth noting that several provisions in the 2017 SIAC IA Rules already address these developments. They are discussed in a previous article.

**2. Arbitrator Selection Process**

Although largely ignored over the years, this area will likely be explored in 2017, though developments are unlikely to surface until at least 2018. Institutions are hesitant to disclose, let alone discuss, the selection process as it leads to significant debate among arbitrators, law firms, and academics. What cannot be denied is that it is inherently difficult to assess whether parties are in a better position to appoint arbitrators, or whether the task should be left to the arbitral institution – as the answer will depend on the experience of the parties.

Developments in this area could vary from the release of practice notes with basic guidelines, to publishing an arbitrator selection framework – where institutions would implement their own guidelines in order to clarify the various factors that must (or should) be considered before an arbitrator is appointed. The other, more difficult, option is to wait for a multilateral framework. Though

only soft law, it would be comparable to the IBA guidelines on conflicts of interest in international arbitration – which emphasise best practice.

**3. Investment Arbitration Rules**

On 1 January 2017 SIAC released the first edition of its IA Rules. This modern set of investment arbitration rules are quite different to the ICSID Rules, as they are a hybrid of commercial and investment arbitration rules. It will be interesting to observe whether a significant number of parties will now settle disputes with SIAC, as opposed to ICSID. In 2017, global arbitration conferences will undoubtedly discuss and evaluate these developments. Beyond 2017, some institutions may follow suit, though most will be proud to highlight that they will remain commercial dispute resolution centres.

**4. Third Party Funding**

Both Singapore and Hong Kong have reformed laws which previously prohibited third party funding arrangements. On 10 January 2017, the Singapore Parliament passed a bill allowing for third party funding for arbitrations in Singapore. On 11 January 2017, Hong Kong similarly introduced a bill to its Legislative Council (LegCo) with Mr Rimsky Yuen SC moving the second reading of the bill. Developments in both jurisdictions indicate that their respective governments are strong supporters of international arbitration. Litigation funders in both jurisdictions have been gearing up for work over the last year, and this area will continue to be discussed heavily at global arbitration conferences in 2017.

**5. Rise in Financial Institution Arbitration**

The ICC Commission on Arbitration and ADR published a comprehensive report in November 2016 titled 'Financial Institutions and International Arbitration'. The Report concluded that many institutions have, in large part, failed to fully embrace international arbitration as a viable dispute resolution method. The report has been discussed in a previous article. The HKIAC was quick to invite the co-chair of the ICC task force on Financial Institutions and International Arbitration to present at an event in December 2016. These developments will lead to institutions targeting a broader set of clients from 2017 onwards. Once financial institutions recognise the commercial benefits associated with international arbitration, they will undoubtedly provide global arbitral institutions with lucrative dispute resolution work.

**6. Potential Appeal Mechanism (by consent)**

One of the benefits of arbitration over litigation is that it does not allow for appeals. Arbitration has always encouraged finality, to ensure that parties can resolve their disputes swiftly and with certainty. Critics, who tend to discourage resolving disputes via arbitration, may argue that justice cannot truly be achieved without an appeal process. In response to question 14 of the questionnaire that the ICC's distributed before it published its 'Financial Institutions and International Arbitration' report, some institutions expressed an interest in an appeal process subject to two broad conditions: that the consent of all parties is obtained at an early stage, and that certainty is not undermined. While the first of these is achievable, it will be difficult (if not impossible) to achieve certainty if an appeal process is introduced.

**7. Sanitising Arbitral Awards**

Another perceived advantage of resolving disputes via arbitration is confidentiality, which inevitably comes at the expense of precedent. Precedent not only ensures consistent decisions, but also promotes certainty. The ICC report also found that several financial institutions viewed confidentiality

as being less important than precedent, particularly where disputes related to syndicated lending and derivatives. The report also reminds readers that although an arbitration is private, it is not expressly confidential according to the ICC Rules. The UNCITRAL rules are also silent as to confidentiality, but publication is addressed in Art 34.5. Other institutions have strict provisions that deal with confidentiality and publication: Article 42 in the 2013 HKIAC Rules, Article 22 in the 2016 ACICA Rules, and Rule 24.4 of the 2016 SIAC Rules. Interestingly, SIAC has taken an extra step to confirm that the tribunal may issue an order or award for sanctions or costs if a party breaches their confidentiality obligations in Rule 39.4. Also worth noting is that the 2017 SIAC IA Rules have provided greater clarity with respect to publishing of awards in Rule 38. Confidentiality, and more specifically publication, provisions are likely to be reformed in all new international arbitration rules from 2017 onwards. More sanitised awards will also be published by institutions.

**8. A Shift to the East**

It is no secret that Hong Kong and Singapore have become some of the most frequently used jurisdictions for international arbitration within the last 5 years. This is due to a multitude of reasons, some of which include: both jurisdictions being competent in administering a high volume of cases as well as high-value disputes, strong panels of arbitrators, state-of-the-art facilities, geographic convenience, modern arbitral rules, and most importantly a supportive judiciary and government. In 2016, both experienced sharp growth, and this is likely to continue beyond 2017.

**9. Diversity in International Arbitration**

Another area which has received little attention is diversity, particularly among arbitrators and with respect to both gender and ethnicity. They key question that needs to be asked is: why is diversity still an issue when there has been a significant increase in the use of international arbitration globally? Other discussions need to focus on the impact this may have on the tribunal's orders and awards, solutions such as quotas, as well as how current obstacles can be overcome. Arbitral Women is an organisation that was set up to address this gender imbalance, and has almost 1000 members in over 40 countries. The non-profit Arbitrator Intelligence also claims that it will 'facilitate increased diversity in arbitrator appointments'. For greater discussion on this topic, refer to another post which discusses a recent survey on diversity which was published in January 2017.

**10. Appropriate use of: Emergency Arbitration, Summary Dismissal, Expedited Procedure, Joinder and Consolidation**

Most institutions are reforming their old rules in order to include these innovative procedures. As each serves a unique purpose, they are not automatically relevant to every dispute. In 2017, global arbitration conferences will likely discuss the most recent provisions such as SIAC's Early Dismissal of Claims and Defences (Rule 29) and SCC's Summary Procedure (Article 39). Joinder, consolidation and emergency arbitration have already received a fair amount of attention since around 2013.