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# Mapping and Assessing the Rise of Multi-tiered Approaches to the Resolution of International Disputes across the Globe

An Introduction

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## 1.1 Introduction

There are many ways in which disputes can arise in the commercial world and there are just as many ways in which they can be resolved. Much as different modes of alternative dispute resolution (ADR) have gained in popularity around the world, there has been growing interest in the combined use of such modes.

The Queen Mary University of London and White & Case LLP 2018 International Arbitration Survey observes that ‘there has been a significant increase in the combination of arbitration with ADR’.<sup>1</sup> Nearly half of the participants<sup>2</sup> in the 2018 survey preferred a hybrid approach, as compared to just 35 per cent in the 2015 survey.<sup>3</sup> This is unsurprising in view of the benefits of mediation as a prerequisite to arbitration.<sup>4</sup> An initial mediation allows for a ‘cooling off’ between the parties, thereby avoiding an escalation of their dispute.<sup>5</sup> It also has a filtering effect. It enables the parties to assess

\* This chapter benefits from the financial support of the Hong Kong Research Grants Council General Research Fund (HKU 17617416, 17602218 and 17609419).

<sup>1</sup> Queen Mary University of London and White & Case LLP, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ <[www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf)> accessed 2 February 2020, 5.

<sup>2</sup> Of the respondents to the survey, 25 per cent were from the Asia Pacific region: see *ibid* 41.

<sup>3</sup> *ibid* 5.

<sup>4</sup> Constance Castres Saint-Martin, ‘Arb-Med-Arb Service in Singapore International Mediation Centre: A Hotfix to the Pitfalls of Multi-tiered Clauses’ [2015] *Asian Journal of Mediation* 35, 37.

<sup>5</sup> Craig Tevendale, Hannah Ambrose and Vanessa Naish, ‘Multi-tier Dispute Resolution Clauses and Arbitration’ (2015) 1 *Turkish Commercial Law Review* 31, 33.

the relative strengths of their respective cases. Even if only partly successful in resolving a dispute, it should result in only the truly contentious issues proceeding to arbitration, while everything else is resolved with the assistance of a skilled mediator.<sup>6</sup> The 2018 survey indicates that, generally, commercial parties would rather avoid disputes and preserve established relationships. For instance, within the in-house counsel sub-group of participants to the 2018 survey, there was a ‘clear preference’ for combining arbitration with other forms of ADR (60 per cent).<sup>7</sup> Mediation as a precondition to arbitration or even litigation thus offers a prospect of parties’ maintaining an amicable commercial relationship.

The 2018 Pound Conference Report further confirms that there is now a global interest in hybrid modes of dispute resolution.<sup>8</sup> These typically require mediation, arbitration and possibly other modes of ADR (for example, neutral evaluation) to be attempted in an agreed sequence. Such processes are referred to as ‘multi-tier dispute resolution’ (MDR). Despite its widespread popularity, MDR, in its development, has followed different trajectories in different jurisdictions. This introductory chapter will therefore provide a survey of MDR and its many pathways around the world. Section 1.2 will discuss concepts and procedures underlying MDR. Section 1.3 will explore how MDR has developed from a regulatory perspective in different countries. Section 1.4 will examine specific situations in a few prominent jurisdictions in both the East and the West. Section 1.5 will conclude with some comparative insights into MDR global trends.

## 1.2 Dispute Resolution Innovation

### 1.2.1 Concept

MDR refers to a hybrid form of dispute resolution that combines an initial non-adjudicative approach (such as mediation or neutral evaluation) with a subsequent adjudicative approach (such as arbitration or litigation) in the event that the initial non-adjudicative process is unsuccessful in resolving all or part of the parties’ differences. This innovative approach accordingly combines two seemingly contrary methods of

<sup>6</sup> *ibid.*

<sup>7</sup> Queen Mary University of London and White & Case LLP (n 1) 5.

<sup>8</sup> Herbert Smith Freehills and PricewaterhouseCoopers, *Global Pound Conference Series: Global Data Trends and Regional Differences* (2018) <[www.imimmediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf](http://www.imimmediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf)> accessed 2 April 2021, 3.

dispute resolution: one adversarial, the other non-adversarial or at least less so. The first stage of an MDR will typically entail a mediation, that is, a ‘person-oriented’ process that takes place within an informal and conciliatory atmosphere. If the mediation proves abortive, the second stage will often mandate the parties to go through an arbitration, that is, an ‘act-oriented’ process that places a premium on formal legal argument, accurate fact-finding and strict observance of due process.<sup>9</sup> Consequently, MDR has the benefit of providing a pre-planned customised framework for the resolution of the parties’ differences. The parties are contractually bound to attempt mediation in good faith for a specified number of days before they can pursue arbitration or start an action in court. However, in interposing an initial non-adversarial tier, MDR also gives the parties the flexibility to reach a ‘deal’ early on. That deal may not reflect the strict legal merits of the parties’ respective contentions, but it can more satisfactorily address their real needs and concerns, which will often be of a non-legal nature (for example, preserving reputation, maintaining cash flow or supply lines, or saving ‘face’). MDR’s promotion of non-adversarial means for settling disputes gives the parties the freedom to fashion creative solutions for resolving their differences. Constrained as they are by rules and precedents, an arbitral tribunal or court would simply not be able to order such solutions.<sup>10</sup> As Stipanowich has commented, MDR is particularly suited for contractual relationships, as parties maintain control over the resolution of their disputes from the outset by reason of the flexibility afforded by the contractually mandated initial non-adversarial tier.<sup>11</sup>

Modes of MDR are often referred to as hyphenated phrases, employing the abbreviations ‘arb’ and ‘med’ in varying permutations (for example, ‘med-arb’, ‘arb-med’, ‘arb-med-arb’, etc). But the use of these terms is not consistent and can become a source of confusion. This is because these terms imply a sequence in which different stages of a dispute resolution process are supposed to be carried out. It is submitted that, while these double-barrelled or triple-barrelled terms can be used to refer to specific

<sup>9</sup> Weixia Gu, ‘Looking at Arbitration through a Comparative Lens’ (2018) 13(2) *Journal of Comparative Law* 164, 181.

<sup>10</sup> Tribunals and courts are normally limited to ordering damages, specific performance or injunctions to resolve a dispute. They can also make declarations as to a party’s rights in a matter. But they would not be able to order that one party apologise to the other or give that other party more business under some contract in return for the latter agreeing to drop its complaints.

<sup>11</sup> Chapter 11 in this volume.

modes of MDR, they should not be used as umbrella terms covering the entire range of MDR.<sup>12</sup> In this chapter, the term ‘MDR’ will be used to denote the concept of multi-tier dispute resolution as a whole, while expressions such as ‘med-arb’ and ‘arb-med’ will be used to refer to specific MDR processes.

### 1.2.2 Procedure

The sequence of mediation and arbitration in MDR can vary. One can have med-arb, arb-med-arb, and arb-med. In med-arb, the parties start with mediation. If that is unsuccessful, they may commence arbitration. Despite the simplicity of the concept, as Nottage and Garnett point out, when a mediation is successful, there is logically no further dispute capable of triggering an arbitration to generate an enforceable arbitral award.<sup>13</sup> Thus, it may be preferable for parties to engage in arb-med-arb. Parties begin with an arbitration and, during the arbitration, attempt to settle some or all of their differences through mediation. At this point, the arbitration is stayed. If the mediation is successful and a settlement is reached, the mediated settlement agreement can be incorporated into an award by the arbitral tribunal.<sup>14</sup> On the other hand, if the mediation is unsuccessful, the arbitration simply continues until the tribunal makes an award. As for arb-med, such process presumes that the parties will voluntarily carry out their mediated settlement agreement once reached. Otherwise, the arbitration will need to be resumed and the tribunal requested to incorporate the mediated settlement into an enforceable award. If parties opt to arbitrate from the outset, it is unlikely that they will be satisfied with a mediated settlement agreement and they will probably request the arbitral tribunal to convert the settlement into an enforceable arbitral award instead.<sup>15</sup> This situation may change after the coming into effect of the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation (the ‘Singapore Convention’) in September 2020. The Singapore Convention enables mediated settlement agreements to be

<sup>12</sup> Weixia Gu, ‘Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-med(-arb) and Its Global Implications’ (2019) 29(1) *Washington International Law Journal* 117, 121–22.

<sup>13</sup> Luke Nottage and Richard Garnett, ‘The Top 20 Things to Change in or around Australia’s International Arbitration Act’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (The Federation Press 2010) 149, 179.

<sup>14</sup> See, for instance, article 30 (Settlement) of the 2006 UNCITRAL Model Law on International Commercial Arbitration (the ‘2006 Model Law’).

<sup>15</sup> Gu (n 12) 122.

enforced in contracting states.<sup>16</sup> However, to date, only 3 countries have acceded to the Singapore Convention, in contrast to the 163 states that are parties to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’). It is hoped that, in the near future, more countries will become parties to the Singapore Convention and mediated settlement agreements can be as easily and widely enforced across borders as arbitration awards.<sup>17</sup>

A particular concern associated with MDR relates to the multiple roles assumed by the same neutral. Throughout the MDR process, the same neutral may take up the roles of arbitrator and mediator. This leads to worries as to the confidentiality of information imparted to the neutral by a party in the course of mediation and the possibility that, when acting as an arbitrator, the neutral may be influenced by what one party or the other has said during the mediation stage. This problem is one that regulatory frameworks around the world have sought to address. How a jurisdiction deals with this issue can affect the trajectory of MDR in that jurisdiction. This is a matter that will be further discussed in Sections 1.3–1.5.

### 1.3 Regulatory Regimes Generally

MDR has been regulated in different ways in different jurisdictions. Regulatory provisions may be found in a jurisdiction’s civil procedure code or in bespoke mediation or arbitration statutes. But, as Aragaki points out, med-arb and arb-med are often regulated separately.<sup>18</sup> There is no holistic legislation for MDR in most countries. Guidelines for med-arb on an international stage can be found in the UNCITRAL Model Law on International Commercial Mediation and International Settlement

<sup>16</sup> Chapter 8 in this volume.

<sup>17</sup> The problem of enforcing a mediated settlement agreement across borders should not, however, be exaggerated. Presumably the parties reach a settlement agreement because they are prepared to abide by it. Some 90 per cent of arbitral awards are in fact honoured by losing parties without need for recourse to the New York Convention. See, for instance, Queen Mary University of London and PricewaterhouseCoopers, ‘International Arbitration: Corporate Attitudes and Practices’ (2008) <[www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf](http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf)> accessed 24 September 2020, 8. It is likely that a similar (if not higher) percentage of mediated settlement agreements will be adhered to without need for a court order. In practice, it will only be in a small proportion of cases (10 per cent or less) that the mechanisms of the Singapore Convention will be required.

<sup>18</sup> Chapter 2 in this volume.

Agreements Resulting from Mediation 2018 (the ‘2018 Model Law’).<sup>19</sup> While the UNCITRAL Conciliation Rules 1980 prohibited a mediator from later acting as arbitrator in the same dispute, the 2018 Model Law revised that position by providing in article 13 that the prohibition can be overridden by the parties’ agreement. On the other hand, UNCITRAL has apparently adopted a different approach for arb-med. Unlike the 2018 Model Law, the UNCITRAL Model Law on International Commercial Arbitration 2006 (the ‘2006 Model Law’) does not explicitly address MDR.<sup>20</sup> Instead, article 19 of the 2006 Model Law merely states that the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration proceedings. It is submitted that the language is broad enough to allow a tribunal to direct that there be an attempt at mediation, conducted by the tribunal or one of its members, at some point within arbitration proceedings.

Aragaki’s survey of MDR in 129 jurisdictions shows that most countries have laws regulating arbitration and mediation.<sup>21</sup> In particular, all jurisdictions surveyed have arbitration laws, while 67 per cent have mediation laws. However, only 38 per cent regulate med-arb. Among these, 90 per cent do so through their mediation law or by their arbitration law, and 76 per cent permit med-arb with the consent of the parties while the rest prohibit med-arb outright. On the other hand, 17 per cent of the jurisdictions regulate arb-med. Among them, 64 per cent authorise arbitrators to act as mediators with the parties’ consent, while roughly 32 per cent allow arbitrators to do so at their discretion. Only Serbia prohibits arb-med. Notably, only 7 per cent of the jurisdictions surveyed regulate med-arb and arb-med.<sup>22</sup> These few jurisdictions are primarily in Australasia, followed by the Americas and Africa. None of the jurisdictions in Europe or the Middle East have done so. Meanwhile, among states that regulate at least one form of MDR, there are three times more common law (as opposed to civil law) jurisdictions.<sup>23</sup> Based on these findings, Aragaki has argued that MDR should not simply be regulated piecemeal, with different statutes applying to mediation and arbitration respectively. He suggests instead that there should be a unified approach to MDR, with a single statute regulating arbitration, mediation and their hybrids.

<sup>19</sup> UN Doc A/73/17 (2018).

<sup>20</sup> UN Doc A/40/17 (2006).

<sup>21</sup> Chapter 2 in this volume.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

From Aragaki's survey results, it can also be observed that the regulatory frameworks for MDR differ not only across jurisdictions but also among different geographical areas and legal systems. The impact of geography and legal system on MDR will be discussed in Sections 1.4 and 1.5.

## 1.4 Regulatory Regimes in Different Jurisdictions

### 1.4.1 MDR in Asia

#### 1.4.1.1 Common Law Asia

MDR has developed rapidly in Hong Kong and Singapore. As both jurisdictions aspire to become Asia's leading dispute resolution hub, MDR is being actively promoted in both.

Singapore's open attitude towards MDR is manifest from its judicial decisions and legislation. MDR is expressly allowed by Singapore's Arbitration Act (Cap 10) and its International Arbitration Act (Cap 143A), both of which permit the same person to act as mediator and arbitrator in a dispute.<sup>24</sup> The Singaporean judiciary's recognition of MDR can be seen in the seminal decision of *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd*,<sup>25</sup> in which the Court of Appeal held that MDR contractual clauses were enforceable. Commentators have characterised the court's approach as 'commercially sensible' as guidance on the requirement of certainty in MDR clauses.<sup>26</sup> In coming to its conclusion, the court emphasised the principle of party autonomy, stating that 'where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled'.<sup>27</sup>

On top of legislative and judicial support for MDR, the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) jointly launched the SIMC–SIAC Arb-Med-Arb Protocol (the 'AMA Protocol') in 2014. The AMA Protocol is in effect a unified MDR framework. If parties choose to adopt the AMA Protocol, their SIAC arbitration will be stayed for a maximum of eight weeks pending

<sup>24</sup> Singapore Arbitration Act, ss 37, 62(4); Singapore International Arbitration Act, ss 16(3), 18.

<sup>25</sup> *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 (Singapore).

<sup>26</sup> Seng Onn Loong and Deborah Koh, 'Enforceability of Dispute Resolution Clauses in Singapore' [2016] *Asian Journal of Mediation* 51, 59.

<sup>27</sup> *Lufthansa* (n 25) [62].



mediation at the SIMC. If the mediation succeeds, the resulting settlement agreement can be incorporated into an SIAC award which would then be enforceable under the New York Convention. On the other hand, if the mediation is unsuccessful, the SIAC arbitration will resume. Yip points out that the AMA Protocol has the advantages of specific procedures, enforceability on a par with an arbitral award, and access to a large pool of independent, impartial and experienced mediators and arbitrators.<sup>28</sup> However, Yip notes that the AMA Protocol may have a negative impact on party autonomy and procedural flexibility, two important features of MDR. This is because it is unclear whether parties can modify the steps and timelines stipulated by the AMA Protocol.<sup>29</sup> While the AMA Protocol is a relatively new feature of MDR in Singapore, a survey indicates that, since its launch in 2014, approximately a fifth of more than fifty SIMC administered mediations have utilised the AMA Protocol.<sup>30</sup>

Hong Kong is a special administrative region of China which enjoys a separate legal system under the ‘One Country, Two Systems’ arrangement. Accordingly, Hong Kong boasts an established common law system with an independent judiciary that is distinct from the socialist civil law system in place in Mainland China. Like Singapore, Hong Kong has long aimed to become a leading regional dispute resolution hub. Consequently, it, too, has a legislative framework and judiciary supportive of MDR. The Arbitration Ordinance (Cap 609) in Hong Kong allows arbitrators to act as mediators before or following an arbitration with the parties’ consent.<sup>31</sup> In a similar vein, various dispute resolution centres in Hong Kong encourage MDR through their rules. For instance, the Hong Kong International Arbitration Centre (HKIAC) revised its Arbitration Rules in 2018 to allow for the suspension of an arbitration to enable parties to pursue other means of settlement (including mediation) in the interim.<sup>32</sup> According to Grimmer, there are also plans to introduce similar amendments to the mediation rules in Hong Kong as well.<sup>33</sup> The Hong Kong Court of Appeal endorsed MDR in *Gao Haiyan v Keeneye Holdings Ltd*<sup>34</sup>

<sup>28</sup> Chapter 8 in this volume.

<sup>29</sup> *ibid.*

<sup>30</sup> Aziah Hussin, Claudia Kück and Nadja Alexander, ‘SIAC-SIMC’s Arb-Med-Arb Protocol’ (2018) 11 *New York Dispute Resolution Lawyer* 85.

<sup>31</sup> Arbitration Ordinance (Cap 609) (Hong Kong), s 33.

<sup>32</sup> Hong Kong International Arbitration Centre, *2018 Administered Arbitration Rules* <[www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018](http://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018)> accessed 26 February 2020, art 13.8.

<sup>33</sup> Chapter 9 in this volume.

<sup>34</sup> *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627 (Hong Kong).



by enforcing an award made after an abortive mediation in which one of the arbitrators had taken part. The Court of Appeal overruled the first instance decision, which had held that the arb-med-arb process employed had been tainted by apparent bias.<sup>35</sup> Nevertheless, despite the many features favouring its use in Hong Kong, the popularity of MDR there remains limited.

The effectiveness of Hong Kong's efforts in promoting MDR can be gleaned from a survey of all cases administered by the HKIAC between 2014 and 2018. According to the HKIAC survey, almost all cases brought to the HKIAC involved dispute resolution clauses, most of which were well crafted with specific steps and timelines. But only 17 per cent of the cases concerned dispute resolution clauses that referred to different modes of dispute resolution and only 2 per cent of the relevant clauses provided for med-arb.<sup>36</sup> The agreements surveyed mostly came from the construction sector and typically adopted a four-tier dispute resolution process of (1) an engineer's decision, (2) mediation, (3) adjudication and (4) arbitration.<sup>37</sup> While the survey excluded cases not submitted to the HKIAC, it evidences a limited resort to MDR in Hong Kong overall.

#### 1.4.1.2 Civil Law Asia

Much as their common law counterparts, civil law jurisdictions in Asia have endeavoured to promote MDR. In Japan, parties tend to be litigation-averse and, as a matter of Japanese culture, there seems to be a preference for the amicable settlement of disputes. As a result, mediation plays a significant role whenever arbitration is used. In family law cases, it is not unusual for the judge hearing a matter to supervise a mediation between the relevant parties.<sup>38</sup> A family law mediation is typically conducted by a third-party mediator who meets in caucus with each party. The mediator, however, reports all communications made to him or her by a party in the course of a caucus to the supervising judge. The mediations are usually successful, albeit conducted over a long time span, due to the parties' respect for the authority of the supervising judge.

<sup>35</sup> *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157 (Hong Kong).

<sup>36</sup> Chapter 9 in this volume.

<sup>37</sup> Keyao Li and Sai On Cheung, 'The Potential of Bias in Multi-tier Construction Dispute Resolution Processes' in Paul W Chan and Christopher J Neilson (eds), *Proceedings of the 32nd Annual ARCOM Conference* (ARCOM 2016).

<sup>38</sup> Harald Baum, 'Mediation in Japan: Development, Forms, Regulation and Practice of Out-of-Court Dispute Resolution' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspectives* (Oxford University Press 2012) 1011–94.

Under Japan's Arbitration Law, an arbitrator may conduct mediation with the parties' written consents, which can be withdrawn at any stage.<sup>39</sup> This is known as the 'double-consent' mechanism. Japan's Arbitration Law does not elaborate on how a neutral should conduct him- or herself when acting as mediator and arbitrator in a dispute. This is instead governed by institutional rules such as those of the Japan Commercial Arbitration Association (JCAA) which require (among other matters) that a neutral disclose at each instance that an *ex parte* communication has occurred.<sup>40</sup> According to a study by the JCAA, the parties in 40 per cent of its arbitration cases between 1999 and 2008 attempted mediation. Of these, 52 per cent concluded with a settlement.<sup>41</sup> This indicates that MDR is becoming increasingly popular in Japan, notwithstanding the lack of a vibrant arbitration market in the jurisdiction.

In Mainland China,<sup>42</sup> MDR such as med-arb is popular for both domestic and cross-border disputes. Arbitrators actively promote mediation to disputing parties. In a survey, 50 per cent of the respondents had recommended mediation to the parties in more than 90 per cent of the cases in which the respondents were acting as arbitrators.<sup>43</sup> Thus, MDR in China is promoted not only by legislation and judicial decisions but also by arbitral institutions. Meanwhile, China's Arbitration Law (recently revised in 2017) requires that arbitral institutions have procedures in place for MDR.<sup>44</sup> The result is that each arbitral institution has its own set of MDR rules. Since there are more than 250 such institutions, this has led to a plethora of MDR procedures in China.

A major criticism against MDR in China concerns the potential conflict of interest that arises when a neutral acts as mediator and arbitrator in the same dispute. While China's legislation is silent on whether parties can request a third party to act as a mediator in the middle of an arbitration, it is assumed as a matter of practice that arbitrators can act as mediators in the

<sup>39</sup> Arbitration Act (Law No 138 of 2003) (Japan), art 38(1).

<sup>40</sup> 'Commercial Arbitration Rules (2019)' (*Japan Commercial Arbitration Association*) <[www.jcaa.or.jp/en/arbitration/rules.html](http://www.jcaa.or.jp/en/arbitration/rules.html)> accessed 14 November 2020 (the '2019 JCAA Rules'), art 59(2).

<sup>41</sup> Tatsuya Nakamura, 'Brief Empirical Study on Arb-med in the JCAA Arbitration' <[www.jcaa.or.jp/e/arbitration/docs/news22.pdf](http://www.jcaa.or.jp/e/arbitration/docs/news22.pdf)> accessed 24 September 2020.

<sup>42</sup> In this chapter, China refers to 'Mainland China', excluding Hong Kong, Macau and Taiwan.

<sup>43</sup> Kun Fan, 'An Empirical Study of Arbitrators Acting as Mediators in China' (2014) 15(3) *Cardozo Journal of Conflict Resolution* 777, 791.

<sup>44</sup> *Zhongcai Fa* (仲裁法) [Arbitration Law] (promulgated by the National People's Congress Standing Committee, 1 September 2017, effective 1 January 2018) (China), art 51(1).