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研究ノート

Between Internationalization and Domestic Resistances:
A Critical Overview of the Application of the *Recognition and Enforcement Act, 2011,* Pakistan

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1. Introduction

In recent decades, arbitration has become the tool of choice when it comes to settling international disputes of both a commercial[1)] and investment nature.[2)] The advantages of arbitration are many and well-known: chief among those, the (relative) freedom from the jurisdiction of local court systems which may be overburdened, pathologically slow, or unprepared to deal with complex international transactions. From this perspective, an arbitration-friendly

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1） Gary B. Born, 'Planning for International Dispute Resolution', *Journal of International Arbitration* 17, no. 3 (2000): 61-72.

2） In the past few years, however, critical voices against investment arbitration and a push towards the establishment of international investment courts have emerged. See Tony Cole and Pietro Ortolani, 'The Public Perception of Investment Arbitration' (University of Leicester School of Law Research Paper No. 16-1, 17 November 2014); Maria Laura Marceddu and Pietro Ortolani, 'What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments', *European Journal of International Law* 31, no. 2 (September 2020): 405-28.

environment is considered a fundamental step in reassuring foreign investors and enticing them into bringing their economic initiatives into a country. Consequently, many developing and recently developed jurisdictions have rushed to improve their arbitration-related legislation and have acceded to international covenants such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), commonly referred to as the "New York Convention."[3)]

In spite of this, a country's legislature is not able to create an arbitration-friendly environment just by enacting new norms, no matter how progressive: in order to create the proper conditions for arbitration to flourish, there is a need for a complex and structural cooperation between all the stakeholders involved. In this regard, national courts still play a fundamental role. While arbitration *aficionados* like to promote the idea of the de-nationalization of arbitration, and while indeed arbitration operates – to a limited extent – in a semi-autonomous legal environment,[4)] some scholars have pointed out that this tension towards delocalization is just a philosophical concept largely detached from reality.[5)] To put it in blunt terms, arbitration still needs the support of national laws and of the State-established court system – for example, when it comes to enforcement.

Pakistan is no exception to this complex dialectic: on the one hand, the country is implementing legislation to promote arbitration (with the primary purpose of attracting foreign investors); on the other, the court system seems to be unprepared to deal with the intricacies of international arbitration and has adopted, in several instances, a pro-domestic bias. This research note intends to present some of these cases to an international audience. We feel that there is a scarcity of literature available on the reality of arbitration in Pakistan, and these short reflections are a first attempt to close that gap.

In fairness, it is appropriate to acknowledge that the problem does not lie with

3） Belize (March 15, 2021) and Malawi (March 3, 2021) are the latest countries to have acceded to the New York Convention.

4） Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration', *Journal of International Arbitration* 28, no. 5 (2011): 445-66.

5） Alexander J. Belohavek, 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth', *ASA Bulletin* 31, no. 2 (2013): 262-92.

the courts alone, but also in the legislation. While the intent of the Pakistani legislature was to provide sound and fair norms to allow for recognition and enforcement of both arbitration agreements and awards (in compliance with the New York Convention, to which Pakistan is a member since 2005), the adopted solution is far from being perfect, and indeed allows courts ample discretionary powers. The reluctance to fully embrace internationally acknowledged principles of arbitration lies in the fear that foreign investors may take advantage of the procedure and obtain favorable awards against which Pakistan would have no defense. As discussed here, the tools implemented to prevent this "exploitation" make the situation worse in practice.

Pakistan enacted and incorporated the "*Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011* (REFA Act)" into its municipal laws on July 15, 2011. There are a few problematic provisions, especially those under which foreign agreements and foreign arbitral awards may become null and void, inoperative, or incapable of being enforced. Courts in Pakistan have a tendency to intervene in arbitration matters in order to improperly (at least in the eyes of the international community) assert jurisdiction over certain cases. In most instances, problems arise when one of the parties to an arbitration agreement approaches the court to obtain recognition or enforcement of an arbitration agreement or award. Sometimes, however, the court, through its *suo motu* power, tries to assume jurisdiction in matters covered by arbitration or even in ongoing arbitral proceedings at international forums, such as in the *Reko Diq* and *Rental Power Plant* cases. Courts usurp jurisdiction in arbitration matters on the following grounds: foreign arbitration as *forum non-conveniens*; concurrent court and arbitration proceedings; nationality of an award; arbitrability of the subject matter and separability doctrine; and public policy. This research note will provide an overview of the flaws in the *REFA Act, 2011* as demonstrated by its application by Pakistani courts.

2. Notable Cases

2.1 Foreign Arbitration as "*Forum Non-Conveniens*"

The Supreme Court of Pakistan in the *Eckhardt* Case – (*Messrs Eckhardt & Co, Marine GmbH Vs. Muhammad Hanif* - Case reported in PLD 1993 Supreme Court 42) – decided the nationality of an award, the seat of arbitration, and how these matters have an impact on the jurisdictions of Pakistani courts.[6] The fact that a Pakistani company signed an agreement with Eckhardt (a company based in Germany) through their representative in Pakistan to buy a motor vessel was the essence of the case. The parties agreed on *ad hoc* arbitration in case of future disputes, with the place of arbitration set in London. The delivery of the vessel could not take place within the agreed time limit, which resulted in the extension of the delivery time by the parties' mutual consent. However, later on, the Pakistani party filed a suit in the Sindh High Court based on the claim that Eckhardt had intentionally delayed the delivery. In response, Eckhardt applied for a stay of court proceedings based on the arbitration clause agreed upon in the contract, under which parties were to resolve disputes through arbitration in London. In its defense, the Pakistani party took the plea in the suit that it was "inconvenient" to initiate the arbitration proceedings in London as all the evidence and other relevant materials related to the case were in Karachi. The Sindh High Court rejected Eckhardt's application to stay the court proceedings considering the grounds of inconvenience with these comments:

> "Considering the legal position stated above, we are of the view that in the instant case no interference is warranted for a reason the Court exercises that discretion in refusing stay on cogent grounds and additionally, we are of the view that non-performance of the contract for the reason of congestion and strike at Karachi Port was beyond the contemplation of the parties at the time of contract. In such

6) Ahmad Ali Ghouri, *Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan* (New York, New York: Springer, 2013).

> circumstances, real evidence on this point has to come from Karachi composed of documents and oral evidence, and taking of such evidence to London would be inconvenient to the parties and also would be expensive."[7)]

This judgment was not reassuring for foreign entities involved in trade with Pakistani entities or engaged in investment in Pakistan. It signaled the reluctance of Pakistani courts to recognize and enforce a valid arbitration agreement on the inappropriate (as well as rather frivolous) grounds of inconvenience. This judgment clearly stated that Pakistani courts are hesitant to recognize and enforce foreign arbitration agreements. The courts viewed foreign arbitration under the suspicion that foreign arbitrators would invariably rule against Pakistani parties. It is observed that the courts, instead of applying Article II of the New York Convention in letter and spirit, decided these matters on a case-by-case basis.[8)]

2.2 Concurrent Court and Arbitration Proceedings

The Sindh High Court in the *Alexander* Case (1991 MLD Karachi) refused to enforce a foreign arbitral award on the grounds that the same matter was pending in court proceedings (which were initiated *after* the arbitration proceedings). In the *Meredith* Case (2002 CLD Karachi 1191), the Sindh High Court observed that if a party raised objection to the jurisdiction of the arbitral tribunal and then joined the arbitration proceedings in protest, then the court may have jurisdiction to determine the validity of the arbitration agreement and even the award rendered by the arbitral tribunal.[9)]

In the case entitled "*Maulana Abdul Haque Baloch and others vs Government of Balochistan through Secretary Industries and Mineral Development and others*"

7） *Ibid*.
8） Rana Sajjad Ahmad, "Pakistan's Legal Framework for International Arbitration and Seminal Judgments of the Supreme Court," *International Journal of Arab Arbitration* 9, no. 2 (2017): pp. 29-39.
9） Ahmad Ali Ghouri, *Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan* (New York, New York: Springer, 2013).

(Case reported in PLD 2013 Supreme Court 641, also known as the *Reko Diq* case), there was an agreement regarding the exploration of copper and gold mines in the Reko Diq area in the province of Balochistan.[10] The other details of the case are that the Tethyan Copper Company (TCC) – a joint venture between Antofagasta Minerals of Chile and Canada's Barrick Gold Corporation – entered into an agreement with the Government of Balochistan concerning the exploration of mines. Parties agreed on arbitration in case of disputes. Later, the government of Balochistan declined a mining license to TCC, which resulted in a dispute among parties. In response, TCC initiated arbitration proceedings in the International Chamber of Commerce (ICC) and ICSID on the grounds that the government of Balochistan illegitimately denied them the mining license.

On the other side, the Supreme Court of Pakistan took *suo motu* notice of the matter and questioned Balochistan's government regarding the lease agreement for copper and gold mines in Reko Diq. Furthermore, the Supreme Court instructed Balochistan's government to communicate with the ICC and ICSID to stay the arbitration proceedings as the same matter was to be considered *sub judice*, and the Supreme Court had jurisdiction to decide about the validity of the contract. While issuing these remarks, the Supreme Court also observed that TCC had committed contempt of the court and breached prevailing international laws by initiating an arbitral proceeding about the same subject matter that was to be considered under court proceedings. Consequently, the Supreme Court's three-member bench headed by the Chief Justice of Pakistan concluded that the agreement was null and void. Later, in the same matter, the ICSID decided against Pakistan.

2.3 Nationality of an Award

Courts in Pakistan often consider foreign arbitration agreements and awards as domestic. Pakistan's courts, in some cases, misinterpret Paragraph (1) of Article 1

10) Rana Sajjad Ahmad, "Pakistan's Legal Framework for International Arbitration and Seminal Judgments of the Supreme Court," *International Journal of Arab Arbitration* 9, no. 2 (2017): pp. 29-39.

of the *REFA Act, 2011,* which states:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory or a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where recognition and enforcement are sought."

The lack of a clear definition of domestic awards in the *REFA Act, 2011* occasionally results in the misinterpretation of foreign arbitral awards as domestic awards along with the application of available remedies against the latter in the *Arbitration Act, 1940*, which includes modification, remission, setting aside, and revocation of awards within a prescribed time limit based on the governing law of the contract. The same rationale also applies to foreign arbitration agreements.

Article (2)(d) of the *REFA Act, 2011* states "foreign arbitral award means an award made in a contracting state to the convention, or a state notified by the federal government by notification in the official gazette." It is not clear what factors determine the nationality of the award, that is, whether it is a domestic or foreign one. Do the nationalities of the parties, place of arbitration, seat of arbitration, place of financial control of corporation, domicile of the company, and substantive law applicable to the contract need to be considered, or is it just up to the court to determine the character of an award? In Pakistan, the substantive law applicable to an arbitration agreement or proceedings would be the major determining factor regarding the character of an award. If the case involves a foreign party and a Pakistani party conducting arbitration outside of Pakistan under a non-Pakistani substantive law, then the rendered award would be weighted as a foreign award. Other determinations made by the courts regarding the nationality of an award are as follows:

- Two Pakistani parties (even though one is a foreign controlled corporation) conducting arbitration inside or outside Pakistan under Pakistani substantive

law: the resulting award would be considered a domestic award by Pakistani courts, irrespective of the place of arbitration.

- A situation in which a Pakistani party and a foreign party conduct their arbitration within Pakistan under Pakistani substantive law. This would be treated as a domestic arbitration, and the proceedings would most likely be governed by the *Arbitration Act, 1940*: the rendered award would be treated as a domestic award.
- If an award is rendered in an arbitration between a foreign party and a Pakistani one, and Pakistan is the seat of the arbitration: such award must be treated as domestic.[11)]

The case "*Taisei Corporation v A.M. Construction Company*" (Case reported in PLD 2012 Lahore 45) is related to the application of the New York Convention.[12)] This case involved the Taisei Corporation ("Taisei"), a Japanese company, working on a project carrying out improvement works on the Kararo-Wadh section of National Highway N-25 in the province of Balochistan. It entered into a sub-contract with A.M. Construction Company ("A.M.") in 2007. The contract included an arbitration clause of ICC arbitration with a seat in Singapore and was governed by Pakistani law. Taisei launched arbitral proceedings against A.M. Construction Co. for breach of contract, with the arbitral tribunal subsequently deciding the matter against A.M. Construction Co. In response, A.M. Construction Co. challenged the arbitral award before a civil court in Pakistan on the grounds of arbitrator misconduct and claimed that the award was unenforceable due to it being invalid according to the public policy of Pakistan. Taisei responded that, as the award was foreign, the civil court would not have jurisdiction, and the High Court should decide upon the matter instead. However, the civil court declared the award to be domestic in its verdict based on the agreement's governing law.

11) Shahid Irfan Jamil, "PAPER PREPARED FOR THE ICC ARBITRATION CONFERENCE HELD AT KARACHI, PAKISTAN NOVEMBER 23, 2005." (Karachi, November 23, 2005).

12) Hassan Raza, Maciej Kuropatwiński, and Menalco Solis, "Pakistan's Dilemma with Foreign Arbitrations," Kluwer Arbitration Blog, April 23, 2018, http://arbitrationblog.kluwerarbitration.com/2018/04/24/pakistans-dilemma-foreign-arbitrations/.

Moreover, the High Court would later uphold the civil court's judgment for the same reasons based on the governing law of the contract.

These are the complexities of Pakistan's judicial system, which is not ready to advance a pro-arbitration environment for the enforcement of foreign arbitration agreements and awards in-line with enforcement provisions of the New York Convention. In comparison, other jurisdictions around the world have tailored their legislation to make sure that foreign awards are treated as per the norms of the New York Convention.

In the case "*Hitachi Limited v Rupali Polyester*" (Case reported in 1998 SCMR 1618), a Pakistani company entered into a contract with a Japanese company and a German company to procure a plant, equipment, and related services for construction, installation, and commissioning of a plant for the production of chips of polyester.[13] The agreement was governed by Pakistani law while the seat of arbitration depended upon who would be the respondent in the case. If it was the Pakistani party, the seat would be Karachi (Pakistan), and if it was the foreign party, the seat would be London.

The conflict was initiated when Rupali claimed that the supplies provided by Hitachi were defective. Rupali initiated arbitration proceedings as agreed upon by the parties in the agreement. Meanwhile, Rupali also filed applications in the Pakistani court to suspend the arbitration clause, claiming that because Pakistani law governed the agreement, the seat of arbitration should be Pakistan instead of England. Another matter, *i.e.* the nationality of the award, was argued based on the seat of arbitration: the question was whether the rendered award would be treated as a foreign or domestic award in Pakistan's courts. Eventually, the Supreme Court gave its remarks in these words: "[…] the nationality of the award does not solely depend on the venue of the Arbitration Proceedings. An award given in a foreign country may be treated as a domestic award."

By giving this verdict, the court dismissed the principle that an award's nationality depends upon the seat of arbitration. The decision of the court, in this

13）Sohaib Mukhtar and Shafqat Mahmood Khan Mastoi, "The Challenge of Arbitral Awards in Pakistan," *Journal of Arbitration Studies* 27, no. 1 (2017): pp. 37-57, https://doi.org/10.16998/jas.2017.27.1.37.

case, has further complicated the situation by establishing that an award rendered outside of Pakistan may not be enforced in Pakistan as a foreign award. This decision is in direct conflict with the spirit of the New York Convention.

2.4 Subject Matter Arbitrability and Separability Doctrine

In the case entitled "*Hub Power Company Limited (HUBCO) v Pakistan WAPDA*" (Case reported in PLD 2000 Supreme Court 841), a power purchase agreement was executed between the Water and Power Development Authority (WAPDA) and HUBCO, an Independent Power Producer (IPP).[14] English law governed the contract with an ICC clause of arbitration. Later, some amendments were made to the contract, and this was challenged in the court as a matter related to the public interest in a constitutional petition on the grounds of *mala fide* and corruption in procuring the contract by HUBCO. The court then constrained HUBCO from utilizing any funds. In reaction, HUBCO invoked the necessity of arbitration proceedings, as a result of which WAPDA responded with a suit, asking the court for an injunction to stop HUBCO from initiating such proceedings. The case eventually came before the Supreme Court of Pakistan. The issue before the Supreme Court was about whether such subject matter, which involved corruption, could be arbitrable under the public policy of Pakistan. The majority of the judges decided that the subject matter contained allegations of corruption that pertain to criminal proceedings and as such could not be referred to arbitration.

The Court ruled out the doctrine of separability of the contract in this case. It reasoned that the contract as a whole was in question, not just a clause; therefore, the case was about the very existence of the contract and a dispute could not therefore be arbitrable. This ruling was widely criticized within the arbitration circle as being an incorrect interpretation of separability doctrine, because it was seen as a straightforward matter of international arbitration as per the clause of the

14） Rana Sajjad Ahmad, "Pakistan's Legal Framework for International Arbitration and Seminal Judgments of the Supreme Court," *International Journal of Arab Arbitration* 9, no. 2 (2017): pp. 29-39.

contract. Subject matter arbitrability appears to be a recurring issue in international arbitration cases decided by Pakistan's Supreme Court.[15)]

2.5 Public Policy

Courts may refuse recognition and enforcement of foreign arbitration agreements and awards on the basis of "public policy" of the State: in this matter, the courts in Pakistan twist these two parts of the New York Convention.

1. Paragraph (1) of Article II of the New York Convention, "Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
2. Article V (2)(a)(b), "Recognition and enforcement of an arbitral award may be refused if the complement authority in the country where recognition and enforcement is sought finds that:
   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

The allegations of corruption provided courts in Pakistan with the basis for decline and judicial probe into foreign arbitration agreements citing the State's public policy. In such matters, courts do not apply the "principle of separability" on arbitration clauses/agreements.

In recent years, there have been two significant judgments made by the Supreme Court of Pakistan which were widely discussed, criticized, and declared as apparent interventions into international arbitration matters. Clearly, public policy has been interpreted broadly by Pakistani courts, allowing them to

15）*Ibid.*

intervene in ongoing international arbitration proceedings, pass orders restraining parties from arbitrating a dispute, and invalidate arbitration agreements/clauses on public policy grounds.

This issue was examined in another recent case entitled "*Alleged Corruption in Rental Power Plants*" (Case reported in 2012 SCMR 773) when the same issue of fraud and illegality came up before the Supreme Court.[16] The relevant facts of the case were that Karkey Karadeniz Elektrik Uretim A.S. ("Karkey"), a Turkish company, entered into a contract with the government to supply rental power. The contract provided for the London Court of International Arbitration (LCIA) to be the arbitral institution and specified London as the seat of arbitration.

Karkey ceased to supply its services to Pakistan right after the first year of its agreement on the allegation of non-fulfillment of contractual commitments to honor sovereign payment guarantees. The Supreme Court of Pakistan, while exercising its power under Article 184(3) of the Constitution, initiated proceedings into suspicion of corruption in awarding the contract. In probing the mechanism and due procedures for granting the agreement, the court doubted the lawfulness and transparency of the matter.

Subsequently, after months of court hearings, it was concluded that the contract had been procured illegally. The court ordered Karkey to pay back the advance amount given to it by the Pakistani government and also ordered the detention of Karkey's power-generating vessels. In reaction to the Supreme Court's decision, Karkey began arbitration proceedings at the ICSID in line with the Pakistan-Turkey Bilateral Investment Treaty (BIT). Following this, the arbitral tribunal at the ICSID rendered an award against Pakistan's state for not fulfilling its contractual obligations. The same happened with the *Reko Diq* case in which the Supreme Court of Pakistan declared the contract illegal and ordered the government of Balochistan not to proceed further with the contract and its operations. Here, the ICSID also rendered an award against Pakistan.

16) Hassan Raza, Dorothée Goertz, and Zoltán Novák, "International Arbitration: Is Pakistan Finding New Avenues?" Kluwer Arbitration Blog, January 31, 2020, http://arbitrationblog.kluwerarbitration.com/2020/01/31/international-arbitration-is-pakistan-finding-new-avenues/.

3. Conclusions

This short research note has highlighted an ambiguity which is recurring in many recently developed and developing jurisdictions, *i.e.* the tension between the desire to attract foreign investors by offering them a safe and appropriate landscape for dispute resolution (read: arbitration) on the one hand, and the protectionist attitude of courts and legislators alike on the other.

It seems to us that many countries are laboring under a fundamental misunderstanding about the whole problem. Arbitration is not *per se* a pass for foreign investors to ravage defenseless countries, nor is it an evil device conceived by multinational companies to avoid the scrutiny of local courts: arbitration is a *tool*,[17] which is in itself neutral. Hence, liberal arbitration legislation is not – again, *per se* – a threat to the national economy or to judicial sovereignty. Moreover, it is somehow nonsensical to have liberal arbitration laws on the books but not in practice or, even worse, protectionist legislation: it would defy its very own purpose.

However, one should not be *naïve*. It is true that arbitration may be exploited by parties with a superior knowledge of the procedure, and sometimes, a neo-colonial attitude may be observed towards recently developed jurisdictions: there are several instances of this happening in the past.[18] Also, it is totally legitimate that countries put in place provisions to protect public policy: the New York Convention itself allows that to happen, and rightfully so.

As we have seen in this research note, however, problems happen when there are misinterpretations about the boundaries of public policy, about the validity or scope of arbitration agreements, or about the nationality of an award: in this sense, a country will not be admitted to the comity of arbitration-friendly jurisdictions unless it conforms to internationally acknowledged standards, no matter how far they are from the domestic legal practice. Otherwise, not only would this

17） Luke Nottage, 'The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration (Sydney Law School Research Paper No. 06/51)', 1 December 2006.

18） Won Kidane, *The Culture of International Arbitration* (New York: Oxford University Press, 2017), 43-61.

discourage investors, depriving the national economy of potential sources of income, but it would not even solve the problem: a discontent foreign party will simply escalate the dispute to another level. As the cases dealt with here show, many disputes end up with countries losing in front of the ICSID.

In our opinion, the solution to this conundrum lies in the development of a healthy arbitration culture. The international arbitration community needs to invest in capacity building and education, in order to have legislators, judges, lawyers, and business entities fully understand the technicalities and specificities of arbitral proceedings.

While indeed the attainment of international standards is an objective every developing and recently developed jurisdiction should aim for, the way to reach it is often complicated, not only by local resistances, but also by a sort of paternalistic attitude characterizing much of how arbitration is promoted and taught. There are many laudable initiatives to promote arbitration, among which is the ICCA's New York Convention Roadshow program aimed at assisting judges in reaching a homogeneous application of the Convention.[19] While the project in itself is undoubtedly worthy, we believe that it may benefit from the contribution of neighboring social sciences such as sociology, anthropology, and linguistics[20] to make sure that the proposition that "each workshop takes into account the specific challenges faced by judges in applying the Convention in their particular region or jurisdiction" is fully met.

Also, developing jurisdictions will not feel fully included in the world of international commercial dispute resolution until and unless a sufficient number of practitioners expressing diversity are involved in the process. The arbitration community has been – correctly – defined as "male, pale, and stale":[21] it is a

19) https://www.arbitration-icca.org/judicial-outreach. ICCA has also produced a very useful *ICCA's Guide to the Interpretation of the 1958 New York Convention* available for free in 26 different languages.

20) Under this perspective, the notion of "cultural expertise" developed, *inter alia*, by Livia Holden may provide valuable contributions to the debate. See Livia Holden, ed., *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2011).

21) Erin Peters, 'Pale, Male, and Stale: Addressing Diversity in Arbitration', *ADR Resarch Institute of Canada* (blog), 22 February 2018, https://adric.ca/adr-perspectives/pale-male-and-stale-addressing-diversity-in-arbitration/.

group still largely composed of Caucasian men in their 50s and 60s, educated in Europe or in the United States. The inclusion of minorities and voices from emerging jurisdictions is sorely needed not only to ensure equality,[22] but also to broaden the variety of opinions and perspectives in the community. To borrow Tuck and Yang's lexicon, "decolonization is not a metaphor":[23] material change needs to happen.

22）The issue of lack of diversity in an arbitral tribunal as a *procedural* problem was discussed during the famous case *Shawn Carter et al. v. Iconix Brand Group et al.* (American Arbitration Association – AAA and New York State Supreme Court, New York County, No. 655894/2018)

23）Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor', *Decolonization: Indigeneity, Education & Society* 1, no. 1 (2012): 1-40.