ADRIAN LEUNG: Hello, everyone. Dear colleagues and friends, ladies and gentlemen. I would like to extend a warm welcome to all of you to the first webinar in 2021 organised by the Hong Kong Institute of Arbitrators. We're very pleased to note that this first webinar of the institute has received hundreds of online registrations with participants spanning more than 12 jurisdictions. On behalf of the institute, once again we would like to express our gratitude to Professor Anselmo Reyes, international judge of the SICC, for agreeing to be our guest speaker for this webinar, which will feature a discussion by Professor Reyes of the interlocutory applications before an arbitral tribunal focusing on considerations that parties should bear in mind in light of major changes in the context of international commercial arbitration brought about by the COVID-19 pandemic.

I would also like to take this opportunity to express a token of thanks to our two supporting organisations for today's event: the Hong Kong Federation of Women Lawyers and the Asia-Pacific Centre for Arbitration and Mediation. In a minute, Professor Reyes will be taking us through various well-established tests for

interlocutory applications, including security for costs, interim injunctions, freezing orders, anti-suit injunctions and discovery applications. And Professor will discuss whether these tests in principle in litigation make sense at all or maintain applicable in the arbitration context. The discussion by Professor Reyes will also highlight some of the recent and interesting decisions of the Hong Kong Court of Final Appeal in CSAV v Hin-Pro, and also a recent position of the UK Supreme Court in Enka v Chubb. Under the discission of each head of these interlocutory applications, Professor Reyes will also be discussing the relevant and potential implications brought about by the COVID-19 pandemic. Before we start, just a gentle reminder to all registered participants that the webinar will be recorded, and at the end of this webinar all participants can make use of the Q&A question-and-answer function to ask questions. You can simply type your questions making use of the Q&A box, and the moderator and the team here at the HKIA will ask the question for you. Please also be reminded that the chat box function, the raise hand function, as well as the video function has been

disabled, meaning myself and Professor Reyes will not be able to get to see the faces and the background of the participants. Also, the mute function for all participants is also on. The audience cannot unmute themselves during the talk by Professor Reyes.

Lastly, CPD points of the law society have been applied for. One CPD point will be awarded to this course, and please remember to submit your evaluation form after joining and taking part in this webinar.

And now may I invite Professor Reyes to begin the talk. Thank you.

PROFESSOR REYES: Thank you very much. I'm grateful to the Hong Kong Institute of Arbitrators for inviting me to give this talk this evening. Looking at the list of participants/attendees in tonight's talk, I see the names of a lot of old friends, and I'm only sorry that I'm not able to be in Hong Kong physically to see you. But that this remote technology will come as close as possible to being there.

What I propose to do this evening is go through a number of different types of, five different types of interlocutory applications to discuss some concerns that I have about the rules or principles, whether they make sense, whether they're easy or not so easy

personally to apply as an arbitrator; and then to think about, or to suggest, possible implications on the way that these interlocutory applications will be developing in the future as a result of the COVID-19 pandemic.

Let me start by highlighting two already palpable or clear consequences of COVID-19. The first everyone is talking about is the greater resort to remote technology. Arbitration hearings, even court hearings, are now taking place remotely. I have in another webinar suggested, this is my hope, that this will be the wave of the future in terms of lowering the carbon footprint of arbitration or cross-border dispute resolution. This seems to be a good thing, and I'm not sure that it will be a good idea to go back the way things were previously.

So first palpable consequence of COVID-19: the greater use of remote technology both now and, I hope, in the future.

Secondly, COVID-19, with its lockdowns, quarantine, travel restrictions, social distancing seems to have ushered in a financial recession worldwide. So a lot of businesses will be facing cash flow difficulties. There will be pressures on parties to settle. The

expenses that used to be lavished on arbitration and other forms of international dispute resolution in the past may not be sustainable now and in the future. With that in mind, with those two sequences in mind, let me deal with the first of the five types of interlocutory applications that I will be considering this evening. And that's the security for costs application. It used to be thought that there was a divide between the common law and civil law jurisdictions. Common law arbitrators or judges, it was thought, were prone to give security for costs, whereas civil lawyers, civil law arbitrators, civil law judges, were less inclined to give security for costs applications.

Today I'm not sure that that is the case. From what I've seen, from personal experience, it seems that security for costs applications are regularly made whether the arbitration is more in a common law or a civil law context.

Let's look at the test in litigation whether -- when a court should not grant a security for costs. When I was a judge in Hong Kong, just like every other case on security for costs, I used to say that just because a plaintiff is a foreign plaintiff, without any

tangible assets in Hong Kong, was not a reason for ordering security for costs against that plaintiff. But in the normal course of events, despite my saying that, just like in almost every other case on security for costs in Hong Kong in litigation, I would order security for costs precisely because the plaintiff was a foreign plaintiff.

Does that test make sense in arbitration, especially in international commercial administration? It doesn't seem to make sense in international commercial arbitration because you're bound to have international parties, international plaintiffs, in international commercial arbitration. And, in fact, the reason they probably chose, let's say, Hong Kong as the seat of arbitration, as the place of the arbitration, is because Hong Kong was a neutral jurisdiction, a jurisdiction with which neither side, neither plaintiff nor defendant, would have any connection. Therefore, if one were simply to give security for costs on the basis of the claimant in an arbitration being a foreign claimant, that would not seem to make sense. You would be granting a security for costs in just about every arbitration.

So that test doesn't make sense in arbitration. What

about another test? Under the Hong Kong Companies Ordinance, the test for granting security for costs in respect of a company is if one can show credible evidence that the company will not be able to pay its debts as and when they fall due. Is that a good test? I'm not sure that's a good test, because again in the course of arbitration, in the course of entering into arbitration agreements, you deal with parties who may not have been solvent or particularly reliable in terms of their financial resources at the time when you entered into a contract, an arbitration agreement included, with them. Why should you have security for costs just because when they bring an arbitration proceeding against you, they seem to be financially not so stable?

So I don't think that that is a sufficient test for arbitration either. The best guidelines that I can find on security for costs applications are the Chartered Institute of Arbitrators' guidelines on applications for security for costs. Under article 1(2) of the guidelines, they suggest or they propose that arbitrators take into account three matters when deciding whether to grant security for costs. One, prospects of success of the claims and

defenses, and that's dealt with in article 2 of the guidelines. Secondly, the claimant's ability to satisfy adverse cost award and the availability of the claimant's assets for enforcement of an adverse cost award. That is in article 3. So the solvency of the claimant. And third, whether it is fair in all of the circumstances to require one party to provide security for the other party's costs. So that is a question of fairness. It would not be right, the guidelines suggest, for instance, to grant or to order security for costs where that would stifle a legitimate claim. Let's just very quickly go through the three matters that should be taken into account. Prospects of success. In reality as an arbitrator, even as a judge, when taking into account prospects of success for the purposes of deciding whether or not to grant security for costs, I have always found it rather difficult, because the parties, if they know what they're doing, will both argue very convincingly that they have good prospects of success. It's going to be a very rare case where you have an arbitration, or for that matter a court case, where the outcome is clear-cut in favour of one party as opposed to the other. In a case where the outcome is clear, you would expect a party to apply

for a summary judgment, at any rate, in litigation context.

So prospects of success, I don't really find that a very useful guide. If you're not careful, if you entertain -- if you go too much into the merits, then you will find that security for costs applications bloom into huge investigations of a -- whether or not a party has a good case. And that seems, to me, not what security for costs applications should be. You shouldn't be looking into the merit. So most of the time, unless there's a glaring problem, I tend to suggest or tell the parties that, well, I'm going to assume that each party has a good prospect of success, has an arguable case. So that's not really very helpful.

What about the next test? Solvency. Well, here we run into the problem that I highlighted at the very beginning. If all you're going to say is, well, you look like you're insolvent, well, the party may have been insolvent or financially unstable at the time when the agreement, the contract, was entered into. So why should one have security for costs if one, as a commercial party, undertook the risk that a party was going to be insolvent? You entered into a

contract with a BVI company. You took the risk. You can't suddenly say in the arbitration, "Well, it's a BVI company, it doesn't have any assets, it has all sorts of problems with its shareholding. Therefore, we should have security for costs." So I don't think the mere stability of a party, financial instability, is enough.

The commentary to the CIR guidelines actually takes up this point. For instance, in the commentary to article 3, the CIR guidelines say:

"If the solvency of the party was questionable at the inception of the relationship between the parties, arbitrators may consider that the inability to pay is no reason to order security as such a risk was a consequential effect of doing business with that party."

And they give an example. If a party contracts with a shell company without obtaining some kind of financial guarantee, arbitrators may consider that its ability to pay was known or ought to have been reasonably known at the inception of the relationship and was an accepted consequence of doing business with it.

So I find that to be the most helpful test. You look

at the parties when they entered into a contract. Was the financial solvency, or the solvency, of a particular party a risk that the other party, the party seeking security for costs, could have anticipated? Was it within the known risks of dealing with such a party? That, I found for arbitration the most helpful test. And I suggest that should be the test for litigation as well.

Now, you're told -- a final matter to take into account that you shouldn't order security for costs where it might stifle a legitimate claim. Now, I have never found this a helpful guideline either in litigation or in arbitration, because it seems to me once again to go back to the same question of prospect of success. You will have one party saying this is a hopeless case and the other party saying, no, we have a very strong case, and if you order security for costs against us, you are going to stifle what is a compelling case. So it defaults, it seems to me at the end of the day, to the prospect of success criteria which I have not found very helpful.

Given that that's the test, given that the best I can do for security for costs is to look at whether the solvency of the claimant was a risk that the respondent

was undertaking at the time when it entered into a contract, an international commercial contract, with a claimant. Given that that's the test, what COVID-19 implications might there be? Well, we've talked about the financial recession that has come in the wake of COVID-19. So it might be argued that, well, now that COVID-19 has struck, the respondent might say the claimant is -- has cash flow difficulties and is insolvent, and COVID-19 was unforeseeable. So that it could not have been within the risk of doing business with that particular claimant at the time of entering into their international commercial contract.

I'm not sure that that is actually the case. There is a lot of debate now whether COVID-19 is or is not a force majeure event, whether it is or is not something that could have been anticipated. Some say yes, some say no. It may depend on the facts of each particular case. But by itself, just to say, because one has cash flow difficulties as a result of COVID-19, I'm not sure -- I have doubts whether that would be sufficient of itself as a reason for granting an application for security for costs.

Let me now move on to the second of the applications

that I will talk about this evening. Interlocutory injunctions. Here, let me start with a test for arbitration. Under article 17A(1) of the UNCITRAL Model Law, a test is given. Does it make sense in arbitration? Well, before we go into looking into article 17A(1), let's look at UNCITRAL Model Law article 17(2). 17(2) describes what an interim measure is. An interim measure is any temporary measure whether, in the form of an award or in another form, by which at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) to preserve evidence.

So there is mention in article 17(2) of maintaining the status quo, but that is mentioned in the context of a reason for granting an interlocutory injunction, to maintain or restore the status quo pending the termination of the dispute.

Article 17A(1), against that background, gives the test but in relation only to (a), (b) and (c), the first three of the situations that I've described. It doesn't talk about applying this test to the preservation of evidence, (d) of 17(2). The test that 17A(1) gives is two-fold. It says in order to get an interim measure, the applicant must satisfy the arbitral tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed, if the measure is granted. And (b), there is a reasonable possibility that the requesting party will succeed on the merits of the case.

This second criterion, a reasonable possibility that the party seeking the interim injunction, interlocutory injunction, will succeed is akin to having an arguable case in the American Cyanamid principle. 17A(1)(a), the balancing of the harm to the party against whom the interlocutory injunction is directed and the harm to the party seeking the interlocutory injunction is similar to the American Cyanamid test but is not as detailed as the American

Cyanamid test. So that, actually, I find the rule, or the principle, in the UNCITRAL Model Law 17A(1) that I have just read out to you, I found it unsatisfactory. I feel that the American Cyanamid test is much more precise and much more helpful.

And just to recall, the American Cyanamid test, you first check to see whether the person applying, let's say the claimant, the person seeking the interlocutory injunction will be adequately compensated in damages. If the claimant will be adequately compensated in damages, you stop right there. You refuse the injunction. If the claimant cannot be adequately compensated by damages, you move to the second test: will the respondent be adequately compensated by damages if you grant the injunction and it turns out you were wrong? It turns out the respondent wins at the end of the day, and the claimant loses. Will you be able to compensate the respondent with damages? If not, you move on to the next test. If the respondent will adequately be compensated, then you grant the injunction. So let's assume that the respondent will not be adequately compensated in damages. Then you move to the third test: you maintain the status quo. The problem that I found there applying this in real

life is what exactly is the status quo? Is it the situation just before the wrong or the harm that you are seeking to -- that the applicant is seeking to forestall that came into play? Or is it the situation at the time when the argument is being made that there should be an interlocutory injunction?

Notice that this ambiguity in status quo is also present in 17(2) of the UNCITRAL Model Law, which I read out a moment ago. Maintain or restore the status quo, pending the termination of the dispute. Very often in many cases, I just find it very, very difficult to decide what exactly is the status quo that I should be preserving?

If you're not able to determine what is the status quo that you should be preserving, then you move on to the fourth limb of the American Cyanamid test, and that is: are there any special factors going one way or the other? If there are no special factors pointing one way or the other, then you go to the final limb, the fifth limb, and that is you give a preliminary view on the merits and grant or refuse an injunction accordingly.

I find that a much more accurate test than the very compact test in 17A(1)(a), which is simply to balance

the harms to the parties where harm not adequately reparable by an award of damages is likely to result if the measure is not ordered. So I find that the American Cyanamid test is much more helpful. And here, I would use the American Cyanamid test in deciding whether or not to grant an interlocutory injunction. All right. If that's the case, are there any COVID-19 implications? Does anything change because of COVID-19? On this, I don't think anything really changes on account of COVID-19. It may be that there are certain factual circumstances brought about by the COVID-19 pandemic that point to the grant or refusal of an interlocutory injunction, but that would seem to be on a case-by-case basis. Prima facie, there's no reason -- there's no way to generalise at the outset what certain factors are likely to be and whether they dictate a particular outcome in respect of granting or refusing an interlocutory injunction. So I'm not sure -- I doubt that there are too many implications in terms of COVID-19 on the test applicable in interlocutory injunctions.

Let me now move on to freezing orders, perhaps one of the most common orders sought from arbitral tribunals. But here, my difficulty is what exactly is the role

of the arbitral tribunal in the grant of freezing orders? So to put it more precisely, can an arbitral tribunal play any useful role in the grant or refusal of freezing orders?

What is the test in litigation? When I was a judge in Hong Kong, typically what I would do was I would hear applications for Mareva injunctions. Those would be heard ex parte. The reasoning being you don't want to tip off the other side that you're seeking a freezing order, a Mareva injunction, because otherwise the other side will do its best to transfer its assets to some jurisdiction where it will be difficult to get at the assets. And nowadays with the internet, transfer of assets can be done relatively quickly. So it's typically ex parte. It has to be done quickly because the main test -- there is a real risk of dissipation of assets. Very often, cases in Hong Kong -- Honsaico is one example, point out -- judges point out that usually the guideline to whether there is a real risk of dissipation of assets is there must be some hint of fraud or appearance of fraud or sharp practice, as I think is sometimes the expression used.

Does this test make sense in arbitration? It made

sense to me as a judge, deciding whether or not to grant or refuse Mareva injunctions. Does it make sense in arbitration? And here I have some difficulty.

Under the UNCITRAL Model Law article 17(c), there is a procedure for obtaining what is called preliminary orders, and that seems to be the equivalent in arbitrations of applying ex parte for a Mareva injunction. You apply for a preliminary order from the tribunal.

And let me just go through the elements of article 17(c) because they may not be too well known. Immediately after the arbitral tribunal has made a determination in respect of an application for preliminary order. So you apply to the arbitral tribunal for a preliminary order. You can do that ex parte. And then article 17(c) says that immediately after the arbitral tribunal has made its determination in respect of a preliminary order, let's say it's decided to grant one, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including but indicating the content of any oral communication between any party and the

arbitral tribunal in relation thereto. So you apply for a preliminary order, and then immediately afterwards, the arbitrator or the arbitral tribunal informs the parties, including the other side, that a preliminary order has been granted. Unlike in litigation where once you get an order from the court, a Mareva injunction of the court, you can present it just about immediately to the bank, the preliminary order of the arbitral tribunal cannot simply be presented to the bank to freeze assets. It would have to be converted into an order of the court.

And that will take a little bit of time. You don't have that much time, because immediately after the arbitral tribunal has granted the preliminary order, it's supposed to tell the other side that it has made a freezing order, it has given out a freezing order. It seems to me that between the time of your preliminary order, obtaining the preliminary order, and the time it takes to convert it into an order of the court, the other side, if it's guilty of fraud or sharp practice, will have siphoned off its assets to some other jurisdiction if it hasn't already done so. If you still have to go to the court to turn the order of the arbitral tribunal into an order of the court,

which you can enforce like a Mareva, why not just go to the court in the first place? Why go to the arbitral tribunal?

The other point about a preliminary order is that it requires -- it seems to require the arbitral tribunal to have been formed -- to have been constituted. If you have a three-man, or a three-person arbitral tribunal, that may take a little bit of time to constitute. So if you have to wait for the arbitral tribunal to be constituted, one side to nominate an arbitrator, the other side to nominate its arbitrator, the two arbitrators to get together and nominate a third party. Then a lot of time will have passed. If there's a real risk of dissipation of assets, then the assets would already have been removed from the jurisdiction.

Well, what about emergency arbitrators, one might ask. Can you use an emergency arbitrator? Many rules now allow for an emergency arbitrator, but not all rules do. So it all depends upon the rules under which an arbitration takes place. But again is the emergency arbitrator procedure appropriate or helpful in a freezing order situation? Let's look at the HKIAC's rules on emergency arbitrator. That's found in the

2018 rules in schedule 4. Rule 20 says this:

"The emergency arbitrator procedure is not intended to prevent any party from seeking urgent interim or conservatory measures from a competent authority at any time."

So it may be that an emergency arbitrator can be constituted relatively quickly. It may be that in that case, you could obtain an interlocutory order a freezing order from the emergency arbitrator. But then you still have to convert it into an order of the court. And rule 20 itself recognises that the emergency arbitrator procedure is not intended to prevent a party from seeking urgent relief from a competent authority, from the court, at any time. So again one asks: what is the point of asking for a freezing order from an emergency arbitrator if, really, you have to go to the court? If the test is a real risk of dissipation of assets, which I believe the test should be, if the test requires some fraud or dishonest or sharp practice, then this delay in getting an order from the court that is enforceable by way of a Mareva injunction or a freezing order could be fatal to an application for -- or successful implementation of a freezing order. Why not just go

to the court immediately?

The other thing about the emergency arbitrator rules, reading through them, you can have a look at -- in your leisure time, it seems to envisage that the emergency arbitrator hears whatever emergency relief is being sought, whatever emergency application is being made -- hears it inter partes rather than ex parte, just from one side. The rules -- the HKIAC rules seem to envisage a bilateral proceeding rather than a unilateral ex parte proceeding.

What are the COVID-19 implications? I think what COVID-19 will give rise to is because, again, of cash flow difficulties arising out of COVID-19, there will probably be a lot more applications for freezing orders, whether to the arbitral tribunal or to the court. Most likely, if my logic is correct, to the court.

From the point of view of an arbitral tribunal or from the point of view of a court, however, I would urge caution in relation to the granting of freezing orders. If the test is a real risk of dissipation of assets and some sort of fraud or sharp practice, what COVID-19 may also result in is that because parties are experiencing cash flow difficulties, they may have to

liquidate some of their assets in order to have the means to get by on a day-to-day basis, especially where businesses are being closed, where there is lockdown and so on.

Court, or the arbitral tribunal, should be careful not to confuse that liquidating asset "because I've got to live", with a real risk of dissipation of assets and indeed evidence of dissipation of assets. So although I think there will be more applications for freezing orders brought on by the financial recession that comes, or has come in the wake of COVID-19, courts and arbitral tribunals should be careful, should be scrutinised carefully and make sure that they're not penalizing a party for seeking to liquidate its assets in order to survive these difficult times.

Let me move on to the next of the applications that I would like to consider. That is, anti-suit injunctions. And again it used to be thought that there's a common law and civil law divide in relation to anti-suit injunctions. It was thought that common law jurisdictions freely gave anti-suit injunctions in order to protect arbitration agreements and to see that arbitration agreements were enforced, whereas civil law jurisdictions tended not to do so.

I'm not sure again that that is true today. And I myself have been on the receiving end of an anti-suit injunction, an injunction to prevent -- to prohibit an arbitration from going on, an anti-suit injunction from a Chinese court.

What is the test in litigation, and does it make sense in arbitration? Well, typically for -- in litigation, if someone comes to the court for an anti-suit injunction, it will be because there has been a breach of an exclusive jurisdiction clause. The particular court, let's say the Hong Kong court, has been given exclusive jurisdiction in relation to commercial disputes arising out of a particular contract, but in breach of that, a party goes and starts proceedings in another jurisdiction.

There may, in some case, be a willingness in the court, in the Hong Kong court perhaps, to give an anti-suit injunction on lis alibi pendens grounds. That is to say even though there is no exclusive jurisdiction clause, the court might say, well, it is wasteful to have two proceedings on the same matters and issues between the same parties proceeding in two jurisdictions. Hong Kong, let us say, is the more appropriate jurisdiction. And, therefore, we will

issue an anti-suit injunction to prevent the other party, typically the defendant, from litigating the same matter in another jurisdiction.

But I think this second area, lis alibi pendens, will probably be less used than the breach of an exclusive jurisdiction clause.

What about the test in arbitration? Well, parties can come to the arbitral tribunal for an anti-suit injunction to prevent another party, the respondent let us say, from proceeding in the court of some other jurisdiction in breach of the arbitration agreement. Typically, it will be said in the foreign court where the respondent brings court proceedings, that for some reason the arbitration agreement is null and void. In some situations, in some cases, Indonesia is an example, for arbitral tribunals to grant anti-suit injunctions would be regarded as an affront against a national sovereignty. The courts regard it as an arbitral tribunal telling the court -- let's take our example, the Indonesian court, what to do. This seems to be a misunderstanding of what an anti-suit injunction is, because an anti-suit injunction is not addressed to the foreign court. It is addressed to the particular individual, the respondent who has

brought proceedings in breach of an arbitration agreement.

My concern here with anti-suit injunctions is what happens if -- well, you have the situation where there is an arbitration agreement. The claimant has brought arbitration proceedings in, let us say, Hong Kong, the seat of the arbitration. The respondent brings court proceedings, let's say, in some other jurisdiction. Let's say in Indonesia. What happens if the foreign court itself issues an anti-arbitration injunction? So you have an anti-suit injunction from the arbitral tribunal, and you have an anti-arbitration injunction from the foreign court. In theory, if I've understood Enka v Chubb, the recent decision of the house of -- of the UK Supreme Court correctly, the court in the seat of arbitration plays or must play the supervisory role in supporting and enforcing an arbitration agreement. So you can obtain an anti-suit injunction from the Hong Kong -- from an arbitral tribunal in Hong Kong. You can probably convert that into an order of the Hong Kong court, and it is the Hong Kong court as the seat of -- as the supervisory court in the seat of arbitration that would support -- that plays the

important role in supporting and enforcing arbitration agreement. So you would ignore the injunction of the Indonesian court.

But is it that easy? Supposing some of the arbitrators are Indonesian, one or two of the arbitrators in the arbitral tribunal are Indonesian. It seems to me that they would have little choice but to abide by the anti-arbitration injunction, our hypothetical anti-arbitration injunction, given by the Indonesian court. Otherwise, they would be open to penalty.

If that's the case, then how does one deal with this situation? It seems to me that the only way to deal with it is not on the level of the arbitral tribunal, but for the parties to go to the relevant court, or courts, and to thrash out the matter there.

What are the consequences, then, of COVID-19?

I suggest that in COVID-19, we will see an increased protectionism in various jurisdictions. For perhaps, even, Asian jurisdictions. Because of the severe economic circumstances or consequences of COVID-19, states will want to be protective of their debtors, of domestic debtors, perhaps at the expense of foreign creditors. And so they will be passing laws or being

more assertive in the grants of anti-suit or anti-arbitration injunctions in order to protect domestic debtors. So I think this is a situation that in the future we will be seeing. And, effectively, the arbitral tribunal will be caught in the middle. There may be some arbitrators within the tribunal who are or might be exposed to penalties by a foreign court's anti-arbitration injunction even if all analysis points to the arbitration agreement as being valid and the proceedings before the foreign court having been brought in error. The reality is it may not be possible just to go on.

But let us see what happens. Reference was made by Adrian in his introduction to the CSAV v Hin-Pro case. That was a decision of the Court of Final Appeal of Hong Kong, in a case not dealing with arbitration agreements but with exclusive jurisdiction clauses. The English court construed a dispute resolution clause as giving exclusive jurisdiction to the English court and gave an anti-suit injunction in favour of CSAV against Hin-Pro in relation to a dispute over the delivery of goods carried by sea. Hin-Pro brought proceedings, any number of proceedings, in China. And it claimed that it was entitled to do so because

the exclusive jurisdiction clause was invalid as a matter of Chinese law.

CSAV obtained anti-suit injunctions from the English court. They came to Hong Kong to enforce them, enforce those anti-suit injunctions and orders in their favour by way of Mareva injunctions against Hin-Pro's assets in Hong Kong.

I just wonder what would have happened if Hin-Pro had, pending its many court cases in China against CSAV, applied for anti-suit injunctions against CSAV. And then we would have the situation of one court's anti-suit injunction against the other court's anti-anti-suit injunction. Enka v Chubb. Most people have focused on Enka v Chubb as dealing with the proper law of an arbitration agreement. What is the governing law of an arbitration agreement, in particular where the governing law of the main contract, of the rest of the contract, has not been specified? And where the seat of the arbitration is undoubtedly Hong Kong. So there's an arbitration agreement or there is a multi-tiered dispute resolution clause with an arbitration agreement pointing to English -- sorry, not Hong Kong. An English seat arbitration in London. But the

arbitration agreement did not specify what was its governing law. And the main contract, the rest of the contract, did not specify its governing law either. And the debate was whether the governing law of the arbitration agreement was Russian law or English law. However, underlying Enka v Chubb was a dispute over an anti-suit injunction granted by the English court against Russian proceedings, Russian court proceedings brought by Chubb in Russia. I just think -- you just raised this as a -- what is likely to happen in the future as a result of COVID-19, although it was not a case of anti-suit and anti-anti-suit injunctions in Enka v Chubb.

I envisage that things can get much, much more complicated in the future with one party seeking to improve its position tactically by getting an anti-suit injunction and the other party seeking to respond with an anti-anti-suit injunction.

Let me move to the final application that I wish to deal with this evening. And that's discovery applications. Discovery at common law, at pure common law, came in two limbs. The Peruvian Guano test had a limb for requiring discovery of directly relevant documents, documents that advanced the other

side's case or documents that harmed your case. You had a duty to disclose those. That's the first limb. The second limb is a reasonable train of enquiry limb. You should also disclose documents that could reasonably lead the other side to a train of enquiry which would have the result of advancing their case or going to the detriment of your case.

So that's the pure test at common law, the two limbs directly relevant and the reasonable train of enquiry. Under CJR, civil justice reform in Hong Kong, we have retained the Peruvian Guano test, although I think it was suggested that we should simply abandon the train of enquiry limb because it was too costly and stick with the directly relevant limb. As far as I know, in Hong Kong, the default situation still remains the Peruvian Guano, the double-limb test, and although there is the option of having the directly relevant test just restricting discovery in court to the directly relevant test, we've gone with both limbs, and I don't think any case has really focused on just the directly relevant limb. Well, that's litigation under the Peruvian Guano case. Discovery in the civil law jurisdiction is much narrower. There is no general discovery. There is specific disclosure of

documents. So at a particular stage, the parties may ask for documents that they say are in the custody, possession or control of the other side that will assist their case.

Arbitration tends to follow discovery under the civil law. And here, what happens is that one typically will attach the documents that one relies on in support of one's case to one's pleadings. So you attach, as claimant, the document you are relying on as claimant. The respondent attaches the documents that it's relying on as respondents to its pleadings. And then at a certain stage, there may be a time where the parties take out Redfern schedules and ask each other for disclosure of specific documents.

My understanding is that the test -- the discovery in arbitration should be very narrow. It should be specific disclosure in accordance with what takes place in the civil law. Otherwise, if we have the directly relevant and the train of enquiry limbs as the basis for seeking specific disclosure in arbitration, then that can entail a lot of time and cost, and that can be particularly oppressive. So my thesis is that discovery in arbitration is narrow.

Now, if we look at the IBA rules on the taking of

evidence in international arbitration, article 33(a) provides, amongst other things, the -- what must be specified in, say, a Redfern schedule in order to obtain specific disclosure of a document. And amongst the things that should be specified is you should give a description of each requested document. So when you request a document, you should describe it sufficiently to identify it. Most of the time, however, in discovery in arbitration, people ask for classes or categories of documents. And here, the IBA rules on taking of evidence require a description in sufficient detail including subject matter of a narrow and specific requested category of documents that are reasonable -- that are reasonably believed to exist. In the case of documents maintained in electronic form, the requesting party may or the arbitral tribunal may order that it shall be required to identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner.

My sense is that arbitrations -- and people tend to go for this second. They rarely ask for specific documents, a "this document" or "that document". But they ask for classes of documents. And the classes

of documents sought are very wide. They are not, as far as I can see, a description in sufficient detail of a narrow and specific requested category. They are wide. All documents produced between such and such a time, including but not limited to emails, memoranda, et cetera, dealing with or evidencing or relating to a number of different subjects. Very wide.

That doesn't seem to conform with the IBA rules in the taking of evidence. Now, under the IBA rules article 9(2), there are a number of grounds (a) through (g), which one can raise in opposing a request for disclosure, for specific disclosure. Amongst those grounds, there's a lack of sufficient relevance, privilege, unreasonable burden, loss or destruction of documents, confidentiality, sensitivity, political sensitivity, or (g) considerations of procedural economy, proportionality, fairness or equality of the parties that the -- and it's left to the arbitral tribunal to determine whether those grounds are compelling.

There's much mention of the test of relevance in the IBA rules in the taking of evidence. But what guidance do the IBA rules give on what constitutes relevance? I found very little. The best that

I could find is in article 7, where it says:

"Either party may, within the time ordered by the arbitral tribunal, request the arbitral tribunal to rule on an objection to disclosure. The arbitral tribunal shall then in consultation with the parties and in timely fashion consider the request to produce and the objection. The arbitral tribunal may order the party to whom such request is addressed to produce any requested document in its possession, custody, or control as to which the arbitral tribunal determines that, one, the issues of the requesting party wishes to prove are relevant to the case and material to its outcome; two, none of the reasons for the objections set forth in article 9(2), the (a) through (g) that applies. And the requirements of article 3(3) as to what you have to specify in your request have been satisfied."

So all it says is the arbitral tribunal shall order disclosure of documents that it believes to be relevant. But it doesn't give any test -- any real assistance as to what is relevant. I suggest that the most useful test of relevance is the first limb of the Peruvian Guano test. That is the directly relevant limb. I'm very much persuaded by Lord Woolf's

argument that the reasonable train of enquiry limb simply leads to an escalation of costs, often unnecessary. One should just leave it at the directly relevant limb; that is, it will either advance my case or be detrimental to your case and not it will lead to a reasonable train of enquiry.

Unfortunately, what I find in Redfern schedules nowadays is the parties seek documents -- whole laundry lists of documents on the basis of the train of enquiry limb. That is, the reason given is "I'm entitled given this pleading to test the evidence of the other side. So I must have ammunition, and the ammunition I need will be in these documents".

I suggest that that is a step too far, and that is not -- would not be consonant with the IBA rules on taking of evidence and the spirit of arbitration which has adopted the civil law approach.

What, then, are the COVID-19 implications? I'm afraid that the COVID-19 implication is that there will be more and more onerous disclosure demands, and that will put some burden on the tribunal. Parties will be asking for whole classes of documents, because each party will be trying to jockey for position, tactical position. What you will have is because of

the economic circumstances of COVID-19, parties may not be able to proceed with their contractual commitments. So they're going to try to find ways out of their contractual commitments. And a typical way is that a party has made -- that a claimant has made misrepresentations, and those misrepresentations are fraudulent or reckless or negligent misrepresentations allow one to treat a contract as voidable. And, therefore, in order to fuel this, this sort of argument as to whether or not representations were made, whether or not representations were true or false, then one will need a lot of documents. And so I suspect that there will be a lot more request for documents, and they will be not for specific documents but for whole classes of documents.

But again, that remains to be seen, and that will undoubtedly make it more difficult for arbitrators to go through Redfern schedules. It will be difficult in light, particularly, of the very limited guidance given on what is relevant, what is relevant for the purposes of the IBA rules on the taking of evidence. Those are the five applications that I wish to canvass this evening. I believe there will be a question-and-answer period following. I see from

the Q&A icon that there are some six questions. So we will go into that in a moment. But let me just make some concluding remarks.

What is an appropriate response by arbitrators to COVID-19? COVID-19 has ushered in some important changes in the way arbitration has been carried out and the way arbitrations will be carried out in the future. I've already mentioned that to a large extent in terms of the use of remote technology, I welcome that. But I believe that there is also danger that unless tight, strict, disciplined watch is kept in relation to interlocutory applications, as a result of COVID-19, there will be more attempts to use these interlocutory applications in tactical ways, either to harass the other side, if one is a claimant, or to delay proceedings if one is a respondent. So arbitral tribunals will have to be particularly alert, sensitive to the various tests, the limits of those tests, how far an arbitral tribunal can really go. Guerrilla tactics should be discouraged. In the time of COVID-19, cases should be resolved as quickly as possible. But a lot depends on an arbitral tribunal being aware of the abuse of interlocutory applications and putting a tight lid on such abuse.

Thank you very much.

ADRIAN LEUNG: Thank you, Professor. We would now like to ask you to deal with the -- deal with the Q&A questions that we've received. I believe that we have to read out the questions one by one so that the participants to this webinar could also hear what the questions are.

PROFESSOR REYES: All right. Why don't I read out the questions; I've got them in front of me now.

ADRIAN LEUNG: Okay.

PROFESSOR REYES: At the moment, there are six questions, and there may be more as we go along. I'll read them out and then I'll try to answer them. If I'm not able to answer them, then if you don't mind, Adrian, I will invite you to answer them.

ADRIAN LEUNG: Right.

PROFESSOR REYES: All right. There's one question:

"Would you suggest that arbitrators shall now be more lenient when considering security for costs applications now due to COVID-19? Would it cause unjustified prejudice to the respondent applying for the same?"

I'm not suggesting any more leniency than in the past. In other words, I am suggesting that one should apply the CIR guideline test in the way that it was meant

to be -- to apply. And if one does that, then I think that there will not be that many security for costs applications that will succeed, because you're dealing -- it's difficult to show that some change of circumstance is such that it could not have been contemplated when you engaged in -- when you entered into a contract with the other side. I'm not sure, for the reasons that I've said, that the COVID-19 is something that you can say, well, that changes all bets. So because COVID-19 was completely unexpected, I'm entitled to security for costs. I don't think that would be the right approach. That would be too simplistic. You would have to look at the particular facts of each case.

The second question:

"Would you say article 17(c) model law is a bar to Mareva injunctions, freezing orders from arbitration tribunals in practice and, therefore, should be removed?"

I'm not quite sure what the question is getting at in relation to article 17(c). It's -- article 17(c), just to recall, is the system of preliminary orders. Is it a bar to Mareva injunctions from arbitration tribunals? I think it's not so much a bar, but it just

leads to a problem. If speed is of the essence, or if time is of the essence in applying for a freezing order, then it seems to me that a preliminary order procedure pursuant to article 17(c) may not be appropriate in most cases, for applying for a freezing order.

The third question is this:

"Is there any advantage in getting an injunction from an arbitral tribunal in the form of an award which could then be enforceable under the NYC, New York Convention, unlike a court order?"

It is possible to get an injunction, a final injunction, from an arbitral tribunal. But an interlocutory injunction would not be final; and, therefore, would be outside the scope of the New York Convention. Recall that one of the conditions of an enforceable award under the New York Convention is that it must be final. If it's an interim award, which can change, which is only provisional, then that would not be enforceable under the New York Convention. What about getting a final injunction? At the end of the day, you get a final injunction from an arbitral tribunal. Would that be enforceable under the New York Convention? And New York Convention tends to be

for the enforcement of money awards rather than awards to do something or awards to refrain from doing something. I don't rule out the possibility of enforcing it under the New York Convention. In fact, I think when I was in charge of the arbitration lists in Hong Kong, there were one or two applications for the enforcement effectively of an injunction that came before me. But there may be difficulties and some jurisdictions may not be willing to accept or may not be prepared to enforce an arbitral award. Many jurisdictions have given a reservation to their application of the New York Convention. For instance, many jurisdictions have said that they will only enforce New York Convention awards to the extent that they deal with commercial matters. "Commercial" as defined within their jurisdiction.

Most commercial awards will be monetary, because typically in a commercial case, you can be adequately compensated by money, by a payment of money. So it's unlikely that in many jurisdictions that they will be prepared to enforce an injunction. But I can't really say for sure.

"What are my thoughts" -- next question -- "where there is an arbitration agreement and the claimant has

commenced court proceedings for insolvency in a foreign court? The respondent participates in these proceedings and a few years later, claimant commences parallel arbitration proceedings based on the same set of facts?"

Now, this is a rather difficult question. I'm not sure that I have any particular thoughts at the moment on it. I would have to reflect on the particular fact scenario. So there's an arbitration agreement. You go for a court proceeding for insolvency in a foreign court. The respondent takes part in those, and a few years later, you commence parallel arbitration proceedings. There maybe a contradiction between the two. It may be that if you are going for insolvency proceedings, then that is inconsistent with also applying for arbitration proceedings. But I would have to think more closely about it and may even have to look at the laws in place in the two jurisdictions raised in the question.

Next question:

"As I just wind up the session on HCCH, that's the Hague conference, do you see the exclusive jurisdiction in Hague conference and not seeing the day of light?"

I think this is a reference to the 2005 Hague Choice of Court Agreements Convention. You might recall that the Hague Choice of Court Agreements Convention enables choice of court agreements to be enforced in contracting states. That's the first thing it does. So if you come to the -- a state -- a contracting state which is not -- which has not been designated in an exclusive jurisdiction clause as the court to resolve disputes, than that contracting state is supposed to refuse jurisdiction and send you to the designated court in a contracting state.

The next -- the other thing that the Hague Choice of Court Agreements Convention does is it allows for the enforcement of judgments from the designated court in a contracting state. The Hague Choice of Court Agreements Convention is, in fact, now in play. It is now enforced. There are some 40 parties to that convention.

So it has seen the light of day. Actually, whether or not many countries, or a country, accedes to the 2005 Hague Choice of Court Agreements Convention, there is a big possibility that the rules, or the laws of that jurisdiction, are, in fact, very similar to the 2005 Hague Choice of Court Agreements Convention.

For instance, the law in Japan in relation to the choice of court agreements and jurisdiction in choice of court agreements is very similar to that found in the 2005 Hague Choice of Court Agreements Convention. But Japan is not a party to that convention.

"Have you encountered many applications for security for claims in this economic climate and an application made by the claimant against the respondent as opposed to security for costs?"

I have so far not yet encountered such. But I'm sure there will be in the future.

"If so, what test would you apply based on a change in the risk allocation taken by the parties under the contract such that the inability to pay was not known, or ought to have been reasonably known at the time of entering the contract, and that such change in the respondent's finances was not caused by any reasonably accepted business risk?"

I think that that would be the nature of the test that I would apply. I need to think about it a little bit more. You're distinguishing this type of a security for a claim rather than a security for costs application. The -- one difficulty that I find in asking for security for claim -- that is, what I think

you mean -- is a claimant seeks security of a respondent in relation to the claimant's claim. A claimant is typically entitled to defend itself. So that if it refuses to pay security, then what exactly is the sanction? So you order security against the respondent, but then what happens if the respondent fails? If you say, well, the respondent is then not entitled to bring its case, then you may not be doing yourself a favour, because in that case, would you be refusing the respondent a reasonable opportunity to be heard? Well, I gave him reasonable opportunity. I provided -- the respondent provided security. But I'm not sure that many jurisdictions would accept that. In principle, a respondent should always be entitled to defend itself.

Let's see now whether there are any other questions. I think those are all the questions. I think the question that I've just dealt with is the last question. Are there any more questions that anyone would like to ask?

ADRIAN LEUNG: There is one more question from our side here in Hong Kong.

PROFESSOR REYES: Yes.

ADRIAN LEUNG: That is to the first topic, security for costs

application.

PROFESSOR REYES: Yes.

ADRIAN LEUNG: We understand that in the commercial litigation context, in court proceedings, when making a security for costs application, there is this line of authority or practice that if the court is faced with claimant counterclaim which are flip side of the same coin, mirror images, then this may be a consideration for refusing security for costs. Would the arbitral tribunals also take into account this factor when exercising their discretion?

PROFESSOR REYES: I think the arbitral tribunal would. You ask yourself again, if the claimant refuses to pay security, what happens to the respondent's counterclaim? If the respondent's counterclaim precedes, then we're back to the situation I was just discussing: Should the claimant be entitled to defend itself against the counterclaim? Now, I think the guidelines of the Chartered Institute of Arbitrators and other commentators have suggested that, well, you need to look to see even if there's a counterclaim, who is the attacker and whether a counterclaim is really put in by way of defence. Now, I'm not sure in practice that's an easy matter to

discern who's the attacker and who's the defender even in respect of a counterclaim. Sometimes it will be easy. Most of the time, it is not. So I would take a simple line. If there is a counterclaim -- in particular, if it's the flip side of the claim, then is it really a matter of asking for security for costs, or does one cancel out the other? I would tend to think the latter rather than the former.

ADRIAN LEUNG: Right, right. Thank you. Thank you very much. So I think that's all of the questions that we have for this webinar, and we would like to thank Professor Reyes again on behalf of the Hong Kong Institute of Arbitrators.

PROFESSOR REYES: Thank you very much.

ADRIAN LEUNG: Thank you very much. Thank you. Thank you, all participants, for joining us today. Have a great evening. Thank you, Professor.

PROFESSOR REYES: Okay. Good-bye.

ADRIAN LEUNG: Thank you, bye-bye.

[End of audio]