

HKI Arb Webinar:

“Even Pariahs Have Rights[./!/?”]”

28 June 2022 | 6:00pm (HKT)



Adrian Lai

Deputy Secretary General and Co-Convenor of the Advisory Board, Asian Academy of International Law
Barrister, Des Voeux Chambers

Purpose

- **Questions:**

- *From a legal representative's perspective:*

- ❖ issue(s) involved in accepting / retaining a sanctioned client
- ❖ right to terminate a retainer

- *From an arbitrator's perspective:*

- ❖ importance to maintain independence and impartiality
- ❖ practical concerns

Right to Legal Representation

❖ ICCPR, Article 14(3)

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"

❖ UNHRC has confirmed Article 14 extends beyond criminal proceedings to "rights and obligations" in civil proceedings.

Right to Legal Representation

❖ HK Basic Law, Art. 35(1):

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.”

❖ ***Rondel v. Worsley*** [1969] 1 AC 191 *per* Lord Pearce

“It is easier, pleasanter, and more advantageous professionally for barrister to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet, it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right.”

Right to Legal Representation

❖ The “cab-rank” rule under the Bar Code (Article 6.1):

*“A practising barrister **must** accept any brief to appear before a court or instructions to provide any other legal services in a field in which the barrister practises or professes to practise if [(a) within his competence; (b) he is available; (c) proper fee offered; and (d) listed exceptions do not apply]*

and must do so irrespective of (i) the nature of the case; (ii) the party on whose behalf he is instructed; and (iii) any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person.”

The “cab-rank” rule only applies to the Bar.

Right to Legal Representation

- ❖ ***Escarcena v. Gibraltar Health Authority*** [2017] Gib LR 149 (Sup. Ct.)
 - An ordinary P.I. case turned into a potential claim by the client against her own lawyer for professional negligence. Independent legal advice expected.
 - General reluctance of a member of the Bar advising a lay client to sue another member of the Bar. Foreseeable difficulty in obtaining legal representation.
 - *Appearing* to be a common law power for court to require counsel to act for an unrepresented: ***Seton v. Stasy*** (1357) (no one willing to act for the D against whom the judge sued)
 - Jack J. held: “... *where no lawyer is willing voluntarily to accept a civil brief, the court has the power to nominate named members of the Bar to take the case. This is subject to the would-be having a prima facie case and to arrangements being made for the payment of counsel’s reasonable fees.*”

Lawyers' Freedom from Undue Interference

- ❖ UNHRC Special Rapporteur's Report (22.4.2022):

"Lawyers and free practice of the legal profession are indispensable to the rule of law, the protection of human rights and an independent judicial system."

- ❖ The Bar Code (Duties of Counsel to the Lay Client):

"10.15 A practising barrister must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person ..."

- ❖ Similar duty found in the Commentary to para.10.02 of HK Solicitors' Guide to Professional Conduct "The Litigation Solicitor"

Right to Independent and Impartial Tribunal

- ❖ “Basic Principles on the Independence of the Judiciary”
(adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders):

“2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

4. There shall not be any inappropriate or unwarranted interference with the judicial process”

- ❖ HK Basic Law Article 85

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference”

Right to Independent and Impartial Tribunal

- ❖ Independence and impartiality equally apply to arbitral tribunals:
 - *Halliburton v. Chubb Bermuda Insurance Ltd.* [2021] AC 1083 (para.63)
 - “Increased neutrality and impartiality of the local legal systems” ranked the 2nd most important reason in choosing the seat
 - Statutes / Rules:
 - HKAO s.46(2)-(3)
(incorporating UNCITRAL ML Article 18)
 - UNCITRAL Rules
(Articles 11-13 challenging an arbitrator on grounds of justifiable doubts)
 - HKIAC Rules
(Article 11.1 – an express requirement of a tribunal remaining impartial and independent)

Right to Independent and Impartial Tribunal

- ❖ ***Sun Yang v. World Anti-Doping Agency & FINA*** (Int'l Swimming Federation)
(Case 4A_318/2020, 22.12.2020)
 - 28.2.2020: CAS' arbitral tribunal rendered an award suspending Sun (the swimmer) for 8 years
 - 28.4.2020: Sun filed an appeal to the Swiss Federal Court seeking to set aside the award
 - 15.6.2020: Sun revised his grounds of appeal claiming the tribunal chairman was biased

Right to Independent and Impartial Tribunal

➤ Tribunal chair's tweets (extracted from para.5.1):

- *"Show the HORROR – THIS IS CHINA TODAY!! I'm sure nobody will ha e [sic] the courage to respond to me!!! Ambassador of China to Italy, where are you??? Are you silent on the tortures on dogs in Yulin???"*(tweet of May 28 2018);
- *"Let's multiply our messages! Invade in China with our protest against horror and torture on stray dogs and cats, as they try to invade our markets with fake products!! Raise our voice, otherwise we are in complicity!"* (tweet of May 28 2018);
- *"Hell forever for those bastard sadic chinese who brutally killed dogs and cats in Yulin, with the complicity of the Chinese authorities !!!"*(tweet of July 3 2018);
- *"This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell!!! Shame on China, pretending to be a superpower and tolerating these horrors!!* (tweet of May 28 2019);
- *"Racist????Me??ehi guy, I repeat: those horrible sadics are CHINESE! not French or Italian or polish! And I think they deserve a worse hell than the one in which they torture innocent animals!!Chinese is Yulin!!!do you want to defend!!come on, shame!!!"* (tweet May 28 2019);
- *"Old yellow-face sadic trying to kill and torture a small dog: this is China's picture!!! Westerners doing rich business with China bear in mind these atrocities"* (tweet of June 2 2019);
- *"Torturing innocent animal is a flag of chinese! Sadics, inhumans with the protection of chinese authorities and the tolerance of western powers focusing on more business with China, regardless any massive violence! Shame on china and their protectors!"* (tweet of June 9 2019).

➤ **AWARD ANNULLED!**

Sanctions' "Side-Effects" against Rule of Law

- “Unilateral sanctions”: economic measures taken by one State to compel a change in policy of another State (e.g. trade sanctions)
- “Specific sanctions”: measures employed by a State to influence individuals who are perceived to be in a position to decide on a political action in a particular State (e.g. asset freezing, travel bans)
- UNHCR Commissioner’s Annual Report (11.1.2012) on specific coercive measures:

“... the targeted effect of such ‘individualized’ sanctions may be more likely to violate such individual rights than the more diffuse general trade sanctions.”

Threat to Right to Legal Representation

- Lawyers increasingly refusing to act for sanctioned parties
- Discrimination applies irrespective whether the Russian clients are exposed to unilateral sanctions

11:20

FINANCIAL TIMES

myFT

Your guide to a disrupted world

Start a 4-week trial

Legal services + Add to myFT

Russian litigants left struggling to find lawyers for court actions

Top London firms warn wider fallout from sanctions could spell the end to big-ticket Russian litigation



© Chris Dorney/Dreamstime









 Save

Jane Croft in London JUNE 5 2022

ft.com — Private

Threat to Right to Legal Representation

- Political pressure
- “Name and Shame”
- Lawyers themselves exposed to sanction / criminal liabilities?
- Problem with receiving fees

 The Law Society

Gazette





NEWS

Truss blaming lawyers for blocking Russia sanctions, says MP

By **John Hyde** | 26 February 2022



Foreign secretary Liz Truss has reportedly told MPs that ‘London law firms’ are delaying government efforts to implement sanctions against Russian oligarchs.

Labour MP Ben Bradshaw said on Friday that Truss had

 lawgazette.co.uk — Private

Threat to Right to Legal Representation

The “David Perry QC” Incident

- DPQC was instructed by HK DoJ to prosecute offences of unlawful assembly
- Pressure and criticism in the UK building up
- DPQC quit



Jimmy Lai, a publisher who is critical of Beijing, will be prosecuted by David Perry

EDMOND SO/SOUTH CHINA MORNING POST/ZUMA/ALAMY

David Perry, QC, a ‘source of shame’ for prosecuting Hong Kong democracy campaigners

Jonathan Ames, Legal Editor | George Grylls, Political Reporter | Didi Tang, Beijing

Thursday January 14 2021, 12.00am GMT, The Times

Senior Tory MPs and figures within the Home Office have expressed concern about a high-flying British barrister agreeing to prosecute pro-democracy campaigners in Hong Kong.

David Perry, QC, has been appointed by a Hong Kong court to represent the prosecution in the trial of [Jimmy Lai](#), a publisher known for his

Threat to Right to Legal Representation

❖ HKMA's letter of 8.8.2020:

“Foreign Government Unilateral Sanctions

For the avoidance of doubt, **unilateral sanctions** imposed by foreign governments are not part of the international targeted financial sanctions regime and **have no legal status in Hong Kong**. Therefore, no obligation is created for AIs under Hong Kong law.

AIs are reminded of the need to establish and implement policies for their Hong Kong businesses that are informed by a thorough assessment of any legal, business and commercial risks involved and based on a balanced approach. **In assessing whether to continue to provide banking services to an individual or entity designated under a unilateral sanction which does not create an obligation under Hong Kong law, boards and senior management of AIs should have particular regard to the treat customers fairly principles.”**

Threat to Right to Legal Representation

- ❖ E.g. HSBC's Global Sanctions Policy Statement (minimum standards including):
 - Prohibiting or restricting customer relationships or transactions / business activity, involving:
 - parties named on certain sanctions lists issued by the UN, UK, HK, EU or US;
 - any entity owned directly or indirectly 50% or more ... or controlled by any of the parties described above, even if the party is not named on a sanctions list
 - HSBC may, in its sole discretion, agree to process certain transactions prohibited or restricted ... that are authorised by a licence from an appropriate authority or are otherwise permitted under applicable laws and regulations, such as those which relate to humanitarian aid

Response(s) to the Threat to Legal Representation

❖ China: 10.6.2021 Anti-Foreign Sanctions Law (《反外國制裁法》)

”Article 12(1)

Organizations and individuals must not enforce or assist in enforcing the discriminatory restrictive measures employed by foreign nations against **our nation's** citizens or organizations.”

(Not yet enlisted under Annex III of the HKSAR Basic Law)

➤ **Protection not applicable to non-Chinese sanctioned parties**

Response(s) to the Threat to Legal Representation

- ❖ ***JST VTB Bank v. Alexandra Katunin*** BVIHC (Com) 2014/0062 (15.3.2022 and 22.3.2022)
 - Ogier sought leave to come off the record as acting for VTB Bank
 - 14 grounds identified, including:
 - (1) VTB was Russian-State-owned;
 - (2) Unjustifiable and unacceptable Russia's invasion and the humanitarian crises brought about;
 - (3) UK's sanction against VTB applied in BVI, and breach of it is a criminal offence;
 - (4) Against Ogier's ethics and code to act for an entity closely related to Russia;
 - (5) VTB could not pay Ogier due to sanction

Response(s) to the Threat to Legal Representation

- ***Is the sanction meant to deprive VTB of the right to litigate?***

“13. [Counsel for Ogier having accepted that the termination would be potentially disastrous to VTB submitted that] ... Far from being a problem, this, he submitted, was a good thing. Reprehensible entities such as state-owned Russian banks should forfeit their right by being denied the right to litigate.

14. That in my judgment would require special legislative provision. As ... the current president of the Law Society of England and Wales, said in expressing support for law firms representing Russian clients:

‘It’s the job of solicitors to represent their clients, whoever they may be, so that the courts act fairly. This is how the public can be confident they live in a country that respects the rule of law’

15. ... Denial of a right to litigate and to defend oneself in litigation could at least start to raise an argument that there was an expropriation of assets. This Court should in my judgment be extremely wary of interpreting the sanctions legislation as having any intended effects beyond those which appear from the plain wording of the legislation.”

Response(s) to the Threat to Legal Representation

- ***VTB's right to legal representation***

*“16. ... The duty to continue to act is self-evident when a firm of legal practitioners is representing a defendant in criminal proceedings. Many criminal clients manifest varying degrees of unsavoriness. That has never been a ground for withdrawing from a retainer. **The situation with civil clients is the same.** VTB may be a pariah, as Mr. Alexander QC submitted. That does not afford a ground for its legal representatives to withdraw from representing them. **Quite the contrary. It is precisely when VTB are stigmatised as a pariah that VTB need the best endeavours of their legal representatives to advise them and to advocate in Court on their behalf.** However uncomfortable it may be for Ogier, this is, as Ms. Boyce asserted in respect of England and Wales, a vital safeguard for ensuring the rule of law in this Territory. **Even pariahs have rights.**”*

Response(s) to the Threat to Legal Representation

- ***Ogier's reputation concern overridden by rule of law***

"21. So far as reputational damage is concerned, there is on the one hand Ogier's commercial interest in keeping its name unsullied by association with Russian state entities. Their contractual terms entitle them to terminate the retainer. On the other hand, their duties as officers of the Court require them to maintain the rule of law by ensuring access to the Courts for the proper and fair determination of parties' rights and obligations.

22. ... in the exercise of my discretion I find that their duties as officers of the Court outweigh the other considerations. I accordingly refuse the application for Ogier to come off the record."

Response(s) to the Threat to Legal Representation

- ***Ogier's inability to pay a potential ground to termination***

"7. If [remittance by VTB to Ogier] cannot be done, then this issue of payment as a ground for coming off the record would need to be revisited. Ogier are entitled to be paid

20. I turn then to my decision in relation to Ogier's application. So far as outstanding fees are concerned, this is a matter which needs to be kept under review. If Ogier cannot obtain licences so as to legitimise payment to them by VTB, then there may be a need to release Ogier on that ground "

Response(s) to the Threat to Legal Representation

❖ Russia's "self-help" remedy

- 19.6.2020: Russia amended *Arbitrazh* (Commercial) Procedural Code
- Article 248.1: conferring on Russia's state commercial courts **exclusive jurisdiction** over disputes involving persons against whom sanctions have been imposed (applicable to disputes referable to arbitration if the arbitration agreement is unenforceable due to sanctions).
- Article 248.2: granting a right to a sanctioned party the right to apply to Russian court an anti-suit injunction against foreign court proceedings or arbitration

Response(s) to the Threat to Legal Representation

❖ Russia's "self-help" remedy

- The ***Instar Logistics*** case (pre-new law): Russian court held the ICC arbitration clause not enforceable since the US respondent would be placed in a more favourable position; and that Russian court should seize jurisdiction.
- ***Uraltransmash v. PESA***
 - Lower court held Uraltransmash failed to prove the obstruction to access to justice. Article 248.1 not engaged.
 - Supreme Court: held Uraltransmash need not prove existence of obstacles to access to justice; and that sanctions themselves are sufficient to conclude existence of such obstacles.

Threat to Impartial and Independent Tribunal

Politics

Call by US lawmakers for sanctions against Hong Kong judges and prosecutors handling national security law dismissed by judiciary as 'absolutely unacceptable'

- 7 Republican congressmen urge US President Biden to impose sanctions on judges and prosecutors as part of 'more rigorous and lasting measures'
- Judiciary spokesman says the suggestion amounts to a 'direct infringement' on Hong Kong's rule of law

25



Topic | Hong Kong national security law (NSL)



Ng Kang-chung and Chris Lau

Published: 8:34pm, 11 May, 2022

Follow this topic and get notified the next time we publish content about **Hong Kong national security law (NSL)**.

+ Follow HONG **25** KONG for the latest updates

Response(s) to the Threat to Impartial / Independent Tribunal

❖ **17.6.2015 Joint Statement of LCIA, SCC and ICC**

“The sanctions do not impose a general prohibition for Russian parties to seek arbitration before European arbitral institutions, and Russian parties are not treated differently from other parties.

The integrity of the process of our respective institutions remains the same, as does the impartiality and independence of the procedure.”

Response(s) to the Threat to Impartial / Independent Tribunal

❖ HKIAC Sanctions Policy

“2.3. HKIAC does not treat any party listed under a sanctions regime differently from any other parties in the Proceedings.

3.5 Where sanctions affect Proceedings and may affect HKIAC’s banking operations, HKIAC may:

- a. use or avoid a certain currency to facilitate payments;
- b. provide case information to a bank where HKIAC’s role in the Proceedings triggers such a requirement or where HKIAC wishes to obtain information from the bank. Any information provided will be limited to what is strictly necessary.”

Response(s) to the Threat to Impartial / Independent Tribunal

❖ Practical issues:

- Increased complexity by arbitral bodies in entertaining arbitration requests
- Arbitrator's bias
- Arbitrator's nationality
- Inability to pay the arbitrator's (or the arbitral body's) fees



Q & A

HKI Arb Webinar:

“Even Pariahs Have Rights[./!/?””

28 June 2022 | 6:00pm (HKT)



Adrian Lai

Deputy Secretary General and Co-Convenor of the Advisory Board, Asian Academy of International Law
Barrister, Des Voeux Chambers