GAR Global Arbitration Review

The Asia-Pacific Arbitration Review

2019

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International Arbitration Developments During the Second Decade of the Pacific Century

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Summary

The 21st century has aptly been described as the 'Pacific Century' (or the Asia-Pacific century). This is certainly evident in relation to international trade developments and foreign direct investment (FDI) inflows. Key trade agreements were executed and entered into force during the first two decades of this century, including the Trans-Pacific Partnership Agreement that was signed on 4 February 2016 (the TPP) by the original 12 contracting states and bilateral free trade agreements such as the US-Korea Free Trade Agreement that was signed on 30 June 2007 and entered into force on 15 March 2012. In addition, the 2014 World Investment Report of the United Nations Conference on Trade and Development indicated that Asia continues to be the world's top recipient of FDI, accounting for approximately 30 per cent of FDI inflows globally.1 Finally, three major Asian economies, China, South Korea and Japan, signed a trilateral investment agreement on 13 May 2012, which entered into force on 17 May 2014. In the coming decades of this century, many anticipate that the strengthening economies of the Asia-Pacific will increasingly turn from being recipients to being sources of investment and capital.

As with the flow of FDI, the litmus test of the Pacific century in respect of international arbitration will be whether the region can not only absorb, attract and adopt, but also proliferate, promote and produce ideas, talent and innovation. As we near the end of the second decade of this century, it is an opportune time for this chapter to take stock and highlight some noteworthy developments in the area of international arbitration in the Asia-Pacific region that would reaffirm the notion that this is the Pacific century.

The first set of developments relate to efforts taken by Asian-Pacific jurisdictions seeking to align themselves with international best practices in international arbitration, in particular giving effect to their adoption of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The second set of developments relate to the promotion of diversity, which is both part of a larger, global movement, but also an area where Asian-Pacific arbitration communities are beginning to proactively partake in an exchange of ideas and explore new initiatives. Finally, the third set of developments relate to the positioning various institutions and jurisdictions are undertaking in connection with China's Belt and Road Initiative (BRI), which is perhaps the most striking example of innovation emanating from the region to the rest of the world.

ALIGNMENT: DEVELOPMENTS ON THE LEGISLATIVE FRONT

In considering developments in the Asia-Pacific region, it is important to look at the work of the United Nations Commission on International Trade Law (UNCITRAL), especially as 2018 marked the 60th anniversary of the New York Convention. Since its inception UNCITRAL has worked to further its mandate of progressing the harmonisation and modernisation of international trade law by preparing and promoting the use of legislative and non-legislative instruments in several key aspects of commercial law, including international arbitration.

Two UNCITRAL instruments significant to international arbitration are the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law) and the New York Convention. Jurisdictions seek to adopt these instruments in an effort to bring themselves in line with best practices in international arbitration. Notably, Hong Kong became the first jurisdiction in Asia to incorporate the 1985 UNCITRAL Model Law in its domestic legislation, only a few years after the instrument was released. Since then, several other jurisdictions in Asia have adopted the UNCITRAL Model Law, including, among others, Singapore in 1994,

Sri Lanka in 1995 and South Korea in 1999. In 2012, UNCITRAL launched its Regional Centre for Asia and the Pacific in order to strengthen its mandate in the Asia-Pacific region.

More recently, Myanmar and Fiji both enacted new arbitration legislation. Myanmar's Parliament passed its new Arbitration Law (Union Law No. 5/2016) on 5 January 2016 and Fiji's legislature passed the International Arbitration Act 2017 on 15 September 2017 (the 2017 Act). These long-awaited legislative developments have brought these jurisdictions in line with international arbitration best practices by both aligning them with the UNCITRAL Model Law and giving effect to the New York Convention in each state. Myanmar's reforms have been covered extensively including in earlier editions of this publication,[2] in particular since they are coming at the same time the state has made significant strides to attract foreign investment with the introduction of new investment laws, rules and procedures, which are meant to bolster investor confidence and the ease of doing business in Myanmar, as well as increase efficiency.

Fiji's enactment of the 2017 Act has not only been lauded as a step in the right direction for the state, as it incorporates best practices from other leading pro-arbitration jurisdictions in the Asia-Pacific region, but it might be a catalyst for others among the Pacific Island states to make similar reforms. The 2017 Act applies only to international arbitrations while the 1965 Arbitration Act in Fiji will continue to apply to domestic arbitrations.

According to the 2017 Act, 'international arbitrations' are where:

- at the time the arbitration agreement was entered into, one of the parties was based outside of Fiji;
- Fiji is not the seat of the arbitration;
- the place in which a substantial part of the obligations of the commercial relationship are required to be performed is not Fiji; or
- there is a locale that has a closer connection to the subject-matter of the dispute that is not Fiji.

Among the number of advisers involved in assisting the government of Fiji with its reforms, it is noteworthy that international and regional organisations such as UNCITRAL and the Asian Development Bank were involved. Aspects of best practices found in many pro-arbitration jurisdictions that were adopted in the 2017 Act, include, among other things, provisions ensuring the confidentiality of arbitration proceedings (subject only to limited exceptions), provisions giving parties autonomy in their selection of representation in arbitrations, as well as provisions concerning the recognition of the enforceability of decisions by emergency arbitrators.

As part of its efforts to progress harmonisation across jurisdictions, UNCITRAL initiated work nearly a decade ago on the preparation of a guide with the objective of promoting the uniform and effective interpretation and application of the New York Convention with a view to minimising the risk that the practice and application by the 159 contracting states might diverge from the spirit of the Convention. UNCITRAL was assisted by two prominent members of the international arbitration community, Professor Emmanuel Gaillard, the head of the international arbitration practice at Shearman & Sterling LLP, and Professor George Bermann, the director for the Center for International Commercial and Investment Arbitration at Columbia Law School. The UNCITRAL Secretariat Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the Guide) was presented

to UNCITRAL in 2016. The Guide was developed using a 'bottom up' approach, whereby case law across a combination of 15 common and civil law jurisdictions was compared and analysed. An online platform was also launched at the same time, the aim of which is to supplement the Guide by making available case law implementing the New York Convention from these 15 jurisdictions, as well as others (www.newyorkconvention1958.org), including from jurisdictions in the Asia-Pacific region, such as China, Hong Kong and Singapore. Several members of the arbitration community from around the world, including courts, academic institutions, law firms, arbitral institutions and organisations have contributed to this initiative, including, among others, the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) and the Cairo Regional Centre for International Commercial Arbitration. The Hong Kong International Arbitration Centre (HKIAC) became an official contributor in January 2018. On 5 April 2018, the platform reached a significant milestone with more than 2,000 decisions from 58 jurisdictions now publicly accessible online.

Coinciding with the 60th anniversary of the New York Convention, a series of seminars have been launched in the past two years in an effort to promote the Convention, as well as the Guide, and encourage the broader international arbitration community to participate in the dialogue regarding the interpretation and application of the Convention. Such seminars have already taken place in the Asia-Pacific region: in Beijing at the premises of the China International Economic and Trade Arbitration Commission on 15 November 2017,3 and in Hong Kong at HKIAC on 12 February 2018.4

In parallel to these seminars on the New York Convention, UNCITRAL has been organising judicial summits in the Asia-Pacific region. The primary objective of these summits has been to enhance international trade and development by way of capacity-building for judiciaries, focusing on the interpretation and application of UNCITRAL and other international instruments. The second judicial summit took place in Hong Kong in October 2017 during the Hong Kong Arbitration Week.

In addition to welcomed reforms in Myanmar and Fiji, pro-arbitration jurisdictions have also enacted enhancements to their domestic legislation. In 2017, the first of these has been the much-watched passage of third-party funding (TPF) legislation in both Singapore and Hong Kong. Singapore's framework for TPF abolishes the common law torts of maintenance and champerty; and qualified that TPF in relation to international arbitration and related court or mediation proceedings is neither contrary to public policy nor unlawful. That legislation came into force in March 2017.

Similar amendments to Hong Kong's Arbitration Ordinance are expected to enter into force later in 2018. Their practical effect mirrors that of the reforms in Singapore, ie, abolishing tortious doctrines in favour of allowing funding by third parties; so long as they do not have a legitimate interest in the proceedings, which would include representation of any party to the dispute. In this context, Hong Kong's reforms are broader than that of Singapore's as the meaning of third-party funder extends beyond professional funding outfits. Analogous reforms have also been made to Hong Kong's Mediation Ordinance. In addition to the legislative reforms, a provisional TPF code of practice – covering matters including conflicts, degree of funder control and grounds for terminating a TPF agreement – is expected to be drawn up within three years of these amendments taking effect. The TPF amendments to the legislative frameworks in Singapore and Hong Kong should broaden the dispute resolution options available to parties in both jurisdictions.

As reported by GAR in September 2017, HKIAC has initiated a rules revision process in respect of its 2013 Administered Arbitration Rules, which is looking to introduce, among other things, a new provision on the disclosure of TPF and amend the confidentiality provisions to allow for the disclosure of information of the third-party funder.5 This proposed amendment is aimed at giving regard to the recent TPF reforms in Hong Kong's laws.

Hong Kong has also introduced legislation in 2017 that clarifies in its Arbitration Ordinance (Cap. 609) that all disputes relating to intellectual property rights are arbitrable in Hong Kong and that it is not contrary to public policy to enforce awards rendered in relation to intellectual property rights in the jurisdiction. The legislation has broadly defined intellectual property rights so as to cover intellectual property rights wherever they may subsist, by whatever name called, whether registrable or registered, as well as new types of intellectual property rights which may be recognised in the future.

The legislative reform removes the legal uncertainty that some jurisdictions continue to face as to whether intellectual property disputes, especially those that concern the validity of intellectual property rights registered with or granted by intellectual property authorities can be resolved by arbitration between private parties. The development has been praised as removing another obstacle to parties seeking to conduct intellectual property arbitrations in Hong Kong.

EXCHANGE: DEVELOPMENTS ON THE GENDER DIVERSITY FRONT

While the international system of arbitration and dispute resolution is underpinned by black letter law, its success and effectiveness depend greatly on the intangible, in particular human capital. Communities worldwide are realising the importance of inclusivity when attracting capable and diverse talent. Whereas the legislative developments throughout Asia-Pacific discussed above are best characterised as an alignment with existent international practices, the promotion of gender diversity is an equally topical issue all around the world – even in jurisdictions which are normally considered as market leaders on other fronts. To that end, in the Pacific Century, the arbitration communities of the Asia-Pacific should be cognisant of their responsibility to improve diversity along a number of different fronts; while acknowledging that gender inclusivity is an area of the broader diversity challenge in which the region can contribute and shape future best practices.

As such, Asian-Pacific arbitration communities cannot simply look to their counterparts in other jurisdictions for established models of diversity or inclusiveness. Rather, this is an area where the region can both observe evolving practices and engage in the exchange of ideas through initiatives of their own.

A promising trend towards greater inclusivity is the diversity that can be seen at the helm of several major arbitral institutions not only in the region, but also across the world. Jackie van Haersolte-van Hof is director general at the London Court of International Arbitration (LCIA), Annette Magnusson is secretary general at the SCC, Sarah Grimmer is secretary-general at HKIAC, Deborah Hart is executive director at the Arbitrators' and Mediators' Institute of New Zealand, and Meg Kinnear is secretary-general at the International Centre for Settlement of Investment Disputes, just to name a few. Women also rank highly on the governing bodies of various arbitral institutions including Judith Gill QC, the first female president of the LCIA Court and Teresa Cheng SC, former chairperson of HKIAC and the current secretary for justice of Hong Kong.

Conscious of the fact that women remain under-represented in international arbitral tribunals, the international arbitration community has taken on efforts of finding ways to address this. One such initiative is the Equal Representation in Arbitration Pledge (the Pledge), which numerous law firms, arbitral institutions and international organisations have signed, including HKIAC. In this context, HKIAC has shown since signing the Pledge a marked improvement in the number of female arbitrators it has appointed – nearly 17 per cent in 2017, up from 6.7 per cent in 2016. HKIAC is also working to enhance gender diversity on its Panel and List of Arbitrators by increasing the presence of female arbitrators from just under 10 per cent in 2016 to 17 per cent in 2017. Such efforts to increase the visibility of women in the field of international arbitration are expected to continue.

Empowering female leadership also expands the scope of innovation in the Asia-Pacific region by giving women a platform to implement initiatives that target wider communities than just those of arbitral institutions. Dr Ling Yang, deputy secretary-general of HKIAC, for example is behind the Women in Arbitration (WIA) initiative, which was launched on International Women's Day on 8 March 2018.6 WIA aims to promote the success of female practitioners in international arbitration and related practice areas in China. WIA provides a forum for its members to discuss, network and develop the next generation of leading female practitioners. Notably, what prompted the creation of the WIA initiative was the lack of groups dedicated to the interests of female practitioners in the Chinese arbitration community.

Diversity is of course not only important in arbitration communities, but also in the judicial systems that underpin their work. In this context, the arbitration list of Hong Kong's Court of First Instance is overseen by a well-known female jurist in the form of the Hon Madam Justice Mimmie Chan. Recently, in March 2018, Hong Kong's highest judicial body, the Court of Final Appeal, announced the appointment of Baroness Brenda Hale and Chief Justice Beverley McLachlin as non-permanent judges (NPJs).7 The system of NPJs was introduced in 1997 as part of an effort to promote the exchange of ideas and judicial practices between Hong Kong and other common law jurisdictions after the handover. This development is a positive sign that Hong Kong's judiciary is becoming more diverse, while also remaining robust and independent under the 'one country, two systems' framework; and comes soon after the Special Administrate Region marked the 20th anniversary of the handover in 2017.

The appointments of Baroness Hale and Chief Justice McLachlin serve as an inspiring example for the Asia-Pacific to become a regional epicentre for the flow of ideas tackling social issues that transcend borders. Being historical 'firsts' in the United Kingdom and Canada respectively (ie, the first female heads of their native jurisdictions' highest courts) they will now go on to become the first female NPJs in Hong Kong. Moreover, Baroness Hale's jurisprudence has also been well received and referred to by judges in Hong Kong when considering matters concerning issues such as discrimination against same-sex couples. The Hong Kong judiciary's overall openness to the exchange and implementation of progressive ideas with other common law counterparts serves as an important reminder to the arbitration community in the Asia-Pacific. Rather than an accomplished end goal, the progress made to date is better seen as part of a larger, conscious effort towards greater inclusivity that will surely continue to develop into the next decade on multiple spectra.

INNOVATION: DEVELOPMENTS ALONG THE BELT AND ROAD

As China's BRI continues to enhance global supply chains across over 65 economies, analysts predict it will deliver trade revenue totalling US$2.5 trillion by 2025. The Asia-Pacific's arbitral institutions are aware of the opportunities that lay in the sophisticated agreements

that will be negotiated as part of BRI investments across the world. The BRI was covered extensively last year in the 2018 edition of the GAR Asia-Pacific Arbitration Review.[8] That said, this initiative is an ever more dynamic phenomenon that is likely to occupy the minds of practitioners and pages of publications for the coming years, if not decades.

In early 2018, China announced the establishment of international commercial courts to handle BRI disputes.[9] These are also referred to as the so-called One Belt One Road (OBOR) Courts. At the time of writing, this Chinese innovation is very much in a nascent stage and not much is known as to the details of the undertaking. It appears that initially, three OBOR Courts will be established in Beijing, Xian and Shenzhen, which will fall in practice under the supervision of the Supreme People's Court.[10] Each OBOR Court will hear BRI disputes based on the locality in which they arose: with the Xian court hearing Silk Road Economic Belt matters,[11] the Shenzhen court hearing Maritime Silk Road matters[12] and the Beijing court discharging 'functions similar to a "headquarter"'.[13]

While the concept of OBOR Courts presents new competition to existing, established players in the region, institutions are also proactively innovating to cater to BRI disputes. In March 2018, the International Court of Arbitration of the International Chamber of Commerce (ICC) launched a 'Belt and Road Initiative Commission', which will aim to 'drive the development of ICC's existing dispute resolution procedures and infrastructure to support Belt and Road disputes'.[14] In April 2018, HKIAC launched a host of dedicated BRI services, including expertise, outreach and a knowledge database. In particular, HKIAC's knowledge database, which is updated on a regular basis, archives publications and reports relevant to the BRI and provides information on the practical application of the law to assist parties to BRI agreements. The initiative by HKIAC is complemented by a Belt and Road advisory committee: composed of experts from a variety of BRI affiliated industries (eg, finance, construction, insurance) who will ensure HKIAC's services remain relevant to the diverse array of stakeholders who are engaged in BRI-related projects.

CONCLUSION: THERE IS STILL WORK TO BE DONE

As the second decade of the Pacific Century draws to a close, some might argue that there have been setbacks that stood in the way of progress. The Trump administration's original decision to withdraw from the inaugural version of the TPP and the United States' imposition of tariffs on Chinese goods – ostensibly in the name of protecting intellectual property rights – come to mind. Nevertheless, international arbitration in the Asia-Pacific region is on a largely positive trajectory. Several jurisdictions have adopted UNCITRAL-based legislation and collaborated with international bodies to develop frameworks that lay the foundations for effective arbitration and the enforcement of awards. The pro-arbitration jurisdictions of Hong Kong and Singapore have implemented reforms that now allow TPF in international arbitration proceedings. Hong Kong has also clarified its stance on intellectual property arbitrations. Communities in the region are participating in the enlightened international movement towards greater diversity. The BRI will create new opportunities for both established, and perhaps even new arbitral institutions in the region.

With all of this considered, many challenges lie ahead as we ask ourselves what to hope for in the coming decades of the Pacific Century. We still need more States to accede to the New York Convention, especially in Belt and Road economies. We need to further promote the adoption of the UNCITRAL Model Law. We need to start thinking about a broader spectrum of inclusivity, whilst maintaining the progress made so far. We need to remain acutely aware of the innovation emanating from the region and spot the opportunities

that arise therein. We need to think of ways to lessen the conspicuous gaps that exist between the region's sophisticated arbitral jurisdictions and the newcomers. Reassuringly, the developments discussed in this chapter are testament to the fact that the international arbitration community in Asia-Pacific has scope and power to contribute to positive change whether independently or in cooperation with states and law makers.

Endnotes

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