The Asia Pacific Arbitration Review

2007

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Japan

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Nishimura & Asahi

Summary

To date, Japan has not frequently been selected as a place for international arbitration. The Japan Commercial Arbitration Association (the JCAA), a representative institution for international commercial arbitration in Japan, hosted only ten new cases for the business year of 2005 (from April 2005 to March 2006), and together with other continuing cases from previous business years, hosted only 36 cases in the same business year. Of claimants, 95.2 per cent, and 78.7 per cent of respondents, came from Japan, Korea and China, which demonstrates a remarkably uneven geographical distribution of users of international arbitration at the JCAA. International arbitration in Japan has not been very popular as a method of dispute resolution. Considering the size of the national economy and transnational transactions, it is rather surprising that the number of international arbitration cases in Japan has been relatively small.

The choice of the place of arbitration has implications other than just the ease with which the parties will be able to access the arbitration hearings. The lex arbitri, ie, the law of the place or seat of the arbitration, is applicable to the whole process of arbitration. Arbitral awards might be set aside without a legitimate reason by a court in the place of arbitration if the host nation has a stake in the result and the judiciary is not independent from local politics. Regardless of the importance of the place of arbitration, it appears that business lawyers engaging in transactional matters often fail to pay sufficient attention to its implications when they agree to arbitration clauses.

This chapter provides an overview of the characteristics of Japanese arbitration law and practices, focusing on recent legal developments and trends, in order to discuss the advantages of Japan as a place for international arbitration, which may not have been fully appreciated by both Japanese and non-Japanese parties.

MODERN ARBITRATION LAW

It is fundamentally important that the place of arbitration has modern arbitration law. Until recently, the law regarding arbitration in Japan was not refined in many respects. It provided that, unless the parties agreed otherwise, there were to be only two arbitrators and in cases where the arbitrators failed to agree on the award the arbitration agreement would become void. It also provided that, in general, parties had to resort to full litigation if they wanted to obtain a court decision regarding judicial assistance or intervention concerning arbitration proceedings in Japan, such as appointment and challenge of arbitrators. Court decisions regarding these matters were rendered after full judgment (hanketsu) proceedings, which provided the unsatisfied party with means to resort to full appeal to a higher court and even to the Supreme Court, making the process very time-consuming. These anachronistic rules of procedure made it possible for parties to unreasonably delay arbitration proceedings.

In 2003, Japan adopted new arbitration legislation called the Arbitration Law, which followed the UNCITRAL Model Law on International Commercial Arbitration[1] and which came into effect in 2004. The Arbitration Law applies to both domestic and international arbitration, and provides the necessary legal infrastructure for Japan's arbitration system to be globally accepted by users of international arbitration. Under the Arbitration Law, unless both parties have otherwise agreed, each party shall appoint one arbitrator, and the two arbitrators shall appoint a third arbitrator. Court decisions regarding assistance and intervention in arbitration proceedings shall be made in ruling (kettei) proceedings, which are less formalised and faster than judgment (hanketsu) proceedings. For a ruling rendered by a court, the parties

can resort to an appeal only once. This change has brought about speedier resolutions of disputes raised in the process of arbitration.

The Arbitration Law provides several deviations from the UNCITRAL Model Law in order to incorporate the most recent global trends in international arbitration. For example, the Arbitration Law explicitly provides that agreements made by way of exchange of "data messages", such as e-mails, are valid. In July 2006, UNCITRAL adopted revisions to the UNCITRAL Model Law to include a similar provision to address the reality of contemporary commercial trades. The Arbitration Law predates such revisions, but it had already incorporated them in anticipation of the revisions to the UNCITRAL Model Law.

Another example is with regard to the choice of law by the arbitral tribunal. While article 28(2) of the UNCITRAL Model Law provides that "failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable", article 36(2) of the Arbitration Law provides that "failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected". The Arbitration Law follows the most recent trends in international arbitration, directing arbitral tribunals to apply the appropriate law of a particular nation without applying conflict of laws rules of any particular nation.

An additional deviation from the UNCITRAL Model Law addresses criticisms of the former practice of arbitration in Japan. Formerly, it was not rare for Japanese arbitrators to recommend that parties enter into a settlement during the course of arbitration, such practice being a reflection of Japanese court practices. However, the practice was often criticised, especially from foreign parties with common law backgrounds who generally consider that once the arbitrators act as mediators, they should not resume their roles as arbitrators when the settlement fails. To eliminate such criticism, the Arbitration Law provides that the arbitral tribunal may attempt to settle the dispute only if the parties consent to do so. The Arbitration Law provides that such consent shall be in writing unless both parties agree otherwise.

JAPANESE COURTS' ATTITUDES TO ARBITRATION

The Arbitration Law provides court assistance for, and intervention in, arbitration proceedings in Japan. From March 2004 to July 2006, one case each for the appointment of an arbitrator, service of an award and service of a document was filed in Japanese courts relating to arbitration proceedings. Because the number of large arbitration cases in Japan is relatively small, the number of requests for court assistance or intervention is also small. However, as the following sections demonstrate, Japanese courts have so far shown reasonably pro-arbitration tendencies.

ENFORCEMENT OF ARBITRAL AWARDS

Under Japanese law, the party who has obtained an arbitral award and wishes to enforce it in Japan must file a motion with a competent Japanese court to issue a decision to enforce the arbitral award. To obtain such a decision, the arbitral award and the arbitral process to obtain it must satisfy certain requirements.

The Arbitration Law adopts requirements for the enforcement of arbitral awards substantially the same as those in the UNCITRAL Model Law. As Japan is a signatory state to the New York Convention regarding the enforcement of arbitral awards, the liberal

requirements of the New York Convention regarding the enforcement of arbitral awards have been applied to enforcement of arbitral awards rendered in signatory states, but the liberal requirements for enforcement under the new Arbitration Law now apply regardless of the nation in which the arbitral award is rendered. From March 2004 to July 2006, 14 enforcement rulings were made and so far we are aware of no ruling that has rejected the enforcement of a foreign arbitral award.

As explained above, since the enforcement of the new Arbitration Law, court decisions regarding arbitration proceedings have been rendered in ruling (kettei) proceedings, which has expedited such proceedings. Generally, courts are expected to make decisions regarding the enforcement of foreign awards in approximately one to three months.

Of course, not all arbitral awards are enforceable in Japan. For example, Japanese courts cannot enforce arbitral awards the recognition of which would be contrary to the public policy of Japan. Because punitive damages rendered by US courts have been interpreted as being contrary to the public policy of Japan by the Supreme Court of Japan, punitive damages awarded by an arbitral tribunal would probably be interpreted in the same way and would not be enforced in Japan.[2]

ASSISTANCE IN TAKING EVIDENCE FOR ARBITRATION PROCEEDINGS

Under the Arbitration Law, an arbitral tribunal or a party to arbitration (with permission from the arbitral tribunal) may request that a court examine a third party witness, unless the parties have otherwise agreed. The examination of the witnesses in courts must be conducted in Japanese. Thus, if the witness does not speak Japanese, the court appoints an interpreter. From March 2004 to July 2006, only one request for a court's assistance in a witness examination was filed in a Japanese court.

Japanese courts can also issue a document production order to a party to the arbitration or a third party unless the documents fall within certain exceptions provided in the Code of Civil Procedure, such as privileged documents and documents prepared for internal use only. Since the arbitral tribunal may order a party to the arbitration to produce documents, the tribunal would not normally find it necessary to request the court to issue a document production order to a party to the arbitration.

It should be noted that Japanese courts provide assistance in taking evidence only for arbitration proceedings in Japan, and a party to arbitration or an arbitral tribunal cannot directly request the assistance of Japanese courts if the place of arbitration is outside of Japan. However, such party or arbitral tribunal may request that a court of the country in which the arbitration is conducted make arrangements for judicial assistance from a Japanese court and can in this way indirectly obtain assistance from a Japanese court.

INTERPRETATION OF THE PRINCIPLE OF SEPARABILITY BY JAPANESE COURTS

Modern arbitration law recognises the principle of separability, ie, an arbitration agreement is not necessarily invalid or cancelled even if the contract providing for the arbitration agreement is invalid or cancelled. Even before the enactment of the new Arbitration Law, the Supreme Court of Japan recognised this principle.[3] The new Arbitration Law explicitly incorporates this principle.

Recently, a Japanese court applied the principle incorporated in the new Arbitration Law to an actual case. The Tokyo High Court ruled that an arbitration agreement shall be valid even if the main contract was terminated by the plaintiff's notice to the defendant.[4]

VALIDITY OF AGREEMENTS WHICH REJECT THE FINALITY OF ARBITRAL AWARDS

An interesting issue regarding Japanese courts' attitudes to arbitration was raised in a recent decision by the Tokyo District Court regarding the validity of agreements which reject the finality of arbitral awards.[5] The issue raised in the decision is similar to that discussed in a US court decision that held that the decision of an arbitral tribunal could be reviewed by a court under a standard of substantial evidence and error of law but not a more deferential standard such as "completely irrational" or "manifest disregard of law".[6]

The Tokyo District Court stated, obiter, that an agreement permitting lawsuits to be filed with regard to disputes that have already been decided in arbitration would be invalid. The court reasoned that it would be unacceptable to admit the validity of such an agreement because it would create a situation where inconsistent decisions made by an arbitral tribunal and a court could concurrently exist. Because both the arbitral award and the court judgment would have a res judicata effect, allowing inconsistent decisions to exist concurrently would undermine the principle of res judicata and threaten the stability of the legal order.

METHOD OF CONDUCTING ARBITRATION IN JAPAN CONSISTENT WITH INTERNATIONAL STANDARD

Japan has adopted the UNCITRAL Model Law and has sought to achieve a global standard in conducting arbitration. It has become less frequent for international arbitration proceedings in Japan to be conducted in a way like court proceedings in Japan.

PARTICIPATION OF FOREIGN COUNSEL AND ARBITRATORS

Previously, foreign attorneys were prohibited from representing parties in international arbitration proceedings by the Japanese Lawyers Act. However, since 1996, foreign attorneys have been permitted to represent parties in international arbitration proceedings if they are requested to undertake or have undertaken the case in a foreign country where they are qualified to practice laws. Furthermore, foreign attorneys registered in Japan (gaikoku-hô-jimu-bengoshi) are permitted to represent parties regardless of where they are requested to undertake or have undertaken the case. It is not rare for many of the players, including counsel and arbitrators, of international arbitration proceedings in Japan to be non-Japanese, with the language of the proceedings having been agreed to be, or ordered by an arbitral tribunal to be, English.

There are no explicit provisions in Japanese statutes regulating the practice of law in Japan by non-lawyers that allow foreign arbitrators to sit in an arbitral tribunal and to conduct arbitration proceedings in Japan for fees. Thus, some have argued that it is unclear whether foreign arbitrators could conduct arbitration proceedings in Japan. Most Japanese jurists have believed that participation by foreign arbitrators in international arbitration proceedings in Japan was not legally prohibited, and in fact, there have been a number of cases where arbitrators not qualified to practise law (such as law professors, architects, and foreign lawyers) acted as arbitrators, but some foreign arbitrators have shown hesitation in assuming such responsibility due to the apparent lack of explicit provisions in the Japanese regulations on the activities of non-lawyers as arbitrators. However, in the process of drafting the new Arbitration Law, a governmental committee stated in discussions at the Diet that no qualifications were necessary for arbitrators, and such statements can be interpreted to mean that foreign lawyers and non-lawyers can sit as arbitrators in international arbitration proceedings conducted in Japan. It would be unreasonable to require foreigners to be

admitted to practise law in Japan in order to sit as arbitrators in Japan, when Japanese non-lawyers such as law professors are allowed to sit as arbitrators. The Japan Federation of Bar Associations confirmed such interpretation when one of the authors of this chapter made an inquiry in December 2006. Given such a view, foreign arbitrators clearly can participate in proceedings without concern. Furthermore, a de facto barrier for foreign arbitrators provided in the JCAA's rules has been eliminated. The JCAA formerly provided in its rules that a party who appointed a foreign resident as an arbitrator was responsible for additional fees incurred from such appointment that would not be incurred if a Japanese resident was appointed, but such rule has now been abolished.

METHOD OF CONDUCTING PROCEEDINGS

It has become fairly common for English to be used for the arbitration proceedings in Japan in accordance with the parties' agreement or the tribunal's order. The method of conducting international arbitration proceedings has now become compatible to the international standard in modern arbitration rather than the method of proceedings adopted in Japanese courts. For example, in the past Japanese arbitrators sometimes relied on the approach adopted in the Code of Civil Procedure in issuing document production orders. Now, it has become more common for even Japanese arbitrators to defer to the Rules of Evidence of the International Bar Association (the IBA).

LOGISTICAL ASPECTS

It is also important that the place of arbitration be equipped with adequate infrastructure to accommodate the proceedings. Tokyo was known to be a very expensive place to stay, but due to a long recession, the prices of lodging, conference rooms, etc, in Tokyo are competitive as compared with major arbitration centres, such as Paris and Hong Kong. Capable English-Japanese interpreters are easy to find. Even court reporters who can prepare real time transcripts in English, which had been impossible to find in Japan until recently, have become available. Tokyo has direct flights to and from many major cities in the world.

NEUTRALITY AND INDEPENDENCE OF THE JUDICIARY

Arbitration is preferred in cases where a particular nation has a stake in the outcome of the case and the parties would like to avoid the potentially biased disposition of national courts. Furthermore, because a tribunal, unlike a court, does not have its authority supported by a sovereign power, it is imperative that tribunals, parties to arbitration and awards are effectively supported by impartial national courts.

JAPANESE JUDGES ARE KNOWN TO BE INDEPENDENT FROM POLITICAL INFLUENCE AND FREE FROM CORRUPTION.

The Japanese judiciary adopts the 'career system', where judges are generally recruited from new graduates of the Legal Training and Research Institute of the Supreme Court of Japan based on their level of achievement, and are trained as judges and promoted within the court system according to the competency of each judge. Judges recruited and trained in such a manner are generally considered to be highly competent and independent of political influence.

It is also an important consideration that Japan's political climate and society are stable. In conducting arbitration in Japan, a country with an independent judiciary and a stable political

and social environment, there are unlikely to be surprising, unreasonable interventions in arbitral proceedings or arbitral awards by Japanese courts.

* * *

As an officer of the IBA's Arbitration Committee, one of the authors of this chapter last year organised an international symposium on international arbitration in Tokyo discussing whether Japan could become an arbitration centre in Asia. Foreign panellists knowledgeable and experienced in international arbitration proceedings from Switzerland, Korea and Canada expressed their views that Japan has many advantages favourable to it becoming such a popular place for arbitration in Asia, but as stated in the beginning of this chapter, this has yet to occur.

As demonstrated in this chapter, modern arbitration in Japan under the new Arbitration Law has many strong points and is worthy of consideration when parties negotiate dispute resolution clauses.

Notes

1. An English translation of Japan's Arbitration Law is available at www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html.
2. Northcon I v Mansei Kogyo KK, 51 Minshu 2573 (Supreme Court, 11 July 1997).
3. Kokusan Kinzoku Kogyo KK v Guardlife Corp, 29 Minshu 1061 (15 July 1975).
4. Taiyo Inki Seizo KK v Tamura Kaken KK, LEX/DB 28110611 (28 February 2006).
5. KK Descente v Adidas-Salomon AG, 1847 Hanrei Jiho 123 (Tokyo District Court, 26 January 2004).
6. Lapine Technology Corp v Kyocera Corp, 130 F3d 884 (9th Circuit 1997).

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Indonesia

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Summary

ENDNOTES

Indonesia does not have, for the most part, a litigious culture. The country's underlying philosophy, Pancasila, calls for deliberation to reach a consensus and discourages contention in all things, where possible. A mix of diverse cultures, most of her people are invariably courteous and eschew confrontation of any kind. Commercial litigation is relatively rare, particularly when compared with such jurisdictions as Singapore, India and the United States, for example.

But aside from the cultural rationale, the uncertainty and unpredictability of court judgments and the inordinate amount of time it can take to reach a final and binding decision through the judicial system also act as a disincentive to litigation. As business transactions become more and more sophisticated and complex, we see an increase in contractual documentation calling for arbitration, although most of these require an attempt at amicable resolution as a prerequisite. A recent Supreme Court regulation[2] now requires an attempt at mediation before a case may be heard in the courts, and arbitrators are required to try to encourage amicable settlement before commencing hearings.

LEGAL BACKGROUND

Indonesia's legal system is based upon Dutch civil law, which was adopted by the new Indonesian nation at the time of its independence in 1945 to continue to govern unless and until superseded by new laws of the Republic. A number of new laws have since been enacted to fit in with ever-changing global economic trends and needs. Many of these new laws include principles from common law jurisdictions such as the United States and Australia, but the basis of legal practice remains civil law.

Arbitration has been recognised, and applied, as a formal means of dispute resolution in Indonesia since the mid-nineteenth century. However, until late 1999, there was no specific law governing arbitration, and for over 150 years all arbitrations were regulated under a few dozen provisions of the Dutch Code of Civil Procedure, the Reglement op de Rechtsvordering (generally known as the RV),[3] while the substantive basis for the ability of the parties to agree to arbitrate was to be found in the general freedom of contract provisions of the Indonesian Civil Code,[4] also taken from the Dutch.

NEW YORK CONVENTION/ENFORCEMENT OF FOREIGN AWARDS

Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1981, but it was not until 1990 that implementing regulations were enacted to serve as guidelines for the courts in enforcing foreign-rendered awards. Article 463 of the RV provides that, except for general average awards, judgments of foreign courts cannot be enforced in Indonesia, and it had previously been assumed that the same applied to foreign-rendered arbitration awards. Thus the courts did not recognise their jurisdiction and were reluctant to enforce foreign awards, until the Supreme Court issued its 1990 regulation, which has been, for the most part, reflected in the new Arbitration Law (Law No. 30 of 1999, discussed below). But the new Arbitration Law also served to expedite enforcement of foreign awards in that it designated the District Court (court of first instance) of Central Jakarta as the court with jurisdiction to grant exequatur, the order of enforcement, over foreign-rendered awards, whereas the 1990 regulation lodged that jurisdiction with the Supreme Court, resulting in considerable delay due to that court's heavy caseload. Today, the Central Jakarta District Court generally will issue orders of

enforcement in a matter of weeks. Only if the Indonesian government is a party to the arbitration must the award still be enforced by the Supreme Court.

ARBITRATION LAW (LAW NO. 30 OF 1999)

After years in the drafting, on 12 August 1999 Indonesia promulgated its new comprehensive Law Concerning Arbitration and Alternative Dispute Resolution, Law No. 30 of 1999 (the Arbitration Law), superseding those articles of the RV covering arbitration. The Arbitration Law makes it very clear that where the parties have agreed to arbitrate their disputes no court has, nor may take, jurisdiction over such disputes, and court intervention is only permitted for enforcement of an eventual award or to appoint or challenge an arbitrator where, and only where, the parties have not agreed upon a different appointing authority. There is no appeal from arbitral awards, including interim awards on jurisdiction.

The Arbitration Law, as well as the 1990 implementing regulation make it clear that all arbitrations with their seat in Indonesia are considered 'domestic', and only those held outside of this archipelago are characterised as 'international' arbitrations, regardless of the nationality of the parties, location of the subject matter of the dispute, governing law, etc. Therefore, there need be only the one Arbitration Law, which applies to all arbitrations held in Indonesia, and to enforcement in Indonesia of any international awards as well.

Parties are free to choose any administrating institution, or any ad hoc rules they may wish. If no other appointing authority is designated, this role will be played by the Chief Judge of the District Court having jurisdiction over the Respondent. The Arbitration Law also provides basic procedural rules which will apply if the parties have not made any designation as to administering institution or governing rules.

The Arbitration Law does not follow the UNCITRAL Model Law. There are similarities in spirit but a number of substantial differences in language, which include - aside from the fact that all domestically held arbitrations are domestic, as mentioned above - among others:

- the Arbitration Law does not specifically require a court to refer to arbitration a dispute brought before it where there is an agreement to arbitrate. It only states that the courts do not have jurisdiction to hear such case;
- nor does the Law specify that the arbitrators are competent to rule on their own jurisdiction (Kompetenz-Kompetenz), although this should be implicit;
- the Arbitration Law sets out certain requirements to act as arbitrator, although none of these relate to nationality or residence but primarily to age and experience, also barring sitting judges or court personnel from acting as arbitrator;
- language: unless the parties otherwise agree, the language will be Indonesian, regardless of the language of the underlying documents;
- hearings: the Arbitration Law states that the case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas the Model Law requires hearings unless the parties agree otherwise;
- incorporation by reference is not recognised in Indonesia unless it can be shown that the party contesting actually read and agreed to the arbitration clause in the document sought to be incorporated;
- awards must be reasoned;
-

the parties may request only typographical errors and similar to be corrected, and have only fourteen days to so request;

- the grounds for annulment of Indonesian awards are far more limited than those set out in the Model Law, and include primarily fraud, forgery or concealed material documents.

Several of these points will be explored later in this chapter.

AGREEMENT TO ARBITRATE

As in virtually any jurisdiction, the availability of the arbitral process for resolution of disputes is based upon consent of the parties. Courts, as instruments of the government, are vested with inherent jurisdiction to resolve disputes arising in the territory over which that government has sovereignty. But in commercial matters, because Indonesia's Civil Code recognises that a commercial contract has the force of law between the parties who have formed and agreed to such contract,[5] the parties have the freedom to agree that disputes under their contract shall be resolved through arbitration, thereby opting out of the court's jurisdiction for such purpose. But only where the parties both, or all, agree will an arbitral tribunal have jurisdiction to resolve the dispute.

Articles 3 and 11 of the Arbitration Law make it clear that if the parties have agreed to arbitrate their disputes the courts do not have and may not take jurisdiction over such disputes. Article 11 provides:

(1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.

(2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.

Although the Supreme Court has held that the court must, on its own initiative, dismiss any case in which it does not have jurisdiction,[6] in practice, courts will almost invariably address any application made to it, and it is up to the party claiming its lack of jurisdiction to bring the matter up as an absolute exception to jurisdiction. Often the issue will arise when a party brings an action in the court on a dispute which should be subject only to arbitration, and the other party must invoke articles 3 and 11 of the Arbitration Law in contesting the court's competence to hear any dispute under the subject agreement. Often courts will ignore both the provisions of the Arbitration Law and the Supreme Court's holding; however this does appear to be changing. In one recent case, a party respondent to an arbitration applied to the court to stay the arbitration on the ground that it was precipitously brought. The court refused to hear such an application where the other party contested its jurisdiction on the basis of an agreement to arbitrate and an arbitration already commenced.[7]

WRITING

Although the general requirements for a valid contract under Indonesian law do not necessarily require that a contract or contractual provision be rendered in writing, the Arbitration Law specifically requires that the agreement to arbitrate be "in writing" and signed by all parties to the dispute.[8] Electronic and facsimile communications are recognised as "writings", but require a record of receipt of such correspondence.[9]

As mentioned above, incorporation of an arbitration clause in a third-party agreement by reference in the underlying agreement between the parties to the dispute will not normally be sufficient to constitute a valid agreement to arbitrate. As a general rule, it would have to be shown that the contesting party had read the arbitration clause and consented in writing to its applicability. This position is based upon the writing requirement of article 4 of the Arbitration Law coupled with the freedom of contract provisions (article 1320 et seq) of the Indonesian Civil Code.

Article 1(3) of the Arbitration Law defines an agreement to arbitrate as follows:

Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises.

An arbitration agreement, or clause in the underlying agreement, entered into prior to the time a dispute arises, need only be in writing and meet the general requirements of a contract as contained in the Civil Code[10] in order to constitute a valid agreement to arbitrate, there being no specific requirements set out in the Arbitration Law itself. However, an agreement to arbitrate entered into subsequent to the execution of the underlying commercial agreement, ie, once a dispute has already arisen, must meet the further conditions set out in article 9 of the Arbitration Law, as follows:

(3) A written agreement (entered into after a dispute has arisen) must contain:
a. the subject matter of the dispute;
b. the full names and addresses of residence of the parties;
c. the full name and place of residence of the arbitrator or arbitrators;
d. the place the arbitrator or arbitration panel will make their decision;
e. the full name of the secretary;
f. the period in which the dispute shall be resolved;
g. a statement of willingness by the arbitrator(s); and
h. a statement of willingness of the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.
(4) a written agreement not containing the matters specified in paragraph (3) will be null and void.

Whether a clause in an underlying contract or a subsequent writing, the agreement to arbitrate must be unequivocal. An arbitration clause which gives one or more parties the option to choose between arbitration and litigation will not operate to divest the courts of their jurisdiction if one party still wishes to litigate such dispute. Care must be taken in the drafting to ensure the arbitration clause will properly serve its purpose.

SEVERABILITY

Although 'severability' or 'separability' is not mentioned in so many words, the Arbitration Law does provide that once the parties have agreed that their disputes shall be resolved by arbitration, even if the underlying contract is subsequently terminated, annulled or declared by the court to be null and void, the agreement to arbitrate still stands. Article 10 of the Arbitration Law states:

An arbitration agreement shall not become null or void under any of the following circumstances:

a. the death of one of the parties;
b. the bankruptcy of one of the parties;
c. novation;
d. the insolvency of one of the parties;
e. inheritance;
f. effectivity of requirements for the cancellation of the main contract;
g. if the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who made the agreement to arbitrate; or
h. the expiration or voidance of the main contract.

However, if an agreement were to be determined to have been invalid ab initio, under a relevant provision of law, to the extent that the parties had not even agreed to arbitrate, it is questionable whether the arbitration clause would still be held to be valid.

LIMITATIONS

SCOPE

Following the prior legal regime as set out in the RV, the Arbitration Law restricts the scope of arbitration to commercial disputes and only to the extent that the rights concerned fall within the full legal authority of the parties to determine.[11] Thus disputes for which no amicable settlement would be permissible would not be arbitrable.[12] This means that where state intervention is required, such as criminal matters or cases where a party seeks declaration of divorce, adoption, bankruptcy, ownership of shares in Indonesian companies, real property or seagoing vessels, or ownership of intellectual property rights, only the courts will have jurisdiction. This is reinforced in the case of bankruptcy and intellectual property rights where new Commercial Courts have been set up with exclusive jurisdiction over such matters.

TIME LIMITATIONS

As required under the previous legislative regime, the Arbitration Law imposes a time limit for completion of hearings of 180 days from the time of constitution of the full panel. Furthermore, after conclusion of hearings, the arbitrators have only thirty days in which to render the award. These time limits may be waived and extended, or shortened, by written agreement of the parties, either in their agreement to arbitrate or at any subsequent time. But such a waiver should indicate an alternative time limit or the waiver may be deemed ineffective should the matter come before a court.

A domestic arbitration award must be registered with the court within 30 days of rendering in order to be enforceable. Foreign awards also must be registered to be enforced here, but there is no time limit on such registration.

ARBITRATORS

As mentioned above, one of the somewhat unusual provisions of the Arbitration Law is that it sets minimum, mandatory, requirements for who may act as arbitrator. Article 12 provides as follows:

(1) The parties who may be appointed or designated as arbitrators must meet the following requirements:

a. being authorised or competent to perform legal actions;

b. being at least 35 years of age;
c. having no family relationship, by blood or marriage to the third degree, with any of the disputing parties;
d. having no financial or other interest in the arbitration award; and
e. having at least 15 years experience and active mastery in the field.

(2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.

Note that there has not as yet been any elucidation as to the meaning of "field" in subsection (1), nor has this as yet been tested in the courts, as far as the writer is aware.

As for number of arbitrators, the new Arbitration Law allows the parties to designate the number of arbitrators in their arbitration agreement, without restriction, but requires an odd number in cases in which the parties have not previously agreed otherwise.

APPOINTMENT

Appointment of arbitrators is covered in considerable detail in the Arbitration Law, but in summary such provisions follow accepted norms, allowing the parties each to choose one arbitrator and the two so chosen to appoint the chair. The Chief Judge of the District Court with jurisdiction over the respondent is the appointing authority unless the parties have designated another or have chosen rules which provide otherwise.

Each arbitrator must notify the parties in writing of the acceptance or rejection of his or her appointment. The appointment by the parties in writing and the acceptance in writing by the arbitrator forms a civil contract between them. The arbitrators are thus bound to render their award fairly, justly, and in accordance with the prevailing stipulations and the parties are bound to accept the award as final and binding. Once the mandate is accepted, the arbitrator may not withdraw without consent of the parties or, if the parties do not consent, the Chief Judge of the District Court may release the arbitrator from his or her duties.[13]

INDEPENDENCE AND RECUSAL

Article 18(1) of the Arbitration Law provides that: A prospective arbitrator asked by one of the parties to sit on the arbitration panel shall be obliged to advise the parties of any matter which could influence his independence or give rise to bias in the rendering of the award.

And article 22 allows the parties to challenge, or request recusal of, an arbitrator if:

- there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his or her duties independently or will be biased in rendering an award;[14] or
- if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.[15]
- If it is a sole arbitrator that is challenged, the challenge is made first directly to the arbitrator. Where the dispute is to be heard by a panel of arbitrators, the challenge is presented to the whole panel. If the arbitrator to be challenged was appointed by the court, the challenge is submitted to the court.[16] Any challenge must be made within 14 days of the appointment or, if the basis for the challenge becomes known to the challenging party after that date, the challenge must be lodged within 14 days after such information becomes known.[17] The ultimate decision maker is the Chief

Justice of the District Court except where the parties have designated specific rules for the conduct of the arbitration, in which case the authority designated in such rules, if any, will prevail and supersede the provisions of the law so designating the court.

RECORDS AND REPORTING

Indonesia being a civil law jurisdiction, there is no necessity even for courts, let alone arbitral tribunals, to follow precedent, and each case is decided anew based upon the presiding court's interpretation of the law and determination of the facts at the time. The body of case law has little legal effect and very few court cases are published. Of course, arbitral awards are not published and even when registered in the court for enforcement purposes do not become public record, beyond only the registration data. International awards that need to be enforced are registered in a single court, the District Court of Central Jakarta (Pengadilan Negeri Jakarta Pusat) and thus some data on these can be obtained from that court's registry. However, there is no central registry for enforcement of domestic awards, as orders for enforcement and for execution are within the jurisdiction of the District Court that has jurisdiction over the party against which the order is sought. As there are almost 300 judicial districts in Indonesia, five within the city limits of Jakarta alone, there is no compilation of any kind of meaningful data on domestic arbitrations or awards. Nor would prior awards, or even court decisions, have any precedential value.

PROCEDURE

RULES

As mentioned above, the Arbitration Law allows parties mutually to designate in their agreement to arbitrate the rules which shall govern the procedure, provided such rules do not conflict with mandatory provisions of the Arbitration Law. If no rules are designated, the procedural provisions of the Arbitration Law itself must be followed.[18] The Arbitration Law also recognises the parties' choice of any arbitral institution to administer the arbitration and provides that if such an institution is designated, the rules of such institution shall govern the procedure.[19] Thus where parties have simply agreed to arbitrate in Indonesia, without designating either an administering institution or rules to govern, the tribunal will be required to follow the procedural rules set out in chapter IV (articles 27 to 51) of the Arbitration Law.

HEARINGS

Article 36 of the Arbitration Law calls for the dispute to be heard and decided on the basis of written documents, but oral hearings may be conducted with the approval of the parties or if deemed necessary by the arbitrators. As a practical matter, almost all arbitral proceedings do involve some hearings, usually with witness testimony as well as written submissions and argument.

There are minimum requirements for submissions, which follow normal standards. Any counterclaim or claim of set-off must be submitted together with the statement of defence, although the arbitrators may permit the same to be filed at a later date, but not later than the first hearing.

Article 51 of the Arbitration Law calls for minutes of the hearings, and of examination of witnesses, to be drawn up by a secretary and should cover "all activities in the examination and arbitration hearings". Unfortunately BANI, the national commercial arbitration body,

interprets this requirement to be for the benefit of the tribunal only and has denied copies of transcripts to the parties.

EVIDENCE

Indonesia being a civil law jurisdiction, the rules of evidence and discovery procedures are far less developed than those of common law jurisdictions. The Arbitration Law provides only that the parties are afforded an opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support such positions.[20] The Arbitration Law refers to the old Dutch-based code of civil procedure for examination of witnesses and other evidentiary matters. Evidence is defined as comprising written evidence, testimony of witnesses, inference, acknowledgements and oath. Generally it is incumbent upon a party to adduce the evidence it needs to prove its case, and arbitrators do not have the power to order the appearance of witnesses or discovery of documents unless the parties have specifically afforded it such jurisdiction.

Authentic written evidence is distinguished from non-notarial written evidence. Authentic written evidence is evidence made before a notary public[21] and should be considered as perfect, or undeniable, evidence in respect of matters contained therein.[22]

The Arbitration Law allows witnesses of fact or expert witnesses to be called, either at the request of a party or as ordered by the tribunal.[23] Witnesses are to testify under oath. Note that it is recognised in all aspects of the law in Indonesia that the testimony of a single witness shall be not be trusted, unless accompanied by that of another witness or by other supporting evidence. Family, relatives, those having relation with a disputant through marriage and divorced husbands or wives are generally not qualified or permitted to act as witnesses, except in certain exceptional cases.[24] Nor are employees, principals or other personnel of a disputant company considered as witnesses, but are identified as being a part of the party itself.

As noted above, for the most part, both arbitral references and court cases are based upon documents. But there are no formal discovery procedures of the type known in common law jurisdictions. Courts do have power to order submission of documents or appearance of witnesses, but as a practical matter this is seldom effective, because there are no real sanctions, at least not in commercial cases. Arbitrators also would have authority so to order under their general powers over the conduct of the hearings, but again they may not impose sanctions for failure to comply. It is established practice that if one party claims that there are documents in the possession of the other party which are relevant, but the other party denies possession of or refuses to produce these, the arbitrators are free to draw their own conclusion on the matter and rule accordingly.

In addition to the right of the parties to call expert witnesses, the arbitral tribunal may call expert witnesses of its own. Article 50 of the Arbitration Law, provides that:

(1) The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.
(2) The parties shall be required to provide all details and information that may be deemed necessary by such expert witnesses.
(3) The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.

(4) In the event that any matters opined upon by any such expert witness is insufficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in a hearing before the arbitrator(s) and the parties, or their legal representatives.

Of course, if the parties have chosen other specific rules to govern, such rules will prevail over the above-mentioned provisions.

INTERIM MEASURES OF PROTECTION

The Arbitration Law allows the arbitrators to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and sale of perishable goods.[25] No such power could be exercised by arbitrators under the prior regime. Court intervention would, however, probably need to be sought in the event that a party were to fail to comply with such an order or award of the tribunal. Only a court may order execution of an attachment, thus the requesting party could make an application to a court to have the order of the tribunal enforced by a court bailiff if not voluntarily complied with. But since, as a general rule, only final and binding awards and court judgments will be enforced by the courts, and since there are no sanctions provided in the Arbitration Law for failure to comply with such interlocutory arbitral awards, article 32 of the Arbitration Law may prove difficult to implement in practice. But it has not as yet been tested.

DEFAULT

If the claimant does not appear at the initial hearing without good reason, the statement of claim is declared null and void and the mandate of the arbitrators terminated.[26] If the respondent, having been duly summoned to a hearing, does not appear and provides no valid reason, the tribunal is required to call a second hearing. Only if the respondent, again without reason, fails to appear at the second hearing, may the tribunal issue a default award.[27]

REPRESENTATION

Unlike in the courts, where only Indonesian-licensed counsel may act, there is no restriction as to who may represent a party in an arbitration. However, if it is anyone other than the party itself, such representative must present a properly executed and, if executed outside of Indonesia, legalised, power of attorney.[28] Hearings are closed to the public,[29] so anyone in attendance must be authorised to be there, either due to their role or on approval of the parties and tribunal.

In harmony with the national philosophy, Pancasila, the arbitration tribunal is required first to attempt to encourage the parties to reach an amicable settlement before commencing hearings.[30] If such a settlement can be reached, the same is to be drawn up in writing by the tribunal, which writing becomes a consent award binding upon the parties and enforceable in the same manner as would be a final and biding award of the tribunal. Attempt to settle has for a long time been a prerequisite to commencing a suit in the court, and today it is codified in the Supreme Court's regulation on court-annexed mediation.[31]

APPLICABLE LAW

Consistent with the general freedom of contract provisions of the Indonesian Civil Code,[32] the Arbitration Law allows the parties to designate the law to be applied to the resolution of disputes which may arise, or which have arisen, between or among them.[33] Article 56(1) of the Arbitration Law also contemplates decisions based upon "justice and fairness", but the aforesaid freedom of contract provisions of the Civil Code would seem to restrict this

practice to cases where the parties have so agreed or where the governing law is completely silent on the relevant question.

Indonesian substantive law must, of course, apply to certain transactions over which the state has control, such as those relating to transfers of or security interests in land, seagoing vessels and shares in private Indonesian companies. There are also certain contracts relating to infrastructure and resource projects which are required to be governed by Indonesian law. Otherwise parties are free mutually to designate the substantive law that will govern the interpretation and performance of their contract. But where parties have not so provided, it will be up to the tribunal to determine which law to apply, normally based upon submissions of the parties. Such determination should be made based upon the normal criteria: points of connection, including the nationalities of the parties; the place of the performance of the contract; any references to provisions of law in the contract; flag of a vessel in a maritime case, and similar. As a general rule, Indonesian courts will apply Indonesian law where no other has been designated and, unless there is a strong indication that some other law should govern, arbitrators also are more likely to apply Indonesian law where there is a significant Indonesian connection.

AWARD

After the close of hearings, the tribunal is allowed only thirty days to render its award.[34] Like that for hearings, this time limit may be extended on agreement of the parties, but an alternative limitation should be designated or the extension may be deemed ineffective. Once the award has been issued, the parties are afforded fourteen days in which to submit a request to the tribunal to "correct any administrative errors and/or to make additions or deletions to the award if a matter claimed has not been dealt with in such award".[35]

The Arbitration Law sets out minimum criteria for the award. Article 54 provides as follows:

(1) An arbitration award must contain:
a. a heading to the award containing the words 'Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa' (for the sake of Justice based on belief in the Almighty God);
b. the full name and addresses of the disputing parties;
c. a brief description of the matter in dispute;
d. the respective position of each of the parties;
e. the full names and addresses of the arbitrators;
f. the considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole;
g. the opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal;
h. the order of the award;
i. the place and date of the award; and
j. the signature(s) of the arbitrator or arbitration tribunal.

(2) The effectiveness of the award shall not be frustrated by the failure of one arbitrator (where there are three) to sign the award if such failure to sign is caused by illness or demise of such non-signing arbitrator.

(3) The reason for the failure of such arbitrator to sign, as contemplated in paragraph (2),

must be set out in the award.

(4) The award shall state a time limitation within which the award must be implemented.

No provision is made in the Arbitration Law for issuance of an award where the arbitrators are unable to reach a unanimous or majority decision. Nor is mention made of dissenting opinion, other than the requirement set out in article 54(1)(g), quoted above, to give a reason where one arbitrator fails to sign. However there is no impediment to an arbitrator appending a dissenting opinion and these have been issued on occasion.

ENFORCEMENT

Awards must be registered with the applicable court in order to be enforceable. Domestic awards must be registered by the tribunal with the court in the domicile of the losing party within thirty days of its rendering.[36] There is no such time limit for registration of foreign-rendered awards, and these are registered with the District Court of Central Jakarta. Awards in a language other than Indonesian must be accompanied by an official translation in Indonesian of both the award and the underlying agreement to arbitrate, which Indonesian version will be the one considered as the original by the court in enforcement proceedings.

If the Government of the Republic of Indonesia is a party to the arbitral reference, the enforcement order may only be issued by the Supreme Court. In such cases, application is still made through the Central Jakarta District Court, which forwards the same to the Supreme Court for action.

Enforcement procedures differ somewhat depending upon whether the award is domestic or international. The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution (fiat execusi) directly if the losing party does not, after being duly summoned and so requested by the court, satisfy the award. The losing party has an opportunity to contest execution at the hearing and may also file a separate contest after issuance of any execution order. Although the District Court may not review the reasoning in the award itself,[37] it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law[38] and if the award is not in conflict with public morality and order.[39] There is no recourse against rejection by the court of execution.[40]

Once an order of execution is issued, the same may be executed against the assets and property of the losing party in accordance with the provisions of the RV, in the same manner as execution of judgments in civil cases which are final and binding.[41]

Foreign-rendered awards registered with the District Court of Central Jakarta are enforced by that court unless the Indonesian government itself is a party, in which case only the Supreme Court has such jurisdiction. Applications for enforcement of foreign awards must be accompanied by not only an official translation, but also a "certification from the diplomatic representative of the Republic of Indonesia in the country in which the International Arbitration Award was rendered stating that such country and the Republic of Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards".[42] Once the enforcement order, exequatur, is issued, the court will send the same to the District Court having jurisdiction over the losing party or its assets, and that local court will follow the same procedures as it does for a domestic award.

RECOURSE

There is no appeal on the merits from an arbitral award, either to the court or to any other forum.[43] Nor may a party appeal against a decision of the Supreme Court either issuing or rejecting exequatur where the Government of Indonesia is a party.[44] Rejection by the Central Jakarta District Court of exequatur over an international award can be appealed directly to the Supreme Court, which must decide upon the appeal within 90 days of application therefor.[45][46] Issuance of exequatur, however, is not subject to appeal.

Application may be made to the applicable District Court to annul either domestic or international awards, but on very limited grounds, primarily involving withholding of decisive documentation, forgery or fraud. Article V(1)(e) of the New York Convention makes it clear that the court with jurisdiction to annul an award is the court of either the country in which, or under the law of which, the arbitration is held. Thus, if the lex arbitri is Indonesian Law (ie, presently Law No. 30 of 1999), even if the seat was elsewhere, the Indonesian courts have jurisdiction to hear the annulment application and to annul if appropriate. Application for such annulment must be submitted within thirty days of registration of the award,[47] and a decision must be made upon such application within thirty days of submission thereof. Appeal may be made directly to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within thirty days of application.[48]

Law No. 14 of 1985 states that any final and binding decision may be subject to judicial review by the Supreme Court if it meets certain requirements. One of the primary ones is that new evidence, or novum, is discovered. There is a longer time period to bring such application after discovery as well as certain administrative requirements.

Endnotes

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China: developments and trends

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Summary

Arbitration - like everything else in China today - has become a growth industry. Spurred on by institutional changes and dramatic economic growth, both the number of disputes and the number of institutions providing dispute resolution services have proliferated. At the same time, significant efforts have been made to upgrade and clarify the legal framework for arbitration in China and bring its legislation and the rules of arbitration institutions more in line with international practice. This article provides an overview of the key recent developments and trends.

MAINLAND INSTITUTIONS AND CASELOADS ON THE RISE

Before 1995, only CIETAC (the China International Economic and Trade Arbitration Commission) and CMAC (the China Maritime Arbitration Commission) had jurisdiction over 'foreign-related' disputes in mainland China.1 This changed, however, with the introduction of the PRC Arbitration Law in 1995. The jurisdiction of both bodies was expanded to include domestic arbitrations as well. At the same time, domestic arbitration commissions established under Chinese law were permitted to handle foreign-related arbitrations. As a result, there has been a dramatic increase in local arbitration institutions and as of today, there are more than 170 Chinese arbitration commissions.

Correspondingly, China's arbitration caseload has steadily increased, as shown by the following table:

CASELOAD OF CHINA'S MAJOR ARBITRATION COMMISSIONS 2003-20052

Arbitration	Years		
Commission	2003	2004	2005
Wuhan	3,050	4,363	5,013
Guangzhou	2,670	3,125	3,448
Shenzhen	1,744	1,751	2,110
Beijing	1,029	1,796	1,979
Tianjin	748	793	624
Shanhai	649	1.073	1,592
CIETAC	709	850	979

For example, the Shanghai Arbitration Commission's caseload has increased by nearly 40 to 50 per cent every year during this period. The Beijing Arbitration Commission nearly doubled its caseload between 2003 and 2005, whereas CIETAC's caseload has steadily increased by nearly 20 per cent every year. CIETAC has already indicated that its caseload for 2006 has continued to increase.

Today, CIETAC still remains the principal Chinese arbitration institution for foreign-related arbitration. Nearly 50 per cent of its cases in 2004 and 2005 were foreign-related.3 The overwhelming majority of other Chinese arbitration commissions only handle domestic cases and the remainder of CIETAC's caseload is also considered domestic.

However, the fact that cases are 'domestic' does not necessarily mean that foreign interests are not involved. Indeed, domestic cases may involve foreign-invested enterprises (FIEs). These are entities, such as equity joint ventures, cooperative joint ventures and wholly foreign-owned enterprises created in part or fully by the investment of foreign capital. Nevertheless, Chinese law regards them as Chinese legal entities. Therefore, a dispute between an FIE and a 'pure' Chinese counterparty is considered domestic, even if the FIE may in substance be foreign-controlled or managed. According to CIETAC, more than 60 per cent of its 'domestic' cases involve FIEs and it is very likely that some of the domestic arbitrations filed with other arbitration institutions also involve FIEs. Thus, it is fair to say that overall, there has been a considerable increase of arbitrations involving - whether directly or indirectly - foreign parties.

HONG KONG IS AN INCREASINGLY ATTRACTIVE VENUE FOR RESOLVING CHINA-RELATED DISPUTES

The increasing use of arbitration to resolve China-related disputes has also 'spilled' over into Hong Kong. The Hong Kong International Arbitration Centre (HKIAC) has recorded a significant jump in the number of cases involving one or more Chinese parties. In 2003 there were 44 cases involving Chinese parties; that number increased to 66 in 2004, 79 in 2005 and 100 in 2006.[4]

A key reason for Hong Kong's popularity is that notwithstanding its reversion to Chinese sovereignty, under the region's mini-constitution (known as the Basic Law), Hong Kong retains its English common law-based legal system, separate from that of the mainland. As such, arbitration procedures remain governed by a separate Arbitration Ordinance, which incorporates in large part the UNCITRAL Model Law. While foreign parties regard Hong Kong as a fair and neutral forum for resolving disputes, Chinese parties consider it a proximate and culturally-friendly venue. HKIAC may even be attractive for disputes between purely domestic Chinese parties. Indeed, the HKIAC's statistics show that of the 100 cases accepted in 2006 that involve Chinese parties, 18 of them involve parties only from mainland China.[5]

Hong Kong's popularity as a venue is further bolstered by the fact that since 2000, awards made in Hong Kong are easily enforceable in mainland China pursuant to the Arrangement Concerning the Mutual Enforcement of Arbitral Awards Between the mainland and Hong Kong. The terms for enforcement, as well as for non-enforcement, of awards under this Arrangement are almost identical to those under the New York Convention. Enforcement actions before the People's Court have apparently been largely successful to date.

CIETAC UPDATES ITS RULES

Faced with increasing domestic as well as international competition (including from the HKIAC), CIETAC updated its rules on 1 May 2005 (CIETAC Rules 2005) to bring them more in line with international practice. They constitute at least the eighth revised version of the rules since CIETAC was established in 1956. Some of the most significant changes are briefly addressed below.

A WIDER CHOICE OF ARBITRATORS

Previously, parties to a CIETAC arbitration could only choose arbitrators from CIETAC's Panel of Arbitrators. Although that panel includes many renowned lawyers with arbitration expertise, from within and outside China (the panel includes 738 members, of whom 206 are foreigners), it still represented a restriction on the parties' autonomy. The new rules give

the parties a right to appoint arbitrators from outside the panel, subject to the confirmation of the appointment by CIETAC's chairman.[6] This right is, however, not automatic: it must be specifically agreed to by the parties.

THE ARBITRATORS' INDEPENDENCE AND IMPARTIALITY

In the past, foreign parties frequently voiced concerns about the independence and impartiality of CIETAC tribunals. The background was that many Chinese members of CIETAC's Panel of Arbitrators are either current or retired government officials. In addition, while CIETAC considers itself an "independent and impartial" body, it in fact remains closely connected to the Chinese government.

CIETAC introduced a number of new protections to address these concerns. For instance, arbitrators are now required (before or during the proceedings) to disclose in writing to CIETAC any matters which may give rise to reasonable doubts as to their independence and impartiality. CIETAC, in turn, is required to inform the parties of these matters.[7]

THE PARTIES' FREEDOM TO TAILOR THE ARBITRATION RULES

Parties are now allowed to amend the CIETAC Rules 2005 and can even adopt a different set of arbitration rules altogether.8 Thus, parties may choose to have an arbitration administered by CIETAC under the United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules. Since the UNCITRAL Arbitration Rules do not provide for a specific administering institution, such a choice should work in practice. This new flexibility does have its limitations, though. It may not be practicable to have CIETAC administer other institutional rules. For instance, an arbitration that is administered by CIETAC, but subject to the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) may give rise to practical issues because the ICC Rules were specifically designed for arbitrations administered by the ICC International Court of Arbitration.

THE PARTIES' FREEDOM TO CHOOSE BETWEEN AN ADVERSARIAL OR INQUISITORIAL APPROACH

While arbitrations in China have historically been conducted in accordance with an inquisitorial approach, parties to a CIETAC arbitration now have the choice of agreeing on an inquisitorial or an adversarial approach. Even if the parties do not agree on any particular approach, the arbitrator has the discretion to adopt one approach over the other.[9]

THE INTRODUCTION OF THE KOMPETENZ-KOMPETENZ CONCEPT

In many jurisdictions, the concept of kompetenz-kompetenz is enshrined in the arbitral legal framework. It provides that the arbitral tribunal has jurisdiction to decide whether it has jurisdiction over a dispute. This includes a tribunal's ability to decide whether an arbitration agreement is valid or void.

Chinese law did not recognise such a concept. It was CIETAC and the People's Court that had jurisdiction to decide on the validity of an arbitration agreement.[10] The CIETAC Rules 2005 introduced for the first time the concept of kompetenz-kompetenz, albeit in a more limited form. While CIETAC still has the power to determine issues of jurisdiction, it may delegate such power to the arbitral tribunal.[11]

Two points are important to remember in this context. For one, the Supreme People's Court still retains decision-making powers with regard to jurisdictional matters.[12]

Also, where an arbitration commission has already ruled on the validity of an arbitration agreement, a court may not subsequently accept the same application.[13]

THE PARTIES' ABILITY TO CHOOSE A SEAT OUTSIDE OF CHINA

Whereas previously, the parties were free to agree on a venue for the oral hearing, their choice of seat was restricted to China.[14] The CIETAC Rules 2005 now provide in articles 31 and 32 that the parties may choose both the hearing venue as well as the seat of the arbitration.

This flexibility provides parties negotiating an arbitration agreement with more scope for compromise. Thus the parties may now be able to reach a compromise by agreeing on Shanghai as the hearing venue (where, for example, the evidence and the witnesses are located), but on a place outside of China (such as Hong Kong) as the seat of arbitration. While this new flexibility is fully available in the case of a foreign-related arbitration, it is understood that parties involved in domestic arbitrations must still choose a seat inside of China.[15]

THE ELIMINATION OF THE RESTRICTION ON THE RECOVERY OF COSTS

Prior to 2005, CIETAC permitted the winning party's reasonable expenses, including the attorney's fees, to be paid by the losing party but such expenses were capped at 10 per cent of the amount awarded.[16] The CIETAC Rules 2005 have lifted this restriction. A tribunal may now decide that "the losing party shall compensate the winning party for the expenses reasonably incurred in pursuing its case [...] the arbitral tribunal shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s) and the amount in dispute."[17]

COURT ISSUES NEW INTERPRETATION ON ARBITRATION LAW

Unlike the arbitration framework in many other jurisdictions (including Hong Kong), the PRC Arbitration Law is not based on the UNCITRAL Model Law. Even though it was drafted with international arbitration practices in mind, the Arbitration Law provides a legal framework with "Chinese characteristics". The increasing number of arbitration cases has nevertheless exposed significant gaps in the Arbitration Law. The Supreme People's Court (SPC) has sought to address some of these gaps in numerous pronouncements and decisions to guide the lower courts on the application of the Arbitration Law. Such guidance has ranged from defining the court's jurisdiction over interim measures and the handling of jurisdictional challenges on the one hand, to the setting aside and enforcement of awards on the other. Most recently, the SPC issued a further Interpretation on Certain Issues Relating to the Application of the Arbitration Law (2006 Interpretation), which became effective on 8 September 2006. The 2006 Interpretation builds on some of the SPC's previous notices and regulations as well as recent People's Court rulings, but also provides helpful guidance on a number of matters not previously addressed.

VALIDITY OF ARBITRATION AGREEMENTS
The requirements for a valid arbitration agreement

One of the requirements under the Arbitration Law for the validity of an arbitration agreement is that an arbitral institution must be designated. However, little guidance was provided as to what this entails in practice, and the lower courts have struggled to interpret this requirement, often with conflicting results. The 2006 Interpretation makes it clear that where the name of an arbitration institution is inaccurately specified in the arbitration agreement, the agreement is nevertheless valid if that institution can be readily identified.[18] By the same token, if parties have only provided for the applicable arbitration rules but failed to designate an arbitration

institution, the arbitration agreement will be valid if the relevant institution can be ascertained from the arbitration rules.[19]

The 2006 Interpretation also permits an arbitration agreement to be "incorporated by reference". Thus, where parties have provided in one contract that disputes shall be resolved by applying a valid arbitration clause contained in another contract or document, this incorporation by reference will constitute a valid arbitration agreement.[20]

FORUM FOR CHALLENGING THE VALIDITY OF ARBITRATION AGREEMENTS

The Arbitration Law provides that parties may challenge the validity of an arbitration agreement before the arbitration institution or the People's Court. Where the People's Court is asked to determine the validity of a domestic arbitration agreement, the 2006 Interpretation states that the Intermediate People's Court (IPC) at the place where the arbitration institution is located shall hear the challenge. Where the arbitration institution is not clearly specified, the challenge shall be heard by the IPC at the place where the arbitration agreement was signed or the place of domicile of the party against whom the challenge is made. Where the challenge is in relation to a foreign-related arbitration agreement, the challenge shall be heard either in the IPC of the place of the arbitration institution chosen by the parties, the place where the arbitration agreement was signed or the place of domicile of either party.[21]

The 2006 Interpretation also restates an earlier pronouncement that where an arbitration institution has previously made a ruling on the validity of the arbitration agreement, the People's Court shall not revisit the issue.[22]

THE APPLICABLE LAWS FOR DETERMINING THE VALIDITY OF ARBITRATION AGREEMENTS

The 2006 Interpretation provides that in determining the validity of a foreign-related arbitration agreement, the People's Court should not automatically apply Chinese law.[23] Rather, the validity of the agreement should be determined by reference to: (a) the applicable law agreed upon by the parties; (b) failing such agreement on the applicable law, the law of the place of arbitration; or (c) failing agreement on both the applicable law and the place of arbitration, the law of the place of the courts.[24]

This interpretation is not unlike the stepped-approach for determining the validity of an arbitration agreement under article V(1)(a) of the New York Convention (in the context, however, of whether there is ground for non-enforcement of an award).

ENFORCEMENT OF AWARDS

The procedures for enforcing an arbitration award

The 2006 Interpretation provides that an application for the enforcement of an arbitration award shall be made to the IPC in the place of the domicile of the party that is subject to the enforcement or the place where that party's assets are located.[25] This position is largely consistent with past pronouncements by the SPC, save in relation to domestic awards where applications for their enforcement could previously also be submitted to the basic level People's Courts.[26] The 2006 Interpretation, however, takes precedence over any previous pronouncements.[27]

The 2006 Interpretation also states that where an arbitration award has been issued pursuant to a settlement agreement between the parties, the People's Court will not entertain any attempt to resist enforcement of the award.[28]

The SPC's right to demand explanations and documents from arbitration institutions An aspect of the 2006 Interpretation which raises some concern is that, in the course of reviewing an application to set aside or refuse enforcement of an arbitral award, the People's Court may now require an arbitration institution (presumably only those in mainland China) to provide explanations or give the Court access to the arbitration documents.[29] No limit is imposed on the scope of any explanation or document access that the arbitration institution may be required to provide. This raises some questions: May the court unilaterally investigate not only the procedural, but also the substantive, aspects of the arbitration? If the arbitration institution fails to cooperate, either fully or at all, how will the application (to set aside or refuse enforcement) be affected? Presumably, it would not give rise to an independent ground for setting aside or for non-enforcement of the award.

OPEN ISSUES

Notwithstanding the useful guidance provided by the 2006 Interpretation, a number of important issues regarding the PRC arbitral legal framework remain unaddressed. In particularly, the following issues remain unclear:

Whether disputes involving only mainland parties may be arbitrated outside the mainland The PRC Contract Law provides (at article 128) that parties to a foreign-related[30] contract may submit their dispute to a Chinese arbitration institution or other (non-Chinese) arbitral institutions. It is commonly accepted that by implication, a purely domestic dispute (that is, not foreign-related) may only be arbitrated before a Chinese arbitral institution. The rules of Chinese arbitral institutions, however, invariably provide for arbitrations administered by them to be seated inside mainland China. Therefore, the working assumption has been that domestic disputes may only be arbitrated within mainland China. In this regard, the SPC's 2003 Draft Provisions[31] had noted that an arbitration agreement shall be deemed invalid if domestic parties refer a dispute with no foreign-related elements to arbitration outside China.[32] However, the 2003 Draft Provisions were never finally adopted and their status remains unclear. Therefore it is unclear whether purely domestic arbitrations may be seated outside the mainland. Indeed, in practice, purely domestic arbitrations are being held in Hong Kong (and possibly, also elsewhere). The situation is further confused by CIETAC's Rules 2005, which permit CIETAC to administer arbitrations outside mainland China if the parties so agree without drawing any distinction between domestic and foreign-related disputes.

In view of this uncertainty, it is unfortunate that the SPC did not provide guidance on whether wholly domestic arbitrations conducted outside mainland China are legal.

WHETHER FOREIGN INSTITUTIONS MAY CONDUCT ARBITRATIONS IN MAINLAND CHINA

The Arbitration Law appears to permit arbitrations in China to be conducted only by arbitration institutions established in China with approval from the Chinese Government.[33] This implies that agreements providing for arbitrations by foreign arbitration institutions in China are invalid. In practice, though, institutions such as the ICC have conducted arbitrations on the mainland. The 2006 Interpretation has failed to clarify the status of such arbitrations. A court ruling shortly before the 2006 Interpretation, however, noted that an award issued pursuant to an ICC arbitration in Shanghai was unenforceable on the basis that the arbitration agreement, which provided for "Arbitration: ICC Rules, Shanghai shall apply", was invalid for failing to designate the arbitral institution. It is unclear whether the objection could have been overcome by providing in the arbitration clause for the ICC as the designated arbitral

institution or whether the designated institution must be a Chinese institution in the first place.[34]

WHETHER AD HOC AWARDS ISSUED OUTSIDE MAINLAND CHINA ARE ENFORCEABLE IN MAINLAND CHINA

As noted above, one requirement for a valid arbitration agreement under the Arbitration Law is that parties must include the choice of an "arbitration institution". While this makes it plain that ad hoc arbitrations seated in mainland China are prohibited, the position of ad hoc foreign arbitrations, and the enforceability of their resulting awards in the mainland is less clear.

Recent internal working documents of the SPC have suggested that ad hoc arbitration agreements are valid if the arbitration is in a New York Convention state and the law of that state does not prohibit ad hoc arbitration, and further that the recognition and enforcement of the resulting awards can be handled in accordance with Article 269 of the Civil Procedure Law. (This provides that the recognition and enforcement of foreign awards shall be dealt with in accordance with China's "international treaty" obligations.)[35] These internal documents do not, however, have the force of law and it is unfortunate that the SPC has failed to resolve this uncertainty by explicitly recognising the enforceability of ad hoc foreign awards. That said, the authors are not aware of any foreign ad hoc awards having been denied enforcement in China.

* * *

Recently, China has done some serious catching up in the area of arbitration. The growth of arbitration in China has been tremendous. Chinese arbitration institutions such as CIETAC have kept up with the pace of development and updated their rules to be more in line with international standards. The SPC has also been vigilant in providing helpful guidance on the Chinese arbitration framework in some areas of uncertainty, although some crucial issues remain to be clarified.

Endnotes

China: BITs

Elodie Dulac and **John Savage**
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Summary

China has entered into more bilateral investment treaties (BITs) than any country other than Germany, but no investor-state arbitrations have been brought as yet against China or by Chinese investors against other countries. This may change soon, as China ratifies more 'new generation' BITs, which offer investors significantly more protection than the first generation of China treaties, including much freer access to international arbitration.

By the end of 2006, China[2] had signed at least 115 BITs, over 85 of which had entered into force.[3] China is party to BITs with most Asian countries,[4] with many developed countries outside Asia,[5] and with a growing number of developing countries outside Asia.[6] In addition, China has signed at least one free-trade agreement (FTA) containing an investment chapter, with Pakistan.[7]

The most notorious feature of China's early treaties is the absence of an effective investor-state dispute resolution provision. These first generation instruments either contain no investor-dispute provision at all, or one which contains no consent by the state to arbitration or which permits investors to refer to arbitration only disputes over the amount of compensation payable following an expropriation. The first generation of treaties thus provided investors with little protection in practice, which is no doubt a key reason why, thus far, no investment treaty arbitrations have been brought by Chinese investors, or against China, despite the huge volume of investment coming out of and going into China.

China's approach to investment treaties took a significant turn in 1998, following the adoption of China's 'Going Abroad' policy encouraging Chinese outbound investment. About 30 'new generation' China BITs have been concluded since this policy turn,[8] a number of which have already entered into force.[9] Most importantly, the scope of the investor-state dispute resolution clause has been considerably expanded in these new generation China BITs, allowing investors to effectively enforce the treaties' substantive protections through international arbitration (see I below). At the same time, the substantive protections themselves are increasingly comprehensive and powerful (see II below).

I. New generation BITs allow investors access to effective investor-state arbitration From China's first BIT (with France) in 1984, until 1998 and its first new generation BIT (with Barbados) China BITs either: (i) did not provide for international arbitration of investor-state disputes at all;[10] (ii) contained an investor-state dispute resolution clause with no consent by the host state in the treaty to arbitration;[11] or, most commonly, (iii) contained an investor-state dispute resolution clause with consent to arbitration by the host state, but only for disputes relating to the amount of compensation payable following an expropriation, as opposed (for example) to disputes over breaches of any BIT protections.[12] This latter limitation is mirrored in China's notification to the International Centre for Settlement of Investment Disputes (ICSID) - one of the arbitration forums commonly offered to investors in China's BITs[13] - pursuant to article 25(4) of the ICSID Convention.[14]

This absence of an effective investor-state disputes mechanism deprives the treaties, in practice, of any protective value, as almost all the substantive protections offered in the treaties are effectively unenforceable.

In striking contrast, new generation China BITs contain no such limitation: they allow investors to refer disputes with host states to arbitration but impose no restrictions as to the specific subject matter of the dispute.[15] In fact, while a small number of new generation China BITs extend the scope of investor-state arbitration to disputes concerning

an obligation of the host state under the relevant treaty,[16] most dispute provisions in the new treaties are even more broadly drafted. They provide for arbitration of "any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party".[17] This expansive language arguably allows for the submission to a treaty tribunal not only of claims alleging violation of the treaty provisions, but also claims of breach by the host state of contracts entered into by the state with the foreign investor. Whether such broadly worded provisions will always cover this sort of purely contractual claim is unsettled,[18] but what is clear is that the scope of investor-state dispute provisions in Chinese BITs has moved from one extreme to the other.

Although there are now several new generation China BITs in force, much investment into and out of China remains covered only by first generation BITs (which we have seen offer investors virtually no access to arbitration), or by no investment treaties at all (as in the case of investment made directly by Chinese investors into India or the United States, and by Indian or US investors directly into China). The key question today is whether investors not directly covered by new generation BITs can nonetheless benefit from the broad investor-state dispute resolution provisions found in those new treaties. There are two ways in which investors may attempt to do so: (a) by invoking most-favoured-nation clauses in applicable first generation treaties, once a dispute has arisen, or (b) by structuring their investment in the first place so as to benefit from new generation treaties.

'TREATY SHOPPING' AFTER A DISPUTE HAS ARISEN: THE MOST-FAVOURED-NATION CLAUSE

Most Chinese BITs contain a most-favoured-nation clause (MFN) entitling foreign investors to treatment no less favourable than that accorded by the host state to nationals of third countries. Thus, an MFN clause at least theoretically allows an investor to pick and choose among other investment treaties entered into by the host state the most favourable protection on offer. This is sometimes known as 'treaty shopping' or 'protection shopping'. Taking the example of an investor in China, this would involve importing into the basic (first generation) treaty between the investor's home state and China a more favourable dispute resolution provision found in a new generation BIT entered into by China with a third state. The provision would be more favourable in that it would allow the investor to refer to arbitration, say, 'any dispute concerning investments', whereas the basic treaty would only offer arbitration of disputes over the amount of compensation for expropriation. The later clause may also be more favourable in that it would provide for ICSID arbitration, whereas the basic treaty did not.[19]

There is fierce debate whether and to what extent an investor may rely on an MFN clause to import dispute resolution rights from one treaty into another.[20] As a preliminary point, some BITs do contain express language either including or excluding dispute resolution provisions from the scope of the MFN clause. This does not appear to be the case with China BITs. However, the MFN clauses in over 25 China BITs from the 1990s expressly cover the host states' obligations to treat investment fairly and equitably, which may well be regarded as removing other matters, such as dispute resolution, from the MFN clause's scope.[21]

Absent express language in treaties either including or excluding dispute resolution from the scope of MFN clauses, arbitral tribunals have taken different positions on whether to allow an MFN clause to extend to dispute resolution.

In short, a first line of decisions, beginning with that in the Maffezini v Spain case,[22] accepted that dispute resolution was part of the 'treatment' of the investment and thereby fell within the scope of the MFN clause, subject to limited exceptions characterised as being based on public policy considerations. However, these decisions were all concerned with whether the investor could bypass an admissibility requirement: that of prior recourse to domestic courts for a given period before commencing arbitration. They were not concerned with the more far-reaching enterprise relevant in the present hypothesis, namely the expansion of the jurisdiction of an arbitral tribunal.

Also, even in the Maffezini line of decisions, arbitral tribunals reviewed the treaty practice of the host state to determine whether the restrictions in the basic treaty's dispute resolution clause which the investor was attempting to bypass reflected the state's public policy. If they did, they could not be circumvented by recourse to an MFN clause. Where the host state's treaty practice was not consistent, arbitrators concluded that there was no public policy issue and allowed the MFN clause to extend to the dispute resolution clause. China's treaty practice in limiting the scope of the dispute resolution clauses in its BITs was consistent from 1984 until 1998, and may therefore evidence policy which arbitrators will not permit investors to bypass using an MFN clause. This may significantly hinder an investor seeking to rely on Maffezini and similar decisions against China, although the tribunals' conclusions in those decisions regarding treaty practice and public policy are not especially convincing, and will not necessarily be followed in future cases.

A second line of decisions is more restrictive than the Maffezini line. It is also arguably more relevant here, as it addresses the same sort of contention as one would encounter in the Chinese context, namely that the MFN clause causes the tribunal's jurisdiction to extend to categories of disputes not covered by the dispute resolution clause in the basic treaty, or gives an ICSID tribunal jurisdiction over the dispute although ICSID arbitration is not offered as an option in the basic treaty (or both). The leading case here is Plama v Bulgaria, where the tribunal rejected the application of the MFN clause to dispute resolution, creating instead a presumption that MFN clauses do not cover dispute resolution unless the investor proves that the contracting parties clearly so intended.[23] This presumption would undoubtedly be challenging for an investor to rebut in the Chinese context. However, the reasoning in the Plama decision and those that follow is questionable in our view, and there is no guarantee that the same presumption will find favour with future tribunals.

Another hurdle faces an investor submitting a dispute against China to ICSID arbitration under a Chinese BIT, of whatever vintage, where the dispute concerns something other than the amount of compensation payable following an expropriation. It is China's notification under article 25(4) of the ICSID Convention, introduced above. That notification remains in place, and states that China would only consider submitting to the jurisdiction of ICSID disputes over compensation following an expropriation. Accordingly, it is uncertain whether an ICSID tribunal would have jurisdiction under a Chinese BIT over claims against China not limited to the amount of compensation following an expropriation, even if all other jurisdictional obstacles under the BIT were overcome.[24] The decision on jurisdiction in the PSEG v Turkey case sheds some light: the ICSID tribunal retained jurisdiction, despite Turkey's article 25(4) notification, on the basis that the BIT at issue did not reproduce the limitation found in the notification.[25]

In view of these decisions, it is difficult to be overly optimistic about the prospects of an investor relying on an MFN clause contained in a first generation China BIT to benefit from

broader dispute resolution provisions, whether contained in the new generation of China BITs or in BITs with third states entered into by states hosting Chinese investments. No investor to date, of any nationality, has succeeded in using an MFN clause to enlarge the jurisdiction of an arbitral tribunal, which is what an investor would be seeking to achieve in the Chinese context. That said, there is no rule of binding precedent in investment treaty arbitration, and arbitral tribunals have proved quite prepared to depart from earlier decisions interpreting similar or identical treaty provisions.[26] Many of the existing decisions concerning MFN clauses are irreconcilable, and none is particularly persuasive, suggesting the time may be ripe for a new and more widely accepted approach. Also, China has - despite the controversy surrounding the Maffezini decision - not included in its new generation BITs any language excluding dispute resolution from the scope of its MFN clauses, arguably leaving the door open to the construction of MFN clauses in accordance with their ordinary meaning, reaching dispute resolution and even allowing the expansion of arbitral jurisdiction.

'TREATY SHOPPING' BEFORE THE DISPUTE HAS ARISEN: SPECIAL PURPOSE VEHICLES

Given the small number of new generation China BITs in force, and the uncertainty regarding reliance on MFN clauses to extend arbitral jurisdiction, foreign investors in China may be tempted to seek the benefit of new generation China BITs in another way: by channelling their investment through a special purpose vehicle (SPV), or 'shell' company, in a country party to a new generation BIT with China. Whether an SPV benefits from the protections offered by investment treaties is a controversial question, but one which - for now - has been consistently answered in the affirmative by arbitral tribunals.

To reach this conclusion, arbitrators have focused on the text of the BITs at issue, which generally defines an investor qualifying for protection as a company incorporated or with its corporate seat in one of the contracting states.[27] Arbitrators have held that they cannot add into the treaty conditions not already expressly contained in it.[28] So, if a company, whether or not it has real activity in the state party to the treaty in which it is incorporated, meets the definition of qualifying investor in the treaty (which again usually requires just the place of incorporation or corporate seat to be in a contracting state), it will be entitled to the protection offered by the treaty and the tribunal will accept jurisdiction.

It is possible for states to incorporate language in their investment treaties excluding SPVs from their protective umbrella. This can be done by including additional requirements in the definition of investor - typically, control by nationals of a contracting state other than the host state or substantial business activity in the territory of that other contracting state (or both)[29] - or by inserting a so-called 'denial of benefits' clause.[30] Investment treaties and the investment chapters of FTAs increasingly incorporate such express language. However, few China BITs do,[31] and new generation China BITs do not systematically seek to exclude SPVs from their coverage. In most cases, therefore, it should currently be possible for an investor in China hailing from a country without a new generation China BIT to secure the protection of a new generation China BIT by passing its investment through an SPV incorporated in a state party to a new generation BIT.

II. CHINA BITS TYPICALLY OFFER COMPREHENSIVE SUBSTANTIVE PROTECTIONS

Substantive protections - that is, protections other than investor-state dispute resolution - offered in China BITs are numerous and broad. This has remained so in new generation China BITs, in contrast to the more restrictive trend witnessed in investment treaties and FTAs recently signed by other countries, most notably the United States.

The protection offered by China BITs almost invariably includes the obligation to grant qualifying investments "fair and equitable treatment" and, with variations in language, "constant protection and security" or "full protection and security".[32] Outside the Chinese context, debate surrounds the meaning of these standards. In particular, views diverge as to whether the fair and equitable treatment standard should be limited to the customary international law minimum standard of treatment, or should be interpreted as an autonomous standard based on a plain meaning interpretation of the text of the treaty. Absent express language in the treaty attaching the fair and equitable treatment standard to the international minimum standard, arbitral tribunals have favoured an autonomous approach.[33] Very few China BITs contain references to international law in their fair and equitable treatment provisions.[34] That is, China BITs appear to allow an autonomous interpretation of the fair and equitable treatment standard. The wording of fair and equitable treatment provisions in new generation China BITs is consistent with earlier China BITs in not limiting the standard by reference to the international minimum standard. Again, this contrasts with BITs and FTAs entered into over the past few years by other countries which, in reaction to the jurisprudential uncertainty, now often incorporate restrictive language expressly equating the fair and equitable treatment standard to the international minimum standard.[35]

Similarly, new generation China BITs contain no wording restricting the scope of the obligation to protect and secure qualifying investments. Outside the China context there is uncertainty whether that obligation is limited to physical protection of the investment,[36] or whether it is more expansive and extends to the protection of the investor's right to own, control and enjoy the benefits of its investment.[37] Here too, the trend outside China has been to incorporate in recent BITs express language limiting the protection and security obligation to physical protection of investments.[38]

Nor do new-generation China BITs adopt the restrictive provisions concerning expropriation found in some modern treaties. The interrelationship of the concept of expropriation and a state's right to regulate is a highly sensitive area: can the exercise by the host state of its right to regulate in the interests of general welfare give rise to an expropriation under an investment treaty for which compensation should be paid to foreign investors? Arbitrators have issued conflicting awards on the point, leading a growing number of states to address the matter in their recent treaties, through an express presumption that a bona fide general welfare measure does not amount to an expropriation for which the host state should compensate affected investors.[39] China's position in eschewing such restrictions in its recent BITs is in line with its equally investor-friendly approach, described earlier, towards the fair and equitable treatment and full protection and security standards.

A more affirmative pro-investor development can also be seen in the introduction into new China BITs of observance of undertakings or 'umbrella' clauses. These were sporadically encountered in first-generation China BITs,[40] but have become close to a permanent fixture in newer treaties.[41] An umbrella clause typically reads as follows: "Each Contracting Party shall observe any obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party."[42] These clauses are widely considered - notwithstanding some unconvincing arbitral decisions holding otherwise - to transform, or 'elevate', a breach of a contract between an investor and host state into a breach of the treaty falling within the jurisdiction of a treaty-based arbitral tribunal.[43] Interpreted and applied in this way, these clauses give investors powerful protection in practice.

* * *

China's new generation BITs thus typically offer investors enhanced protection, as compared to first generation treaties, both in their broad and effective investor-state dispute provisions, and in their comprehensive and unqualified substantive protections. This goes counter to the restrictive trend seen recently in some other countries' BIT programmes. The Chinese position can no doubt be put down, in large part, to China's desire to protect its own companies as they 'go out' and invest overseas, particularly in developing countries. It may also be the result of China not, for the moment, being on the receiving end of an investment treaty arbitration: the curbs recently placed by the United States, for example, on protections offered in its investment treaties seem to have been spurred by the number of investor-state claims brought against the United States, notably under NAFTA.[44] It may not be too long, given the rapid and far-reaching renewal of its BIT programme, before China is in a similar situation.

Endnotes

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International commercial arbitration in the PRC, further steps in the right direction

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Summary

ENDNOTES

Arbitration has always been popular in China, fitting as it does with Confucian values and in particular with the belief that a formal dispute breaches the fundamental principle of business arrangements - that both parties should find a benefit. Given concerns over the difficulties of navigating the People's Republic of China's complex and sometimes inconsistent court system, foreign parties doing business in the PRC and with Chinese parties have similarly preferred arbitration. Recent statements issued by the PRC courts, if put into practice, should make them feel increasingly comfortable in doing so.

Chinese law on international arbitration was based (as is increasingly the norm) on the UNCITRAL Model Law on International Commercial Arbitration, but, that being said, there are a number of traps for the unwary who are used to operating in Model Law jurisdictions. The principle legislative source is the Arbitration Law of the PRC (which came into effect on 1 September 1995). In addition reference must be made to Chapter XXVIII (articles 257 to 261) of China's Civil Procedure Law. These two statutes are supplemented by the 1995 Notice on Foreign and Foreign Related Arbitrations, the Supreme Court's Interpretation of the Civil Procedure Law of 14 July 1992 (articles 313 to 317) and, perhaps more interestingly for the foreign investor, its Judicial Interpretation of 8 September 2006 (the 2006 Interpretation).

The 2006 Interpretation has been generally welcomed by international commentators. If realised it brings increasing certainty to PRC seated arbitrations, and takes significant steps to narrow the scope for highly technical challenges to awards rendered in the PRC. For instance, the 2006 Interpretation clarifies that for the purposes of the requirement that an "arbitration agreement must be in writing", the term "in writing" will, as in most jurisdictions, now include more modern mediums such as e-mail, electronic data interchange, telegram, telex and facsimile.[1] Article 2 of the Interpretation is similarly progressive on arbitrability, holding that where the matters for arbitration are contractual in nature, they may include disputes arising from the execution, validity, modification, assignment, performance, breach, interpretation or rescission of a contract. While this may seem at first blush an uncontroversial point, it is worth bearing in mind that even jurisdictions with an established pro-arbitration jurisprudence, such as England, are still hearing arguments on this issue, see, for example, the recent decision in Fiona Trust & Holding Corp v Yuri Privalov (2007).[2]

For reasons that will become clear, arbitral institutions (or 'arbitration commissions' as they are termed under the Arbitration Law) have particular importance in the PRC. The two most significant commissions for the foreign user are the China International Economic and Trade Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC). As well as the two main commissions, there are over 170 regional commissions (probably the most well-known of which to foreign investors is the Beijing Arbitration Commission), which are typically formed in co-operation between the local chamber of commerce and the department of justice of the corresponding province, autonomous region or municipality. Of the main two, CIETAC is by far the more relevant for the foreign commercial investor (CMAC, which handles only 20 or so cases a year, tends to deal solely with maritime matters). Formerly known as the Foreign Trade Arbitration Commission, CIETAC (like any other arbitral institution) has issued its own procedural rules, last revised in 2005, and, as might be expected, these rules will be largely familiar to those who have previously read the ICC and UNCITRAL Arbitration Rules. One notable deviation is that the CIETAC Rules unusually require the claimant's notice of arbitration to be a fully formed statement of its claim with supporting evidence.[3] While such front-loading does have the advantage of forcing a party

to fully consider the merits of his claim before he commences proceedings, it can also serve as a significant impediment when swift action and interim measures are needed.

Also noteworthy is the need for the parties specifically to agree that they may appoint arbitrators from a wider pool than CIETAC's panel of arbitrators, should they wish to do so. Whilst generally championing the autonomous role of the tribunal, much like the ICC Court, CIETAC retains for itself supervisory powers over the ultimate award. It also serves as the ultimate arbiter of any challenges to the tribunal's jurisdiction. Although under the 2006 Interpretation the courts expressly recognise the principle of kompetenz-kompetenz, CIETAC tribunals are only competent to consider their own jurisdiction when CIETAC allows them to do so. This is a potentially important drafting point for arbitration agreements.

The importance of arbitration commissions for PRC seated arbitrations is highlighted by article 16 of the Arbitration Law, which requires that, for an arbitration agreement to be valid, it must indicate the arbitration commission chosen. While this has been relaxed somewhat by the 2006 Interpretation,[4] it still raises significant concerns for those used to reaching for the more familiar selection of arbitral rules. As a threshold matter it seems clear that ad hoc or unadministered UNCITRAL Rule arbitration agreements will not be valid - at least under internal PRC law - where a PRC arbitral seat is selected. In addition, although it is not made expressly clear, articles 10 and 11 of the Arbitration Law would seem to preclude the selection of a foreign arbitration institution to serve as the commission for a PRC-seated arbitration. This is a significant point of speculation, but as yet there is no definitive guidance. These proscriptions do of course (significantly) narrow the procedural flexibility which most non-Chinese parties would take for granted in drafting their arbitration clauses.

Article 13 of the Arbitration Law specifies that any arbitrator must fulfil at least one of the following five conditions: (i) that they have engaged in arbitration work for at least eight years; (ii) that they have worked as a lawyer for at least eight years; (iii) that they have been a judge for at least eight years; (iv) that they are engaged in legal research or legal teaching in senior positions; or (v) that they have legal knowledge and are engaged in professional work relating to economics and trade, and maintain senior positions or of equivalent professional level. Additionally, tribunal members may be challenged if: (a) the arbitrator is a party involved in the case or a blood relation or relative of the parties concerned or their attorneys; (b) the arbitrator has vital personal interests in the case; (c) the arbitrator has other relations with the parties or their attorneys involved in the case that might effect the fair ruling of the case; or (d) the arbitrator meets the parties concerned or their attorneys in private or has accepted gifts or attended banquets hosted by the parties concerned or their attorneys.[5] Although on its face such standards do not seem that different from those normally expected in arbitration, a number of foreign parties have been surprised by the willingness of commissions such as CIETAC to appoint their own commissioners and staff as arbitrators on a regular basis. There are no restrictions under PRC law as to the nationality of arbitrators, however CIETAC will generally only accept arbitrators onto its panel if that arbitrator has at least "a certain" knowledge of Chinese (though this condition may be observed more in the breach where foreign arbitrators of a certain reputation are concerned). That being said CIETAC's roster of arbitrators stands at over a thousand strong, approximately 25 per cent of which are not residents of mainland China.

It is not unusual for arbitrators in PRC seated proceedings to be called upon to play a dual role. Article 51 of the Arbitration Law provides that the tribunal may perform "conciliation" (ie, mediation) prior to making the award. The tribunal is encouraged to take up this extra role

by both long Chinese tradition and the CIETAC. Arbitrators can therefore find themselves acting as both arbitrator and mediator. This raises the concerns generally raised whenever the subject of Med-Arb is discussed - namely that the tribunal, to be effective as a mediator, must be willing to discuss frankly the strengths and weaknesses they see in the case with both parties and to receive information in return that they would not normally receive were they sitting purely as arbitrators. Then, should the conciliation fail, the same individuals will be required to again take up the shield of impartiality and put from their minds all that they have learned. Although under the CIETAC Rules (article 40(8)) the Tribunal in such circumstances is prohibited from relying on any "without prejudice" or confidential information they have learned, it is hard to see as a practical matter how this can be truly policed or expected. That being said, such schemes are also permitted, and are not uncommon features, in arbitrations seated in Australia, Singapore or Hong Kong.

The majority of changes contained within the 2006 Interpretation affect the enforcement of arbitral awards in the PRC, and more particularly the ability of a party to challenge an award rendered in the PRC. In this regard there are two different regimes applicable, depending on whether the award is considered 'domestic' or whether it is 'foreign related'. The Supreme People's Court has clarified that 'foreign related' disputes included cases in which one or both parties is a foreigner (although a party being a wholly foreign owned enterprise does not meet this criteria, a potentially significant fact given the use of 'WFOEs' in PRC projects), where the contract or other legal relationship was established, modified, or terminated in a foreign country or where the disputed subject-matter is located in a foreign country. Although foreign related arbitrations are domestic in the sense that they are seated in the PRC, the grounds for challenge are largely procedural in nature (eg, invalid arbitration agreement, failure to afford the respondent an opportunity to state its case, a failure to abide by the arbitration rules, or lack of jurisdiction) but also include the right not to enforce where the award would be contrary to social or public interests.

Where a challenge is successfully brought then, since the 2006 Interpretation, the court may take a sophisticated approach. For instance, where only one aspect of an award is successfully challenged then a set aside of the challenged aspect alone is possible. Equally an award may be partially or completely remitted back to the tribunal in certain circumstance, with the court issuing the tribunal with instructions to 're-arbitrate'. To bring a successful challenge however, a party must not only have convinced the court hearing the case but must also have gained the approval of the Superior People's Court. In addition, the 2006 Interpretation also usefully confirms that where a party has attempted to challenge an award and lost, it may not at the enforcement stage raise the same arguments in its defence as made up its challenge application.[6] Certain other technical avenues of attack (mostly concerning whether a court was bound by the parties express choice of law and forum) were also closed off, further improving the foreign investor's position. These clarifications are consistent with the general view that the Chinese courts will be supportive of arbitration, even (in the majority of cases at least) where an award is to the detriment of a domestic party.

While an arbitration that cannot be brought under the 'foreign-related' category is more vulnerable to challenge (with the court being empowered to examine underlying facts), a certain level of protection may be acquired by the selection of CIETAC Rules as, per the 1995 Notice on Foreign and Foreign Related Arbitrations, a court may only uphold a challenge to a CIETAC conducted arbitration where it has received the approval of the provincial-level court above it to do so.

One unusual aspect of the challenge provisions (which has been maintained by the 2006 Interpretation) is that the court may, when called upon to consider challenge proceedings, request documentary evidence and testimony from the arbitral institution which conducted the proceedings. This clarification (article 30) follows a number of previous attempts by institutions to assert confidentiality as a defence to the handing over of such internal documents. It is not clear whether this should be taken as an indicator that PRC arbitrations are merely private proceedings (per article 40 of the Arbitration Law) and not confidential in the sense understood in jurisdictions such as England.

As to foreign arbitral awards (ie, those rendered in seats other than those in the PRC) the PRC is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Although there remains some concern about courts outside the major urban areas, reports from and experience in the courts inside those areas show increasing confidence in the regularity of enforcement review. An effort by the Chinese courts to accelerate the enforcement process has begun to be realised, and it is now generally believed to be a fairly expeditious process, particularly in the Beijing courts and most particularly if the award involves only foreign parties or wholly owned foreign entities. The procedural rules for enforcement do not set out a lengthy process, and the court's attitudes are increasingly that the process should not involve lengthy court procedures and that the opportunities for avoiding enforcement should be severely limited. Notwithstanding this progress, there continue to be concerns that Chinese parties outside the major urban areas will be able to delay or frustrate the enforcement process. As a result, most parties accepting arbitration in the PRC are probably advised, at least for now, to seat the arbitration in Beijing or Shanghai and to specify that the courts in the seat city will be a non-exclusive venue for enforcement.

On the subject of enforcement, Hong Kong-rendered awards deserve special mention. Under the Arrangement between the Mainland and Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards, arbitration awards rendered in Hong Kong are enforceable in the PRC with much the same level of ease and protection as domestic foreign related awards. This means that it is possible to conduct domestic Hong Kong arbitral proceedings (effectively governed by pre-1996 English arbitral law as enacted in Hong Kong) and still enjoy the effective enforcement benefits that would have been achieved if the arbitration was seated in the PRC. The empirical evidence would suggest that this option is becoming increasingly popular for arbitrations between two domestic PRC parties. There is, however, uncertainty as to whether Hong Kong counts as part of China for the purposes of article 128(2) of the PRC Contract Law, and accordingly a question remains as to whether a necessarily domestic PRC arbitration could have its seat in Hong Kong as opposed to mainland China and therefore escape the traditional PRC domestic arbitral regime's restrictions.

Given the limits on the choice of arbitral institutions, and the relative unfamiliarity which still remains with arbitration in the PRC, most foreign investors will be minded, whenever possible, to negotiate an agreement to arbitrate in a more familiar jurisdiction (such as Singapore). However, if this is not possible or is unacceptable to the Chinese counterparty, steps can be taken in drafting to protect the foreign investor's interests and expectations. In this regard completeness is essential. Many issues can be agreed to operate as might typically be expected in international arbitration, but without such specific agreements, the

default provisions may lead to less than satisfactory results in the PRC. The first major tip is to ensure that an appropriate arbitration commission is selected to oversee the arbitration. CIETAC should probably be the starting place, given the relatively familiar nature of its rules and the additional protection from challenge that it provides. It may also be well worth specifically setting out the foreign elements of any transaction within the arbitration clause and seeking the other side's agreement that any arbitration should be deemed to be 'foreign related' in the event that there is any room to argue otherwise.

Where CIETAC has been selected, specifically agree that non-panel arbitrators may be appointed by the parties and (if the neutrality of a chairman is important to the parties) specify that the chairman should not be a national of the domicile of either of the parties. Where appropriate, agree that the proceedings should be heard in a language the foreign investor (and its counsel) will be familiar with. Where particular standards of impartiality or independence are important, then specifically import them into the clause. Equally provide for the number of arbitrators and the mechanism for their appointment, otherwise you may be subject entirely to the views of the relevant arbitration commission. If there is a specific need to keep the documents and testimony submitted in any proceedings confidential then, given the current uncertainty in the law, this should be expressly legislated for. Consider carefully whether the parties would feel comfortable with the tribunal assuming a dual mediator-arbitrator role. If not, take advantage of article 40(2) of the CIETAC Rules and opt out.

In conclusion, it can be observed that the 2006 Interpretation has led to increased legal certainty by clarifying a number of points in terms of the form, interpretation and effect of arbitration agreements and the law applicable to the validity of foreign-related arbitration agreements. Further, the new Interpretation has reduced the scope for the technical challenges to arbitration agreements and arbitral awards by resolving a number of jurisdictional and procedural issues. Though Chinese arbitration still lacks the reliance on party autonomy that characterises Western arbitral proceedings (in particular its restrictions on the choice of foreign arbitral institutions), it appears to be continuing to evolve in a direction that most foreign investors would find comfortable.

Endnotes

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Summary

'SHOULD WE CONSIDER ARBITRATION IN THAILAND?' 'WILL WE GET A RELIABLE DECISION?' 'DO THAI COURTS ENFORCE AWARDS?'

These are common and pertinent questions for businesses negotiating Thai contracts or considering Thai-related claims. A lot of money may ride upon the answer. But it is not always easy to give an accurate or concise reply. Arbitration is comparatively new in the mainstream of Thai dispute resolution, and though much has been achieved in many areas of arbitration law and practice, there have also been reversals and uncertainties which complicate the picture. This article offers one perspective on the current environment for arbitration in Thailand.

ARBITRATION LAW

It is only 20 years since Thailand first enacted a comprehensive arbitration law. Though arbitration had been known and practised for many decades before, the Arbitration Act 1987 provided the first clear and solid legal foundation.

The 1987 Act was recognisably a modern arbitration law but it contained several quirks and local anomalies. These were largely explained by the fact that the law was intentionally transitional, aiming only to start a move from traditional, court-influenced arbitration procedures towards a more modern, international view of arbitration law and practice. The 1987 Act sought to educate as well as to reform, and the draftsmen therefore resisted the temptation to push ahead too fast. It was felt that Thailand in the mid-1980s was not yet ready for a fully-fledged Model Law statute.

It can be seen as a measure of the progress over 15 years that, by 2002, Thailand was thought to be ready for an updated statute based substantially on UNCITRAL's Model Law. The form and content of the Arbitration Act 2002 are immediately recognisable to anyone familiar with arbitration laws around the world, and generally it provides a more than adequate statutory framework for Thai arbitration proceedings.

This is not the place for an exhaustive review of the Act. However, a brief glance will give a flavour and highlight points of note or variation. As a preliminary observation, the Act makes no distinction between domestic and international cases and awards.

As would be expected, the 2002 Act requires courts to enforce arbitration agreements on a non-discretionary basis. Courts must dismiss proceedings brought in breach of an arbitration agreement made in writing, unless that agreement is found to be void, unenforceable or incapable of being performed. Notably, the definition of an agreement 'in writing' goes beyond the Model Law by including "data interchange with electronic signature, or other means which provide a record of the agreement".

In contrast to the Model Law, the Act provides for a sole arbitrator unless the parties agree on another number (the Act requires an uneven number). The Thai court is the default appointing authority and also the final forum for determining challenges to arbitrators, on whom there is an express duty of independence and impartiality. Tribunals are empowered to rule on their own jurisdiction but not to order provisional measures, though the court may do so if requested by either party. The tribunal, or a party with the approval of the majority of the tribunal, may apply for court assistance in obtaining evidence.

In keeping with most modern arbitration laws, the Act says little about detailed procedures beyond simply recognising tribunal discretion in this respect, subject to an express requirement for equality of treatment and an opportunity for each party to present its case.

Importantly (given the contrary expectations of some users), the Arbitration Act 2002 does not empower tribunals to award legal costs in the absence of agreement by the parties. If required, this power should therefore be expressly included in an arbitration clause or agreement.

Once an award has been obtained, the Act's provisions on challenge and enforcement are essentially identical to the Model Law and therefore aim to restrict the ability of courts to reopen or overturn awards by reference to the substantive merits of the arbitrators' decision. It should be noted that awards may be set aside or refused enforcement where recognition or enforcement would be "contrary to public policy or the good morals of the people". Appeals from challenge and enforcement proceedings leapfrog directly to the Supreme Court, by-passing the Court of Appeal.

In general terms, therefore, the Act follows an internationally-accepted form and creates a modern legal environment for arbitration in Thailand, providing a workable framework with most of the necessary tools and supports. Of course, it may not follow that the law is always acknowledged or applied in practice, but in black-letter law terms at least, Thailand scores a comfortable pass with the Arbitration Act 2002.

ARBITRATION AND THE COURTS

Thai Courts were previously ambivalent (to say the least) in their attitudes and approach to arbitration. There was a distinctly patchy record of judicial support and an unfortunate tendency for some judges to see arbitration as an improper encroachment on the rightful territory of the courts. Some judges therefore sought to ignore arbitration agreements or were willing to involve themselves surprisingly in pending cases. Successful enforcement of awards was not always assured.

The position has improved substantially. In part, this reflects greater awareness and support for arbitration at an institutional level, but it is also credited to a sustained educational programme within the judiciary that aims to increase awareness of the nature and role of arbitration and the requirements of the law. It can now be said with greater confidence that Thai courts will enforce arbitration agreements and dismiss litigation brought in breach of an agreement to arbitrate disputes. Similar changes can be seen at the other end of arbitration proceedings, where courts show greater willingness to uphold and enforce awards, even awards made overseas or in favour of foreign parties against Thai counterparties. Finally, Thai courts are also more willing in suitable cases to issue orders for provisional relief or protection pending the outcome of arbitration proceedings.

One should not overstate the case. On any realistic assessment, Thai courts are not yet as arbitration-friendly as (say) the courts of Hong Kong or Singapore. Even if one can reasonably hope that the courts will reach the right decision, the procedures for getting to that decision can be inefficient and slow. Instances remain of courts appearing reluctant to uphold arbitration agreements; or setting aside awards on puzzling grounds; or meddling with pending cases; or delaying the exercise of default powers so as (intentionally or otherwise) to delay the arbitration proceedings. Special considerations may also arise sometimes in relation to cases involving state-sector counterparties. But these mishaps seem increasingly

to be exceptions rather than the rule, and there is generally greater confidence than before that the courts will support arbitration in compliance with the law.

ARBITRAL INSTITUTIONS

There are two main commercial arbitral institutions in Thailand, of which the Thai Arbitration Institute (TAI) is by far the more prominent and active. The TAI was established in 1990 as a further plank in the reform and development programme that included the 1987 Act. It was originally set up under the auspices of the Ministry of Justice, where it was known simply as the Arbitration Office. This was a deliberate step intended to bolster the TAI's standing against a background of widespread belief at that time that arbitrators and awards lacked integrity and authority. However, this came at the price of concerns about overt links with a Government Ministry, and oversight was later transferred to the Office of the Judiciary, a constitutionally independent body. The TAI appears to operate substantially free from interference.

The TAI has contributed greatly to the promotion and growth of Thai arbitration. Its caseload has grown dramatically from one case in 1990, seven in 1991, to 126 new cases in 2006. It offers good, technology-enabled facilities for hearings and it promotes an active programme of education for public servants and the business community.

Notably and almost uniquely, the TAI does not make a charge for its own services. This is a welcome surprise to those familiar with the charges at other international centres. But it comes at a price when the absence of fee income is not compensated by other funding. Compared to regional counterparts, the TAI has a smaller budget for institutional development and for investment in case-handling and administration. TAI's success and dedication is unquestioned but its administration will inevitably feel some strain as it prospers in credibility and caseload, and this may start to impact more significantly on further growth and popularity. Over time this may even start to affect the current perspective of informed business users, who see presently that there is no cause for particular concern at the prospect of agreeing to arbitrate under the TAI's supervision and rules.

The other institutional option is the Thai Commercial Arbitration Committee of the Board of Trade. It was established well before the TAI but it has struggled to make an impact and is rarely disturbed in practice. Other schemes operate prominently in particular business sectors: for example, the Securities and Exchange Commission has a scheme for arbitrating disputes between securities companies and private clients, while the Department of Insurance requires that all Thai insurers must offer policy-holders the option of arbitrating claims under the department's own rules.

ARBITRATORS

Most arbitration in Thailand proceeds under Thai law and according to Thai procedures. Many cases are conducted in Thai language. Not surprisingly, therefore, the rising caseload translates into growing demand for arbitrators - specifically, Thai arbitrators - with appropriate qualifications, experience and sensitivities.

This represents an opportunity for interested individuals. However, the risk of mismatch between demand and supply is a challenge to further development in the market for arbitration. Indeed, the greatest practical challenge facing Thai arbitration may be the current shortage of arbitrators with requisite experience and expertise.

This is partly a matter of simple finance. TAI's low daily payment rate makes tribunal appointments far from lucrative, deterring some suitably-qualified Thai candidates and all but the most dedicated foreign arbitrators. Finances aside, the supply shortage also reflects the relative modernity of mainstream arbitration in Thailand, and the fact that there was for many years rather little opportunity for training or on-the-job learning. Comparatively few people have had extensive exposure and experience of modern arbitration over many years, and even today some arbitrators hold the traditional perception of arbitration as a form of negotiation between arbitrators as representatives for each party. It is not at all uncommon for an arbitrator to be chosen precisely because of his or her affiliation and sympathies with the appointing party, and for this state of affairs to be assumed and accepted by the other party.

The position is not yet critical; it may never become so. Highly-regarded professional arbitrators sit in Thai cases and there is a broad panel of people available to join them on tribunals. Nevertheless, those who undertake Thai arbitration face recurrent issues when deciding who to appoint, and the need to develop a wider pool of experience is well-recognised. As with the constraints on institutional development, the expansion in Thai tribunal resources is also a critical factor for further growth.

ARBITRATION PROCEDURES

It is common all over the world for domestic arbitration procedures to contain reflections of procedures in local courts. This applies in Thailand as elsewhere.

For example, there is no general discovery of documents in Thai litigation and therefore very little document production in Thai arbitration. Similarly, it was traditionally the practice of Thai courts to hold evidentiary hearings on a periodic basis rather than in one block, and some Thai arbitrators still adopt the same approach (for example, holding witness hearings two days every week for an extended period). Matters such as requests for particulars or the exchange of written arguments and pre-hearing briefs are very uncommon. Even at the start of an arbitration proceeding, after an initial exchange of statements of case but before the tribunal is appointed, the Thai Arbitration Institute is likely to convene a meeting at which it will seek to mediate a settlement between the parties. There is no provision for this in TAI rules but it is invariable in practice and can impact substantially on progress in the early stages of a case. Several other examples of local procedures could be cited.

As with arbitration anywhere, the efficient progress of a case can be strongly impacted by decisions on procedural issues. It is important for foreign parties to be aware that there will be differences in procedure from their experiences elsewhere. This also reinforces the importance of care in choosing the arbitrators who will make procedural decisions.

INTERNATIONAL TREATIES

Thailand has several international obligations in the context of arbitration. Most importantly, it is a signatory to the New York Convention 1958 and ratified the convention without reservation in 1959. This ensures effective enforcement in Thailand of awards made in other contracting states, in contrast to the position of foreign court judgments which receive no recognition and are unenforceable in Thailand. As already noted, the Thai courts are increasingly reliable in handling applications for enforcement of foreign awards.

Thailand is also a signatory to the International Centre for the Settlement of Investment Disputes Convention 1965, but it has not yet ratified that treaty and shows no likelihood

of doing so. Arbitration of investment disputes under the ICSID treaty is therefore not an available option for aggrieved investors, although other investment arbitration may be possible under numerous bilateral investment protection treaties or the ASEAN regional counterpart.

ARBITRATION AND THE PUBLIC SECTOR

The law is clear that arbitration agreements bind public sector entities just as they bind the private sector. Indeed, the Thai public sector has considerable experience of arbitration over the last two decades. In Thailand as elsewhere, arbitration is often the preferred method for handling commercial disputes with public sector entities, particularly among foreign parties who may not relish the prospect of litigating those claims in the state's own courts.

Successive Thai governments have supported Thai arbitration. The 1987 and 2002 Acts were expressly intended to increase the popularity and practice of arbitration, likewise the creation of the TAI in 1990. It has been noted that some departments and bodies have established their own arbitration schemes, and for some time the standard government procurement contract has contained a clause providing for arbitration under TAI rules. Regulations published in 2001 sought to increase public sector compliance with awards; other regulations were amended to ease the immigration status of foreign arbitrators and arbitration counsel; and tax reform removed an unpopular requirement for payment of stamp duty on awards.

But this is not the whole of the story. Government support is not unequivocal. For example, in 2004 the Cabinet issued a much-discussed directive that appeared to prohibit public agencies from accepting arbitration clauses in 'concession agreements' (a term of imprecise ambit in Thai law and language) without first seeking Cabinet approval. Some public entities jumped upon this as an excuse to resist arbitration clauses in almost any commercial contracts. Meanwhile senior officials have gone on record to say that arbitration is inappropriate in principle for disputes involving the state (not least because of a perceived - and anecdotally justified - fear of collusion between some arbitrators and some private parties), and that arbitration should in principle be confined to disputes between private entities who can better manage such risks. It should be added that concerns at the risk of influence are not always targeted at the private sector side alone.

Matters are further complicated by the recent creation of an Administrative Court whose jurisdiction includes certain kinds of public contracts. Where a contract falls within Administrative Court jurisdiction, that court also has supervisory jurisdiction over arbitrations arising under such contracts, so that (for example) applications for enforcement of awards in such cases will be heard in Administrative Courts as opposed to ordinary civil courts. This is not merely a dry matter of technical jurisdiction. Unlike civil courts, Administrative Courts are entitled to reach decisions based on public policy as well as principles of law. In these early years of Administrative Court practice it is uncertain how the court may interpret and apply these wider public policy considerations in the context of arbitrations between state entities and private parties.

In short, there is a mixed message on arbitration involving the state. There has been great support at numerous levels over a sustained period, yet it seems that some sections of government still entertain doubts about the role of arbitration in the public sector. It is therefore right to note the need for care and judgment when seeking to arbitrate with the public sector, but Thailand is not alone in raising issues of this kind. Experience

shows that cases can be brought, handled and concluded successfully even against core government departments. Arbitration is likely to remain a preferred method (for foreign parties, at least) for handling commercial disputes involving state sector entities. The fundamental attractions remain: level playing field, choice of tribunal, procedural adaptability, confidentiality and international enforcement.

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It is easy to forget that Thai arbitration is relatively young as a mainstream process for dispute resolution, though its bare existence and practice in Thailand is certainly much older. The last two decades have seen remarkable progress, with arbitration now firmly established as a legitimate and recognised option for commercial dispute resolution. Case statistics prove the increased popularity. Real credit is due to those who have worked with determination and dedication to achieve this.

As a result of these efforts, the laws, rules and procedures are now much improved as a framework for effective arbitration. There is little significant pressure for black-letter reform, though there is always scope for refinement and detailed enhancement.

Greater pressures exist in the realm of practice. The best laws and rules will not avail if those responsible for carrying them into practice - institutions, arbitrators, attorneys - lack resources or experience to discharge their duties effectively. Further training will be needed to encourage a new generation of arbitrators, and robust administrative infrastructure must be capable handling ever-increasing numbers of cases. These priorities will be critical if Thai arbitration is to further cement its position as a mainstream procedure of choice for successful commercial dispute resolution.

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India

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Arbitration as a mode of dispute resolution has been prevalent and popular in India for a long time. The Arbitration Act 1940 (the 1940 Arbitration Act) which was in force in India for a long time was replaced by a new law known as the Arbitration and Conciliation Act 1996 (the 1996 Arbitration Act). The 1940 Arbitration Act had a number of problems including providing for court intervention at a number of stages of the proceedings resulting in delays. The 1996 Arbitration Act was introduced to comprehensively cover international commercial arbitration and conciliation as well as domestic arbitration and conciliation. The further objective was to minimise the supervisory role of courts in the arbitral process. The purpose of the statute also included permitting the arbitral tribunal to use mediation, conciliation or other proceedings or other procedures during arbitral proceedings to encourage settlement of disputes. The objective of the statute was also to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by the arbitral tribunal and to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award. The 1996 Arbitration Act consolidated the various laws prevalent in India relating to arbitration and enforcement of foreign awards into one single statute.

The 1996 Arbitration Act introduced a new chapter on conciliation, which did not exist in any earlier law. The object was to promote conciliation and mediation as alternative modes of dispute resolution in India.

The 1996 Arbitration Act is divided into four parts. Part I of the 1996 Arbitration Act deals with domestic arbitration, ie, those arbitrations where the seat of arbitration is in India. Part II deals with provisions relating to enforcement of New York Convention Awards and Geneva Convention Awards in India. Part III deals with disputes, which can be settled by conciliation. Part IV deals with certain supplementary provisions.

The 1996 Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration and is largely a reproduction of the provisions of the model law. This has resulted in some problems being faced particularly on the domestic side.

Part I of the 1996 Arbitration Act deals with domestic arbitration. Section 8 is the reference provision and enables a judicial authority before which an action has been brought, relating to the subject matter of the arbitration agreement, to refer the parties to arbitration.

Section 9 of the 1996 Arbitration Act empowers the court to take certain interim measures of protection including granting of interim injunctions, preservation, interim custody, sale of goods, appointment of receivers, etc.

An interesting issue arose as to whether the provisions of section 9 relating to interim measures of protection by the court, could be applied to an international commercial

arbitration with its seat outside India and where assets or property relating to the dispute were located in India. This issue was settled by the Supreme Court of India in the case of Bhatia International v Bulk Trading SA wherein the Supreme Court concluded that provisions such as section 9 of the 1996 Arbitration Act relating to interim measures of protection by the court were general provisions which were applicable throughout the statute unless any of the provisions were specifically excluded by a statute or by agreement of the parties. Thus it is open for parties in an international arbitration with the seat of arbitration outside India to apply for interim measures of protection within India where the assets relating to the dispute are located in India.

Under the 1996 Arbitration Act the arbitral tribunal can consist of either a sole arbitrator or an odd number of arbitrators. If the arbitral tribunal is to consist of more than one arbitrator, then the 1996 Arbitration Act provides that either party can appoint their nominee arbitrator and the appointed nominee would further appoint a third arbitrator who would be the presiding arbitrator. This is different from the 1940 Arbitration Act wherein it was permissible to appoint an even number of arbitrators and an umpire to whom the disputes were to be referred to in the event of a deadlock. However section 10 of the 1996 Arbitration Act provides that the number of arbitrators cannot be an even number. In an interesting case, Narayan Prasad Lohia and Nikunj Kumar Lohia and others, the Honourable Supreme Court of India held that parties would be entitled to derogate from the provisions of section 10 of the 1996 Arbitration Act and an award by two arbitrators would not be void. If either of the parties fails to make an appointment under the agreed appointment procedure then the other party may make a request to the Chief Justice or a person or institution designated by him to take the necessary measure. The arbitration agreement entered into by the parties can provide for other means of securing the appointment, for example by delegating the appointing function to an institution.

Section 11(6) of the 1996 Arbitration Act provides for intervention of the Chief Justice in appointing arbitrators where there is failure under the appointment procedure agreed upon by the parties. The framers used a language different from the Model Law. The question that arose was whether the Chief Justice to whom the power was conferred to take the necessary measure of making an appointment was exercising powers in a 'judicial capacity' or in an 'administrative capacity'. The 1996 Arbitration Act only refers to the power of the Chief Justice to take the "necessary measures" for the appointment of arbitrators in case of default by the parties. The UNCITRAL Model Law provided that the "court" would have the power to make the appointment. The controversy was ultimately resolved by the Supreme Court of India in the case of SBP & Co v Patel Engineering. A bench consisting of seven judges of the Honourable Supreme Court held that the power conferred by section 11 of the Arbitration and Conciliation Act 1996 was a judicial power and the Chief Justice had to act in his judicial capacity and not in an administrative capacity.

While making an appointment of an arbitrator, the Chief Justice or any institution designated by him is required to give due consideration to the qualifications of the arbitrator by the agreement of parties. The Chief Justice is also required to have due regard to other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In order to speed up the process in cases of international commercial arbitrations, the application for appointment of an arbitrator has to be made directly to the Chief Justice of India, ie, to the Supreme Court of India. The objective of this provision was to cut short the delays due to many layers of appeals in the process of appointment of arbitrators. Thus the decision of the Chief Justice of India on the issues of appointment in an international

commercial arbitration is final and not appealable. In an international commercial arbitration, the Chief Justice of India has the discretion to appoint arbitrators of nationalities other than the nationalities of the parties.

Under the 1996 Arbitration Act an "international commercial arbitration" is defined as one in which at least one of the parties is a resident of a country other than India, or a body corporate incorporated in any country other than India, or a company or association or a body of individuals whose central management and control is exercised in any country other than India. An arbitration with the government of a foreign country is also considered to be an international commercial arbitration. One of the major differences between an international commercial arbitration with its seat in India and a domestic arbitration is that in an international commercial arbitration there exist provisions for expedited appointment of arbitrators by directly approaching the Supreme Court. The other difference is that unlike in a domestic arbitration, in international commercial arbitration, the parties are free to choose the law applicable to the substance of the dispute for governing the arbitral proceedings.

In a domestic arbitration, the appointment of an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his independence or impartiality. The appointment of an arbitrator may also be challenged where the arbitrator does not possess the qualifications agreed upon to by the parties to the arbitration agreement.

The mandate of an appointed arbitrator would terminate if the arbitrator becomes de jure or de facto unable to perform his functions. Unlike the 1940 Arbitration Act, the 1996 Arbitration Act does not provide for any time limit within which the arbitral tribunal is to give its award. Thus if the arbitral tribunal fails to act without undue delay in conducting the arbitration proceedings it can create grounds for terminating the mandate of the arbitrators. The arbitral tribunal has the power to rule on its own jurisdiction including ruling on any objections with respect to the existence and validity of the arbitration agreement. The arbitral tribunal also has the power to order a party to take interim measures of protection in relation to the subject matter of the disputes and to provide an appropriate security in relation to a measure ordered by the tribunal.

The arbitral tribunal is not bound by any procedural rules other than those agreed upon by the parties. The arbitral tribunal is not bound to follow the Code of Civil Procedure 1908 or the Indian Evidence Act 1872 and can decide the disputes in accordance with the terms of the contract and the substantive law in force in India. Decision-making by the arbitral tribunal is by the majority of its members.

Under the 1940 Arbitration Act, the arbitral tribunal, unless expressly required to do so, was not obliged to give reasons in the award. There is a marked departure in the 1996 Arbitration Act in as much as the arbitral tribunal is required to give reasons in the award unless the parties agree otherwise. The arbitral tribunal has also been conferred with the power to award costs and apportion costs between the parties. A specified period is also prescribed within which parties can go back to the arbitral tribunal for correction and interpretation of the award or for giving an additional award.

The arbitration award made by the arbitral tribunal is open to challenge on the grounds mentioned in section 34 of the 1996 Arbitration Act.

The grounds of challenge under the 1940 Arbitration Act, were very wide and included grounds such as "errors of law arising on the face of the award" making them more open

to the challenge procedure. The 1996 Arbitration Act has very limited grounds of challenge based on UNCITRAL Model Law. Apart from jurisdictional grounds, the arbitral award made by the arbitral tribunal can be set aside if the award is in conflict with the public policy of India.

In a recent case of the Supreme Court entitled ONGC v Saw Pipes the Indian Supreme Court gave an interpretation to the meaning of public policy in a wide sense in a domestic arbitration. The Supreme Court held that an arbitral award could be challenged on the ground that it was: (i) contrary to (a) fundamental policy of Indian law, or (b) the interest of India, or (c) justice or morality; or (ii) is patently illegal; or (iii) is so unfair and unreasonable that it shocks the conscience of the court - however, illegality of a trivial nature can be ignored. Under the 1996 Arbitration Act, awards which have become final and binding are enforceable in the domestic courts system in India and are deemed to be decrees of the court.

The 1996 Arbitration Act provides for appeals against orders granting or refusing to grant interim measures of protection and orders setting aside or refusing to set aside the arbitral award. Orders concerning the jurisdiction or authority of the tribunal/award are also appealable. The appellate court is usually the High Court. No other statutory appeal is provided. Any subsequent appeal can lie only to the Supreme Court by way of a special leave.

Part II of the Arbitration and Conciliation Act 1996 deals with enforcement of New York Convention Awards and Geneva Convention Awards and empowers the Indian courts to refer matters to arbitration which come before them and in which the seat of arbitration is outside India.

Section 48 of the Arbitration and Conciliation Act 1996 enumerates the conditions for the refusal to enforce a foreign award in an Indian court. Thus if the subject matter of the dispute or difference is not capable of settlement by arbitration in India or if the enforcement of the award was contrary to public policy of India, the court may refuse to enforce the award. Once, however, the court is satisfied that the award can be enforced in India, then the same is deemed to be decree of the court.

Part III of the Arbitration and Conciliation Act 1996 has provisions relating to conciliation and is new. No such provision existed in the 1940 Arbitration Act.

Under the 1996 Arbitration Act a conciliator is required to keep all matters relating to conciliation confidential, except where disclosure is necessary for the purpose of implementation and enforcement.

Even though the number of international commercial arbitrations in relation to India are growing, most arbitration agreements provide for seat of arbitration outside India. The preferred venues of arbitration are usually London and Singapore. In recent times Dubai has also become an attractive arbitration centre, particularly after Dubai acceded to the New York Convention. This is largely on account of the fact that the court process in India is slow and parties do not want to subject themselves to the jurisdiction of the Indian courts.

There is also a lack of reputable arbitral institutions in India. An effort is being made by a number of recognised international institutes such as ICC, LCIA and SICA to increase their exposure in India. Recently the Singapore International Arbitration Centre (SIAC) entered into a joint venture agreement with the Construction Industry Development Council of India (CIDC) for the setting up of an arbitral centre in India.

The Indian Parliament is proposing to amend the 1996 Arbitration Act to overcome some of the difficulties that are being faced. It is hoped that the law, once amended, will pave the way for a much better and speedier arbitration regime in India.

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Summary

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration which is prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally arbitration was largely confined to areas such as building and construction disputes. However, the strong and steady growth of the Australian economy over the last decade and the opening of the Asian markets in the mid-1990s has further advanced the use of arbitration in other areas, in particular in the energy and trade sectors. From an Australian perspective the opening of foreign markets, particularly in Asia, is dramatically increasing the significance of foreign investment protection under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID). While the number of investment arbitrations with Australian participation is expected to significantly increase over the next few years, the level of awareness about the different options of investment protection that is available under investment treaties still needs to be raised.

Australia is a party to 18 bilateral investment treaties (BITs)[1] and further treaties are currently being negotiated with Turkey, Mexico and Sri Lanka. Most of these BITs designate ICSID arbitration for the resolution of disputes.

In addition to Australia's existing free trade agreements (FTAs) with New Zealand, Singapore, Thailand and the United States, further FTAs are currently under negotiation with China, Malaysia, Japan and ASEAN.

The use of arbitration clauses in international contracts has grown steadily and the majority of Australian companies prefer arbitration over litigation when it comes to cross-border agreements. While this might be slightly different in a purely domestic context, largely due to the bad reputation of domestic arbitration in the 1990s, there is a trend towards adopting more efficient and flexible procedures based on what is good and common practice in international arbitrations (for example, the Anaconda arbitration in 2002).

Another milestone in the promotion of international arbitration in Australia was the re-invigoration of the Australian Centre for International Commercial Arbitration (ACICA) and the launch of its new institutional arbitration rules in 2005. The ACICA arbitration rules are to a large degree based on the UNCITRAL Arbitration Rules 1985 and were amended and modified to allow for administrative support through ACICA, but also provide some additional features. The rules have been well received by users and are now referred to in many of the standard form agreements in Australia and the Asia-Pacific.

PRIMARY SOURCES OF ARBITRATION LAW

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and six states. Furthermore, there are two federal territories with their own legislatures.

Matters of international arbitration are governed by the International Arbitration Act 1974 (Cth) (IAA) which in section 16 adopts the UNCITRAL Model Law. It is possible for the parties to opt-out of the application of the Model Law by express choice in writing (section 22 of the IAA). The Model Law provides for a flexible and arbitration-friendly legislative environment, granting the parties ample freedom to tailor the procedure to their individual needs. The adoption of the Model Law does of course also provide users with a high degree of familiarity and certainty as to the operation of those provisions, which makes it an attractive choice.

The IAA supplements the Model Law in several respects. Division 3 of the IAA, for example, contains optional provisions such as for the enforcement of interim measures or the consolidation of arbitral proceedings. Another helpful provision is section 19 of the IAA, which specifies the otherwise debatable term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

Part II contains the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Australia has acceded to the New York Convention without reservations and it extends to all external Territories except for Papua New Guinea.

Australia is also a signatory to ICSID, the implementation of which is contained in part IV of the IAA.

Domestic arbitration has traditionally been a matter of state law and is governed by the relevant Commercial Arbitration Act (CAA) of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the CAAs of the states and territories are largely uniform. While the CAA primarily deals with domestic arbitration proceedings, parts of it may also apply in international arbitrations where the parties have chosen to opt out of the Model Law.

ARBITRATION AGREEMENTS

FORM REQUIREMENTS

For international arbitrations in Australia, both the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention qualifies writing as either signed by both parties or contained in an exchange of letters or telegrams, the Model Law is more expansive in its definition of writing and includes any means of telecommunication which provides a permanent record of the agreement. In the rare situation that an arbitration agreement is subject to enforcement under the IAA rather than the Model Law (ie, where the parties have opted-out of the Model Law) the IAA refers to the New York Convention for the definition of 'agreement in writing'.

In Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192 the Federal Court has recently confirmed its position that an arbitration clause contained in an exchange of letters is sufficient to fulfil the writing requirement.

For domestic arbitrations the CAA also requires an arbitration agreement to be in writing. However, there is no requirement for the agreement to be signed. There is generally no distinction between submission of an existing dispute to arbitration and an arbitration clause referring future disputes to arbitration. However, the distinction is important in the context of statutory provisions, such as those relating to insurance contracts. These will be discussed further below.

Under Australian law arbitration agreements are not required to be mutual, ie, they may confer a right to commence arbitration to one party only (see PMT Partners Pty Ltd v Australian National Parks & Wildlife Service [1995] HCA 36). Some standard form contracts, particularly in the construction industry and the banking and finance sector, still make use of this.

SEVERABILITY OF THE ARBITRATION AGREEMENT

Australian courts acknowledge the notion of severability of the arbitration agreement from the rest of contract. There is authority from the High Court of Australia in relation to domestic arbitrations that suggests that the notion of severability does not apply in circumstances where there is a dispute concerning the initial existence of the underlying contract or the arbitration agreement itself (see Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337). However, this issue has been resolved at least in New South Wales. In Ferris v Plaister (1994) 34 NSWLR 474 it was held that the arbitrator has jurisdiction to determine that the relevant contract was void ab initio as long as there was a general consensus. However, an arbitrator may not possess jurisdiction to determine a claim that no arbitration agreement has in fact been concluded. In those circumstances the arbitrator will usually adjourn the arbitration proceedings pending the court's determination of the issue.

In contrast, for international arbitrations article 16(1) of the Model Law expressly provides that the tribunal may also consider objections as to the existence of the arbitration agreement.

STAY OF PROCEEDINGS

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. For domestic arbitrations section 53(2) of the CAA provides that a stay application has to be made before the party has delivered pleadings or has taken any other steps in the proceedings other than filing of an appearance, unless with the leave of the court. For international arbitrations section 7(2) of the IAA incorporates Australia's obligations under the New York Convention and provides for a stay of court proceedings if the proceedings involve the determination of a matter that is capable of settlement by arbitration. Applications for stay are limited to those types of arbitration agreements listed in section 7(1) of the IAA. The primary purpose of this section is to ensure that a stay of proceedings is not granted under the New York Convention for purely domestic arbitrations.

For international arbitrations under the Model Law, article 8 provides for a stay of proceedings where there is a valid arbitration agreement. A party must request the stay before it makes its first substantive submissions. Although the issue of the relationship between article 8 of the Model Law and section 7 of the IAA has not been finally settled by the courts, the prevailing opinion among arbitration practitioners is that a party can make a stay application under either of the two provisions (this also seems to be the position of the Federal Court in Shanghai Foreign Trade Corporation v Sigma Metallurgical Company Pty Ltd (1996) 133 FLR 417).

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth) which renders void an arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. Furthermore, there are statutory provisions in Australia's insurance legislation (section 43 of the Insurance Contracts Act 1984 (Cth) and section 19 of the Insurance Act 1902 (NSW)) which render void an arbitration agreement unless it has been concluded after the dispute has arisen. A recent decision by the New South Wales Supreme Court clarified that this limitation applies to both insurance and reinsurance contracts (HIH Casualty & General Insurance Limited (in liquidation) v Wallace (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

The issue of which disputes are arbitrable and which are not has not yet been finally resolved. Especially in relation to competition, bankruptcy and insolvency matters (with regard to insolvency matters see Tanning Research Laboratories Inc v O'Brien (1990) 64 ALJR 211, reported in Yearbook Commercial Arbitration XV (1991), pp521-529) courts have occasionally refused to stay proceedings though without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such dispute (see for example ACD Tridon Inc v Tridon Australia [2002] NSWSC 896).

Considerations such as these commonly arise in relation to the Trade Practices Act 1974 (Cth), Australia's competition and consumer protection legislation. In IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466, the New South Wales Court of Appeal held that certain matters of consumer protection under the Trade Practices Act are capable of settlement by arbitration. More recently, the New South Wales Supreme Court in Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 and the Federal Court in Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (1998) 159 ALR 142 confirmed that disputes based on misleading and deceptive conduct under section 52 of the Trade Practices Act are arbitrable.

However, in Petersville Ltd v Peters (WA) Ltd (1997) ATPR 41-566 and Alstom Power Ltd v Eraring Energy (2004) ATPR 42-009, the Federal Court took a slightly different position and held that disputes under part IV of the Trade Practices Act (anti-competitive behaviour) are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement. These decisions show that courts may be reluctant to allow the arbitrability of competition matters and seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An issue that courts have had to deal with more regularly in recent times is when multiple claims are brought by one party including some which are capable of settlement and others which are not. So far the courts have approached this issue by staying court proceedings for only those claims it considers to be capable of settlement by arbitration (see Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (1998) 159 ALR 142, Tanning Research Laboratories Incorporated v O'Brien (1990) 169 CLR 332).

THE ARBITRAL TRIBUNAL

APPOINTMENT AND QUALIFICATION OF ARBITRATORS

Australian laws do not impose any special requirements with regard to the arbitrator's professional qualification, nationality or residence. However, arbitrators will need to be impartial and independent. Article 12 of the Model Law requires an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence. This duty continues during the course of the arbitration.

Where the parties fail to agree on the number of arbitrators to be appointed, section 6 of the CAA provides for a single arbitrator and article 10 of the Model Law for a three-member tribunal to be appointed. The appointment process for arbitrators will generally be provided in the institutional arbitration rules or within the arbitration agreement itself. For all other circumstances article 11 of the Model Law and section 8 of the CAA prescribe a procedure for the appointment of arbitrators.

It should be noted that the arbitration law in Australia does not prescribe a special procedure for the appointment of arbitrators in multi-party disputes. If multi-party disputes are likely to arise under a contract it is advisable to agree on a set of arbitration rules that contain particular provisions for the appointment of arbitrators under those circumstances, such as the ACICA arbitration rules (article 11).

CHALLENGE OF ARBITRATORS

For arbitrations under the Model Law a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. This standard has also been applied in domestic arbitrations (Gascor v Ellicott [1997] 1 VR 332).

The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement article 13(2) of the Model Law prescribes the procedure. Initially the party is required to submit a challenge to the tribunal, but may then apply to a competent court if the challenge has been rejected (article 13(3) of the Model Law).

For domestic arbitrations the courts have exclusive jurisdiction to remove arbitrators. Pursuant to section 44 of the CAA any party can make an application to the court to remove an arbitrator or umpire where it is satisfied that there has been misconduct by the arbitrator, undue influence has been exercised in relation to the arbitrator or an arbitrator is unsuitable or incompetent to deal with the particular dispute. Also, its involvement in the appointment of an arbitrator does not bar a party from later on alleging the arbitrator's lack of impartiality, incompetence or unsuitability for the position (section 45 of the CAA).

LIABILITY OF ARBITRATORS

Both the CAA (section 51) and the IAA (section 28) provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators. But they remain liable for fraud. This is also reflected in article 44 of the ACICA arbitration Rules. There are no known cases where an arbitrator has been sued in Australia.

PROCEDURE

Under Australian law parties are generally free to tailor the procedure for the arbitration to their particular needs as long as they comply with fundamental principles of due process and natural justice such as equal treatment of the parties, the right of a party to present its case and the giving of proper notice of hearings. This applies to domestic arbitrations as well as to international arbitrations.

COURT INVOLVEMENT

Australian courts have a good history of supporting the autonomy of arbitral proceedings. Courts will generally interfere only if specifically requested to do so by a party or the tribunal and only where the applicable law allows them to do so.

The courts' powers under the Model Law are very restricted. However, courts may:

- grant interim measures of protection (article 9);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4));
-

decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3));

- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on a plea as a preliminary question, and a party has requested the court to make a final determination on its jurisdiction (article 16(3));
- assist in the taking of evidence (article 27); and
- set aside an arbitral award (article 34(2)).

With regard to domestic arbitration courts have some additional powers. In particular, courts have discretion to stay proceedings (section 53 of the CAA) as well as power to review an award for errors of law (section 38 of the CAA) and to issue subpoenas under section 17 of the CAA upon application by a party.

Party representation

There are much greater flexibilities with regard to legal representation in international arbitration than there are in domestic arbitrations. Under section 29(2) of the IAA a party may represent itself or may chose to be represented by a duly qualified legal practitioner from any legal jurisdiction or, in fact, by any other person of its choice. This applies to all international arbitrations irrespective of whether the Model Law applies or not (in case the parties chose to opt-out). For domestic arbitrations the requirements are more restrictive. Section 20(1) of the CAA sets out a comprehensive list of circumstances and requirements under which a party may be represented in arbitral proceedings. While the provision is broad enough to also allow representation by a foreign legal practitioner in certain circumstances, representation by a non-legal practitioner is very limited.

Confidentiality of proceedings

Australian courts have taken a somewhat controversial approach to confidentiality of arbitral proceedings. In the well-known decision of Esso Australia Resources Limited v Plowman (1995) 183 CLR 10 the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, that does not mean that all documents voluntarily produced by a party during the proceedings are confidential. In other words, confidentiality is not inherent in the fact that the parties agreed to arbitrate. However, the court noted that it is open to the parties to agree that documents are to be kept confidential. From an Australian perspective it is therefore advisable to provide in the arbitration agreement, either expressly or by reference to a set of arbitration rules containing confidentiality provisions, that the arbitration and all documents produced during the proceedings are to be confidential.

Evidence

Evidentiary procedure in Australian arbitrations is largely influenced by the common law system. Arbitrators in international and domestic arbitration proceedings are not bound by the rules of evidence and may determine the admissibility, relevance, materiality and weight of the evidence with considerable freedom (article 19(2) of the Model Law and section 19(3) of the CAA).

Although arbitrators enjoy great freedom in the taking of evidence, in practice arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence. The ACICA arbitration rules also suggest the adoption of the IBA Rules absent any express agreement between the parties and the arbitrator.

The situation is slightly different with regard to domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAA many arbitrators still conduct arbitrations in a way not dissimilar to court proceedings, ie, witnesses are sworn in, examined and cross-examined. Nevertheless, there has been some development lately and more arbitrators are adopting procedures that suit the particular circumstances of the case and which allow for more efficient proceedings.

For arbitrations under the Model Law, article 27 allows an arbitrator to seek the court's assistance in the taking of evidence. In such case, a court will usually apply its own rules for the taking of evidence.

Interim measures

With regard to arbitrations under the Model Law the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary in respect of the subject matter of the dispute. Article 9 states that it is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, interim measures from a court and for a court to grant such measures. There is currently debate about whether an Australian court is entitled to grant interim measures of protection in support of foreign arbitrations, as article 1(2) of the Model Law expressly allows for the application of article 9 in arbitrations with a foreign seat. While the position in Australia is yet to be tested it is possible that Australian courts will follow the decision of the High Court of Singapore in Front Carriers Ltd v Atlantic Shipping Corp [2006] SGHC 127, granting such interim measure of protection (in that case an asset preservation order) in support of foreign arbitration proceedings in England, as Singapore's arbitration laws are very similar to those in Australia.

Parties may also chose to opt in to section 23 of the IAA (additional provisions) which allows a court to enforce interim measures of protection under article 17 of the Model Law in the same way as awards under chapter VIII of the Model Law. Although of great benefit, this provisions is hardly ever noticed at the time the arbitration agreement is drafted.

Under the CAA the arbitrator has freedom to conduct the arbitration as he or she thinks fit. In particular, section 23 of the CAA allows the arbitrator to make interim awards unless the parties intention to the contrary is expressed in the arbitration agreement. Furthermore, section 47 of the CAA confers on the court the same powers

of making interlocutory orders for arbitral proceedings as it has with regard to court proceedings.

Form of the award

The proceedings are formally ended with the issuing of a final award. Neither the Model Law nor the CAAs prescribe time limits for the delivery of the award. However, there are certain form requirements awards have to meet. According to article 31 of the Model Law an award must be in writing and signed by at least a majority of the arbitrators. It must contain reasons, state the date and place of the arbitration and must be delivered to all parties to the proceedings. This date will be relevant for determining the period in which a party make seek recourse against the award.

The form requirements for domestic awards are similar. The award needs to be in writing, signed and contain reasons (section 29 of the CAA). Although there is no express requirement for the award to state the date and place of the arbitration it is recommended to do so. The parties may also choose for the award to be delivered orally with a subsequent written statement of reasons and terms by the arbitrator (section 29(2) of the CAA). With regard to the content of the award, there are currently no restrictions as to the remedies available to an arbitrator. Whether the award of exemplary or punitive damages is admissible, however, is yet to be tested in Australia.

There are no statutory time limits, neither in domestic nor international proceedings, for the making of an award. Where the arbitration agreement itself contains a time limit to this effect, a court would have the power to extend the time limit with regards to domestic proceedings (section 48(1) of CAA). The effect of such time limit in Model Law proceedings is unsettled. Under article 32 of the Model Law delays in rendering an award do not result in the termination of the arbitral proceedings. Instead, one option is for a party to apply to a court to determine that the arbitrator looses his mandate under article 14(1) of the Model Law on the basis that he is "unable to perform his function or for any other reason fails to act without undue delay". Under article 29 of the Model Law any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the CAA provides that the decision of a presiding arbitrator shall prevail if no majority can be reached (section 15 of the CAA). The Model Law allows a similar power of the presiding arbitrator only with regard to procedural matters (article 29 of the Model Law).

Recourse against the award and enforcement

Appeal and setting aside proceedings

Most important to a party that is unhappy with the outcome of the arbitration is whether it is possible to appeal or set aside the award. The only available avenue for recourse against international awards is to set aside the award (article 34(2) of the Model Law). The grounds for setting aside an award mirror those for refusal of enforcement under the New York Convention and basically require a violation of due

process or breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

The CAA allows for broader means to attack an award. An appeal to the Supreme Court is possible on any question of law (section 38(2)) with either the consent of all parties or where the court grants special leave (section 38(4)) - section 38 is worded slightly different in the Northern Territory and Tasmania. However, the Supreme Court will not grant leave unless it considers the determination of the question of law concerned to substantially affect the rights of one or more parties to the arbitration agreement. Furthermore, the court will have to be satisfied that there is either a manifest error of law on the face of the award or strong evidence exists that the arbitrator made an error of law and that the determination of that question may add substantially to the certainty of commercial law (section 38(5) of the CAA). Guidance as to how a court might interpret these provisions can be taken from Giles v GRS Constructions Pty Ltd (2002) 81 SASR 575 and Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724, though the latter case has been criticised to some regard in more recent decisions.

All the aforementioned rights to appeal may be excluded by the parties by way of an exclusion agreement (section 40), subject to the limitations set out in section 41 of the CAA. Further recourse is available under section 42 of the CAA in the form of setting aside the award on the grounds that the arbitrator misconducted the proceedings or the award has been improperly procured.

Enforcement

The most crucial moment for a party that has obtained an award is often the enforcement stage. Australia is a signatory to the New York Convention. Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if the award had been made in that state or territory in accordance with the laws of that state or territory. However, section 8 of the IAA only applies to awards made outside of Australia. For awards made within Australia, either article 25 of the Model Law, for international arbitration under the Model Law, or section 33 of the CAA with regard to domestic awards apply.

Australian courts have an excellent record for enforcing foreign arbitral awards. They rarely refuse enforcement. However, it should be noted that interlocutory or procedural orders made by an arbitral tribunal may not fulfil the requirements for an award and therefore courts may refuse enforcement of such interim measures (see Resort Condominiums International Inc v Bolwell (1993) 118 ALR 655). For this purpose parties may wish to apply section 23 of the IAA (optional provisions) which allows for the enforcement of interim measures under part VIII of the Model Law.

Notes

1. China (1988), Vietnam (1991), Papua New Guinea (1991), Poland (1992), Hungary (1992), Indonesia (1993), Romania (1994), Czech Republic (1994), Philippines (1995), Laos (1995), Argentine (1997), Peru (1997), Pakistan (1998), Chile (1999), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).

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Endnotes

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Summary

There are two Acts governing the arbitration regime in Malaysia, namely the Arbitration Act 1952 (1952 Act) and the Arbitration Act 2005 (2005 Act). The latter Act, came into force on 14 March 2006. The 1952 Act is similar to the English Arbitration Act of 1950. It applies to both domestic and international arbitrations. The 1952 Act, though repealed by the 2005 Act, applies to pending arbitrations, of which notice of arbitration was given prior to 14 March 2006.

The arbitration community, in particular the Malaysian Bar Council, recognising that the 1952 Act was outmoded, proposed that the 1952 Act be repealed and that a new Arbitration Act incorporating the model law be enacted to govern both domestic and international arbitrations. The recommendations of the Malaysian Bar Council came to fruition when the 2005 Act was enacted. The 2005 Act drew its inspiration from the New Zealand Arbitration Act. The 2005 Act, however, only applies to arbitration proceedings commencing from 14 March 2006.

ARBITRATION ACT 2005

INTERNATIONAL AND DOMESTIC ARBITRATIONS

The 2005 Act applies both to domestic and international arbitrations and defines international and domestic arbitrations. An international arbitration is defined as
"that where one of the parties has its place of business outside Malaysia, or where the seat of the arbitration is outside Malaysia or where the substantial part of the obligations of any commercial or other relationship is performed outside Malaysia or the place where the subject matter of the dispute is most closely connected with. A domestic arbitration is defined as any arbitration, which is not an international arbitration."

OPTING IN AND OPTING OUT

The 2005 Act has an 'opting in' and 'opting out' provision. In respect of domestic arbitrations where the seat of the arbitration is Malaysia, Parts I, II and IV of the Act shall apply. Part I deals with preliminary matters such as arbitrability. Part II deals with the definition and form of arbitration agreements, interim measures, composition of arbitrators, challenges, jurisdiction of arbitral tribunals, conduct of arbitral proceedings, making of awards, recourse against awards and recognition and enforcement of awards, domestic and foreign. Part III deals with consolidation, preliminary points of law, references on questions of law, appeals, costs and extension of time for commencement of arbitration proceedings, and extension of time for rendering of awards. Part IV deals with miscellaneous matters such as liability of arbitrators, immunity of arbitral institutions, bankruptcy, mode of application, repeal and saving provisions. In international arbitrations, parts I, II and IV of the Act apply but part III of the Act which concerns issues in which there can be supervisions and interference by the domestic court is excluded unless the parties agree otherwise in writing for it to apply.

It is also possible for parties to a domestic arbitration to agree to exclude the application of part III. The 'opting in' and 'opting out' provision makes it imperative that anyone drafting an arbitration agreement, be it domestic or international, has to be extremely careful to ensure that part III is either excluded or included, as the case may be.

OTHER FEATURES OF THE 2005 ACT

The main aim of the 2005 Act is to reduce interference by the courts. The 1952 Act contains many provisions where there is court supervision and interferences, especially in domestic arbitrations, in particular, the case stated procedure which prevails under this Act. The 1952 Act also has provisions for the courts to grant security for costs and interim measures and the power to appoint arbitrators, in the event parties are unable to agree. The 2005 Act attempts to reduce court interference considerably - interim measures, discovery and security for costs can now be applied for to the arbitral tribunal but at the same time, preserving the parties' right to apply for such measures to the court, if necessary. The 2005 Act has vested the right of appointment of an arbitrator where parties are unable to agree, with the director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Only when the director fails to act within 30 days can the parties apply to the High Court to make such an appointment.

The provisions for stay of arbitration proceedings under the 1952 Act were discretionary whereas under the 2005 Act, stay is now mandatory unless the agreement is null and void, inoperative or incapable of being performed or there is in fact no dispute between the parties.

RECENT DECISIONS OF MALAYSIAN COURTS IN RESPECT OF INTERNATIONAL ARBITRATIONS

The Malaysian courts have not been consistent in dealing with applications for stay in respect of international arbitrations. Highlighted below is the manner in which the Malaysian courts have dealt with interlocutory applications for stay in respect of international arbitrations.

COLLIERS CASE

The dispute concerned a Malaysian company and an American company with regard to an affiliation agreement and licence agreement. The agreement provided for arbitration in London. The High Court in Malaya initially granted an interim injunction to the Malaysian company restraining the American company from appointing a Malaysian agent. However, before the dispute was brought to court, the American company had already commenced arbitration proceedings in London. It applied for a stay of the High Court action pending the reference to arbitration.

The Malaysian company did appear in the arbitration in London and contested the arbitrator's jurisdiction. The arbitrator considered the issue of his jurisdiction and concluded that he had jurisdiction.

The Malaysian company also applied to the High Court to stay the London arbitration proceedings. The court discharged the interim injunction restraining the American company from appointing a local agent and granted the American company's application for a stay of proceedings pending arbitration, and refused to restrain the international arbitration in London from continuing. There is an appeal pending in the Malaysian Court of Appeal.

INAI CASE

The Malaysian Court of Appeal recently had occasion in the case of Jan De Nul NV & 3 Ors v Inai Kiara Sdn Bhd (2006) 4 AMR p697 to deal with the issue of stay under section 6 of the Malaysian Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (New York Convention Act 1985), which gives effect to the New York Convention.

The facts briefly:

The plaintiff and the respondent in the above case had executed a memorandum of understanding whereby the plaintiff would provide a dredger for the respondent to use. But the business relationship between the plaintiff and the respondent turned sour. The plaintiff alleged breach of fiduciary duty by the respondent and demanded payment for outstanding rentals and terminated the memorandum of understanding.

There was a dispute and the plaintiff commenced arbitration proceedings pursuant to the memorandum of understanding, which provided for arbitration in Zurich. However, the defendant commenced a suit in Malaysia against the appellants and others who were not parties to the arbitration agreement, alleging several causes of action such as conspiracy to default breach of fiduciary duty, conversion, unlawful interference of business and interest. The plaintiff contended that since the law governing the business relationship between the plaintiff and the defendant was Swiss law as stipulated in the memorandum of understanding, the arbitration proceedings could not be domestic and as such, section 6 of the New York Convention Act 1985 would apply and therefore, there should be a mandatory stay. The Court of Appeal in dealing with this matter held that the arbitration was clearly a non-domestic arbitration and came within the purview of the New York Convention Act 1985, namely sections 2 and 6 of the Malaysian Act giving effect to the New York Convention. However, it held that as the dispute between the parties dealt with non-contractual issues, it would not come within the purview of the arbitration clause. The Court of Appeal relied on an Australian authority known as Hi-Fert Pty Ltd and Another v Kiukiang Maritime Carriers Inc and Anor (1998) 159 ALR p142.

The court also held that as there were other parties involved in the litigation who were not parties to the memorandum of understanding, the provisions of section 6 of the Act did not apply as they were not parties to the arbitration agreement.

The Court of Appeal therefore reaffirmed the decision of the High Court and refused to grant an injunction to stay the arbitration proceedings in Switzerland. The proceedings in Malaysia involving the plaintiff and others in the Malaysian courts, was permitted to continue and the Court of Appeal refused to stay the proceedings despite pending arbitration in Switzerland pursuant to section 6 of the New York Convention Act 1985.

This matter went up by way of leave to the highest court, namely the Federal Court but the matter was settled during the course of the appeal.

This decision has ramifications in respect of international arbitrations as the Malaysian court has given a rather restrictive interpretation to the phrase "any dispute or differences arising out of and/or in connection with the Agreement". The Malaysian court has held that this only encompasses contractual claims and that tortious claims do not come within the purview of the arbitration clause. This is a rather narrow interpretation of the arbitration clause, for tortious claims can sometimes arise out of and in connection with the contractual dispute.

NEXT ENGINEERING

There was a dispute between a Swiss company and a Malaysian company with regard to a distributorship agreement which contained an arbitration clause. The venue for the

arbitration was Switzerland, under the ICC Rules. The arbitration proceedings commenced in Switzerland and the Malaysian company, who was the respondent on the arbitration proceedings, refused to appear in the Swiss arbitration but chose to file proceedings in the High Court against the claimant and the arbitrators, the International Chamber of Commerce (ICC) and the International Court of Arbitration. The Malaysian company sought a number of declarations. The cause papers were served on the National Committee of the ICC in Malaysia, who was not authorised to accept service of process on behalf of the ICC. The Malaysian company used such service to obtain judgment in default against the ICC and the International Court of Arbitration. The Malaysian arbitrator involved in the arbitration was also sued. The Malaysian arbitrator and the ICC are now contesting the matter in court and the court has still to decide on the various issues such as jurisdiction.

This decision has a number of ramifications, especially with regard to local arbitrators appointed in international arbitrations. Many an arbitrator resident in the country in which proceedings are pending against him, may, if he does not have professional indemnity insurance, decide not to take part in such proceedings but resign as arbitrator as he does not wish to go through the indignity and expense of court proceedings. This phenomena is happening quite often in a number of countries in Asia and it is a matter that needs to be addressed by the arbitral institutions who have to ensure that arbitrators sued in the various jurisdictions are offered protection and legal assistance so that international commercial arbitration can thrive in these countries.

THE CONTROVERSIAL SECTION 34 OF THE 1952 ARBITRATION ACT

The 2005 Act repeals the controversial provision that existed under the old 1952 Act, namely section 34. This provision was enacted in the 1952 Act in an endeavour to encourage international arbitrations to be conducted at the KLRCA and arbitrations held under the Convention of Settlement of Investment Disputes between States and Nationals of other States (ICSID), under the UNCITRAL Rules or the Rules of the KLRCA, were not subject to the jurisdiction of the High Court save insofar as it related to enforcement of convention awards under the provisions of the New York Convention Act 1985.

The purpose of enacting the old section 34 was to make the KLRCA conducive to international arbitrations because supervisory jurisdiction of the court would be excluded. A major concern was that section 34 was interpreted to prevent parties from seeking interim relief and security for costs. This was unsatisfactory and despite a number of ingenious attempts to get round section 34, they all failed. The Court of Appeal recently, in Thye Hin Enterprises v Daimler Crysler Malaysia Sdn Bhd (2005) 2MLJ 293, held that section 34 did not preclude the grant of interim relief. This pragmatic approach by the court is to be lauded - it has allayed the fears of arbitrating under the KLRCA Rules. The 2005 Act has repealed section 34 and the special protection accorded to the KLRCA no longer subsists.

REGISTRATION OF FOREIGN AWARDS

Malaysia is a party to the New York Convention and had enacted the Convention into law by the New York Convention Act 1985. This Act, however, has been repealed in the 2005 Act. There does not appear to be any saving provisions in the 2005 Act, save for section 38 of the 2005 Act which deals with recognition and enforcement of awards. The section does not appear to preserve the provisions of the New York Convention Act 1985. The enforcement of foreign arbitral awards in Malaysia has been put in a state of disarray by the decision of the Court of Appeal in Sri Lanka Cricket (formerly known as Board of Control for Cricket in

Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd) (2006) 3MLJ 116. The Sri Lanka Cricket Board attempted to register in Malaysia an arbitral award handed down in Singapore, which is a convention country. The award was registered by the High Court. However, on appeal to the Court of Appeal, it was argued that Malaysia had not gazetted the reciprocating countries as required under section 2(2) of the New York Convention Act 1985. The Court of Appeal upheld the submissions and refused to enforce the award. The parties were urged to register the award as a judgment in Singapore and then to enforce it as a judgment under the Reciprocal Enforcement of Judgments Act 1958. This is a cumbersome method of enforcement of arbitral awards.

The Sri Lanka Cricket Board was granted leave to appeal to the Federal Court. However, the matter has been compromised. The decision of the Court of Appeal is binding on the Malaysian High Court insofar as the registration of foreign arbitral awards is concerned.

Consequence of the Nimbus decision on enforcing foreign awards in Malaysia. The above decision suggests that foreign awards cannot now be enforced under the New York Convention Act 1985. The only method to enforce it would be as a judgment under the Reciprocal Enforcement of Judgments Act of 1958. However, the schedule to that Act only covers these jurisdictions, namely the United Kingdom, Hong Kong, Singapore, Sri Lanka, India, New Zealand and Brunei. Australia was excluded from the schedule in 1994.

Hence, countries which are not in the schedule would not be able to use this route to enforce convention awards. They would have to sue on the award and enforce it by way of an action in the court. This is an extremely cumbersome method of enforcing foreign awards.

The 2005 Act has repealed the New York Convention Act 1985. The 2005 Act has enacted in section 38 provisions for the enforcement of awards from a foreign state but it has excluded a foreign award made in Malaysia. The foreign state is said to be a state which is a party to the New York Convention. There is no provision in the 2005 Act which specifically identifies the foreign states which are parties to the New York Convention and which states, are reciprocating countries with Malaysia. The countries concerned have also not been gazetted.

This leads to a controversy: namely, whether even under the present section 38 of the 2005 Act, it would be possible to enforce a foreign award in Malaysia from a New York Convention country. Any attempt to register an award would be met by the same arguments advanced in the Nimbus decision. The solution would be to amend the 2005 Act to incorporate provisions which are similar to sections 99 and 100 of the English Arbitration Act 1996 or, alternatively, provisions similar to section 27 of the Singapore International Arbitration Act Cap 143. Alternatively, the reciprocating countries of the New York Convention could be gazetted either prospectively or retrospectively. Otherwise one would have to await another application to register a foreign award and lead primary evidence of the reciprocating country.

The 2005 Act is in its infancy and there are no decisions on its interpretation. However, a number of amendments are needed to the 2005 Act to make it more effective to both domestic and international arbitrations. The various arbitral institutions in the country are presently discussing the deficiencies in the 2005 Act with a view to submitting proposals to the attorney general, to amend the 2005 Act.

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Hong Kong

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Summary

Arbitration is not new to Hong Kong. The first Arbitration Ordinance (No. 6 of 1844) was passed on 20 March 1844[1] not as an alternative to litigation but because there was no civil litigation system in place in the former British colony at the time. Today, as Hong Kong moves even further towards a service-oriented economy, arbitration as well as other legal services play an ever-increasing role and arbitration continues to be the preferred method for resolving international commercial disputes in Hong Kong.

Indeed, the Hong Kong International Arbitration Centre (HKIAC) which was established in 1985 is now one of the major players on the international arbitration stage, attracting business from all over the world and in particular from the People's Republic of China and the rest of the Asia-Pacific region. The HKIAC is active in finding ways to promote arbitration in Hong Kong. An example of this is the Asia-Pacific Regional Arbitration Group Conference 2006 which took place in Hong Kong in December and which was hosted by the HKIAC.

The HKIAC also supports the Vis Moot (East), which takes place in Hong Kong. The Vis Moot (East) is a sister moot to the well-known Willem C Vis International Commercial Arbitration Moot, which takes place in Vienna each year. The purpose of both moots is to foster the study of international commercial law and arbitration for resolution of international business disputes.

HONG KONG'S LEGAL SYSTEM AND SOURCES OF ARBITRATION LAW

In 1997 British rule ended in Hong Kong and control of the territory was returned to the PRC. Under the Joint Declaration[2] however, Hong Kong is guaranteed a high degree of autonomy from the PRC for 50 years as a Special Administrative Region (SAR) of the People's Republic of China under the principle of 'One Country, Two Systems'. Thus, Hong Kong continues to use a common law legal system based closely on English law and will do so until 2047.

The principal statute governing arbitration in Hong Kong is the Arbitration Ordinance (chapter 341)[3] (the Ordinance). The Ordinance provides for two distinct regimes:

- the domestic regime, which is based largely on the English Arbitration Acts 1950, 1975, 1979 and 1996; and
- the international regime which, since 1990, has been based on the UNCITRAL Model Law (the Fifth Schedule to the Ordinance).

Article 1(3) of the Model Law sets out the criteria for deciding when an arbitration will be considered international. Arbitrations which do not satisfy these criteria are regarded as domestic arbitrations.[4] Parties can, however, opt into either regime: parties to a domestic agreement may, after a dispute has arisen, agree in writing to have the dispute arbitrated as an international arbitration[5] and parties to an international arbitration agreement may agree in writing before (ie, this can be stipulated in the underlying arbitration clause or agreement) or after a dispute has arisen, to have the arbitration conducted under the domestic regime.[6]

The main focus of this review is upon international arbitration. The significant difference between the two regimes is that the domestic regime provides the Hong Kong courts with additional powers to intervene in and assist with the arbitration process which are not available under the international regime. By contrast the international regime, based as it is on the Model Law, follows the principle that the Hong Kong courts should support, but not interfere with, the arbitration process.

Hong Kong is a common law jurisdiction. As such, court case authorities from Hong Kong and other common law jurisdictions (and in particular England) will have persuasive authority before the arbitral tribunals in Hong Kong.[7]

PROPOSED REFORMS

In 1998, the Hong Kong Institute of Arbitrators (the HKIArb)[8] established the Committee on Hong Kong Arbitration Law in co-operation with HKIAC (HK Committee). The HK Committee was established with the support of the Secretary for Justice to consider further and to take forward proposed reforms identified in 1996 by an earlier HKIAC committee. The HK Committee published its report on 30 April 2003. Its primary recommendations were:

- to abolish the distinction between domestic and international arbitrations and to establish a unitary regime for arbitration law in Hong Kong;
- that the Model Law should continue to be scheduled to the Ordinance and to have the force of law in Hong Kong, subject only to necessary amendments;

and

- that the Ordinance should follow the order and chapter headings of the Model Law, and the Model Law and additional provisions should be set out in the main body of the Ordinance, to make it as user-friendly as possible.

In addition, the HK Committee recommended that the parties should still be able to agree to 'opt-in' to provisions similar to those which are part of the current domestic regime, being section 6B (consolidation of arbitrations by the court); section 23A (obtaining the Court's opinion on a preliminary point of law and which the HK Committee has recommended should be replaced by a provision similar to section 45 of the English Arbitration Act 1996 which covers the same point); and Section 23 (relating to an appeal on a point of law arising under an arbitration award[9]).

At the date of writing, a new draft Ordinance is almost complete. It is expected that the draft bill will be made available for public consultation in the first half of 2007 after which, and depending on the results of the consultation, it should go before the Hong Kong Legislative Council. These suggested reforms can only serve to reinforce Hong Kong's appeal as a venue for international arbitration.

FEATURES OF HK ARBITRATION

HONG KONG COURTS

Support

As stated above, the Model Law is based upon the principle that the local courts should support, but not interfere with, the arbitration process. The Hong Kong judiciary fully supports this policy and takes a robust approach in its interpretation of the Ordinance and enforcement of arbitration agreements and arbitration awards. By contrast, the current domestic regime provides the courts with a number of additional powers to supervise and assist the arbitration proceedings, some of which have been set out above.

SPECIALIST LIST

Hong Kong also benefits from a specialist 'Construction and Arbitration List'. All matters concerning arbitration are set down in this List, presided over by one judge who is a specialist

in the field of arbitration (and construction). As such, parties who bring arbitration issues before the Hong Kong court can be confident that they will be resolved in a manner which is consistent, and in accordance, with international arbitration practice and procedure.

INTERIM MEASURES

Both the Hong Kong courts and the arbitration tribunal have powers under the Ordinance to grant interim relief in respect of Hong Kong arbitration proceedings. The courts have power to grant interim relief notwithstanding that the tribunal has similar powers, but the courts are more likely to decline to exercise their powers when the arbitration proceedings have already commenced, on the basis that it would then be more appropriate for the application for interim relief to be dealt with by the tribunal itself.

The Hong Kong courts also have jurisdiction[10] to grant interim measures of protection in aid of foreign arbitration proceedings. Where the applicant has not obtained the approval of the foreign tribunal to make the application, however, the Hong Kong court will only grant the relief if the applicant can show that justice dictates that the relief should be granted to prevent serious and irreparable damage to the position of the applicant in the arbitration.

KOMPETENZ-KOMPETENZ

The principle of Kompetenz-Kompetenz applies in both domestic and international arbitrations in Hong Kong.[11] This means that an arbitral tribunal may rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement.

REPRESENTATION

Parties to an arbitration in Hong Kong can be represented by anyone they choose. The Hong Kong immigration department will provide work visas to non-residents wishing to come to Hong Kong to represent a party in a Hong Kong arbitration, although a local sponsor or employer (for example a partner in the instructing Hong Kong law firm, as appropriate) will usually be required as a matter of formality.

INTEREST

The tribunal is given power under the Ordinance to award compound as well as simple interest on any award from such dates and at such rates as it considers appropriate for any period ending not later than the date of payment.[12] Where claims are of a commercial nature, the general rule is that the commercial lending rate prevailing in Hong Kong (relating to the currency of the claim) plus one percent should be the interest rate applied on an award of damages.

ARBITRAL INSTITUTIONS

The primary arbitral institution in Hong Kong is the HKIAC. Although it has been funded by both the Hong Kong business community and the Hong Kong government, it is independent of both and financially self-sufficient. The HKIAC has adopted the UNCITRAL Arbitration Rules as its rules for international arbitrations and has drafted its own Domestic Arbitration Rules for domestic arbitrations (although the HKIAC will administer arbitrations for parties who have chosen the arbitral rules of other institutions to govern the reference).

The HKIAC is often selected by parties to act as the appointing authority for an arbitration with its seat in Hong Kong. The HKIAC has also been designated in the Ordinance as the

default appointing authority where the parties have not agreed, or are unable to agree, on the method for appointing arbitrators, or any agreed mechanism has broken down. This function was previously exercised by the Hong Kong courts. The HKIAC has an extensive panel of international and local arbitrators. Parties remain free, however, to appoint an arbitrator or arbitrators of their own choosing (subject only to restrictions relating to an arbitrator's independence and impartiality)[13], in the same way as they can appoint legal representatives of their own choice (see 'Representation' above). The HKIAC will respect any nationality restrictions agreed by the parties in their arbitration agreement.

The Ordinance also gives the HKIAC the power to decide whether an arbitral tribunal should consist of one or three arbitrators in an international arbitration where the parties are unable to agree on the number.

The HKIAC is a popular choice of arbitration venue for parties to international commercial contracts, currently ranking only behind CIETAC (China), the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) in terms of the number of international arbitration cases heard. In 2005 it had 250 cases, of which 104 were classified as construction cases, 98 as general commercial cases and 48 as shipping cases. Notably, however, although arbitrations can be formally administered by the HKIAC if the parties wish, such arbitrations are not administered to the same extent as those administered by the ICC, AAA or London Court of International Arbitration (LCIA) in the sense that the HKIAC does not fix the arbitrators' remuneration, nor does it scrutinize awards like the ICC. The fees charged by HKIAC, even for administering an arbitration, are also relatively low.

Many arbitrations have also had their seat in Hong Kong and been administered by, and in accordance with the rules of, the LCIA, the AAA and, particularly, the ICC.

Other institutions in Hong Kong include the HKIArb and the East-Asia branch of the Chartered Institute of Arbitrators, which covers China, Thailand, Vietnam, the Philippines, Korea, Singapore and Indonesia.

The headquarters of the ICC Asia also used to be based in Hong Kong, until they were relocated to Singapore in 2002. ICC Asia is a resource centre to raise ICC's profile in the Asia-Pacific region, promote the use of ICC arbitration and business dispute resolution services by international business operators in the region and to assist in the development and reinforcement of ICC's National Committees in Asia Pacific countries. National Committees have been established in both Hong Kong and China.

HONG KONG AND THE PEOPLE'S REPUBLIC OF CHINA

As a result of its relationship with, and proximity to, the mainland, Hong Kong (and usually the HKIAC) is often selected as an arbitration venue for PRC-related arbitration. For example, of the 250 cases which were referred to the HKIAC in 2005, approximately one-third involved parties from the mainland.

Since its handover in 1997, Hong Kong has been uniquely placed as the PRC's window to the world and, for the rest of the world, the gateway to the PRC. It enjoys close economic ties with the mainland: according to statistics provided by the Hong Kong Trade Development Council, Hong Kong is the largest source of overseas direct investment in the mainland. By the end of 2005, among all the overseas-funded projects registered in the mainland, 45.9 per cent were tied to Hong Kong interests. Similarly, the mainland is one of the leading sources of inward

investment in Hong Kong. According to Hong Kong's Census and Statistics Department, the total of the mainland's direct investment in Hong Kong was HK$1.02 trillion at the end of 2004, accounting for 29 per cent of Hong Kong's inward direct investment and, as of December 2005, 335 mainland companies were listed in Hong Kong, with a total market capitalisation of HK$3.2 trillion. In 2005, Hong Kong was also the mainland's third largest trading partner (after Japan and the United States), accounting for 9.6 per cent of its total external trade and the mainland has been Hong Kong's largest trading partner since 1985.

The official languages of Hong Kong are Chinese (Cantonese) and English; Hong Kong also shares a written language with all Chinese parties (with Mandarin (putonghua) being taught in most schools and spoken more and more) and a cultural background with the mainland. For all these reasons, mainland parties are comfortable arbitrating in Hong Kong (where their contract counterpart wishes to choose a neutral venue outside the PRC).

By the same token, Hong Kong is a popular choice for western parties: from a legal perspective, Hong Kong has retained its well-respected common law legal system even after the handover and from a commercial perspective, Hong Kong is the international financial and commercial capital of Asia and a jurisdiction where parties can work in English (in any court proceedings as well as in the arbitration proceedings). Moreover, Hong Kong is well connected to all Asia Pacific countries and benefits from an excellent infrastructure, including a good transport system, good accommodation and telecommunications, and one of the most efficient airports in the world: Chep Lap Kok, capable of handling 35 million passengers each year and serviced by the Airport Express, bringing travellers to and from the airport swiftly and with ease.

ENFORCEMENT

Prior to 1 July 1997, Hong Kong was a member of the New York Convention (Convention) by virtue of the United Kingdom's accession on its behalf. After the handover, the PRC extended its own membership of the Convention to Hong Kong (the PRC having acceded to the Convention on 22 January 1987). Thus, after the handover, arbitration awards have continued to be enforced in Hong Kong under the Convention. The Hong Kong courts are pro-enforcement and have an excellent record in enforcing foreign arbitration awards in accordance with the Convention. Their approach - depending on the particular circumstances of the case in question and where appropriate - is to enforce the award even if the respondent manages to make out one of the limited grounds under the Ordinance enabling the court to refuse leave to enforce (in respect of which the courts retain a residual discretion).[14]

One such ground is the 'public policy' ground, ie, where the recognition or enforcement of the award would be contrary to the public policy of Hong Kong. The Court of Final Appeal considered the meaning of 'public policy' in a 1999 case and held that the expression meant "contrary to the fundamental conceptions of morality and justice of Hong Kong" and should be narrowly construed and applied. However, the Court of Final Appeal emphasised in that case that "a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground enforcement of the award in the enforcing court in another jurisdiction, because each jurisdiction has its own public policy". Non-Convention awards can be enforced in Hong Kong in a similar manner.[15]

In respect of the PRC, it was identified that after the handover, the Convention no longer applied to the enforcement of PRC awards in Hong Kong and vice versa, on the basis that

the Convention only applies to the enforcement of awards between two different contracting states (whereas Hong Kong is an 'SAR' of the PRC). To overcome this difficulty, the vice president of the PRC Supreme People's Court and the Hong Kong Secretary for Justice signed a Memorandum of Understanding on the 'Arrangement between the mainland and the Hong Kong SAR on the Mutual Enforcement of Arbitral Awards' in 1999, which came into force in both the mainland and Hong Kong in early 2000. Under this Arrangement, a mainland award can be enforced in Hong Kong and vice versa on terms more or less the same as those that would apply to an application to enforce a Convention award. Its implementation resolved two years of uncertainty following the handover and served to re-establish Hong Kong as the pre-eminent jurisdiction in which to conduct PRC-related arbitrations. The Hong Kong courts have continued to enforce PRC awards under the Arrangement.

THE PRC-HKSAR ARRANGEMENT ON RECIPROCAL ENFORCEMENT OF JUDGMENTS

On 14 July 2006 the vice president of the PRC Supreme People's Court and the Hong Kong Secretary for Justice signed the PRC-HKSAR Arrangement on Reciprocal Enforcement of Judgments (Judgment Arrangement), providing for the enforcement of PRC judgments in Hong Kong and vice versa. The Judgment Arrangement is not yet in force and when it is brought into force it will be of limited application, applying: (a) to enforceable final judgments; (b) in civil and commercial matters; and (c) where the parties have expressly, exclusively and specifically designated either the Hong Kong courts or the PRC courts[16] to have jurisdiction to hear the dispute. A detailed discussion of the Judgment Arrangement is outside the scope of this review. Nonetheless, once it is brought into force, the Judgment Arrangement should provide a practical alternative forum to arbitration, namely litigation in Hong Kong, for disputes involving PRC and Hong Kong interests and where there are assets on the mainland against which enforcement may need to be made.

* * *

For all the above reasons, Hong Kong is and should remain a popular choice for parties wishing to arbitrate their disputes in the Asia-Pacific region, benefiting as it does from its highly regarded common law system, supportive courts, multilingualism and excellent infrastructure and, in respect of PRC-related contracts, its proximity to, and relationship with, the PRC.

Endnotes

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Summary

There are many reasons to choose Canada as the seat of international arbitrations. Canada is a desirable neutral venue with proximity to Europe and the United States. The legislative regime in Canada is modern, robust and attuned to the needs of the international commercial and arbitration communities. Canada is the home of sophisticated and experienced counsel and arbitrators who are active in the arbitration community and well-versed and trained in the law of arbitration. There are several cities in Canada that can host arbitrations at reasonable cost. And, Canadian courts are consistent in according a high degree of deference to arbitral decisions and in protecting arbitration awards from an inappropriate amount of intervention in the arbitration process. Indeed, with one notable exception (in which one part of an award of an international arbitration panel was set aside),[1] there is simply no case in which a Canadian court has refused to enforce or has set aside an award of an international commercial arbitration tribunal on any of the grounds set out in the UNCITRAL Model Law. This article reviews a November 2006 decision of the Ontario Superior Court of Justice that exemplifies this latter point.[2]

THE INTERNATIONAL ARBITRATION REGIME IN CANADA

Before reviewing the case, a brief review of the international arbitration regime in Canada is appropriate.

Canada is a federal state comprised of a federal government, 10 provinces and three territories. Property and civil rights, and the administration of justice in particular, are within provincial jurisdiction. Hence, except for limited matters particularly germane to the federal level of government,[3] it is provincial legislation that governs and provides the framework for international arbitration.

International arbitration legislation in Ontario typifies that of all of the provinces. There, the International Commercial Arbitration Act, RSO 1990, c I-9 adopts, with few exceptions, the UNCITRAL Model Law. The principles provided for by the New York Convention have also been adopted. For purposes of the Model Law, Ontario is a "state". The primary divergences from the Model Law are that arbitrators are permitted without subsequent disqualification and with the consent of the parties to utilise mediation and conciliation in order to settle cases,[4] in the absence of agreement by the parties the arbitrators are to apply the rules of law that they consider appropriate,[5] and the courts are empowered to consolidate arbitration proceedings.[6]

Insofar as court intrusion on arbitration awards is concerned, all Canadian provinces have followed the Model Law in precluding all appeals, even on pure questions of law, except, of course, where the parties have otherwise agreed.[7] Even where the parties have agreed to permit appeals, it is noteworthy that appellate courts in Canada are generally deferential to decisions made in first instance. Appeal courts will only reverse trial judgments (and presumably arbitral awards) where there are errors of law or "overriding and palpable errors" on questions of fact or questions of mixed fact and law. Insofar as defences to recognition and enforcement and applications to set aside awards are concerned, articles 34 and 36 of the Model Law are incorporated into provincial law and cannot be avoided or even limited by agreement of the parties. In brief, arbitration awards can be set aside only on very limited grounds; primarily where a panel exceeds its jurisdiction, and this jurisdictional exception will apply where there is a fundamental denial of due process, or where there are breaches of the rules of natural justice, or where there is a contravention of public policy.

THE XEROX V MPI DECISION

In Xerox v MPI the Honourable Justice Colin Campbell of the Ontario Superior Court of Justice dismissed Xerox's application to set aside a decision of a three member panel of arbitrators constituted under the International Commercial Arbitration Act (Ontario) and the UNCITRAL Model Law. In the award that was under review, the panel, which was comprised of a retired Federal Court judge, an intellectual property lawyer and a retired printing technology expert (who was not a lawyer or trained arbitrator), had awarded MPI approximately US$89 million plus interest for unpaid royalties owing under a 1994 licence agreement and damages for unauthorised use of confidential information or breach of copyright in software that was licensed under that agreement.

As to the underlying facts in the arbitration, under the licence agreement MPI licensed software to Xerox for use in the latter's high speed printing systems which, in turn, were used by Xerox customers. Disputes arose between the parties as to the proper calculation and payment of royalties. Resolution of those disputes required the arbitral panel to construe and interpret several provisions of the license agreement and, in particular, to define what a royalty bearing event was (a primary issue being whether royalties were to be paid when upgraded versions of the software were provided to Xerox customers).

Also, during the course of the license agreement, Xerox had developed its own software that performed the same or very similar functions as did the MPI software. MPI claimed that in so doing, Xerox had infringed MPI's copyright in the licensed software. MPI claimed that Xerox had breached duties of confidentiality that formed an express or implied part of the license agreement. The arbitration proceedings were characterised by several interlocutory motions and rulings and culminated in a 40-day hearing and a 78-page award.

On its court application, Xerox maintained that the arbitral panel exceeded its jurisdiction by fundamentally misconstruing its powers and duties under the Model Law, by improperly conducting the hearing and by allowing the misuse of knowledge gained by the non-lawyer arbitrator that was not disclosed to Xerox such that the award was made not on the evidence that the parties had adduced at the hearing. Accepting the very high threshold for a successful challenge under article 34 of the Model Law, Xerox argued that these errors were so fundamental that the entire award had to be set aside and the arbitration repeated before another panel. In rejecting all of Xerox's arguments and in dismissing the application to set aside, Justice Campbell affirmed that properly constituted and conducted international arbitration proceedings in Canada will be accorded great deference by reviewing courts and that any party seeking to overturn an international arbitration award will have to overcome a "powerful presumption" that the arbitral tribunal acted within its powers in all respects.

PARTIES TO THE ARBITRATION

The software in issue had been developed by the MPI parent company, based in France, and licensed by MPI's US-based subsidiary. Only the latter had signed the licence agreement and it was the subsidiary that had launched the arbitration. Later, MPI successfully moved to add the MPI parent as a claimant over Xerox's objection that article 7 of the Model Law does not permit the joinder of non-signatory parties. In allowing the joinder, the panel acceded to MPI's evidence that, during the course of their relationship, Xerox had dealt with MPI as one entity (such that this did not really represent the addition of a true 'third party'), and it took note of the fact that the copyright infringement claim had its foundation in the licence agreement and was a dispute arising under that contract. The panel also noted that, at the motion stage,

it made no determination that the MPI subsidiary could not have prosecuted the infringement claim on its own. In its final award, the panel ruled that Xerox was estopped from denying that the copyright claim could be resolved under the agreement by arbitration. The panel also ruled that it was not persuaded that the addition of the MPI parent was actually necessary to resolve the infringement and confidentiality claims.

Xerox raised the addition of the MPI parent as jurisdictional error on its application to set aside the entire award. On this issue, the court was called upon to construe the agreement together with the Model Law. In doing so, the court applied prior appellate authority that established the "broad deference" to be given to arbitral panels at the "high end of the spectrum".[9] In particular, the court cited with approval the statement of Justice Armstrong of the Ontario Court of Appeal that "notions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly".[10]

Having noted the foregoing as a standard of review and non-interference, Justice Campbell ruled that the agreement was to be construed and interpreted to reflect the parties' intentions that all disputes arising under that agreement were to be settled by arbitration and that the Model Law was to be interpreted liberally so as to reflect legislative purpose and remedial intent consistent with Ontario's public policy that mandates arbitration where that process is selected by contracting parties. He also agreed with the panel that during the course of their commercial relationship Xerox had treated the MPI companies as one and he ruled that Xerox could not later take the position that the MPI parent company could not be a party to the arbitration only because it was not a signatory to the licence agreement.

In summary, the court on Xerox's application to set the award aside, applied a nuanced view of the parties' dealings and interactions as well as a purposive interpretation of the underlying agreement and the Model Law in dealing with the propriety of the joinder of a non-signatory to that contract to the arbitration proceedings.

THE PROPER ROLE OF THE ARBITRATORS

As "bluntly" characterised by Justice Campbell, a critical issue before the panel was whether Xerox misused MPI's software by copying the latter's source code. During the course of the hearing, the parties filed several versions of the software and had that code marked as exhibits. Later, the non-lawyer arbitrator distributed to counsel some charts that, according to that arbitrator, reflected his notes as to certain aspects of the software development. The charts summarised those parts of the code that certain developers had worked on, and the names of the developers who worked on the Xerox code. Also, the arbitrator adverted to some testimony on software development methodologies that had been adduced through an expert witness called by Xerox and he suggested to counsel that further information on that particular subject could be found on some websites.

Both of the foregoing were met by Xerox objections at the hearing and later on their subsequent application to set aside the award to the effect that the panel had exceeded its jurisdiction and acted contrary to law by acting extrajudicially. In particular, it was argued that the panel had: (i) conducted extrajudicial investigations and research; (ii) permitted the non-lawyer arbitrator to act as a panel-appointed expert as if he had been appointed under article 26 of the Model Law; (iii) relied on that extraneous evidence to bridge gaps in MPI's case; and, (iv) supplied evidence not adduced by any of the parties.

The panel rejected the Xerox objections and the court did likewise. In so doing, the court deferred to the panel's conduct of its own process and it also reaffirmed in the context of an attack on a panel's integrity the very high standard of proof that has to be met by an applicant in attempting to upset an award based upon public policy grounds or allegations of an unfair hearing.

In reaching its conclusions, the court noted that it had reviewed the entire record of the arbitration, and noted the irony inherent in the situation whereby a single judge is called upon to sit in review of a decision reached by three arbitrators acting in accordance with the arbitration agreement of the parties.

The court then considered the precise role of an 'expert' arbitrator; that is, an arbitrator chosen for his technical expertise rather than his or her legal experience. In this context, accepting that the arbitrator was supposed at all times to act impartially and in a quasi-judicial capacity, the court ruled that the arbitrator was nevertheless entitled to use his or her own background in the subject field of expertise in assessing evidence and in coming to conclusions on contentious issues, just as a judge or lawyer acting as an arbitrator can exercise the benefits of his or her own legal experiences and expertise [11]. In particular:

There seems little point in having an individual with technical expertise unless that individual can use his or her background in assessing the evidence before the tribunal. That is indeed one of the hallmarks of commercial arbitration as opposed to courtroom adjudication. There is a difference between an individual who because of his or her expertise is in a position to assess technical evidence that is before the Panel and an expert who relies on evidence from other sources outside the evidence and only available to that expert and not disclosed to the parties.

The court further ruled that, in any event, the panel's decisions on breach of confidentiality and copyright infringement were well-founded on the record, that the analysis of the non-lawyer arbitrator did not form part of the panel's conclusions, and that the arbitrator did not, in fact, exceed the propriety of his role in analysing the evidence in the way that he did. Also noteworthy is that the court reviewed what the panel itself had stated in response to Xerox's objections at the hearing and accepted the veracity of what the panel said it had done.

In further dealing with this issue, Justice Campbell also reviewed the ways in which the panel and counsel interacted during the course of the hearing. Before acceding to Xerox's argument that it was denied due process and a fair opportunity to respond to the issues that the panel had, in its view, raised, the court ruled that it had to be satisfied that, in fact, Xerox really could not have dealt with the issues at the hearing. In this context, the court noted that the panel had, throughout, provided full disclosure to the parties as to what it was doing; that was why the charts and websites had been given to the parties. Noted was the observation made by the authors of the Redfern and Hunter text, [12] drawing from Minmetals Germany GmbH v Ferco Steel Ltd, [13] that a party claiming absence of due process cannot, by so doing, benefit from any failure on its part to take advantage of opportunities to remedy the situation provided by an arbitral panel. In this case, the court ruled that Xerox could have dealt with the perceived problem by recalling witnesses or seeking an adjournment; its failures to do so could not be the basis for a subsequent challenge.

That brought the court to its ultimate review of principles that Canadian courts will apply in considering any attack on an arbitral award founded upon allegations of public

policy breaches or failures to adhere to the rules of natural justice. In so doing, Justice Campbell cited the following principles articulated by Madam Justice Lax in Re Corporation Transnacional de Inversiones SA de CV v Stet International Sp A.[14] In that case, Justice Lax wrote that in order to set aside an international arbitration award under article 18 or article 34 of the Model Law, "the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice". Further:

Instances of corruption, bribery or fraud referred to in the Report of the United Nations would not only offend the essential morality of Ontario, but would offend shared notions of justice that are common to legal systems throughout the world. No court would hesitate to set aside an award arrived at in this manner. In considering other kinds of conduct, it is important to bear in mind that the Report of the United Nations may be used as an interpretive aid to the Model Law and it refers to "similar serious cases". In my view, this contemplates that judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state [Emphasis added by Justice Campbell].

So, the bar established by the courts for the invocation of the courts' jurisdiction to either set aside an award, or to refuse enforcement of an award, is very high. The list of impugned behaviour is not, of course, limited to the classical examples of bribery, fraud or corruption. Nevertheless, reviewing courts will examine the entire record of arbitral proceedings with a critical and nuanced eye, accord great deference and always give arbitral panels the benefit of any appropriately-held doubt.

The decision in Xerox v MPI is, to be sure, not new law in Canada. It represents the continuation of a theme and policy of deference that affords parties who have chosen to arbitrate their differences confidence that awards that are obtained will, absent highly unusual facts, be sustained, recognised and enforced.

Endnotes

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International energy dispute resolution in the Asia-Pacific region

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Summary

Global Arbitration Review tasked the authors to prepare an 'up-to-date' survey on energy dispute resolution for the Asia-Pacific Arbitration Review. The idea of calling a third of the world and its people a 'region' seems odd. If anything is more diverse than this region's peoples and legal systems, it is their approaches to resolving international disputes. This topic alone could easily fill an entire book, but that book would be instantly out of date as soon as it was published. In fact, this topic could comprise an entire academic course of study.

That being said, a high-level look is possible if one skips certain fascinating discussions, such as the relative rates of enforcement of international arbitral awards by the district courts in Indonesia. To begin with, let's look at certain characteristics of the energy market in the Asia-Pacific region in 2007.

Explosive growth in Asia of regional energy markets, investment and trade The tremendous and sustained economic growth experienced in the region has led to explosive growth in the regional energy markets, in investment in energy development and distribution infrastructure, and in energy trade. But the phrase 'in Asia' misses half of the picture.

THE EXPANDING ROLE OF ASIAN INVESTORS WORLDWIDE IN ENERGY DEVELOPMENT

To complete the picture, we should note that Asian investors have now made significant investments in energy development in countries around the world. For many Asian companies, particularly for the foreign investment arms of certain state-owned companies, this is a novel experience. In many cases, it is the first time that they have dealt with the question of international dispute resolution from the investor perspective - up until now, the boot has been on the other foot. This 'second half of the picture' is catalysing significant changes in the use of international dispute resolution methods both in the region and worldwide.

DRAMATIC INCREASE IN ENERGY-RELATED INTERNATIONAL DISPUTE RESOLUTION WORK IN THE REGION

These factors of explosive growth and worldwide expansion have led to a dramatic increase in international dispute resolution work in the region.

It is to the nature of that growth and the international dispute resolution methods and techniques that are being used that this article is directed, and it is presented in four sections:

• Trends: a discussion of certain relevant trends in the practice of international dispute resolution (IDR) including both the continuing development of a relatively effective IDR system and the use and growth of IDR in Asia • Troubles: including identification of certain obstacles to the full realisation of the benefits that IDR methods and techniques offer to parties • Techniques: some specific observations on practices we are currently seeing in the use of IDR in commercial agreements in and among Asian parties • Predictions: on how the IDR system will continue to evolve and how Asian practices may be influencing that evolution.

TRENDS

An evaluation of the use of IDR methods and techniques in a particular region requires the identification of the benefits that can be obtained through their use and an assessment of whether these benefits are being realised.

Looking at IDR as just a method of resolving disputes fails to acknowledge that there are positive macro- and micro-economic benefits that can be obtained through the use of the correct IDR methods and techniques. In particular, the IDR system permits commercial and state parties to plan and implement a proactive approach to the management of dispute risks and to maintain control of the dispute resolution process. These two areas constitute some of the riskiest aspects of major energy transactions, particularly long-term contracts.

In addition to assisting parties in managing these risks, the IDR process also provides important benefits to local and regional economies, as the accessibility of a neutral, respected system of dispute resolution serves as a catalyst for increased investments and thus economic growth. Nonetheless, many of these benefits are often misunderstood - accidentally or willfully - or are overcome by political concerns, often masquerading as concerns over 'public interest'.

Realisation of these benefits requires both a legal environment that will respect the parties' agreements and enforce the produce of the process, and the careful negotiation and tailoring of these agreements to specific risk management goals. Fortunately, domestic arbitral laws and international agreements on investment and trade increasingly support the binding use of IDR methods to resolve disputes.

Globally, arbitration is now the preferred method of resolving international commercial disputes. Statistics available from all arbitral institutions, both international and regional, indicate solid growth rates for cases filed and resolved. In addition to arbitration, mediation is gaining ground in the international IDR system. Asian parties are, generally speaking, much more familiar with mediation and its companion technique, conciliation, than are many western parties. Both of these forms, as well as hybrid forms of mediation, are gaining increased acceptance as important IDR techniques.

Turning to the use of IDR for international energy disputes, it is possible to identify certain global trends. Energy transactions have grown steadily in number and size, and have continued to increase in complexity. As these transactions have increased in complexity, so have the resulting disputes and the agreements created to resolve them. In the present day, for example, an LNG project will have literally dozens of parties and agreements, all of which are inter-related. To avoid conflicting results and a multiplicity of proceedings, the parties require - or at least, they should require - a single, coherent method of resolving disputes between parties on multiple levels of the project and from many different states.

There has also been a huge increase in the use of international agreements, such as bilateral investment treaties and the Energy Charter Treaty, as well as other extra-contractual methods of securing the parties' interests in a transaction. It is a subject of some debate as to whether these arrangements have increased or decreased the number of resulting disputes, and a case can be made for both, but they are a fact and they have led to a whole new range of potential disputes being adjudicated through the IDR system.

Both of the foregoing trends have resulted in an explosion in the use of IDR. As mentioned, the statistics from every major institution, as well as information on local enforcement, indicate that the majority of international energy disputes have now moved out of the courts and into private IDR proceedings.

This is in part an aspect of the emergence of a transnational 'IDR system'. This term describes a system of private justice, which has evolved over time as a result of several phenomena, each of which facilitates and influences the others:

• most importantly, the critical facilitation role of the New York Convention and other international and regional conventions on enforcement; • the rise in importance (ie, in caseloads) of the major arbitral institutions; • the emergence of IDR as a de facto legal specialty and, thus, of an international dispute resolution bar; • the recognition of a pool of professional, trained mediators and arbitrators; • the steady improvement in recognition and enforcement laws and practices around the world; and • the proliferation of international agreements consenting to arbitration as a means of resolving disputes. (Although these treaties alone have not dramatically affected the total number of cases, they have also helped lower barriers to IDR use in the countries that are parties to these treaties.)

IDR is now a recognisable system, with similarities around the world. To illustrate, an arbitration in Singapore over a natural gas offtake agreement between Chinese and Malaysian parties will look a lot like the arbitration of a dispute in Paris between Canadian and Bolivian parties. As a result, while there are many variations on the theme, many of which are important, nonetheless it is possible to predict with some degree of accuracy how a 'typical' energy dispute will unfold.

There are, of course, both positive and negative consequences of the emergence of such a system and the rapid growth in its use, although this discussion would be beyond the scope of this article. One perception problem faced by the proponents of the IDR system is that the positive benefits - like most good news - tend to go unreported, while the negative consequences never fail to draw interest from the media, particularly in politically-charged places and times.

Turning now to the Asia-Pacific region, we can also make certain observations about regional trends in the resolution of energy disputes. Again we run into problems when we try to describe Asia as a single block but, very generally speaking, until recently attitudes in Asia about arbitration could be described as being unconvinced about arbitration but receptive to less contentious methods, such as mediation.

Are the sources of this attitude cultural? Probably yes, but the further question - are these cultural attitudes social or commercial in origin? - is not as easily answered. It is commonplace in every discussion of dispute resolution in Asia to speak of the 'cultural affinity' for conciliation and of the preference for consensus as a cultural imperative, although certain sociologists would probably challenge this now trite maxim.

While the use of IDR is not a universal phenomenon throughout trans-border commerce in Asia, it is nearly universal for international energy transactions. It is now unusual to find a cross-border deal or a transnational energy contract that does not specify some form of IDR as the method of resolving disputes.

What is responsible for this trend? Certainly, foreign investors have long tended to seek - and in some places, to demand - the use of IDR instead of national courts. But we think that there are other reasons - reasons why IDR is now preferred and not merely accepted. These reasons include the increasing familiarity of Asian parties with IDR methods, particularly the more contentious methods, and a recognition that if properly designed and employed, IDR offers an efficient and fair method of resolving disputes. This has led to a greater willingness to use IDR methods as opposed to selecting a particular court or - as was often the case - simply ignoring the issue in the contract.

Another likely factor in the increase of Asian IDR usage is the development of a regional 'IDR infrastructure', which we will discuss later. Generally speaking, this refers to the increased familiarity and facility of regional practitioners and regional arbitral institutions with IDR methods and techniques - in other words, there is a supply-driven component to this growth.

Finally, and in our view, significantly, the tremendous increase in outbound investment from Asian companies has led them to appreciate the value of IDR in contracts in unfamiliar parts of the world where otherwise unfamiliar legal regimes would apply.

In addition to all of these trends, which are largely the result of agreements among private parties in the IDR system, there have been deliberate efforts by some states to promote the use of IDR and to reform supporting legislation. These positive efforts have had some success in spurring growth in IDR usage, in some cases significantly so. For example, Singapore has made a conscious, deliberate and well-publicised effort to make its courts and law hospitable to mediation and arbitration, all as part of its programme of promoting Singapore as an 'exporter of justice', much in the same way that the UK has done for most of the modern period.

TROUBLES

Nonetheless, there remain important obstacles, both actual and perceived, to a fully integrated, normalised use of IDR in the Asia-Pacific region. This means, in turn, that the region and its firm are not participating fully in the economic benefits offered by the system.

The obstacles to realising the full benefits of IDR methods and techniques in energy disputes can be loosely grouped into four categories. The first category is that of cultural obstacles. Not infrequently, scholars writing about the spread of arbitration - and particularly, the spread of Anglo-Americanised arbitration - ask the question 'is the IDR system compatible with Asian practices'? Are national commercial systems that are inherently adverse to outright contentious conduct (and anyone who has sat through a modern arbitration will tell you that they are highly contentious) at a disadvantage by inviting IDR methods and techniques? Mediation and conciliation have long been preferred methods of dispute resolution in the region, and those methods are surely available as part of the IDR tool box. Nonetheless, some western parties tend to treat international conciliation as 'roadblocks' or dilatory tactics on the road to resolving a dispute. This near-contempt for these processes, which the Asian party may have envisioned as primary methods of dispute resolution, can result in either an unprepared party or an unsuccessful dispute resolution process.

There also remain a number of legal obstacles to the successful use of IDR in Asian energy disputes. Most importantly, a number of states still have legal systems that are uncooperative - and occasionally hostile - to enforcing agreements to mediate or arbitrate or to enforcing awards.

In the past few years, a common topic of discussion among the IDR Bar has been the problem of enforcement of awards in certain Asian states. Without naming names, most practitioners working in Asia recognise that there were clearly two sides to the problems encountered by the host states in respect of the various power plant agreements in the mid-1990s. Nonetheless, the perception is firmly etched in the minds of many that these states were hostile to international commercial arbitration. This perception is now applied to a number of other countries in the region, some for good reasons and some for reasons that have little, if anything, to do with the reality of the domestic arbitral law or practice.

Still, it must be said that there are important barriers to the implementation of the IDR methods and techniques in many countries. Some contain rules that are highly restrictive as to who can be an arbitrator and when an arbitration can be conducted, others have erected significant barriers to the enforcement of arbitral awards, still others have made it difficult for arbitrations to occur in their territory by imposing a non-standard definition of what constitutes an 'international arbitration' or subjecting all arbitrations in their territory to domestic arbitration laws containing diverse or unusual grounds for the annulment of awards.

There also exist barriers to the efficient settlement of disputes, particularly 'fiscal responsibility' laws that provide powerful disincentives for employees of state enterprises to agree to settlements.

There are also institutional obstacles. Without spending too much time on them, there remain problems with judicial acceptance of IDR methods and techniques and cooperation in the implementation of parties' agreements to use them. In addition, there has been a regrettable trend recently towards the politicisation of any dispute involving a government or state enterprise.

Finally, we must ask whether existing legal structures can accommodate a truly transnational system such as the IDR system. Many Asian states do not have a judiciary or bar with extensive expertise or deep experience in IDR methods and techniques. Thus, while not actively hostile to these methods, they are unwilling or unable to provide the systems that the parties to these agreements need.

We see evidence, however, that this problem may be resolving itself. At the recent biannual Congress of the International Council on Commercial Arbitration, held in May 2004 in Beijing, Asian experts on mediation, conciliation and arbitration were a dominant force in the Congress's discussions. Equally, important regional institutions had begun to take their place among the major international institutions in the IDR systems. In particular, institutions in Singapore, Australia, Hong Kong and Korea have developed good reputations for the efficient implementation of IDR agreements.

To summarise the current state of IDR obstacles, we see three key lingering problems, which must be addressed in order for Asian companies to capture the full benefits of the IDR system. These are the enforcement of agreements or awards, the removal of barriers to settlement of disputes and the taking of steps to limit or prevent the politicisation of certain types of disputes.

Conversely, we see a number of key developments throughout the region. These include the accession to the New York Convention and the Washington (or ICSID) Convention by the great majority of states in the region.

Many of the states have also adopted the UNCITRAL Model Law or have adopted arbitration laws that, in largest part, track the provisions of the Model Law. Certain states that had received a reputation as being difficult with regard to enforcement have taken legislative action to speed the process.

China has implemented legislation that makes it difficult for local People's Courts to refuse enforcement of an arbitral award, as any decision to deny enforcement must be first recorded up to the Intermediate People's Court and, if necessary, to the Supreme People's Court. This

insures that any decision not to enforce an award is made with due deliberation by the most experienced and learned judges in the country.

Perhaps the most important development is the emergence of an Asian IDR infrastructure - the increased awareness and experience of Asian practitioners and Asian institutions.

TECHNIQUES

Successful IDR inevitably requires attention to the following principles (if not always strict adherence). There is more or less universal agreement on the topics that every party considering an IDR agreement should write into their agreement or insure is dealt with by the rules of the institution chosen. These include:

• selection of mediators and arbitrators; • institutions and administered arbitration; • choice of law; • seat of the arbitration; • language; • disclosure; and • enforcement and challenge of awards.

Each of these issues can have a significant impact on the efficiency with which the dispute is resolved and, ultimately, on the outcome of that dispute. It is now common therefore for IDR agreements to deal in some form with each of these issues.

How are these principles and practices being implemented within the context of Asian IDR agreements? As has become a common practice through most of the energy industry, most Asian IDR agreements require the parties to have a period of executive consultation and formal mediation prior to institution of any contentious proceedings, such as arbitration.

In the implementation of these agreements by Asian companies, we observe that they are often much better equipped to make effective use of mediation. One hears the joke that western parties show up at a mediation with a blank pad, a pencil and a bad attitude. Some IDR practitioners now encourage our clients to use mediation as an affirmative opportunity to put the case directly to the other party's decision-makers, without going through the filter of their lawyers or subordinates.

A common feature of certain Asian arbitral laws is the opportunity for the arbitrators themselves to act as conciliators or mediators, sometimes with the consent of the parties and sometimes without. As a result, these types of agreements - often called 'Med-Arb' proposals - are sometimes found embodied in Asian IDR agreements. They have been resisted by western parties for a long time, although they are beginning to obtain acceptance in certain key markets, including the United Kingdom and the United States.

We also see an increase in the use of IDR institutions with a regional focus or competence. For a long time, many of the energy industry agreements called for IDR proceedings to take place in the usual locations, such as Paris or London, before the usual institutions. Certain Asian institutions have made significant inroads in this area. In addition, the larger international institutions, in particular the LCIA and ICC, have made the development of regional competence a key part of their marketing strategy.

Parties are also increasingly insisting on regional arbitral seats, such as Melbourne, Singapore or Hong Kong, in preference to the usual European locales. Both of these practices, if properly employed, can significantly assist the Asian party in successful resolution of its disputes.

As energy transactions have become more and more complex and comprehensive, parties have become less and less focused on the selection of applicable law. Sophisticated parties

have begun to realise that other choices - of institution, seat and mediators and arbitrators - are more important in the great majority of cases than the applicable law. As a result, they have made strategic trades obtaining important benefits for themselves in return for agreeing to a neutral law.

PREDICTIONS

Finally, we come to the predictions, or more accurately, speculations, regarding the evolution of the IDR system in Asia. The last 15 to 20 years of IDR practice around the world has resulted in an amalgamated IDR system, blending elements of the Anglo-American and European civil law procedural systems together into the common 'IDR system' which we discussed earlier.

The explosion in IDR activity in Asia may ultimately drag the centre of gravity of the IDR world eastward. If the obstacles discussed above are addressed, one should expect to see Asian practices begin to influence the 'IDR system'. Although it is highly speculative, one could reasonably project that you will see Asian countries move continually towards the international norms with respect to arbitration, by increasingly adopting the arbitration laws and conventions that underlie the system. In contrast, we believe that the increased emphasis on mediation and conciliation in Asian IDR practice will begin to have an effect on practices across the world as parties begin to realise the efficiencies inherent in resolution achieved in mediation and conciliation. This is particularly true in the case of long term contracts, as the contentious arbitral system is not particularly well suited to the sorts of interim disputes that customarily arise in such contracts.

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International Arbitration in Asia

Michael J Moser

Summary

Recent years have seen a dramatic shift in worldwide patterns of trade and investment. As a result, today's Asia plays an important role in the world economy. Concomitant with these changes, a large number of the disputes which today arise in connection with international trade and business relate to Asian transactions and involve ever larger numbers of Asian parties. In this new environment, arbitration has come to play an increasingly important role.

GROWTH

Arbitration is clearly on the rise in Asia today (see table 1). Whereas 10 years ago Asian arbitration institutions would have received scant mention in a list of the 'top ten' busiest international arbitration bodies, the picture today is quite different. In 1985 the China International Economic and Trade Arbitration Commission (CIETAC) handled 37 cases. Ten years later the number of cases topped 900. In 1985 the number of cases referred to the Hong Kong International Arbitration Centre (HKIAC) was nine. Today, the number is approaching 300.

Over the past five years the number of cases handled by arbitration institutions in mainland China and Hong Kong together have outstripped the International Chamber of Commerce in Paris, the London Court of International Arbitration, the Stockholm Chamber of Commerce and other well-known Western arbitration institutions.

TABLE 1

International arbitration cases filed 1999-2005

	AAA	CIETAC	HKIAC	ICC	LCIA	SIAC	SwissRules	SCC
1999	453	609	257	529	56	67	NA	104
2000	510	543	298	541	81	55	NA	73
2001	649	731	307	566	71	56	NA	74
2002	672	684	320	593	88	46	NA	55
2003	646	709	287	580	104	41	NA	80
2004	614	850	280	561	87	51	52	50
2005	580	979	281	521	118	58	54	56

Table: International arbitration cases received by major institutions.[1] Source: Hong Kong International Arbitration Centre: www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html; www.swissarbitration.ch/news.php (accessed 10 April 2006).

Note: Statistics for CIETAC, ICC and LCIA in some years include domestic and international arbitrations. Accordingly, figures are not directly comparable. NA: not available.

Prepared by HKIAC with the assistance of the named institutions.

Similar dramatic growth in the acceptance of arbitration in Asia is reflected in ICC statistics. Whereas Asian parties figured in only 3 per cent of ICC cases in 1983, the percentage has increased dramatically since. By the end of 2005, nearly 18 per cent of all ICC cases involved

one or more parties from the Asian region. The increase in the number of cases in recent years involving parties from China, India, Japan, Korea and the Philippines is especially noteworthy.

ARBITRAL INSTITUTIONS

Hand in hand with growth in the volume of cases and increased acceptance of arbitration throughout the region has been the proliferation of arbitration institutions in Asia. From the Mongolian International Court of Arbitration (MICA) to the Japan Commercial Arbitration Association (JCAA), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Korean Commercial Arbitration Board (KCAB), the Philippine Dispute Resolution Centre (PDRC), the Thai Arbitration Institute (TAI), the Singapore International Arbitration Centre (SIAC), the Regional Centre for Arbitration at Kuala Lumpur (RCAKL) to the Bandan Arbitrase Nasional Indonesia (BANI) in Indonesia and a number of other similar centres throughout the region, Asian proponents of arbitration have in recent years been engaged in a serious exercise of institution-building.

In 2004 the Asia Pacific Regional Arbitration Group (APRAG) was established as an umbrella organisation for Asia-based institutions. Its membership now includes 27 arbitral institutions, centres and other organisations.

As the large number of arbitration bodies in the region shows, institutional arbitration plays a very prominent role in Asia. Why this is so can be attributed to a variety of factors. Some have argued that the predominance of institutional arbitration reflects a preference by many Asian disputants for administered arbitrations as opposed to ad hoc proceedings. In Japan, for example, ad hoc arbitrations are reported to be quite rare, with Japanese parties preferring the more structured arrangements of arbitration before the JCAA.

Apart from cultural factors, there are in many Asian jurisdictions also good legal reasons why ad hoc arbitration should be avoided. In China, for example, there is no clear legal basis for the conduct of ad hoc proceedings. The 1995 PRC Arbitration Law requires that all arbitrations be carried out under the auspices of a government-sanctioned arbitration commission. Although perhaps not as extreme as in China, doubts also surround the enforceability and practicality of executing ad hoc arbitration agreements in some other Asian jurisdictions.

LEGISLATION

Another theme that emerges from a review of arbitration in Asia is the increasing uniformity of local legislation, as growing numbers of Asian jurisdictions amend outdated laws and adopt the principles established by the UNCITRAL Model Law.

In Australia, where arbitration is well established, a comprehensive legal framework governing arbitration has been in place for some time. At the national or federal level, the International Arbitration Act (1974) implements, inter alia, the UNCITRAL Model Law on International Commercial Arbitration. Each of Australia's mainland states and territories has separately enacted uniform legislation governing domestic arbitrations in the form of the Commercial Arbitration Act (CAA). Under the relevant CAAs, parties in international arbitrations are allowed to 'opt out' of the Model Law and choose application of the CAA if they wish.

Hong Kong, which has long been a pioneer in the area, adopted the UNCITRAL Model Law in 1990 to govern international arbitrations. Domestic arbitrations are governed by a

different section of the Ordinance, although parties may opt in or out of the two regimes. The Arbitration (Amendment) Ordinances of 1996 and 2000 made a number of additional amendments to Hong Kong's arbitration law. A complete revamping of the Hong Kong Arbitration Ordinance, to establish a single Model Law regime for both international and domestic cases, is expected to be enacted later this year.

Singapore has also shown itself to be a progressive force in the region. In 1995 Singapore enacted the International Arbitration Act. The IAA adopts the UNCITRAL Model Law for international arbitrations, while domestic arbitrations continue to be governed by the earlier Arbitration Act, an approach which, as we have seen has also been adopted in Australia and Hong Kong. As in these jurisdictions, parties to arbitrations may opt in or out of either regime.

As a result of the legislation introduced in Australia, Hong Kong and Singapore, these jurisdictions today offer some of the most up-to-date and progressive arbitration legislation in the world. Other jurisdictions that have recently adopted the UNCITRAL Model Law or amended local legislation to incorporate key elements of the Model Law include Japan (2004), Korea (1999), Malaysia (2006), the Philippines (2004), India (1996) and Thailand (2002). At the same time, other Asian jurisdictions (such as Taiwan), while not adopting the Model Law, have adopted amendments to local laws aimed at establishing 'arbitration-friendly' legislation.

One major arbitration player that has lagged behind in reforming its arbitration legislation is China. The PRC enacted its first Arbitration Law in 1994. The law provides for a bifurcated arbitration system consisting of a domestic regime and an international regime. While China considered, but ultimately decided against, adoption of the UNCITRAL Model Law, a number of its key principles are nonetheless reflected in the final legislation.

As discussed earlier, a distinctive feature of arbitration in China is the requirement that all proceedings be conducted by a designated arbitral institution. The Arbitration Law provides for the establishment of both domestic arbitration commissions and international or foreign-related commissions. Whereas the law itself appears to contemplate a strict demarcation of jurisdiction between the two types of commissions, with domestic commissions dealing exclusively with domestic matters and international commissions dealing with international cases, this distinction has in recent years become blurred. In particular, as a result of a State Council decision in 1996, domestic tribunals may now hear international cases and international tribunals established under CIETAC may, since 2000, hear both domestic as well as international disputes.

Although China's Arbitration Law has made an important contribution by unifying the previously scattered legislative enactments governing arbitrations in China, it also leaves many questions unanswered. As discussed previously, the Arbitration Law fails to clearly answer the question as to whether ad hoc arbitrations are permissible in China. This has caused particular concern. In addition, by providing that all arbitrations in China be conducted under the auspices of 'arbitration commissions' established pursuant to the law, the PRC Arbitration Law casts doubt on whether foreign institutions such as the International Chamber of Commerce may legally administer arbitrations inside China.

ARBITRATION PROCEDURES AND ASIAN LEGAL CULTURES

While globalisation has tended to promote the harmonisation of arbitral practice and procedure in Asia and elsewhere, it is important to keep in mind that legal culture continues

to exert a strong influence on dispute settlement processes. This is clearly the case in Asia, where tradition runs deep.

One example concerns the approach towards the use of mediation (or conciliation) in arbitral proceedings. The traditional view in the West has been that mediation and arbitration are distinct proceedings and should be kept separate. In particular, common law-trained lawyers are uncomfortable with the notion that a mediator in possession of confidential information gained in the course of a mediation could subsequently act as arbitrator if the mediation failed. In Asia, by contrast, where 'friendly negotiations' and mediation have long been the preferred mechanism for resolving disputes, the combination of mediation and arbitration in the same proceeding is frequently encountered. The practice is especially common in institutional arbitrations in China, Japan, Korea and Taiwan, jurisdictions strongly influenced by Confucian ideals. Indeed, many cases dealt with by these arbitral bodies are settled by mediation conducted in the course of the arbitral proceedings, rather than by an award on the merits.

The traditional practice of combining arbitration and mediation has received growing official sanction in arbitration legislation and procedural rules of various jurisdictions. In China, for example, no bar exists to an arbitrator acting as mediator in the same proceedings, and settlements reached through conciliation in the course of arbitral proceedings may be enforced as arbitral awards.

Hong Kong and Singapore also allow the practice of 'combining mediation and arbitration'. However, under the arbitration legislation in both jurisdictions, an arbitrator may only act as mediator in a dispute in which he or she has been appointed arbitrator so long as both parties consent in writing and so long as no party withdraws his or her consent. In Hong Kong, an arbitrator acting as mediator is required to keep all information confidential but if the mediation fails the arbitrator must disclose to all other parties as much information as he or she considers is material to the arbitration proceedings.

Legal culture is also evident in the approach toward arbitral decision making found in some Asian jurisdictions. Although arbitrators worldwide have often been accused of making decisions by 'splitting the difference', the tendency toward equity-based compromise decisions is most pronounced in Asia. In Indonesia, for example, the Badan Arbitrasi Nasional Indoneisa (BANI) arbitrators are said to "frequently lean towards basing their awards on the principle of ex aequo et bono, and not always strictly upon the letter of the law". CIETAC's rules direct arbitrators to base their awards in compliance with the "principle of fairness and reasonableness" as well as the facts and the law. Similar examples could be cited from the practice of tribunals in Japan, Taiwan, Vietnam and elsewhere in the region.

ENFORCEMENT

Finally, a word should be said about enforcement. Most jurisdictions in the Asia-Pacific region have acceded to the New York Convention of 1958 (see table 2). Widespread acceptance of the principles contained in the Convention is deserving of applause. Unfortunately, however, there appears to be less uniformity throughout the region with respect to the implementation of the Convention.

TABLE 2

Membership of the New York Convention

State	Ratification/Accession	Reservations
Australia	1975	-
Bangladesh	1992	-
Brunei	1996	R
Cambodia	1960	-
Hong Kong SAR	(1997 via PRC)	R
India	1960	C/R
Indonesia	1981	C/R
Japan	1961	R
Laos	1998	-
Malaysia	1985	-
Mongolia	1994	C/R
Myanmar	-	-
New Zealand	1983	R
People's Republic of China	1987	C/R
Philippines	1967	C/R
Singapore	1986	R
South Korea	1995	C/R
Sri Lanka	1962	-
Taiwan	-	-
Thailand	1959	-
Vietnam	1995	C/R

C:

Commercial Reservation

R:

Reciprocity Reservation

China's own track record with respect to the enforcement of foreign arbitral awards has been mixed. Whereas China itself has been a major beneficiary of the New York Convention, with many of CIETAC's awards being granted recognition and enforcement in courts worldwide, foreign arbitral awards have been greeted less warmly by the People's Courts in China.

Enforcement of foreign arbitral awards has also proved problematical in a number of other jurisdictions throughout the region, including Indonesia, Thailand and Vietnam.

* * *

There is no doubt that arbitration has gained a firm foothold in many jurisdictions in Asia, and is digging down strong roots in others.

Today more and more Asian parties are questioning the benefits of the traditional paths to London, Paris, Stockholm and Zurich and are seeking to resolve disputes closer to home.

A review of trends in arbitration legislation reform throughout the region demonstrates the salutary effects of the work of UNCITRAL and the New York Convention in promoting the harmonisation of international arbitration law and practice in Asia. However, as we can see from the case of the New York Convention, embracing international principles and enforcing the same in diverse political and cultural surroundings present particular challenges. Clearly much more work needs to be done.

Endnotes