The Asia Pacific Arbitration Review

2008

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China

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Summary

China's rapid economic development continues unabated in 2008 and much of this growth has been driven by inward foreign investment and other business transactions between Chinese and foreign companies. A natural consequence of all this economic activity has been a steady rise in the number of disputes between Chinese and foreign parties. Arbitration is frequently preferred to litigation for the resolution of these disputes, for the usual reasons of neutrality, flexibility, confidentiality, costs and, most importantly, greater ease of cross-border enforcement.

If arbitration is chosen, the parties must then decide whether to conduct arbitration in China or overseas, which will often be a subject of tough negotiation. Chinese parties usually prefer to arbitrate within China, whereas foreign parties will often try to insist on arbitration in a neutral and, in their eyes, fairer arbitration environment outside of China. In recent years China has made considerable efforts to make its arbitration environment more attractive, including improvements to the system for enforcement of arbitral awards through the PRC courts. However, much remains to be done, in terms of both arbitration law and practice, before Chinese arbitration can reach a truly international level. This article looks at some of the recent trends in Chinese arbitration and prospects for further reform and development.

INCREASE IN CASELOAD AND COMPETITION AMONG CHINESE ARBITRATION COMMISSIONS

Until 1996, the China International Economic and Trade Arbitration Commission (CIETAC) had a virtual monopoly over 'foreign- related' arbitrations in China.[1] However, this monopoly was abolished when the State Council issued a notice in 1996 allowing local arbitration institutions to handle foreign-related arbitrations. In response to this development, CIETAC adopted new arbitration rules in 2000 and extended its jurisdiction to domestic cases. The number of arbitration institutions in China has been growing rapidly in recent years, and a rough estimate shows that China now has more than 180 arbitration institutions. There has been impressive growth in the caseload of the local arbitration commissions, notably the Beijing Arbitration Commission (BAC) and the Shanghai Arbitration Commission (SAC). However, most of their cases still tend to be domestic, whereas CIETAC has maintained its leading position in international arbitration, notwithstanding that the number of CIETAC's foreign-related cases has been overtaken by that of domestic cases. However, it should be noted that many 'domestic' cases heard by CIETAC or local arbitration commissions actually involve foreign-invested enterprises (FIEs), which are treated as domestic entities since they are incorporated in China.

HONG KONG AND SINGAPORE ARE INCREASINGLY POPULAR CHOICES FOR RESOLVING CHINA-RELATED DISPUTES

Hong Kong is being increasingly chosen as the venue for the resolution of China-related disputes, and the Hong Kong International Arbitration Centre (HKIAC) reports significant increases in the number of cases involving one or more Chinese parties, with over 100 such cases accepted in 2006 alone.

For foreign parties, the attraction of Hong Kong is that, although the territory reverted to Chinese sovereignty in 1997 and became a Special Administrative Region of the PRC, it has retained its own English common law-based legal system. The Hong Kong Arbitration Ordinance closely follows the UNCITRAL Model Law and Hong Kong courts are supportive of the arbitration system. Furthermore, under an arrangement entered into between Hong

Kong and mainland China in 1999, Hong Kong awards are enforceable in the PRC courts subject only to limited grounds for non-enforcement similar to those available under the New York Convention. Hong Kong arbitration is therefore considered by foreign parties to be a fair and neutral mechanism for the resolution of Chinese disputes. For Chinese parties, the main attraction may be Hong Kong's proximity and cultural closeness.

Further, according to HKIAC's statistics, there have been quite a number of HKIAC-administered cases involving purely mainland parties. For example, there were 18 such cases in 2006.

Singapore is also an increasingly popular choice of venue for the resolution of China-related disputes, with the Singapore International Arbitration Centre (SIAC) playing a leading role. The same factors that explain the Hong Kong's growth as a venue for Chinarelated arbitrations (common law system, arbitration-friendly courts, fair and neutral venue, cultural and geographical proximity) are also applicable to Singapore. Singapore awards are directly enforceable in PRC courts under the New York Convention.

Enforcement - the prior reporting system established by the SPC and recent amendment to the Civil Procedure Law A major area of concern for foreign investors in China has been the enforceability of arbitral awards in China, whether the award has been rendered by a Chinese or an overseas arbitral institution. In an effort to improve the record for enforcement of arbitral awards in China, the Supreme People's Court (the SPC) introduced, in the 1990s, a system pursuant to which, where the local Intermediate People's Court is minded to refuse enforcement of an arbitral award, the court is obliged to pass that decision up to the provincial level Higher People's Court for further review, and then up to the SPC for final review. Only with the final approval of the SPC can the Intermediate People's Court refuse to recognise or enforce the award. This system aims to combat local protectionism and improve China's enforcement record.

Although accurate statistics on enforcement are difficult to come by, reports from practitioners indicate that enforcement is improving, particularly in major cities such as Beijing and Shanghai and particularly if the award involves foreign parties or FIEs.

The enforcement system has been further strengthened by a recent amendment to the PRC Civil Procedure Law, which will take effect on 1 April 2008. First, the time limitation for bringing an enforcement action has been uniformly extended to two years as compared to one year for individuals and six months for entities under the old law. Secondly, if the people's court where enforcement is sought has not ruled to effect enforcement within six months of an application for enforcement being made, the applicant may now apply to the court of higher level for enforcement. The court at the higher level may order the people's court to take enforcement action within a certain time limit, take the enforcement action by itself or designate another court to take enforcement action. It remains to be seen whether these new provisions will resolve the frequent delays in enforcement that are still being experienced under the current system.

CIETAC'S REVISED ARBITRATION RULES OF 2005

CIETAC's arbitration rules and practices have been criticised over the years for failing in various ways to meet international standards, and many foreign parties have lacked confidence that CIETAC tribunals would resolve their China-related disputes in a fair, unbiased and independent manner. In response to those criticisms and concerns, and faced with increasing competition from other arbitration institutions, both domestic

and international, CIETAC in 2005 implemented the most comprehensive revision of its arbitration rules to date (the CIETAC Rules 2005). The aim of the revisions was to improve transparency and procedural flexibility and promote party autonomy in CIETAC arbitrations, and thereby make CIETAC a more attractive venue for the resolution of both international and domestic disputes. Some of the more significant changes introduced by the CIETAC Rules 2005 and further recent changes to CIETAC's practices are discussed below.

ARBITRATORS' INDEPENDENCE AND IMPARTIALITY

The independence and impartiality of CIETAC arbitrators has long been a cause of concern for foreign parties. The CIETAC Rules 2005 seek to address that concern by requiring arbitrators to disclose to CIETAC in writing before or during the proceedings 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 this disclosure.

CIETAC has also published a Code of Ethics for Arbitrators and Provisions on Supervising the Conduct of Arbitrators (the Provisions). Among other things, the Provisions include three nonexhaustive lists setting forth detailed guidelines for arbitrators on turning down appointments, making disclosure of possible conflicts of interest and withdrawing from cases under various circumstances. The Provisions take into consideration the IBA Code of Ethics but have tailored them for the Chinese environment. The aim of the Provisions is to prohibit ex parte communications between a party and its appointed arbitrator, to prevent undue influence by parties or other sources on the decisions of arbitrators and to require more extensive disclosure by arbitrators of possible conflicts of interest. With these new measures in place, CIETAC has reported an increasing number of the cases in which arbitrators are being challenged by the parties. Voluntary disclosures of possible conflicts of interest and withdrawals from proceedings by arbitrators have also increased. Despite the delays or additional costs sometimes thereby caused, the increased scope for disclosures of conflicts of interest and challenges of arbitrators should work to increase confidence in the fairness of CIETAC arbitration.

NEUTRALITY OF ARBITRAL TRIBUNAL

In CIETAC arbitrations, the presiding arbitrator in a three-person tribunal, and the sole arbitrator if the parties choose to have only one arbitrator, is appointed by the chairman of CIETAC. CIETAC has been criticised in the past for routinely appointing a Chinese national as the sole or presiding arbitrator, thus resulting in tribunals at least perceived to afford a 'home-team' advantage to Chinese parties. The CIETAC Rules 2005 attempt to resolve this problem by allowing parties to choose arbitrators outside the CIETAC panel list and submitting a list of up to three recommended candidates as presiding arbitrator.2 However, the final decision on the appointment of the presiding arbitrator still remains with the chairman of CIETAC. Foreign parties will therefore often insist in their contracts that the presiding arbitrator should not be of the nationality of either of the parties. Possibly in response to that trend, CIETAC has recently adopted an experimental approach under which the parties can agree on and pay separately the presiding arbitrator's compensation. This would possibly enlarge the pool of the potential international candidates for appointment as the presiding arbitrator, as until now CIETAC has only been able to afford to appoint foreigners living in China or those living overseas but willing to accept appointments for remuneration well below international levels. However, without the permanent lifting of the government's 'revenue and expense control' over CIETAC's finances (discussed in more

detail below), CIETAC's ability to attract foreign arbitrators will probably continue to be limited.

APPOINTMENT OF CIETAC STAFF AS ARBITRATORS

CIETAC has included most of its senior staff members on its panel of arbitrators. These staff members are well-experienced in arbitration matters, having acted as arbitrators' assistants and case managers. However, their status as CIETAC staff gives rise to doubts about their independence and impartiality. Currently, CIETAC will not grant a challenge if the challenge is made on the sole basis that the appointed arbitrator works for CIETAC.

However, CIETAC has adopted internal measures to at least partly address the issue. Since 2005, CIETAC has expressly forbidden its staff members from accepting appointments as partynominated arbitrators. CIETAC has also been more cautious about appointing its staff members as presiding arbitrator. In most cases, CIETAC will now appoint its staff members as arbitrators only if the amount of dispute is small and if one party fails to appoint an arbitrator within the specified time limit. CIETAC also has internal restrictions on the number of times that the same person can be appointed as arbitrator.

Moreover, sources indicate that CIETAC is currently considering abolishing altogether the practice of appointing its staff members as arbitrators.

REMOVAL OF RESTRICTIONS ON RECOVERY OF COSTS

The CIETAC Rules 2005 have removed the restrictions on the percentage of costs the winning party could recover, which were previously capped at 10 per cent of the amount awarded. Under the new rules, a tribunal may now decide that the losing party shall compensate the winning party for all expenses reasonably incurred, taking into account such factors as the outcome and complexity of the case, the workload of the winning party and its representatives and the amount in dispute.[3]

THE SPC ISSUES AN INTERPRETATION IN 2006 TO CLARIFY ENFORCEABILITY OF COMMON TYPES OF ARBITRATION CLAUSES

One of the most salient features of China's arbitration law is that, for an arbitration clause to be valid, it must designate an arbitral institution.[4] Problems frequently arise as to what is considered a valid arbitral institution. In order to clarify that and several other outstanding issues, the SPC in 2006 issued an Interpretation on Certain Issues Relating to the Application of the Arbitration Law (the 2006 SPC Interpretation), which consolidated various previous judicial notices and draft interpretations.

The 2006 SPC Interpretation is significant in that it should encourage consistency in the rulings of Chinese courts on the validity of arbitration clauses and bring this area more into line with international practice. For example, an arbitration clause that does not explicitly refer to an arbitral institution will now be valid if one can reasonably infer the name of the arbitration institution from the wording or reference to the governing arbitration rules.[5]

Furthermore, although ad hoc arbitration conducted in China will continue to be invalid, the 2006 SPC Interpretation confirms clearly that ad hoc arbitration awards made outside China will be enforceable in China. The basis for this is the confirmation in the 2006 SPC Interpretation that foreign law will be applied in determining the validity of the arbitration clause if the place of arbitration is outside China.[6]

MUTUAL ENFORCEMENT OF ARBITRAL AWARDS BETWEEN THE MAINLAND AND THE MACAU SPECIAL ADMINISTRATIVE REGION

Following conclusion of the arrangement with the Hong Kong in 1999, the SPC issued on 12 December 2007 a notice promulgating an arrangement (the Macau Arrangement) reached with the government of the Macau Special Administrative Region (Macau) on the mutual enforcement of arbitral awards between the PRC and Macau, effective from 1 January 2008. Similar to the previous arrangement between mainland China and Hong Kong, the Macau Arrangement has provided a legal basis for mutual recognition and enforcement of arbitral awards made respectively in the PRC and Macau after the handover of Macau to China on 20 December 1999.

ARBITRATION OF FINANCIAL DISPUTES

In China as elsewhere, courts have been a traditional forum for resolving financial disputes, due to the relatively simple nature of many financial disputes (essentially debt collection) and the plaintiff 's desire for a fast and clear-cut judgment. However, with the growing complexity of financial disputes and the promotion internationally of arbitration as a viable mechanism for resolving such disputes, arbitration should become an increasingly important alternative for resolving a wide range of financial disputes in China.

In anticipation of that trend, CIETAC in 2005 revised its Financial Disputes Arbitration Rules. These rules provide for a fast track method for resolving financial disputes. However, the actual number of cases referred to CIETAC under these rules to date has been very limited.

On 18 December 2007, a court of arbitration specialising in financial disputes was also inaugurated in Shanghai, marking a milestone in the city's continued efforts to establish itself as an international financial centre. The court will provide a pool of financial and legal experts from China and overseas to act as arbitrators in financial disputes, for example disputes involving new financial derivatives products.

FUTURE REFORM OF CHINA'S ARBITRATION SYSTEM AND ARBITRATION INSTITUTIONS

One cause for concern among foreign investors is whether PRC arbitration institutions are really free from outside political and other influence. Article 14 of the PRC Arbitration Law states that an arbitration commission shall be independent of administrative bodies and shall have no subordinate relationship with administrative bodies. However, given the long history of government involvement in the establishment and management of arbitration institutions, administrative authorities still have considerable say in the management of arbitration institutions in China. For example, many local arbitration commissions are led by persons holding concurrent government positions. Although CIETAC is in theory a non-governmental organisation, its key management personnel are all appointed by the China Council for the Promotion of International Trade (CCPIT), whose leadership is in turn appointed by the Central Government.

Furthermore, most Chinese arbitration institutions are financially dependent on the government. According to various notices jointly issued by the Ministry of Finance, the State Development and Reform Commission, the Ministry of Supervision and China National Audit Office, arbitration fees fall into the category of administrative and public entity fees and are thus subject to revenue and expense control. This means that arbitration fees collected by arbitration institutions must be submitted to the Ministry of Finance while the expenses of arbitration institutions and arbitrators' remuneration shall be paid out from the state budget

after approval by the Ministry of Finance. As a result, Chinese arbitration institutions have no real control over the use of the arbitration fees that they collect. This has hindered the development of those institutions and the proper integration of Chinese arbitration into the international arbitration system.

There were various discussions and proposals at PRC government level regarding reform of China's arbitration institutions during 2007. The BAC, a forerunner of arbitration reform in China, conducted a questionnaire survey among PRC arbitration institutions and practitioners and came up with a reform proposal that it submitted to the Legislative Affairs Office of the State Council in July 2007. The proposal is designed to strengthen independence and transparency of arbitration institutions in various aspects such as financing, staffing, operation and decision-making. At the same time, increasing voices have focused on the unreasonableness of 'revenue and expense control'. CIETAC has been in active consultation with the Ministry of Finance to resolve this issue, which has hindered the independence of CIETAC and also raised concerns as to its ability to properly compensate its arbitrators and attract experienced international arbitrators to accept appointments to its arbitral tribunals.

PROSPECTS FOR AMENDING THE PRC ARBITRATION LAW

The PRC Arbitration Law, which came into effect in 1995, was the first attempt to unify all the disparate regulations and decrees that previously governed arbitration in China and was revolutionary at the time of its enactment. However, the Arbitration Law has been increasingly unable to meet the demands of parties for an arbitration system capable of resolving complex commercial disputes in a fair and professional manner. There has therefore been much discussion in PRC arbitration circles about the need to enact a major overhaul of the Arbitration Law if China truly wants to play a major role in international arbitration. The main areas that are seen to require amendment include the following:

- opening the Chinese market to foreign arbitration institutions such as the ICC;
- allowing ad hoc arbitration to be conducted in China;
- abolishing compulsory panels of arbitrators;
- removing the differences between foreign-related and domestic arbitrations in relation to setting aside or denying enforcement of arbitral awards;
- expanding acceptance of the internationally accepted principle of Kompetenz-Kompetenz so that the arbitral tribunal can decide on its own jurisdiction (under the CIETAC Rules 2005, CIETAC still has the power to decide whether to make that determination itself or to delegate the decision to the tribunal);
- granting arbitrators more autonomy in deciding the conduct of the arbitral proceedings; and
- allowing arbitral tribunals to grant interim relief (at present, any such application must be referred by the arbitration institution to the courts).

Despite repeated calls by arbitration practitioners for urgent reform and earlier signs of high-level support for amendment, recent indications are that revision of the Arbitration Law is not currently high on the legislative agenda of the National People's Congress.

OUTSTANDING ISSUES

Despite the real improvements introduced by the various reforms discussed above, several important issues remain to be addressed. First, it is still not clear whether arbitrations administered by foreign arbitral institutions, such as the ICC, can be conducted in China. There is disagreement as to whether the term 'arbitration commission' in the PRC arbitration law refers only to Chinese arbitration institutions or also encompasses foreign arbitration institutions. Without that clarification, any ICC arbitration award rendered in China would always be vulnerable to challenge in a PRC court sympathetic to the local respondent.

Second, the status of arbitrations conducted outside the mainland involving only mainland parties, in Hong Kong or elsewhere, remains uncertain. The PRC Contract Law provides that parties to a foreign-related contract may submit their disputes to a Chinese or a foreign arbitration institution. It has long been the opinion of Chinese courts that a purely domestic dispute without a foreign element may only be arbitrated before a Chinese arbitration institution. This means the status and enforceability of awards of arbitrations involving purely domestic parties before the HKIAC, for example, remains uncertain.

Third, the scope of the right of lawyers who work for foreign law firms, even those of Chinese nationality or foreign lawyers based in China, to represent clients in arbitrations conducted in China, remains uncertain. CIETAC appears supportive of participation in CIETAC arbitrations by lawyers from foreign law firms, but the PRC Ministry of Justice has made it clear in various notices that those lawyers can only do so to the extent that they do not make pronouncements on matters of PRC law.

China has made great strides in recent years to bring its arbitration laws and practices more in line with international standards.

CIETAC has enacted a major overhaul of its rules and has made certain internal changes that have improved the transparency and professionalism of its practices. The SPC has also contributed to arbitration reform through various useful clarifications of certain points of PRC arbitration law, in particular through the 2006 SPC Notice. However, further clarifications and reforms need to be carried out if China wants to reach its goal of being a true venue of choice for the resolution of China-related international disputes.

Endnotes

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Summary

2007 was an exciting year for arbitration in Singapore. The city state achieved several milestones in further establishing itself as an international arbitration centre. These included, in chronological order:

- the release of the Singapore International Arbitration Centre's Arbitration Rules, third edition;
- the introduction of the Law Society Arbitration Scheme;
- the announcement of the Singapore government's agreement with the Permanent Court of Arbitration to set up a regional facility in Singapore;
- the hosting of the Meeting of the ICC's Commission on Arbitration and the International Bar Association Conference;
- the opening of the International Centre for Dispute Resolution in Singapore; and
- the announcement of liberalisation for foreign law firms practising in Singapore to conduct international arbitration work.

These recent developments, complemented by legislation that encourages international arbitration and an established policy of minimum judicial intervention, were introduced against the backdrop of several interesting decisions in the Singapore High Court and Court of Appeal. This article explores these developments and two of the more noteworthy judicial decisions.

THIRD EDITION OF ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

SIAC is an independent, non-profit organisation established in 1991 that administers arbitrations under its own rules and, where agreed between the parties, under the UNCITRAL Arbitration Rules.

On 1 July 2007, the third edition of SIAC's Arbitration Rules (2007 Rules) came into effect. The 2007 Rules govern both domestic and international arbitrations, which previously were governed by separate procedural rules, and this simplification is welcomed.

Some of the more pertinent 2007 Rules are outlined below. A copy of the 2007 Rules is available at www.siac.org.sg/rules-siac.htm. Rule 5 governs the appointment of an arbitrator. The starting point is that the number of arbitrators shall be one unless the parties have agreed otherwise or, in the absence of any agreement, the complexity, quantum or other relevant circumstances of the dispute warrant three arbitrators. Perhaps more significantly, and with a view to ensuring the quality and independence of the tribunal, an arbitrator must first be nominated by one of the parties or an arbitrator already appointed to determine the arbitration. That nomination must then be confirmed by the SIAC chairman before the nominated arbitrator can be appointed to the tribunal. The terms of appointment are then fixed by the SIAC registrar in accordance with the 2007 Rules and Practice Notes.

Rule 9 provides that the SIAC chairman, in confirming the nomination or appointment of an arbitrator, shall have regard to the qualifications required of the arbitrator by the agreement of the parties as well as to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. Any circumstances likely to give rise to any justifiable doubts as to that impartiality or independence are to be disclosed to the party which nominates him or her and then to all parties after his or her appointment.

Rules 10 to 12 provide that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge must be made to the SIAC registrar (copied to the counterparty, the challenged arbitrator and the other tribunal members) within 14 days of the appointment or the circumstances that comprise the basis of the challenge becoming known. If the challenge is not accepted by the counter party or the arbitrator does not step down within seven days of the receipt of the notice of challenge then the SIAC chairman determines the challenge. There is no right of appeal against the chairman's decision. This avoids the potentially embarrassing position in which the tribunal is called upon to determine a challenge to the impartiality of one of its members and ensures that such challenges are dealt with expeditiously with minimum disruption to the proceedings.

Rule 17 introduces perhaps the most significant change: the introduction of the memorandum of issues. Within 45 days of the submission of the written statements, the tribunal, in consultation with the parties, shall define the issues which fall for determination by the tribunal in its award. The memorandum must be signed by the parties or approved by the SIAC registrar if one party refuses to sign. The introduction of the memorandum of issues at an early stage will no doubt assist in determining a sensible approach to the discovery process, particularly if addressed in conjunction with the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The importance of the identification of, and focus upon, the relevant issues that divide the parties is reflected in Rules 22 and 23 which govern factual and expert witness evidence. Following the introduction of the memorandum of issues, the tribunal may require any party to give notice of the identity of witnesses, the subject matter of their testimony and the relevance of that testimony to the issues in dispute (Rule 22.1). The tribunal may also, following consultation with the parties, appoint experts to report on specific issues (Rule 23.1.a). The direction of factual and expert evidence towards those issues identified in the memorandum will streamline the arbitration by, again, focusing the discovery and avoiding extensive factual and expert evidence on points which are, at best, described as peripheral.

Finally, all practitioners will no doubt welcome Rule 35.3, which neatly summarises the ultimate goal of every arbitration: In all matters not expressly provided for in these Rules, the Chairman, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of the award.

LAW SOCIETY ARBITRATION SCHEME (LSAS)

On 1 August 2007, the LSAS was launched. It is a dispute resolution scheme that was first conceived by the Law Society of Singapore in 2005. The LSAS has its own set of rules known as the LawSoc Arbitration Rules (the Rules) which may be obtained from the LSAS's website: www.lawsociety.org.sg/lsas/index.asp. It also has its own panel of arbitrators comprising experienced lawyers practicing in various areas of law. The list of the panel of arbitrators is also available on the Law Society's website.

The LSAS provides a quick and user-friendly system of arbitration to resolve disputes. The Rules are designed to be simple and flexible in order to dispose of a wide range of disputes expeditiously and in accordance with arbitration costs that are scaled and fixed by the Law Society of Singapore. The Rules encourage completion of the arbitration by publication of the

award within 120 days (subject to adjustments by the arbitrator) from the commencement of arbitration. The Rules also offer conduct of the dispute on a 'documents-only' basis.

THE PERMANENT COURT OF ARBITRATION REGIONAL FACILITY

The Permanent Court of Arbitration (PCA) was established in 1899 at The Hague. The PCA provides modern rules of procedure which are based on the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) as well as services for the resolution of disputes involving various combinations of states, state entities, international organisations and private parties. Those services include legal and administrative support to tribunals and commissions, research, financial administration, translation and interpretation.

On 10 September 2007, the PCA set up a regional facility in Singapore to handle all cases arising out of Asia referred to it. The PCA regional facility in Singapore provides arbitration, mediation, conciliation and fact-finding services to resolve international disputes for which at least one party is a state, state entity or intergovernmental organisation. This is the PCA's fifth facility worldwide and its first in Asia. At present, Asia accounts for approximately 20 per cent of the cases referred to the PCA. The establishment of the PCA regional facility indicates a growing demand for arbitration services within Asia at the state level as well as the growing pool of arbitrators and arbitration counsel based in Asia with expertise in state related disputes who are able to meet that demand. For more information, see www.pca-cpa.org

MEETING OF THE ICC'S COMMISSION ON ARBITRATION AND IBA CONFERENCE

On 14 October 2007, the ICC's Commission on Arbitration met in Singapore. This is the first time the ICC held this semi-annual meeting outside its Paris headquarters. The meeting was attended by delegates from ICC national committees from all over the world with strong representations from countries in the Asia-Pacific region. Speakers included Singapore's Deputy Prime Minister and Minister for Law, Professor S Jayakumar; Mr Sumeet Kachwaha from the Bar Association of the Indian Supreme Court; and Mr Jingzhou Tao, member of the ICC International Court of Arbitration, who updated the delegates on developments on arbitration in the region, India and China.

Between 14 to 19 October 2007, the International Bar Association (IBA) held its conference in Singapore. The conference was attended by around 3,500 delegates including judiciary members from both national and international courts, government officials, legal practitioners from major law firms across the globe, and representatives from special interest groups. Minister Mentor of Singapore, Mr Lee Kuan Yew, was the keynote speaker at the opening ceremony. The IBA showcase sessions focused on the importance of the rule of law to international business and awareness of cultural differences in cross-border deals in respect of which international arbitration is, of course, highly relevant.

THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION IN SINGAPORE

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA). It has established cooperative agreements with 62 arbitral institutions in 43 countries which enable arbitration cases to be filed and heard around the world. On 17 October 2007, the Singapore office of the ICDR, known as the ICDR-Singapore, was opened in Singapore. This is a joint venture between the AAA and the SIAC and joins the ICDR's centres in New York, Dublin and Mexico City. The ICDR-Singapore Centre provides comprehensive rules for the conduct of arbitration and mediation; training and appointment of arbitrators to the panel of arbitrators of

ICDR-Singapore; and case administration services for submitted disputes. For more information, please see www.adr.org/icdr

PROPOSED LIBERALISATION OF THE LEGAL SERVICES SECTOR IN SINGAPORE

Foreign law firms in Singapore are not permitted under the Legal Profession Act to practise Singapore law. At present, prior to the issue of the notice of arbitration, a foreign law firm must engage Singapore counsel to assist with issues of Singapore law.

In December 2007, the Singapore Ministry of Law announced several proposed changes to liberalise the legal services sector. With particular reference to international arbitration, foreign law firms practising from Singapore will now be able to advise clients on their legal rights and liabilities in disputes involving matters of Singapore law before a notice of arbitration is issued if:

- both parties to the dispute are incorporated, resident or have their place of business outside Singapore;
- the subject matter of the dispute is most closely connected with a place outside Singapore and has no physical connection whatsoever to Singapore;
- the parties' obligations were to be performed entirely outside Singapore; and
- the advice is provided through Singapore-qualified lawyers employed by the firm.

Once the notice of arbitration has been issued, there is no further restriction. The proposed changes are expected to come into effect in 2008.

These changes reflect the growing willingness of companies doing business in Asia to have their agreements, which otherwise are unconnected with Singapore, to be governed by Singapore law and to determine that any dispute relating to that agreement should be resolved by arbitration in Singapore. They also encourage that willingness in that these changes allow those companies to use their international counsel with offices in Singapore to assist them in any dispute arising out of such agreements before and after the notice of arbitration is issued.

Decisions of the Singapore High Court and Court of Appeal Perhaps the most interesting decision of the year handed down by the Singapore High Court came in Government of the Republic of Philippines v Philippine International Air Terminals Co, Inc [2007] 1 SLR 278. This was described as a classic challenge to the jurisdiction of a tribunal made by way of an application to set aside a partial award. The facts of the case were as follows.

In 1997 and 1998, the government of the Philippines awarded Philippine International Air Terminals Co, Inc (PIATCO) the right to build and operate an airport terminal by way of several concession contracts. PIATCO duly commenced construction and declared that the terminal was ready for handover in November 2002. However, in January 2003, the Philippine government applied for (and, in May 2003, secured) an order from the Philippine Supreme Court declaring the concession contracts null and void. At the same time, PIATCO commenced an ICC arbitration.

At the outset of the arbitration, the Philippine government maintained that the tribunal had no jurisdiction to adjudicate any dispute between the parties. As such, the tribunal's first task was to determine its jurisdiction. At the preliminary meeting, it was agreed that the tribunal must first determine the law governing the arbitration agreement and the arbitration

proceedings before the parties could make their submissions on the jurisdiction of the tribunal and the validity of the arbitration agreement. In October 2004, the tribunal rendered a partial award deciding that Singapore law governed both the arbitration agreement and, by reason of the choice of Singapore as a neutral venue, the arbitration proceedings.

The Philippine government then applied to the Singapore High Court to set aside the partial award. That application was dismissed. In its judgment, the High Court held that it was necessary for the tribunal to consider whether the arbitration agreement survived any alleged nullity before it could then address the two substantive issues which it had been asked to determine: the law governing the arbitration agreement and arbitration proceedings.

The Philippine government was not denied any opportunity in the arbitration to put its case on the issue of severability such that there was no breach of natural justice that impugned the tribunal's decision that the arbitration agreement was severable and, consequently, governed by Singapore law. The High Court then rejected the Philippine government's submission that, in breach of the rules of natural justice, it was not afforded an opportunity to address the neutrality of Singapore as the seat of the arbitration when considering the governing law of the arbitration procedure. It held that this submission was tantamount to an appeal on the merits of the tribunal's decision that Singapore law governed the procedure and that such an appeal did not fall within the High Court's jurisdiction. In any event, the court observed that the tribunal had taken an objective approach in construing the arbitration agreement and was entitled then to address the governing law of the arbitration agreement and procedure.

It is helpful to consider the above decision along side Soh Beng Tee & Co v Fairmount Development [2007] SGCA 28. Although less international in flavour, in this case the Singapore Court of Appeal reaffirmed the principle of minimum interference in arbitration when it allowed an appeal against a decision by the High Court of Singapore to set aside an award. The facts of the case were as follows.

Soh Beng Tee & Company (SBT) was employed by Fairmount Development (Fairmount) as the main contractor to construct a condominium. The parties agreed to complete the construction by 1 February 1999. SBT failed to meet that deadline, which ultimately led to the termination of its employment and a claim for liquidated damages. Subsequently the parties went to arbitration and the arbitrator found in favour of SBT, in particular finding that time would be set 'at large' rather than with reference to a reasonable extension of time. Fairmount then sought to set aside the award on the grounds that, first, the arbitrator had exceeded his jurisdiction in determining issues which had not been submitted for arbitration and, second, that in breach of the rules of natural justice, Fairmount had not been provided with an opportunity to make submissions in respect of those issues.

On appeal, the Court of Appeal ruled that the issue as to whether time should be set at large was a live issue during the arbitration such that Fairmount had an occasion to make submissions on this issue and the arbitrator had not exceeded his jurisdiction in determining it. More importantly, and in a balanced judgment, the Court of Appeal recognised that in arbitration, the overriding concern was one of fairness such that the parties had a right to be heard on every issue which was relevant to the dispute. The concept of fairness extended beyond the award such that a successful party should not be deprived of the fruits of its labour by the unsuccessful party combing the award in order to raise a multitude of challenges to that award after it had been made. While the courts would remedy meaningful breaches of the rules of natural justice which had caused prejudice, they would read arbitral

awards generously and would not allow a dissatisfied party a second bite at the cherry. The Court of Appeal went on to state:

As a matter of both principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process in order to promote the two primary objectives of the Act; namely, seeking to respect and preserve party autonomy and to ensure procedural fairness.

The message from Singapore to the international arbitration community is clear. Singapore offers a world-class arbitration venue which, through the SIAC 2007 Rules and the approach of the Singapore courts, provides sensible procedural rules against the backdrop of a sound arbitration legislation and an established policy of minimal curial intervention that accord with international arbitration best practice standards.

European Commissioner for Trade

Hong Kong

Kathryn Sanger
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Summary

INTRODUCTION

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

Indeed, the Hong Kong International Arbitration Centre (HKIAC), 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 (PRC) and the rest of the Asia-Pacific region. The HKIAC is active in finding ways to promote arbitration in Hong Kong. For example, it hosted the Asia Pacific Regional Arbitration Group Conference 2006 in December.

The HKIAC also supports the Vis Moot (East), which takes place in Hong Kong and is sister to the well-known Willem C Vis International Commercial Arbitration Moot that occurs 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 PRC under the principle of 'one country, two systems'. Thus Hong Kong continues to use a common law 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) (the Ordinance).[3] 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 (5th 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 that do not satisfy these criteria are regarded as domestic arbitrations.[4] Parties can, however, opt into either regime, namely:

- 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 (HKIArb)8 formed the Committee on Hong Kong Arbitration Law (HK Committee) in cooperation with HKIAC. 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 establish a unitary regime for arbitration law in Hong Kong;
- that the Model Law should continue to be scheduled to the Ordinance and 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 that 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 that 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, which the HK Committee has recommended should be replaced by a provision similar to section 45 of the English Arbitration Act 1996, covering the same point); and
- section 23 (relating to an appeal on a point of law arising under an arbitration award).[9]

At the time of writing, the Secretary for Justice, Wong Yan Lung, has announced that the Hong Kong government will launch a public consultation on the draft new arbitration bill at the end of 2007. These suggested reforms can only serve to reinforce Hong Kong's appeal as a venue for international arbitration. In the words of Hong Kong's Chief Executive, Donald Tsang: 'By updating our legal mechanism, we will add to Hong Kong's appeal as a prime jurisdiction for arbitration.'

FEATURES OF HONG KONG 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 courts can be confident that they will be resolved in a manner that 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 courts 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 immigration department will provide work visas to non-Hong Kong residents wishing to come to Hong Kong to represent a party in a Hong Kong arbitration, although a local sponsor/employer (eg, 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 1 per cent should be the interest rate applied on an award of damages.

ARBITRATION INSTITUTIONS

The primary arbitration institution is the HKIAC. Although it has been funded by both the local business community and the Hong Kong government, it is independent of both and financially selfsufficient.

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. It 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 arbitration cases heard. In 2006, it had 394 cases, of which 181 were classified as construction cases, 102 as general commercial cases and 18 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 scrutinise 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 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 the 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 the 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 PRC, Hong Kong (and usually the HKIAC) is often selected as an arbitration venue for PRC-related arbitration. For example, of the 394 cases which were referred to the HKIAC in 2006, approximately onethird involved parties from the PRC.

Since the handover to the PRC 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 mainland China: according to statistics provided by the Hong Kong Trade

Development Council, Hong Kong is the largest source of overseas direct investment in China. By the end of 2006, among all the overseas-funded projects registered in the mainland, 45.3 per cent were tied to Hong Kong interests.

Similarly, mainland China is one of the leading sources of inward investment in Hong Kong. According to Hong Kong's Census and Statistics Department, the total of mainland China's direct investment in Hong Kong was HK$1,271.9 billion at the end of 2005, accounting for 31.4 per cent of Hong Kong's inward direct investment and, as of December 2006, 367 mainland Chinese companies were listed in Hong Kong, with total market capitalisation of HK$6.7 trillion. In the first half of 2007, Hong Kong was also China's third largest trading partner (after Japan and the US), accounting for 9.1 per cent of its total external trade, and it 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 wellrespected 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 (the Convention) by virtue of the UK's accession on its behalf. After the handover, the PRC extended its own membership of the Convention to Hong Kong (the PRC having acceded on 22 January 1987). Thus, after the handover, arbitration awards have continued to be enforced in Hong Kong under the Convention. The 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).

One such ground is the 'public policy' ground, namely, 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 a special administrative region 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 China and Hong Kong in early 2000. Under this arrangement, a mainland Chinese award can be enforced in Hong Kong and a Hong Kong award can be enforced in the PRC 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 reestablish 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 (the judgment arrangement), providing for the enforcement of PRC judgments in Hong Kong and vice versa. The judgment arrangement is not yet in force: while the Hong Kong Legislative Council has given the draft mainland judgments (reciprocal enforcement) bill two out of its three readings, there is no word from mainland China as to when the judgment arrangement will be brought into effect there. When it is brought into force it will be of limited application, applying to enforceable final judgments in civil and commercial matters and in cases 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. Once brought into force, however, it 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 mainland China 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

Australia has a longstanding 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 prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally arbitration was largely confined to areas such as building and construction. 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 increase significantly 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) currently in force1 and another treaty is currently being negotiated with Turkey. 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 US, further FTAs are currently under negotiation (with China, Malaysia, Japan, Chile, the Gulf Cooperation Council (GCC) and ASEAN-New Zealand) or under consideration (with South Korea and Indonesia).

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 (eg, the Anaconda arbitration in 2002).

INSTITUTIONAL ARBITRATION IN AUSTRALIA: ACICA

A milestone in the promotion of international arbitration in Australia was the reinvigoration of the Australian Centre for International Commercial Arbitration (ACICA) and the launch of its new institutional arbitration rules in 2005. The ACICA 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.

In April 2007 the Australian Maritime and Transport Arbitration Commission (AMTAC) was officially launched by ACICA. With approximately 12 per cent of world trade by volume either coming into Australia or out of Australia by sea this will pave the way for Australia taking a leading role in domestic and international maritime law arbitration.

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 (IAA, section 22). 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, 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, which speci- fies 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 that 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 the landmark decision of Comandate Marine Corp v Pan Australia Shipping [2006] FCAFC 192, the Federal Court confirmed its position that an arbitration clause contained in an exchange of signed letters is sufficient to fulfil the writing requirement. Furthermore, the court found that a liberal and flexible approach should be australia www.Globalarbitrationreview.com taken in interpreting the scope of an arbitration agreement. In this case the words 'all disputes arising out of this contract' were held to be wide enough to encompass claims under the Trade Practices Act for misleading and deceptive conduct that arose in relation to the formation of the contract. In that respect the Australian position was recently supported by the UK House of Lords in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40.

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: they may confer a right to commence arbitration to one party only (see PMT Partners 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 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 (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)) that 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 clari- fied 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 v O'Brien (1990) 64 ALJR 211, reported in Yearbook of 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 v National Distribution Services (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 v Virgin Atlantic Airways (1996) 39 NSWLR 160 and the Federal Court in Hi-Fert 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 v Peters (WA) (1997) ATPR 41-566 and Alstom Power 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 and Tanning Research Laboratories).

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 multiparty disputes. If multiparty 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 (CAA, section 45).

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 (CAA, section 53) as well as power to review an award for errors of law (CAA, section 38) 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 choose 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 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 CAA, section 19(3), many arbitrators still conduct arbitrations in a way not dissimilar to court proceedings, namely, 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 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 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 choose 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 allows the arbitrator to make interim awards unless the parties intention to the contrary is expressed in the arbitration agreement. Furthermore, section 47 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 CAA prescribes time limits for the delivery of the award. However, there are certain form requirements that 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 (CAA, section 29). 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 (CAA, section 29(2)). 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, either in domestic or 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 (CAA, section 48(1)). 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 loses 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 (CAA, section 15). 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 (CAA, section

38(5)). Guidance as to how a court might interpret these provisions can be taken from Giles v GRS Constructions (2002) 81 SASR 575 and Pioneer Shipping v BTP Tioxide [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 CAA, section 41. Further recourse is available under CAA, section 42 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, applies.

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 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.

Endnotes

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Summary

The Arbitration Act, 1940 (the 1940 Act) governed the law relating to arbitration until it was replaced by the Arbitration and Conciliation Act, 1996 (the 1996 Act).

The 1940 Act had a number of drawbacks, including provisions for court intervention at a number of stages in the proceedings, which resulted in delays. The 1996 Act remedied these procedural defects. It was enacted to cover comprehensively international commercial arbitration and conciliation as well as domestic arbitration and conciliation. It aimed to make the arbitral process fair, efficient and capable of meeting the needs of arbitrations. The 1996 Act introduced, among others, the following changes:

- the arbitral tribunal must give reasons for passing an award and must remain within the limits of its jurisdiction;
- an arbitral award must be enforced in the same manner as if it were a decree of a court;
- the arbitral tribunal is permitted to use conciliation during arbitral proceedings to encourage settlement of disputes (with a view to minimising the supervisory role of the courts in the arbitral process);
- 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;
- 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 Act consolidated the various laws prevalent in India relating to arbitration and enforcement of foreign awards into one single statute. It also introduced a new chapter on conciliation in order to promote conciliation and mediation as alternative modes of dispute resolution in India.

The 1996 Act is divided into four parts: part I deals with domestic 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 that can be settled by conciliation; and part IV deals with certain supplementary provisions.

The 1996 Act is based on the UNCITRAL Model Law and is largely a reproduction of the latter's provisions. This has resulted in some problems, particularly on the domestic side.

PART I OF THE 1996 ACT

An 'arbitration agreement' has been defined to mean an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of defined legal relationships, whether contractual or not.

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 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. The Supreme Court of India in the case of Bhatia International v Bulk Trading

SA concluded that provisions such as section 9 of the 1996 Act relating to interim measures of protection by the court were: 'general provisions which are applicable to international commercial arbitrations held outside India, unless excluded either expressly by a statute or by an agreement between parties, or by implication'.

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. In a recent case, Arvind Construction Co v Kalinga Mining Corporation, the Supreme Court applied the provisions of the Specific Relief Act, 1963 while granting injunctions under the 1996 Act.

Under the provisions of the 1996 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 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 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. Section 10 of the 1996 Act provides that the number of arbitrators cannot be an even number. In Narayan Prasad Lohia, the Supreme Court held that parties would be entitled to derogate from the provisions of section 10 of the 1996 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 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 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 in the case of SBP & Co v Patel Engineering. A bench consisting of seven judges held that the power conferred by section 11 of the 1996 Act was a judicial power and the chief justice had to act in his judicial capacity and not in an administrative capacity. The chief justice has the power to decide certain preliminary issues such as existence of a valid arbitration agreement, existence of a live claim, existence of conditions for the exercise of power and qualifications of the arbitrator or arbitrators.

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, namely, to the Supreme Court of India. The decision of the chief justice on the issue of appointment in an international commercial arbitration is final and is 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.

Section 2(1)(f) of the 1996 Act defines an 'international commercial arbitration' 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.

A major difference 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 an international commercial arbitration, the parties are free to choose the law applicable to the substance of the dispute for governing the arbitral proceedings.

Section 12 of the 1996 Act provides the grounds on which an arbitrator can be challenged. The appointment of an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or the arbitrator does not possess the qualifications agreed to by the parties.

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 Act, the 1996 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 dispute and to provide 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 dispute 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 1996 Act (unlike the 1940 Act), 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 of an additional award, something also not provided under the 1940 Act.

The arbitration award made by the arbitral tribunal is open to challenge on the grounds mentioned in section 34 of the 1996 Act. These grounds include incapacity of a party, invalidity of the arbitration agreement, improper notice of appointment of the arbitrators, dispute not contemplated by or not falling within the terms of the arbitration, composition of the arbitral tribunal not in accordance with the agreement of the parties, dispute incapable of settlement by arbitration under the law for the time being in force and the award being in conflict with the public policy of India.

The grounds of challenge under the 1940 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 Act has very limited grounds of challenge based on the 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.

Recently, in ONGC v Saw Pipes, the Supreme Court interpreted the meaning of 'public policy' in a wide sense in case of a domestic arbitration. It held that an arbitral award could be challenged on the ground that it is:

- contrary to fundamental policy of Indian law; the interest of India; or justice or morality; patently illegal; or
- so unfair and unreasonable that it shocks the conscience of the court.

Illegality of a trivial nature, however, can be ignored. Under the 1996 Act, awards that 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 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 or award are also appealable. The appellate court is usually the High Court. No other statutory appeal is provided. Any subsequent appeal can go only to the Supreme Court by way of a special leave.

PART II OF THE 1996 ACT

Part II deals with enforcement of New York Convention awards and Geneva Convention awards and empowers Indian courts to refer matters coming before them to arbitration where the seat of arbitration is outside India.

In Shin Estu Chemicals, the Supreme Court ruled that any objection raised about the agreement being null and void, inoperative or incapable of being performed raised before a judicial authority is required to be decided by the Court by taking a prima-facie view merely for the purpose of making reference and leaving the parties to a full trial before the arbitral tribunal itself or before the Court at the post award stage.

Section 48 of the 1996 Act 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 1996 ACT

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

Under the 1996 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 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 since it acceded to the New York Convention. This is largely on account of the fact that the court process in India is slow and hence the parties do not want to subject themselves to the jurisdiction of the country's 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 the ICC, LCIA and SICA to increase their exposure in India.

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

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Summary

There are many reasons to choose Canada as the seat of international arbitrations. It is a desirable neutral venue with proximity to Europe and the US. The legislative regime 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. Moreover, Canadian courts are consistent in according a high degree of deference to arbitral decisions and protecting arbitration awards from an inappropriate degree of intervention in the arbitration process. Indeed, with one notable exception (where one part of an award of an international arbitration panel was set aside),[1] there has been 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 two recent appellate cases that continue the trend of judicial support for the arbitration process as a viable alternative to litigation in the public courts.[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 the provinces. There the International Commercial Arbitration Act, RSO 1990, chapter 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]

Consistent with the foregoing, in all Canadian jurisdictions, the principles of Kompetenz-Kompetenz are applied; arbitrators are empowered to make interim awards; and, most importantly, the courts interpret arbitration clauses very broadly in order to ensure that parties do not avoid their contractual obligations to arbitrate.[7]

As for court intrusion on arbitration awards, 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.[8] 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 JARDINE DECISION

In Jardine, the Alberta Court of Appeal was called upon to deal with the issue of court-assisted disclosure and discovery. The primary issue was whether the court could lend assistance in obtaining discovery evidence from third parties.

The dispute arose in relation to insurance coverage for the construction by Western Oil Sands of a large oil sands project. SJO Catlin was one of several insurers, and Jardine was Western's insurance broker. The parties to the international commercial arbitration, pursuant to an arbitration clause contained in the insurance policy, were Western and SJO Catlin. Notably, the parties had agreed that the arbitration would be conducted on the basis that discovery would be permitted as under the Alberta Rules of Court.

It was alleged in the proceedings that Jardine, as Western's agent and broker, had made misrepresentations that served to void the policy. Jardine and Western entered into a written mutual cooperation agreement. They took the position that the terms of that agreement were confidential and Jardine refused to disclose the document to SJO Catlin. Also, Jardine and Western resisted SJO Catlin's attempt to conduct oral examinations for discovery of current and former Jardine employees prior to the arbitration hearing. The arbitral tribunal ruled in first instance that:

- the mutual cooperation agreement would have to be produced to the tribunal which would then rule upon its relevance;
- current and former employees of Jardine could be examined for discovery; and
- Catlin could seek the assistance of the Alberta courts to obtain that discovery.

Both of these rulings were premised on the fact that the parties had agreed to permit discovery as under court rules.

Both of these issues were resolved in first instance by a motion judge who ruled that: the arbitral tribunal did not have jurisdiction to order the oral examination of a third party prior to the hearing; and the arbitral tribunal did have the power to order the disclosure of the mutual cooperation agreement. As to the former, his decision was based on the proposition that Alberta's international arbitration statute (the Act), which incorporated the Model Law, did not authorise examinations for discovery. Article 27 of the Model Law, which entitles arbitral tribunals to seek court assistance in 'the taking of evidence', was held not to apply to pre-hearing disclosure.9 As to the latter, the court ruled that inasmuch as a party to the arbitration did have a document that was arguably relevant, the tribunal under article 19 of the Model Law (which gives tribunals the power to determine their own procedures) allowed the arbitrators to compel production without the need to resort to court discovery and assistance rules.

The Court of Appeal reversed the motion judge on the issue of third-party discovery for the following reasons. Article 19 of the Model Law permits parties to agree upon arbitral procedures and permits arbitral tribunals to determine the admissibility, relevance and weight of any evidence. Article 27 of the Model Law permits tribunals to seek court

assistance in taking evidence, and thus gives arbitral tribunals some power over parties that are not directly involved in the arbitration proceedings. Party autonomy is a core principle of international arbitration, and it is 'axiomatic' that parties are entitled 'to make specific agreements concerning the arbitration proceedings'.[10]

On the foregoing principles, the Court of Appeal identified the key issue as being whether the arbitration agreement actually did contemplate the examination for discovery of third parties. It noted the express agreement to have discovery as permitted by Alberta court rules and the fact that no limitation was placed upon that right. Relying upon the analytical commentary on the Model Law, article 19 of the Model Law was recognised as giving wide plenary authority to arbitral tribunals to give effect to all aspects of the parties' agreement to arbitrate and also to determine their own rules of evidence.

The Court further noted that the tribunal had determined that Jardine had acted as agent in the placing of the insurance and that Jardine witnesses did have relevant evidence to give on material issues in the dispute. The tribunal then analysed the Alberta court rules and relevant case law and determined that, under those rules, the discovery sought by the applicant would be permitted.

The Court then specifically addressed the distinction that the motion judge had made between the taking of evidence and discovery, and rejected that distinction. In the result, the Court disagreed with the narrow construction of article 27 of the Model Law, and perforce the decisions in BNP Paribas and Vibroflotation.

Specifically, the Court held that the words 'at the hearing' ought not to be implied into article 27. In Canadian law, the ordinary and plain meaning of evidence includes evidence gathered by way of discovery, with no distinctions made between such evidence and evidence actually adduced at a hearing. The mere fact that the parties had agreed to arbitrate did not mean that they had agreed to a 'lesser form of litigation than that being conducted in the courts'. The interference into the rights of third parties would be controlled by the courts if, as and when court assistance was sought under article 27 of the Model Law, it being noted that the courts would not in any circumstance be obliged to grant such assistance. Finally, it is noteworthy that while all of Canada's provinces have discovery procedures that are fairly uniform, many provinces do not permit the examination of third parties to the same extent as in Alberta. In Ontario, for example, it is only by exception that anyone other than parties can be examined for discovery prior to a hearing. While the Court's decision was premised upon articles 19 and 27 of the Model Law, the fact that the parties had agreed to discovery under Alberta court rules was a significant factor. Thus, the broad scope of discovery permitted in Jardine may not be replicated where arbitrations are seated in other Canadian provinces. Party autonomy will govern.

THE DELL DECISION

In Dell, the Supreme Court of Canada was called upon to deal with several issues pertinent to class actions and arbitration. As to the latter, the Court clarified the degree to which the principle of Kompetenz-Kompetenz applies in Canada.

The case arose out of an error in an advertisement that Dell had placed on its website. The posted sale prices for two particular models of handheld computers were much lower than the actual prices. Dell identified the errors and immediately blocked public access to the usual address for the erroneous postings. The plaintiff and many others nevertheless accessed the order page and placed orders at the low prices. Dell refused to honour those

orders. The plaintiff instituted court proceedings and sought leave to have his action certified under Quebec's class-action legislation. Dell's response was to have all claims referred to arbitration, pursuant to arbitration clauses set out in the terms and conditions of sale that appeared by way of a hyperlink on the order pages. The arbitration clause provided that any arbitrations were to be governed by the rules of the National Arbitration Forum located in the US.

As far as the arbitration issues were concerned, the first instance judge ruled that inasmuch as the arbitration was international, Quebec legislation precluding waiver of court jurisdiction in consumer and employment claims disentitled Dell from forcing arbitration upon the plaintiff and potential class members. She then ruled that the action could be certified as a class action.

The Quebec Court of Appeal disagreed. The arbitration was not international, and the parties could agree to submit their claims to an arbitration that would take place in Quebec. Nevertheless, because the arbitration was 'external' (being accessible only by hyperlink) and because there was no evidence that the arbitration clause had been brought to the attention of the plaintiff, Dell could not set that clause up against the plaintiff. The Court then ruled that, under then-current Quebec law, consumer claims could be arbitrated and that there was no public-policy principle that class actions would take precedence over arbitration. (It should be noted that after the appeal decision and before the Supreme Court hearing, legislation was passed that does preclude arbitrations in consumer claims. That legislation had no bearing on the Supreme Court decision.)

The Supreme Court, in a 6:3 decision, held that:

- the preclusion of arbitration in consumer claims only applied to international arbitrations;
- inasmuch as the only international factor in this case was the reference to the rules of the National Arbitration Forum, the arbitration in this case would have been domestic, such that the preclusion would not apply;
- notwithstanding that the arbitration clause was accessible only by hyperlink, the clause was as easily found by a reader as a written provision would have been and was thus not external, such that it did apply to the plaintiff 's contract of sale; and
- there was no public policy that, in the face of a valid agreement to arbitrate, would force parties to litigate in a class action procedure.

For present purposes, the significance of Dell is in the way that the Court interpreted and applied Kompetenz-Kompetenz. This issue arose in respect of the following legislative framework. The Quebec Code of Civil Procedure, provides that where an action is commenced in the face of an arbitration agreement, the court is required to refer the matter to an arbitral tribunal unless the matter has already been set down for trial or unless the court finds that the arbitration agreement is null.[11] The Code further provides, however, that while a court action remains pending, an arbitration may be commenced or pursued to the issuance of an award. Then, like the Model Law, the Code provides that arbitrators may decide 'the matter of their own competence'.[12] Where a tribunal finds that it is competent, a party can within 30 days seek to have that decision reviewed by the court, during which time the arbitration may be continued to the issuance of an award.[13] Any court decision on a review is final and not subject to any further appeal.[14] As noted by the Supreme

Court, these provisions incorporate the 'essence'of the New York Convention and article 8 of the Model Law and "clearly indicates acceptance of the competence-competence principle incorporated into article 16 of the Model Law".[15]

The Supreme Court then delved into the question as to where the first recourse for a party seeking to challenge the competence of an arbitral tribunal should be. A review of prior case law suggested that Quebec courts were prone to accept or give effect to arbitration clauses 'without reflecting on the degree of scrutiny required of them' but that the courts were also 'reluctant to engage in a review on the merits' where the analysis of an arbitration clause 'requires an assessment of contradictory factual evidence'.[16] The Supreme Court then noted that the courts have not adopted a distinction between a clause's validity and its applicability as a criterion for intervention and that in the other Canadian provinces a prima-facie analysis has been extended to cases concerning the applicability of arbitration clauses.[17]

The Supreme Court then developed a 'test for reviewing the application to refer a dispute to arbitration that is faithful to article 943 [of the Code of Civil Procedure] and to the prima facie analysis test that is increasingly gaining acceptance around the world',[18] in the following terms:[19]

- As a general rule, any challenge to an arbitrator's jurisdiction must first be resolved by the arbitrator. Such tribunals are equipped to entertain and decide upon a review of documents and factual evidence pertinent to the question of competence and jurisdiction. Such challenges are also made appropriately to the arbitrators where the issue involves questions of mixed fact and law.
- Given the courts' expertise in respect of legal questions, and given that the court is where parties apply when seeking stays of court actions, where a challenge to jurisdiction is based solely on a question of law, an immediate court application may be entertained. This exception will reduce unnecessary duplication of proceedings, but courts must not, on such applications, consider factual issues.
- Where applications may be made directly to the courts, the courts must be satisfied that the challenge is not simply a delaying tactic and that the challenge will not unduly impair the conduct of the arbitration. So, even where the issue requires the consideration of a pure question of law, the courts may refer the matter to the arbitral tribunal for its initial determination.

As the foregoing principles were applied in Dell, the Supreme Court noted that the following issues required factual determinations: whether there was a foreign element to the case that would have entailed a finding that the arbitration was international; and whether the arbitration clause was external to the sales agreement. Accordingly, the matter ought to have been first referred to an arbitral tribunal for an initial determination of jurisdiction.

As stated above, Canada is an arbitration-friendly jurisdiction. Dell and Jardine demonstrate that arbitration proceedings may be conducted in any of Canada's provinces with assurance that the courts will give effect to the terms of arbitration agreements, that the courts will lend assistance where required in order to assist in the securing of pre-hearing evidence, and that the courts will accord deference to arbitral tribunals' pronouncements on their own competence, all consistent with the provisions of the New York Convention and the Model Law.

Endnotes

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Summary

The Arbitration Act 2005 (the 2005 Act) came into force on 14 March 2006. This chapter will explore some of the decisions and issues that have arisen in respect of the operation of the 2005 Act and the repeal of the Arbitration Act 1952 (the 1952 Act) that warrant consideration. It will also look at the more important amendments to the 2005 Act proposed by the Malaysian Bar Council, which are pending consultation with the attorney general's chambers.

DECISIONS UNDER THE 2005 ACT

A substantial number of the decisions that have been handed down under the 2005 Act relate to a stay of proceedings pending a reference to arbitration, both domestic and international arbitrations. It is gratifying to note that the Malaysian courts have recognised and given effect to the provisions for a mandatory stay of proceedings, under the 2005 Act.

In the case of Standard Chartered Bank Malaysia Berhad v City Properties & Anor [2007] MLJU 0581, a stay of proceedings pending a reference to arbitration was sought. The dispute involved a retention bond issued by the Bank in favour of City Properties.

The retention bond was issued pursuant to a construction contract which was the subject matter of pending arbitration proceedings between the first and second defendants. The second defendant, in support of its application to have the dispute relating to the retention bond stayed and referred to arbitration, contended that the dispute arose out of the construction contract and hence was within the purview of the arbitration clause contained in the construction contract. The first defendant contended that the issues pertaining to the retention bond were ultimately contractual issues involving the plaintiff and the first defendant and the arbitration clause did not encompass the retention bond. The High Court, in allowing the stay, recognised the difference in approach under the 1952 Act with respect to the grant of a stay of proceedings, and the fact that the grant of a stay under the 2005 Act is mandatory so long as the arbitration agreement is valid and there is a dispute falling within its ambit. The High Court also recognised the fact that what constitutes an arbitration agreement under the 2005 Act is far wider than that under the 1952 Act and held the arbitration agreement contained in the construction contract was wide enough to include disputes arising out of the retention bond. The court also recognised that to rule otherwise would result in a multiplicity of proceedings and possible inconsistent decisions being reached on the same issues.

In the case of Majlis Ugama Islam v Adat Resam Melayu Pahang v Far East Holdings [2007] MLJU 0523, the High Court upheld an application for a stay of arbitral proceedings under section 10 of the 2005 Act pending a reference to arbitration. In that case, there was a dispute involving a joint venture agreement which contained an arbitration clause. The parties could not agree on the choice of arbitrator. The appellant took the position that the matter could only be referred to arbitration provided the choice of arbitrator was agreed by the parties. As it had not been so agreed, the matter could not be referred to arbitration and the appellant commenced a civil suit in court. The respondent in turn filed an application for a stay of proceedings and a stay was granted. The court took advantage of the provision in section 10(2) of the 2005 Act to make a consequential order to refer to the matter of the appointment of an arbitrator to the director of the Kuala Lumpur Regional Centre for Arbitration. Section 10(2) allows the court, in granting a stay, to impose any conditions it deems fit.

In the case of Innotec Asia Pacific v Innotec GmbH [2007] 8 CLJ 304, the court, in granting a stay of proceedings, spoke in favour of upholding arbitration clauses. The dispute in that case was in relation to a partnership contract and resellers agreement. There was an arbitration clause which provided for arbitration at the 'SIHK'.

It was contended by the plaintiff that the arbitration clause was void for uncertainty as the reference to 'SIHK' could be a reference to any number of institutions. The court there held that in construing the arbitration agreement, the court should not hold a provision void for uncertainty unless the ambiguity could not be resolved. The court found that there was no uncertainty as to whether 'SIHK' referred to the other localities as identified by the plaintiff. The court also held that so long as the seat of arbitration is capable of being made certain with reasonable certainty, the court will uphold the agreement to arbitrate. The fact that the respondent had not objected to the inclusion of arbitration clause in the agreement was held to be a relevant consideration in upholding the arbitration clause. The court further held that even if there was a mistake as to the venue or seat of arbitration, such a mistake was not 'essential' to the arbitration agreement within the meaning of section 21 of the Contracts Act 1950 such as to render the agreement unenforceable. On a separate note, the court recognised that the 2005 Act empowers the arbitral tribunal to decide on a dispute relating to the law applicable to the arbitration. On the construction of section 10 of the 2005 Act, the court was of the view that section 10 does not exclude the courts' general jurisdiction to grant a stay of proceedings on any appropriate grounds including the ground to refer the dispute to an international arbitration (outside Malaysia). The court held further that any objection as to the propriety of the commencement of arbitration proceedings or the objection as to the failure to abide by the relevant procedure on the appointment of an arbitration was not a ground within section 10(1)(a) or (b) of the 2005 Act. As such, it was not a ground upon which the court could properly exercise its power not to grant stay. In any event, the court recognised that such objection should be made to, and decided by, the arbitral tribunal.

In the case of Hello Marketing (M) v Siemens Malaysia (unreported) the High Court upheld an application to stay court proceedings pending a reference to arbitration. In that case, the plaintiff sought to bring itself within the two exceptions to section 10 and contended that the agreement giving rise to the dispute was inoperative or incapable of being performed and that there was in fact no dispute as the defendant had assigned the agreement to a third party. The court dismissed both grounds of objection and held there was a valid agreement between the parties and the dispute ought to be referred to arbitration.

INTERIM RELIEF

In the case of I-Expo v TNB Engineering Corporation [2007] 3 MLJ 53, the High Court of Malaya considered the grant of interim relief pending arbitration proceedings. The plaintiff and defendant entered into a contract for the decommissioning and dismantling of the defendant's power station. The defendant subsequently terminated the contract on the basis that the plaintiff failed to pay certain sums of money allegedly due including a performance bond of 3 million ringgits. The defendant further barred the plaintiff from entering the project site to carry on work. The plaintiff commenced an action in the High Court and applied for an injunction to allow him to enter the site to remove scrap. The defendant applied to stay proceedings pending arbitration pursuant to section 10 of the 2005 Act.

The defendant advanced the argument that the application to stay proceedings was a challenge to the civil proceedings being instituted to resolve the dispute in the face of an arbitration clause. Hence he contended the application for the injunction could not be heard

until the disposal of the stay application. The High Court, in allowing the plaintiff 's application for the injunction, held that the power to grant an interlocutory injunction encompasses all situations, whether before or during arbitral proceedings where the court is required to intervene to preserve the status quo of a dispute in order that its subsequent decision would not be rendered nugatory.

The High Court also disagreed with the defendant that the application for stay should be heard before the application for the injunction and held there was no reason for such a position to be taken.

THE REPEAL AND SAVINGS PROVISION

In the case of Majlis Ugama Islam (referred to above) the question arose as to which Act should apply in determining an application for a stay of proceedings. The court held that section 10 of the 2005 Act applied as the arbitral proceedings were commenced after the 2005 Act came into force. That case dealt with a domestic arbitration which had commenced after the coming into force of the 2005 Act.

A more complex question has arisen in a matter where the High Court is being asked to register a foreign arbitral award pursuant to the 2005 Act where the arbitral proceedings were commenced before the 2005 Act came into operation. This issue involves a consideration of the repeal and savings provisions under the 2005 Act.

Section 51(1) of the 2005 Act provides for the repeal of the 1952 Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the 1985 Act). Section 51(2) and (3) of the 2005 Act provides that the 1952 Act shall apply where the arbitral proceedings were commenced before the coming into operation of the 2005 Act:

Repeal and savings 51. (1) The Arbitration Act 1952 [Act 93] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 [Act 320] are repealed. (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted. (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

The question that arose relates to the application of the 2005 Act in respect to the enforcement of a foreign arbitral award, arising out of arbitral proceedings which took place before the commencement of the 2005 Act. The argument being advanced is that the 2005 Act does not apply as the repeal and savings provision in section 51(2) of the 2005 Act provides for the 1952 Act to apply where arbitral proceedings were commenced before the coming into operation of the 2005 Act. The argument is founded on the premise that the reference to 'arbitral proceedings' in section 51(2) of the 2005 Act governs all arbitral proceedings, whether or not commenced within Malaysia. This, with respect, is misconceived. The reference to 'arbitral proceedings' in the 2005 Act must necessarily refer to arbitral proceedings governed by the 1952 Act. Foreign arbitral proceedings were not governed by the 1952 Act nor was there any award handed down prior to the repeal of the 1985 Act, which governed the enforcement of foreign arbitral awards. As both the 1985 Act and the 1952 Act were repealed prior to the enforcement of the foreign arbitral award, no rights accrued under the 1952 Act and the 1985 Act prior to their repeal. There is presently no decision of the Malaysian Court that has considered the ambit of the phrase 'arbitral proceedings' in section 51(2) of the 2005 Act. The issue has, however, been considered by

leading Malaysian arbitrators in 'The Arbitration Act 2005 - UNCITRAL Model Law as applied in Malaysia' by Sundra Rajoo and WSW Davidson, where the authors said:

Foreign arbitrations are outside the scope of the Act and the reference to 'arbitral proceedings' in section 51(3) should in our view be taken to refer to arbitral proceedings where the seat of arbitration is in Malaysia (see section 3 and the commentary on that section). Hence proceedings for enforcement of a convention award commenced after the Act has come into operation should be governed by section 38 and 39 of the Act regardless of when the foreign arbitral proceedings commenced.

The authors considered the Indian authorities, in so concluding. The case of Thyssen Stahlunion GmbH v Steen Authority of India Ltd [1999] AIR SC 3923 was referred to. There the Supreme Court of India held that where arbitral proceedings were commenced in a foreign jurisdiction before the repeal of the Foreign Awards Act, the award which was issued after the repeal of the Act would be enforceable under the new Act. The Supreme Court expressed its reasoning in the following passages:

The Foreign Awards Act gives the party the right to enforce the foreign award under that Act. But before that right is exercised the Foreign Awards Act has been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending on whether it is a New York Convention Award or Geneva Convention Award. It is irrespective of the fact when the arbitral proceedings commenced in a foreign jurisdiction. Since no right has accrued section 6 of the General Clauses Act would not apply.

The decision in Thyssen has been affirmed in two cases of the Indian Supreme Court, namely Fuerst Day Lawson v Jindal Exports [2001] AIR SC 2293 and Milkfood v GMC Ice Cream [2004] AIR SC 3145. Both those cases affirmed the decision in Thyssen that 'arbitral proceedings' in the savings provision in the new Act applies only to domestic arbitral proceedings so that foreign awards are enforceable under the new Act regardless of when the foreign arbitration commenced.

It is noted thus far, that the decisions of the Malaysian courts have given effect to the spirit and intent of the Model Law and have leaned heavily in favour of upholding arbitration clauses and staying court proceedings to give effect to arbitration agreements.

PROPOSED AMENDMENTS TO THE 2005 ACT

The Malaysian Bar Council has proposed certain amendments to the 2005 Act, which are being considered by the attorney general's chambers. The more substantive of the proposed amendments are discussed below.

WAIVER OF RIGHT TO OBJECT

A common approach adopted by parties seeking to avoid the rigours of an award unfavourable to them is to delay proceedings by taking technical objections at the eleventh hour. This understandably delays proceedings and frustrates the legitimate claimant. The 2005 Act seeks to address this problem by virtue of section 7 of the 2005 Act which provides for the waiver of the right to object. An amendment has been proposed to section 7 of the 2005 Act to fine-tune the implementation of section 7. A deeming provision has been proposed to provide that where parties know or are deemed to know of any provision of the

2005 Act or the arbitration agreement which the party is of the view has not been complied with, the party is required to raise its objection at the earliest opportunity or shall be deemed to have waived its right to object. The deeming provision is proposed to import an objective reasonable diligence standard. This proposed amendment is intended to give effect to the Model Law, which requires technical objections to be taken at the earliest opportunity.

STAY OF PROCEEDINGS

Criticisms have been levelled against the proviso to section 10 of the 2005 Act (which deals with the grant of a mandatory stay). The proviso empowers the court to refuse a stay where there is no dispute between the parties with regard to the matters to be referred. The proposed amendment seeks to do away with the proviso, which is not in line with the Model Law, and may well breach the New York Convention, which requires contracting states to make it mandatory to refer parties to arbitration unless the arbitration agreement is null, void, inoperative or incapable of being performed. The introduction of the proviso with respect to the existence or otherwise of a dispute leaves too much discretion with the courts to determine if there is in fact a dispute. The exercise of such wide powers is likely to result in protracted litigation and is an unnecessarily wide conferment of discretion to the courts. On a separate note, a new provision has been proposed with respect to the stay of admiralty proceedings and the powers of the court pending the determination of an arbitration in relation to an admiralty dispute. The provision includes the power to order the retention of the vessel or the provision of security in lieu.

INTERIM MEASURES

An amendment to section 11 of 2005 Act, which deals with interim measures by the High Court, has been proposed. This proposed amendment is intended to limit the court's power to grant interim measures to the following circumstances; where it is satisfied that the arbitral tribunal is not yet fully constituted; or for some reason is unable to exercise its own power to grant relief interim within the required timeline; or that in acting, the High Court will not encroach on the powers of the arbitrator; or, if such intervention is necessary to support the arbitral process or to render more effective, the arbitral award. This proposed amendment is intended to codify the principles laid down by Lord Mustill in the Channel Tunnel case to ensure that the power to grant interim relief given to the national court is used to support and not to obstruct arbitration.

Application of interlocutory orders to foreign arbitrations Presently section 10 and 11 of the 2005 Act, which deal with stay of proceedings and interim measures, apply only to arbitrations where the seat is in Malaysia. It has been proposed that sections 10 and 11 ought to apply equally to foreign arbitrations where the seat is not in Malaysia. This will bring Malaysia in line with the Model Law and Malaysia's treaty obligations under the New York Convention and give the Malaysian courts jurisdiction to grant a stay of proceedings or interim relief to aid a foreign arbitration.

THE LAW APPLICABLE TO THE DISPUTE

An amendment to section 30 of the 2005 Act has been proposed. Section 30 deals with the law applicable to substance of the dispute, and as presently worded, requires the arbitral tribunal to decide the dispute in accordance with the substantive law of Malaysia in respect of domestic arbitrations. It is proposed that this provision be substituted with a provision that entitles the arbitral tribunal to decide the dispute in accordance with the choice of law as agreed by the parties. This would place both domestic and the international arbitrations

on the same footing and permit parties the right to determine the choice of law to govern their dispute, whether or not it involves a domestic arbitration.

RECOGNITION OF ARBITRAL AWARDS

Section 38 of the 2005 Act, which deals with the recognition and enforcement of the arbitral awards is proposed to be amended to correct the drafting error, which presently, only recognises the enforcement of domestic awards and awards from foreign states. It omits reference to awards made in international arbitrations made where the seat is in Malaysia from being enforced in Malaysia. The proposed amendments allows for all awards, both where the seat of the arbitration is within Malaysia and otherwise, to be recognised as binding and being enforced under the 2005 Act.

To ensure the effect of the decision in Sri Lanka Cricket v World Sport Nimbus [2006] 3 MLJ 117 is not felt with the implementation of the 2005 Act, it is proposed that a new section be introduced, placing the burden of proving that a state is not a foreign state (as defined in the 2005 Act) on the party seeking to resist the enforcement of the award. The author of this paper is, however, of the view that the effect of Nimbus will not apply under the 2005 Act, which omits the reference to the requirement of gazettement of contracting countries as provided under section 2(2) of the 1985 Act. On a separate note, an amendment has been proposed to section 39 of the 2005 Act dealing with the recognition or enforcement of an award. The 2005 Act presently provides that the validity of the award be determined under the laws of Malaysia in the absence of the agreement between the parties. The proposed amendments substitute the laws of Malaysia with the laws of the state where the award was made. This is provided for in the Model Law and the New York Convention.

MISCELLANEOUS AMENDMENTS

A proposed amendment to section 42 of the 2005 Act seeks to limit and to exclude the discretion of the court in ruling on questions of law unless the question of law substantially affects the rights of one or more of the parties to the dispute. This is to avoid parties raising questions of law which are technical in nature and which will not affect the correctness the award or substantially affect the rights of the parties. The repeal and savings provision in section 51 of the 2005 Act is sought to be amended to clarify the problem raised above ('The repeal and savings provision', final paragraph). Section 51 of the 2005 Act provides that where the seat of the arbitration is Malaysia and the arbitral proceedings were commenced before the coming into operation of the 2005 Act, the law governing the arbitration agreement, arbitral proceeding or court proceedings arising therefrom shall be the law in force prior to the enactment of the 2005 Act. It is sought to clarify the repeal and savings provisions are intended to govern only arbitration proceedings where the seat of the arbitration is Malaysia. The 2005 Act shall apply in all other situations. It has been proposed that a gazette notification be effected with respect to the list of the Convention countries or alternatively a validation provision be introduced to provide that a Convention award shall be enforceable in Malaysia whether or not an order under subsection 2(2) of the 1985 Act has been made gazetting the particular Convention country. A further proposal is for arbitrators to be given the power to administer oaths and take affirmation from parties and witnesses.

The proposed amendments to the 2005 Act are both necessary and far-reaching. The author is optimistic that the proposed amendments will be favourably received and implemented. The proposed amendments will serve to smoothen the kinks and inevitable wrinkles in a piece of legislation that has served to transform the practice of arbitration in Malaysia. The

2005 Act is, by all accounts, a welcome development to the law governing arbitrations in Malaysia.

Thus far, its application by the Malaysian Courts has been encouraging. It appears all efforts are being taken to promote Malaysia as a viable venue for arbitrations to take place and the developments are both positive and tangible.

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Designating the Administrator for International Commercial Arbitrations

Luis M Martinez

International Centre for Dispute Resolution

Summary

Not all arbitrations are created equal. In the world of international commercial arbitration, the difference between an efficient and economical resolution to a business dispute and finding oneself in a protracted, expensive arbitral process (where parties may be subjected to procedural irregularities, bad faith, dilatory tactics, biased or unqualified arbitrators) may hinge on whether the arbitration is administered by an arbitral institute or not and, if selected, the quality and capabilities of that particular institution. The designation of the administrator in an arbitration clause cannot be taken lightly and all too often there is insufficient due diligence conducted when it comes to the dispute resolution provision. This decision has significant consequences that the drafter must fully consider, especially when it pertains to the role played by the administering institution, which is an essential component for the successful resolution of any international commercial dispute. The designated institution's administrative system and its policies are important factors as they provide the foundation for its character and identity. It is essential that parties understand the character and identity of the institution as well as its arbitral system and institutional integrity before designating them in their dispute resolution agreement, in order to enhance their level of predictability and avoid the aforementioned pitfalls.

THE INSTITUTION

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) charged with administering all the AAA's international initiatives. Established in 1996, the ICDR consolidated the AAA's international caseload and global experience of more than 70 years under this new division. Its administrative system contains various components and is based on the institutional experience, international expertise, multilingual legal staff, flexibility, international dispute resolution procedures, commitment to service and sensitivity to culture. The ICDR is guided by the principle that the institution must act in the best interests of arbitration and this is an integral part of its international administrative system and policies. All this provides the parties with a measure of predictability and an institutional advantage over arbitrations that are not institutionally administered, for example, ad hoc arbitrations or other institutions that may not have the experience, infrastructure or the policies needed for these complex international matters and thereby highlighting again the importance of the designation of the administrator especially when integrity and transparency have become highly valued requirements for the successful dispute resolution providers operating in today's evolving global markets.

One of the areas of concern in the field today is the sheer numbers of arbitral institutions throughout the world. There are many institutions that have entered the market expecting to be successful administrators; however, their arbitrators may lack qualifications, their staff may be inexperienced, administrative decisions may be unsound or motivated by self-interest, and they may not realise that while it is important to provide a service for their clients it must never be at the expense of the arbitral process as supported by the judiciary. The administrator's mission to protect the arbitral process requires that it not accept every case when the parties' agreement conflicts with due process, fair play and integrity.

A non-profit organisation, the ICDR prides itself on continuing its founding traditions of due process, fair play and integrity throughout all aspects of its domestic and international dispute resolution services. Parties recognise this and understand this difference when designating the ICDR/AAA as their administrators. They are not only selecting a service,

they are also selecting an institution with a tradition of values of the highest standards. The ICDR is an international administrator that provides a full range of conflict management services to businesses around the world. It has offices in the US, Ireland and Mexico, and another recently opened in Singapore, as well as a network of cooperative institutions and key alliances spanning 44 countries. The ICDR thus provides international administrative services and educational initiatives, with access to the local alternative dispute resolution (ADR) methods. Cultural sensitivity by its staff and arbitrators is a priority under the ICDR system. Understanding verbal and nonverbal miscommunications, cultural mores and biases, religion and politics allow the ICDR to better understand how culture affects international dispute resolution which can be an invaluable tool in resolving these commercial disputes.[2]

One of the oft-cited advantages of international arbitration is the ability of the parties to structure their dispute resolution mechanisms in such a way as to foster greater predictability in the procedure to be followed and its eventual results once the dispute has occurred. Achieving predictability, while it can certainly be enhanced it cannot by any means be ensured, especially when one considers the incredible number of variables that may impact an international arbitration.[3] Moreover, any discussion of trying to establish a measure of predictability must guard against generalisation by suggesting that predictability is equally available in all forms of international arbitration. It is admittedly no easy task to see what the future holds for the parties involved in an international arbitration. There are a number of inherent advantages found in an institutionally administered private international commercial arbitration over those that participate in an ad hoc arbitral proceeding. Another area of concern where predictability is elusive is the increasing number of cases involving investor-state proceedings[4] because the context and dynamics are dramatically different and frequently problematic. These cases must be distinguished from the private commercial arbitrations where the state is not a party.[5]

The practitioner's quest for predictability is certainly enhanced by understanding the administrative process. The ICDR's administrative system has the advantage of being easy to follow for common law and civil law practitioners alike. The system has been developed with the benefit of extensive user feedback and has evolved to offer a flexible process combined with a proactive common- sense administrative approach, with less formality and without unnecessary procedural steps. It is subject only to the institutional protection of the process and the parties' due process and fair play requirements. The ICDR brings the parties together via conference call to explore at the outset the use of mediation and any other methods for a possible early resolution. If mediation is not desired, the ICDR consults with the parties and prepares a list of potential arbitrators for their selection. It ensures that qualified arbitrators are appointed from its international panel and that they are impartial and independent and have cleared all conflicts prior to their confirmation.

The ICDR has not adopted the IBA's Guidelines on Conflicts of Interest in International Arbitration. While the ICDR recognises that these guidelines provide needed guidance for arbitrators regarding their disclosures in the international arena, the existing version was not consistent with the institution's standards for disclosures and its policy of ensuring that the parties must always be given the opportunity to object to an arbitrator based on their disclosures.

Throughout the process, the ICDR resolves all procedural impasses and properly interprets and applies its International Arbitration Rules. All cases can be filed online, and all documents

submitted electronically. This approach, combined with the ICDR's proactive oversight of the entire arbitral process, results in arbitration awards that are readily enforced throughout the world, and a process that best meets the expectations of the parties.

ICDR INTERNATIONAL ARBITRATION RULES

Another key component in the successful resolution of an international commercial dispute is the arbitration rules the parties select to govern their arbitration. The International Arbitration Rules are well suited for this purpose. They allow for the maximum in party autonomy while preserving due process. Parties are free to customise their arbitration in any way they deem appropriate, subject to the limitation that each side be given a full opportunity to present its case. Parties are free to choose the seat of the arbitration, the language of the arbitration, the number of arbitrators and the method of their appointment whether opting for a party-appointment or the list method. The parties may designate the nationality of the arbitrator or decide to exclude certain nationalities from the list of potential arbitrators. They may agree to name a specific arbitrator within their arbitration clause. Parties may also include in the clause the scope of document exchange and address other issues such as consolidation, the use of expert testimony or the need for any hearings at all, as they may decide to base their arbitration on documents alone.

The ICDR will be guided by the parties' agreement and, where the agreement is silent, the International Arbitration Rules. The Rules require that all arbitrators be impartial and independent and contain a provision waiving the right to punitive damages unless the parties agree otherwise. A significant feature of the Rules is that they provide the arbitrators with the power to direct the order of proof, bifurcate the proceedings, exclude cumulative or irrelevant testimony and direct the parties to focus their presentations. Moreover these tried and tested Rules contain all the necessary default mechanisms to ensure that the arbitration is not frustrated if the arbitration clause is missing any elements or when faced with a recalcitrant party.

These Rules were revised in 2006 to include a new provision granting parties access to an arbitrator to hear a motion for emergency relief. In international arbitration, it normally takes some time to have an arbitrator appointed and parties in need of emergency protection in the past had to turn to the courts for such relief, with inconsistent results. The ICDR's International Arbitration Rules now includes a new article 37, which provides for an emergency arbitrator to be appointed within 24 hours with notice to the other side6 to make a determination regarding the emergency relief. It was determined that this service was needed at a minimum to provide the parties with the option consistent with their desire to select arbitration in the first place and to avoid each other's national courts.

THE ICDR'S MODEL ARBITRATION CLAUSE

Practitioners who wish to designate the ICDR as their administrator can arbitrate future disputes by inserting the following clause into their contracts:

The parties should add the following provisions:

- 'The number of arbitrators shall be [one or three]';
- 'The place of arbitration shall be [city and/or country]'; and
- 'The language(s) of the arbitration shall be [....]'

The ICDR is an international institution that can provide efficient, neutral and affordable dispute resolution services to parties from all over the world. For further information and contact details, please visit the ICDR's website at www.adr.org/icdr.

Endnotes

International Centre for Dispute Resolution

International Arbitration in Asia

Michael J Moser

Summary

International arbitration has come to play an increasingly important role in resolving cross-border business disputes in Asia. This article describes the growing number of cases being reported in the region, the role of local arbitration institutions and ongoing efforts to modernise local arbitration legislation. It also looks at adherence to the New York Convention and the ICSID (or Washington) Convention in Asia, and the likely future growth of investor-state arbitrations in the region.

GROWTH

The growth of arbitration in Asia in recent years can be seen clearly in the statistical reports (see Table 1). Whereas ten years ago Asian arbitration institutions would have received scant mention in a list of the 10 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 400. 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 arbitral institutions.

Table 1: International arbitration cases filed, 1999-2006[1]

	AAA	CIETAC	HKIAC	HKIAC	LCIA	SIAC	Swiss Rules	SCC
1999	453	609	257	529	56	67	N/A	104
2000	510	543	298	541	81	83	N/A	73
2001	649	731	307	566	71	99	N/A	74
2002	672	684	320	593	88	114	N/A	55
2003	646	709	287	580	104	100	N/A	82
2004	614	850	280	561	87	129	52	50
2005	580	979	281	521	118	103	54	56
2006	N/A	981	394	593	130	119	47	141

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 since increased dramatically. 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.

ARBITRATION 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. These include:

- the Mongolian International Court of Arbitration (MICA);
- 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 Center for Arbitration at Kuala Lumpur (RCAKL); and
- the Bandan Arbitrase Nasional Indonesia (BANI).

Through these and a number of 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 arbitration institutions. Its membership now includes 27 arbitration institutions, centres and other organisations. APRAG has also developed a list of Asia-based arbitrators with broad experience both in the region and beyond. For more on APRAG, visit their website at www.aprag.org.

As the large number of arbitration bodies in the region shows, institutional arbitration plays a very prominent role in Asia. This 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. Each of Australia's mainland states and territories has separately enacted uniform legislation governing domestic arbitrations in the form of a Commercial Arbitration Act (CAA). Under the relevant CAA, 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 changes 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 (IAA). 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 upto- 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 arbitration 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 ICC may legally administer arbitrations inside China.

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.

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
PRC	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 reservationR = reciprocity reservation

Unfortunately, however, there appears to be less uniformity throughout the region with respect to the implementation of the Convention. Enforcement of foreign arbitral awards has proved problematic in some jurisdictions, including mainland China, Thailand, Indonesia and Vietnam.

Hong Kong has long had an exemplary record with respect to the enforcement of arbitral awards. With the reversion of sovereignty to China in 1997, China extended the New York Convention to the territory. In 2000, the Hong Kong-Mainland Enforcement Arrangement was put into effect, ensuring the New York Convention principles would also apply to the enforcement of Hong Kong awards in mainland China and vice versa. At the same time, Hong Kong amended its Arbitration Ordinance to permit the enforcement in Hong Kong of awards made in non-Convention territories such as Taiwan. The result of these changes, coupled with the strong pro-enforcement bias of the Hong Kong courts, makes Hong Kong one of the most enforcement-friendly jurisdictions in the region.

INVESTOR-STATE ARBITRATION

Investor-state arbitration has also begun to grow in Asia. With the notable exception of India and Thailand, most Asian states have acceded to the ICSID Convention. Moreover, an increasing number of Asian states have entered into bilateral investment treaties (BITs) with their major trading partners. China, for example, has entered into more than 100 BITs.

Up to now, Asian states and investors have made only limited appearances on ICSID's case docket. Between 2003 and 2007, only 12 cases have involved Asian states or investors. The states to have appeared include Bangladesh, Indonesia, Malaysia, Mongolia, Pakistan and the Philippines (see http://ita.law.uvic.ca/). Conspicuously absent from the case record has been China, the world's leading destination for foreign direct investment.

This picture will likely change in the years ahead. In particular, observers expect that the number of claims by foreign investors against China will increase as a result of recent changes to the country's BIT regime. Until 2004, China's BITs all provided that decisions as to liability of the state under a BIT claim can only be made by a Chinese court or administrative tribunal; only after a determination on liability was made could issues relating to quantum be referred to arbitration before ICSID or an ad hoc tribunal. Not surprisingly, this scheme tended to discourage BIT claims. In 2004 and 2005, however, China amended its BITs with the Netherlands and Germany to permit both liability and quantum to be referred to international arbitration.

Another factor that will likely lead to an increase in BIT cases involving China is that country's current resource-led investment drive in Africa and central Asia. In recent years, China has strengthened its treaty network to include the signing of BITs with states in these regions.

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

The statistics show clearly that 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. Moreover, Asian jurisdictions have made important efforts to ensure that they have the legal and institutional infrastructure in place to handle the growth in arbitrations.

Reforms in arbitration legislation throughout the region demonstrate 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.

In future years, commercial arbitration will no doubt increase throughout the region. In addition, there will likely be an increase in the number of investor-state arbitrations involving

parties from Asia. It is expected that this trend will be led by China, the region's largest recipient of foreign investment.

Endnotes