The Asia Pacific Arbitration Review

2009

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The Arbitration Landscape in Hong Kong

Gary Soo

Hong Kong International Arbitration Centre

Being a common-law jurisdiction and a part of the People's Republic of China, Hong Kong has a unique position in arbitration. As an arbitration venue, Hong Kong has benefited from the increasing number of Chinese-related disputes arising from the escalation of foreign investment and economic activities in Asia, and in particular China. It has been said that, by retaining its English common law-based legal system, foreign parties regard Hong Kong as a fair and familiar forum with neutrality for resolving commercial disputes. With its proximity in location, Chinese parties regard Hong Kong as a culture-friendly venue. From statistics kept at the Hong Kong International Arbitration Centre (HKIAC), a total of 448 cases was recorded in 2007. This figure has not yet included the 135 domain-name disputes that were handled by the HKIAC. Among them, the number of cases with both parties from Mainland China is also increasing.

The existing Arbitration Ordinance (cap 341) applies the UNCITRAL Model Law as the statutory regime for international commercial arbitration[1] and the New York Convention for enforcement of arbitral awards made overseas in places of signatories to the Convention[2] and also of arbitral awards from various arbitration commissions in Mainland China.[3] There is also clear adherence to the New York Convention and the common law by judges. The Construction and Arbitration List has further been created in the High Court to hear arbitration-related cases for quite some time now.

To maintain Hong Kong's position in the international arbitral arena, Hong Kong is responsive to the needs of users and is supporting and updating its legal landscape in arbitration. These can be demonstrated from the following aspects.

Recent cases review

It may perhaps be good to start by looking at some recent cases to see how the courts of Hong Kong are applying the laws.

Hong Kong courts are consistently known for being supportive toward arbitration. In the recent case of UDL Contracting Ltd v Apple Daily Printing Ltd,[4] disputes arose between the parties to a contract for the construction of a printing workshop and support offices. The claim predicated on certain oral agreements and representations. One of the issues to be determined in an application for stay of proceedings was whether these claims were 'in connection therewith' as regards the contract. The Court of First Instance ruled in favour of a stay and remarked that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. Hence, with this approach, arbitration clauses would be

construed by the courts accordingly, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction and decided otherwise by the courts via separate litigation.

In the case of Monstermob Group Inc v Qian Yongqiang,[5] the Court of First Instance continued a worldwide Mareva injunction until the conclusion of a Hong Kong-based ICC arbitration, which would resolve the dispute between these parties. The disputes concerned a BVI company listed in the UK and arose from a share purchase agreement involving a purchase price of US$112 million. On the evidence, the court found a good arguable case on the crucial elements of the claim and believed that there would be a real risk in the dissipation of assets in the event that the claimant ultimately were to succeed in the arbitration. This case casts light on the evidence that Hong Kong courts would be looking for in approaching such an issue.

In another recent case concerning the enforcement of a CIETAC arbitral award,[6] the issue of impossibility of performance was, inter alia, raised as a public policy ground for opposing enforcement before the Court of First Instance in Hong Kong. As said, the New York Convention grounds were applicable to the enforcement of such an award. The award directed one of the parties to continue the performance of an agreement to transfer the shareholding in a Hong Kong company that owned land in Mainland China. That party argued that this was in effect a disguised transfer of land that would be contrary to the law of Mainland China. In rejecting such an argument and giving leave to enforce the arbitral award, the court remarked that the stringent approach of the court was justified as a matter of comity, since, as the parties had agreed to submit to arbitration and had actually gone through an arbitration process, it would be wrong and unjust in principle if a successful party were denied the court's assistance in enforcing an award, other than for compelling reasons.

From these cases, it can be seen that Hong Kong courts are still very supportive throughout the process of arbitration.

A new arbitration bill

On the last day of 2007, a consultation paper with a draft bill on the reform of the law of arbitration in Hong Kong was published by the Department of Justice of Hong Kong. The draft bill adopted with modifications the proposals as set out in the report of committee on Hong Kong Arbitration Law, recommending a unitary regime that applied the Model Law to govern both domestic and international arbitrations. The draft bill was a rewritten one to replace the existing Arbitration Ordinance (Cap 341). During the process, arbitration laws around the world were examined with a view to incorporating international best practice. The amendments to the UNCITRAL Model Law in 2006[7] had also been taken into account in the draft bill.

The purpose of the reform was to make the law on arbitration in Hong Kong more user friendly. As the UNCITRAL Model Law would be familiar to practitioners from civil law as well as common-law jurisdictions, this would have the benefit of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which would accord with widely accepted international arbitration practices and development, thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings.

In the draft bill, the existing enforcement mechanisms for arbitral awards were retained. The framework and content of UNCITRAL Model Law was also adopted. Those familiar headings

used in the UNCITRAL Model Law were used as well for the benefits of the users. In particular, those amendments to the UNCITRAL 2006 concerning the interim measures were mostly adopted in the draft bill, save as to the mechanism for enforcement of such measures. Thus, under the draft bill, the existing approach under section 2GG of the Arbitration Ordinance (cap 341) for enforcement of orders and directions was preserved, while views were sought as regards whether to introduce conditions such as reciprocity or types of measures in respect of interim measures made outside Hong Kong.

The consultation period of the draft bill ended in July 2008. After consolidation of views, it seems that a new arbitration law for Hong Kong should be appearing some time in 2009.

HKIAC Administered Arbitration Rules

Apart from legislation, new rules for the game were also introduced in 2008. The HKIAC has recently published the HKIAC Administered Arbitration Rules, which took effect from 1 September 2008. This set of rules is the latest addition to the HKIAC publication to replace the HKIAC Procedures for the Administration of International Arbitration.

In the drafting of the HKIAC Administered Arbitration Rules, references have been made to the arbitration rules of different institutions around the world. Key improvements of the rules include the choice of user-friendly wordings and the allowance of more party autonomy for catering needs in individual cases. All of these have been done while keeping up with the international practices and legislative changes.

Good arbitrations do not run themselves. Parties may now agree to have their arbitration fully administered by the HKIAC under the HKIAC Administered Arbitration Rules. Rather than leaving administrative tasks allocated to one of the arbitrator's own staff, parties' legal teams, or sometimes even the parties themselves, as in the case of ad hoc arbitration, may get the benefits of professional administration offered by the HKIAC. Further, there can be more scope and safeguards over managing costs and delay.

Domain-name disputes in Hong Kong

As for domain-name disputes,[8] the HKIAC has seen a steadily increasing caseload in 2008.

The HKIAC is a service provider for domain-name disputes concerning '.cn', '.hk', '.pw' and '.ph'. The HKIAC is also a partner in and manager of the Hong Kong office of the Asian Domain Name Dispute Resolution Centre (ADNDRC), which is one of the four domain-name dispute resolution providers approved by the Internet Corporation for the Assigned Names and Numbers (ICANN) to provide domain-name dispute resolution services in regard to generic top-level domain names (gTLDs), such as '.com', '.net' and '.org'. These are to be carried out under the Uniform Domain Name Policy (UDRP) issued by ICANN. On 21 December 2007, DotAsia Organisation announced the appointment of the HKIAC as the global official dispute resolution provider to handle disputes and challenges arising out of the launch of '.asia' domains.

The number of cases handled by the HKIAC up to September 2008 has already exceeded the total number of cases in the whole of 2007. It is also observed that there are more and more complaints concerning domain names in Chinese, involving complainants outside Hong Kong or China. With the launch of '.asia' and other new gTLDs, it is also anticipated that further expansion of domain-name dispute resolution services could happen in Hong Kong.

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From the above, it seems fair to say that Hong Kong's position in the region for the provision of dispute resolution services has been improving. With the incoming reform in arbitration legislation and rules, it is anticipated that the new landscape can provide an even more user-friendly dispute-resolution process for all users concerned.

Notes

1. Arbitration Ordinance (cap 341), Part IIA.
2. Arbitration Ordinance (cap 341), Part IV.
3. Arbitration Ordinance (cap 341), Part IIIA.
4. 2008 2 HKC 534.
5. 2008 HKCU 1274
6. Xiamen Xin Jing Di Group Co Ltd v Eton Properties Ltd (2008) HCCT 54/2007, Reyes J.
7. See www.unictral.org/untiral/en/uncitral_texts/arbitration/1985Model_arbitration.html for details.
8. The HKIAC has been appointed by the China Internet Network Information Centre as a provider to handle internet keyword disputes.

Hong Kong International Arbitration Centre

'The worst of times, the best of times'

Adrian Winstanley

Director general and registrar of the London Court of International Arbitration

Before the economic meltdown of 2008, the burgeoning economies of East Asia had enjoyed not only unprecedented demand for consumer goods at home, but also an export boom to the west, with which were established substantial trade surpluses, while the west consumed much more than it could afford; funded by cheap and readily available credit, often provided by the exporter state itself. And so, many nations became used to, and complacent about, guaranteed year-on-year, decade-on-decade growth in prosperity and living standards, though careless of those in many of the poorest parts of the world, who became still poorer.

But then the world experienced global economic turmoil on a scale not seen for 70 years. Indeed, given that the global economy had been transformed beyond recognition in just 30 years, with the tiger economies of the Asia-Pacific providing much of the muscle behind the unprecedented economic growth, one might say that the downturn was on a scale never before witnessed.

The world's stock markets went on a white-knuckle ride, the drops so significant as to be measured not in the traditional points, but in percentages that sometimes reached double digits in single 24-hour periods. And while many of the most dramatic declines were in western markets, with despair in New York and London, as the Dow Jones, Nasdaq and FTSE yo-yoed at breakneck speed, the fireworks were no less spectacular on the Nikkei, the Hang Seng, the Kospi and other Asia-Pacific markets.

In the second half of 2008, the manufacturing giants of the Asia-Pacific saw huge falls in share values, with the woes of the great steel industries typifying the region's distress.

Even the Chinese powerhouse took a battering, with the growth in China's GDP slowing for five consecutive quarters up to October 2008, and we saw the spectacle of Singapore falling into recession, as consumer demand from the west dropped inexorably in response to the west's own emergency measures.

South Korea, Japan and China were but three of many in the region that moved to stabilise their economies with multibillion-dollar guarantees of foreign borrowing and with the re-capitalisation of their financial institutions.

In many of the world's leading economies, interest rates were drastically cut in an effort to stimulate growth, with all eyes on the US Federal Reserve, whose lead the rest of the world watched with intense interest, though with some caution, as it was the first chill wind from the innocuous-sounding 'sub-prime lending' in the US, which had picked up into a gale, then a storm and finally the maelstrom of 'toxic assets' at the very heart of the crash.

The collapse of businesses and business relationships inevitably fuels a boom in litigation and arbitration, from which all of those involved in the field, whether as arbitrators, advocates, or administrators benefit, even as we see our personal pension funds battered and the value of our real property plummet, and there has been a surge of contentious work from the Asia-Pacific region.

But we have also seen quite unprecedented cooperative efforts at damage limitation, with hitherto unheard-of pooling of resources and injections of capital, whether by individual governments or governments collectively, of their taxpayers' money, or through the International Monetary Fund, or with those handful of economies most insulated from the worst effects of the downturn, such as the wealthiest Gulf States, making huge loans to shore up ailing financial markets.

And there are other indicators of how we are now more willing to be outward-looking in bad times. India, for example, has benefited, as some of the UK's leading law firms outsource hundreds of millions of dollars' worth of high-volume work to the pool of high-quality, English-speaking, common-law-qualified Indian lawyers.

We have, then, had the most piercing of wake-up calls, which must surely lead to a new global economic order, at the heart of which will, once again, be the great tiger economies of the Asia-Pacific, which have had not only to rethink economic strategy regarding their export markets and foreign investments, but also to manage the expectations of their huge populations for improvements in their quality of life, while minimising the environmental impact of growing consumer demands. And it is in addressing these twin problems that new industries and services will emerge and grow, and out of which, for better or for worse, another generation of arbitral work will emerge.

Meanwhile, the leading arbitral institutions continue to plan for growth in the Asia-Pacific region, with the ICC, for example, planning a branch of its secretariat in Hong Kong and a liaison office in Singapore, while the Permanent Court of Arbitration has entered into a host country agreement with the government of India, to facilitate the dispute resolution activities of the PCA in India and on the Indian sub-continent.

The LCIA, similarly, continues with its plans to establish a branch office in New Delhi. Certainly, India is considered by many contracting parties to be unfriendly to international commercial arbitration, and this reputation has not been helped by the decision of the Supreme Court of India in Venture Global Engineering v Satyam Computer Services Limited (JT2008 (1) SC, 468), in which the Supreme Court held that a foreign arbitral award could be set aside in India, even though India was not the seat of the arbitration.

It is, however, the experience of the LCIA, in extended discussions at the highest level, with government, judiciary and Bar, that there is a growing willingness in India to address these criticisms and to acknowledge that so unwelcome a reputation for flying in the face of accepted international arbitral practice, represents a significant hole in the fabric of the Indian economic miracle.

Though the LCIA would not presume to interfere in the judicial and executive processes of India, it does believe that it is better able to serve contracting parties from India and the wider Asia-Pacific region from a prominent base in the region and that, in so doing, it may play some small part in raising confidence in the local arbitration regime, as it makes the promised advances towards alignment with the wider international arbitration community.

Finally, it is perhaps worth reminding ourselves, in this difficult global economic climate, of the common objective of the major arbitral institutions to support effective and sustainable cross-border trade by facilitating the binding resolution of disputes between international parties.

Thus, for example, on the inauguration of the LCIA in 1892, the Law Quarterly Review reported that 'this Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife'.

And just as the LCIA was heralded as a 'peacemaker', so the ICC was founded, in 1919, when the horrors of the First World War were etched in the public psyche, 'to create an institution that would foster reconciliation and peace through the promotion of international commerce', with the ICC's Court of Arbitration being established in 1923 to provide the means of resolving disputes arising out of international commerce, in the furtherance of that primary object.

It may be that these noble sentiments are equally applicable in times of purely economic hardship as they were in times of military conflict, and that arbitration will play a small but significant part in the restructuring of the economies of South East Asia, as elsewhere.

- The views expressed in this article are those of its author and are not expressed on behalf of the LCIA.

Director general and registrar of the London Court of International Arbitration

International Arbitration in South and East Asia — Opportunities, Challenges and the ICC Experience

Jason A Fry and **James Morrison**
ICC International Court of Arbitration

The year 2008 witnessed a number of important and historical events for international commercial arbitration, the International Chamber of Commerce (ICC) and the ICC International Court of Arbitration (ICC Court).

The New York Convention of 1958, the most important multilateral treaty on international commercial arbitration, celebrated its 50th anniversary this year. The ICC was at the forefront of the development of the New York Convention and has further marked its support for the Convention by compiling a report on the procedural requirements for enforcement of awards in over 60 countries around the world.

The 1998 edition of the ICC Rules of Arbitration (ICC Rules) also celebrated its 10th anniversary this year. Since its promulgation in 1998, the ICC Court has witnessed considerable growth in arbitration. By the end of this year, the ICC Court expects to have administered more than 16,000 arbitrations under the ICC Rules and to be managing an active caseload of around 1,350 cases.

Much of the growth in commercial arbitration has occurred in Asia. In recognition of this fact and to demonstrate its commitment to the region, the ICC Court has now opened an office in Hong Kong and will shortly do the same in Singapore. The Hong Kong office accommodates a new case management team of the ICC Court's Secretariat and will be fully operational by the end of this year. The office in Singapore will house a liaison office dedicated to ICC Dispute Resolution Services.

While all of these events underline the continued growth and success of international arbitration, especially ICC arbitration, as a means of dispute resolution, the opening of the ICC's new offices in Asia is a particularly significant development for the ICC.

The decision to locate a team of specialised case managers to administer arbitrations outside of Paris, the historical headquarters of the ICC Court and its Secretariat, is a first for the ICC. The objective is to bring high-quality service, which is the hallmark of ICC arbitration,

closer to the users of ICC arbitration in Asia and provide them with the benefits of direct and local contact to dedicated case administrators and arbitration lawyers in the same time zone and having specialised experience and knowledge of the region. The ICC Court will continue to sit in Paris, at least for the time being, but will work with the Asian branch of the Secretariat on a regular basis using modern communications, including a dedicated video conferencing link and case management intranet.

The growth of international arbitration in South and East Asia is a story worth tracing. The ICC experience of international arbitration in South and East Asia has been well documented on an annual basis since June 1990 in the Court's annually published statistical report. While these statistics confirm that the ICC Court's experience in South and East Asia continues to be one of great opportunity for the users of international arbitration, both within and outside of the region, there remain a number of challenges to the region which we explore below.

Parties to ICC arbitration

Since the ICC Court first published statistics, parties have participated in ICC arbitration from almost every country in south and east Asia, including Bangladesh, Brunei, Cambodia, China (including Hong Kong), India, Indonesia, Japan, Laos, Malaysia, the Maldives, Mongolia, Pakistan, the Philippines, Singapore, Sri Lanka, Nepal, North Korea, South Korea, Sri Lanka, Taiwan, Thailand and Vietnam.

In 1980 (the first year concerning which the ICC has published statistics), only 2.5 per cent of all parties in ICC arbitration came from South and East Asia, while 64 per cent were recorded as being from Western Europe. Ten years later in 1989, the number of parties from South and East Asia had tripled to 8.7 per cent of all parties, while the number of parties coming from Western Europe had decreased to 56.2 per cent.

Within a further five years, the number of parties from South and East Asia (11.5 per cent) had surpassed the number of parties from North America (10.1 per cent).

In 1998, at a time when 1,151 parties participated in ICC arbitration, the number of parties from South and East Asia had risen to its all time high in percentage terms of 19.5 per cent of all parties.

In 2007, of the 1,611 parties involved in ICC arbitration, 190 were from South and East Asia (11.8 per cent), behind Western Europe with 707 parties (43.9 per cent) and Latin America and the Caribbean with 200 (12.4 per cent). Further figures show that 184 parties came from Central and Eastern Europe (11.4 per cent) and 156 parties came from North America (9.7 per cent). Although final figures are not yet available for 2008, a further rise in the number of cases emanating from Asia is expected, confirming the growth trend.

From the late 1980s until today, Indian, South Korean and Chinese parties (including Hong Kong) have remained consistently among the most frequent users of ICC arbitration from the South and East Asia region. In 2007, 42 parties from India, 40 from South Korea and 27 from China (including Hong Kong) participated in cases under the ICC Rules.

Interestingly, however, the number of participating parties from particular countries within the region has in certain years been especially high. For example, in 1998, 21 parties from Pakistan and 19 parties from Singapore; in 1999, 69 parties from India and 22 parties from Thailand; in 2001, 31 parties from Japan; in 2004, 52 parties from the Philippines and 32 parties from China (including Hong Kong); in 2006, 12 parties from Sri Lanka; and, in 2007, 12 parties from Malaysia.

Arbitrators

In 1992, despite the significant increase in the number of parties from South and East Asia (7.7 per cent of all parties, compared to 3.3 per cent 10 years earlier), of the 249 arbitrators confirmed or appointed by the ICC Court, only 10 came from South or East Asia. Moving forward to 1999, of the 849 arbitrators confirmed or appointed by the ICC Court, 49 were from South and East Asia.

In 2007, 1,039 arbitrators were confirmed or appointed by the ICC Court, of which 53 came from South and East Asia.

Reviewing the breakdown of arbitrators coming from South and East Asia, arbitrators from Singapore have consistently featured as being the most confirmed or appointed by the ICC Court. More recently, however, while Singaporean arbitrators still figure highly (for example, 20 out of the 53 arbitrators from South and East Asia in 2007 were Singaporean), the number of appointments and confirmations of arbitrators from India, China (both from mainland China and Hong Kong), Malaysia, Japan, Thailand and South Korea have been increasing.

Place of arbitration

In 1982, no city in South or East Asia was recorded as having been designated as the place of arbitration, either by the parties or the ICC Court.[1] However, by 1991, the place of arbitration was designated in South and East Asia 17 times.

By 1999, 42 ICC arbitrations were taking place with the place of arbitration in South and East Asia and most recently, in 2007, 47 ICC arbitrations had as the place of arbitration a city in the region.

Since 1992, the place of arbitration has been designated in a city in the following South and East Asian countries: Bangladesh (nine times), China (80 times, and in Hong Kong 64 times), India (58 times), Indonesia (eight times), Japan (37 times), Laos (two times), Malaysia (12 times), Nepal (six times), Pakistan (nine times), the Philippines (15 times), Singapore (180 times), South Korea (24 times), Sri Lanka (23 times), Taiwan (eight times), Thailand (26 times), and Vietnam (three times).

Recently, in 2007, Singapore, Hong Kong and Seoul were most frequently designated as the places of arbitration in South and East Asia (17, seven and six occasions, respectively).

Opportunities and challenges

The growth of ICC arbitration in the South and East Asia region, especially from the mid-1990s onwards in terms of the number of parties, has been remarkable. Equally remarkable has been the geographic spread of the users of ICC arbitration in the region, with almost every country in South and East Asia represented.

Parties from the region are involved in the whole range of arbitrations conducted pursuant to the ICC Rules. The subject matters are diverse and so is the quantum at issue. A popular myth about ICC arbitration is that it is only used for high-value disputes. In fact, almost 60 per cent of all ICC cases have a value below US$10 million. That said, some of the largest ICC arbitrations — where claims exceed US$1 billion — have involved parties from South and East Asia or with the place of arbitration being located in the region, or both.

Another telling statistic is that a significant number of ICC cases are between parties who all share the same nationality. In 2007, for example, 19 per cent of all cases filed were between parties of the same nationality. This willingness to use ICC arbitration to settle domestic disputes has also been shared by parties from South and East Asia.

To reflect the important growth of ICC arbitration in regions such as South and East Asia, the ICC Court has itself grown in size and diversity. For example, members have been appointed to the ICC Court from Bangladesh, China, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan, and Thailand.

The depth and breadth of the membership of the ICC Court, including those members from South and East Asia, is an important feature of ICC arbitration, ensuring an inclusive and high-quality decision making process that benefits from the experience of some of the leading arbitration practitioners from the region. This diversity also provides the users of ICC arbitration with confidence in its independence, knowing that the ICC Court's decisions are made after having received input from the many cultural and legal perspectives of its members.

While the number of arbitrators coming from South and East Asia may appear disproportionate to the number of parties, there has nonetheless been consistent growth and an important diversification in South and East Asian arbitrators. It is expected that as the place of arbitration is more frequently designated within the region, the number of South and East Asian arbitrators in ICC cases will also increase.

Also, the statistics do not reflect the growing number of foreign lawyers residing in the region who act as arbitrators, possessing experience and specialised legal and language skills from many of the jurisdictions in South and East Asia. The need for experienced arbitrators from the region is also increasing in importance given the growing number of awards rendered in a language other than English, with the court having recently approved, for example, awards rendered in Korean, Mandarin, Japanese and Thai. The Secretariat of the ICC currently has the ability to work in 22 different languages.

Within the last 15 years, an ICC arbitration has taken place in most countries in South and East Asia. While Singapore and Hong Kong have historically been the regionally favoured places of arbitration, other cities have also come into favour by parties as being neutral and reliable forums for their arbitrations, in particular in South Korea, Japan and Malaysia. Indeed, the court itself has on recent occasions fixed the place of arbitration in Seoul, Tokyo and Kuala Lumpur and is likely to do so more in the future where the court considers that a venue has the support of the local courts. As more countries in the region reform and update their arbitration laws, it can be expected that cities in South and East Asia will continue to increase in popularity as places of arbitration. This is to be expected not only in terms of party confidence in their neutrality and pro-arbitration legal regimes, but also in terms of minimising costs relative to the more traditional centres of arbitration.

This brief overview of the ICC Court's experience in South and East Asia demonstrates that parties from the region have quickly become confident users of international arbitration, thereby providing opportunities to local and foreign businesses outside of the more traditional dispute resolution methods and outside of the more traditional arbitration centres.

However, in order for users to fully benefit from these opportunities and make the most of the potentials that international arbitration has to offer the region, a number of challenges still remain.

Despite legislative reform, there remain concerns in several countries within South and East Asia about the level of judicial intervention in arbitrations, not only where the place of arbitration is in the country of a particular court, but even where the place of arbitration is not situated within the country of that court. The basis for these interventions is often unclear

and their effect can be to stop or significantly delay the conduct of the arbitration, increasing the time and cost to the parties to finalise the arbitration.

In mainland China, great progress has been made in some areas. For example, the users of international arbitration have received clarification from the courts on the extent to which express reference must be made to an arbitral institution in an arbitration clause for the purposes of its validity under Chinese law.[2]

That said, uncertainty still exists in other areas. For example, the extent to which a foreign arbitral institution, such as the ICC Court, may administer an arbitration where the place of arbitration is in mainland China remains unclear. This is an important issue because mainland China is quite often designated as the place of arbitration for arbitrations administered by foreign arbitral institutions. In the ICC's experience, since 1992, parties have agreed to the place of arbitration being within mainland China on 16 occasions. There continues to be a disjunction between the expectations or understanding of parties and the Chinese arbitration law in this regard. The ICC very much hopes that steps will be taken in China to resolve these lingering ambiguities.

In India, a country in which 58 ICC arbitrations have taken place between 1992 and 2007, stamp duty is imposed upon arbitral awards rendered in many states. The payment of this stamp duty is effectively a condition to the enforceability of an award in India. However, there remains considerable uncertainty for both parties and arbitrators as to the extent to which stamp duty is payable and how and by whom it should be paid. Such uncertainties cause delay in finalising the award as well as its enforcement, particularly where foreign arbitrators or parties are involved. Clarification in this regard would greatly assist parties and arbitrators to reduce the time and costs involved with finalising arbitrations and enforcing awards.

In its administration of cases from South and East Asia, the ICC Court also observes a number of problematic arbitration clauses which have the potential to disrupt arbitrations and jeopardise awards. Parties from Asia often modify the ICC standard arbitration agreement to provide for bespoke methods of appointing the arbitral tribunal or administering the cases. More often than not this gives rise to problems.

Recently, the ICC Court has administered a number of cases involving parties from South and East Asia in which the mechanism agreed to by the parties for the constitution of the arbitral tribunal has created significant uncertainty and delay. For example, a number of arbitration clauses have insufficiently accounted for the possibility of multiple parties being involved in the arbitration, or have modified the time limits to nominate an arbitrator as contained in the ICC Rules to such an extent that some time limits have expired even before a request for arbitration has been filed with the ICC Court. Carefully drafted arbitration clauses can assist in minimising the potential for difficulties and delays in the constitution of the arbitral tribunal.

Another issue which has attracted much public attention is the problem of arbitration clauses providing for arbitration under the ICC Rules, but that purport to permit another arbitral institution to administer the case.[3] Often it would appear that parties that have concluded such agreements do so in the misguided belief that they will get the best of the ICC system of arbitration but at a lower cost. There remains a perception that ICC arbitration is expensive. It is not, but perhaps, more importantly, the drafting of such clauses can lead to significantly increased costs for the parties.

While each case will turn on its particular facts and it is not our intention in this article to comment on any particular case, there is a real danger in drafting clauses that attempt to mix the roles of different institutions. The ICC Court and its Secretariat are unique organs, both in terms of their constitution and the functions they perform under the ICC Rules. The conduct of any arbitration under the ICC Rules is inextricably linked with the ICC Court and its Secretariat, who alone can exercise the powers and functions conferred on them by the Rules.

Take, for example, one of the most distinctive features of the ICC Rules — the scrutiny of draft awards. Only the ICC Court, with its unique constitution, internal practices and vast experience in having approved many thousands of arbitral awards can provide parties with the quality assurance of the ICC scrutiny process. The same observation can be made of other aspects of the ICC Court's administration of the ICC Rules, for example, the confirmation, appointment and removal of arbitrators, the terms of reference and the management of the financial aspect of cases.

An award that has not been approved by the ICC Court is not an ICC award made in accordance with the parties' arbitration agreement. Arbitration agreements which purport to provide otherwise are to be discouraged and parties should be wary of claims that the ICC Rules can be administered by other institutions. Parties cannot be assured of the quality of an arbitration award or, more importantly, that it will be enforceable as an award rendered pursuant to the ICC Rules.

Problematic arbitration clauses are not of course unique to South and East Asia. However, it is probably fair to say that, in the ICC's recent experience, we see a higher proportion of pathological clauses emanating from the region than from elsewhere. The challenge is therefore to educate the legal and business community and to promote simple and effective drafting.

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The experience of ICC arbitration in South and East Asia is an interesting prism through which to view the globalisation of international arbitration. The speed with which South and East Asia has embraced international arbitration is quite remarkable, with the region moving from the farthest margins of ICC arbitration to centre stage within a matter of years. And, although a number of challenges remain, if the foregoing is anything to go by, the future in terms of overcoming these challenges appears to be very promising. The ICC Court and its Secretariat are committed to working closely with businesses, lawyers, governments and the judiciary in the region to increase awareness of international best practices in this regard.

It must also be said that the traffic flow of knowledge and expertise in international arbitration has not all been inward bound. Many countries in the region have long been at the forefront of combining international arbitration with other forms of dispute resolution, such as mediation. Innovative experiences from the region, such as these, can be shared with the rest of the world, to enhance the richness and flexibility of international arbitration as a means of dispute resolution and minimise time and costs for its users.

It is clear that international arbitration in South and East Asia will continue to develop and provide parties with an efficient and independent means to resolve their commercial disputes. The ICC Court very much hopes that its decision to open offices in Hong Kong and Singapore will assist in this process.

Notes

1. In the large majority of cases, the parties agree upon the place of arbitration. For example, in 2007, the parties agreed upon the place of arbitration in 85.2 per cent of cases; the court having fixed the place of arbitration in the absence of the parties' agreement in 14.8 per cent of cases.
2. See, for example, Interpretation of the Supreme People's Court on Certain Issues Relating to Application of the Arbitration Law of the People's Republic of China, 23 August 2006.
3. For examples and a discussion of such clauses, see: Davis, Benjamin G 'Pathological Clauses: Frederic Eisemann's Still Valid Criteria'. Arbitration International, Vol. 7, No. 4 (1991), pp377—378.

ICC International Court of Arbitration

International Arbitration: Past, Present and Future

Jun Bautista

International Centre for Dispute Resolution

The dynamic environment for international trade and investment has highlighted a growing need for the resolution of cross-border disputes through international arbitration. With parties increasingly reluctant to rely upon foreign courts for relief, especially on one party's 'home court', arbitration has gained wide acceptance within the international business and legal communities as a viable alternative method of settling disputes that are international in character. One study has estimated that 90 per cent of international contracts contain an arbitration clause.[2]

This growing preference for international arbitration has coincided with a sharp increase in international commercial disputes and international business transactions over the past few decades. In 1993, 11 of the leading international arbitration institutes had 1,392 cases filed that year.[3] In 2001, the caseload of these same 11 institutions would nearly double, receiving 2,628 cases.[4] International arbitration has become big business itself, fuelling competition, respectively, among arbitral institutions, arbitration venues, arbitrators and law firms. The arbitration cases themselves have presented new complex problems, many of them having arisen from the parties' differing commercial and cultural expectations.

In its nascent form, international arbitration had taken on a vastly different character and demeanor. The story of its evolution is intertwined with shifts in the international legal and business communities' prevalent practices and philosophies. While we may take the utility of arbitration for granted this day and age, most of today's arbitration-friendly jurisdictions were distrustful of arbitration several decades ago. This reluctance to embrace arbitration stemmed from the belief that the state had a monopoly in the dispensation of justice. Policymakers at the national level had to be convinced of the need for and benefits of arbitration. During the early part of this 'age of innocence', businessmen did not need a legal framework for the judicial enforcement of awards, for they were honour-bound to comply with the arbitral award, and relied on this moral imperative and industry pressure to enforce the obligation.[5]

The architects who laid the foundation of the international arbitration system in the 1930s were a small, intimate group of European international law scholars known as the 'grand old men'.[6] These pioneers of modern international arbitration[7] pitched international arbitration to the business community as a fast, private and low-cost means of resolving international commercial disputes through the application of lex mercatoria. These 'grand old men' would

themselves serve as arbitrators to these disputes, and they proved able to bring the parties to an acceptable solution, taking business expectations and needs into consideration.[8]

There were, however, some legal practitioners, mostly Anglo-American, who questioned the infallibility of the 'grand old men' as well as the legitimacy and existence of lex mercatoria, which they criticised as vague and unpredictable.[9] These 'technocrats' argued that international arbitration could only be viable if it became more legalised, resulting in predictability and reliability. The US's ratification of the New York Convention, coupled with the increasing realisation within Anglo-American law firms of the significance of Ð and potential revenue generated from — international arbitration, created another legal centre of gravity in the US alongside Europe, and promoted the notion of international arbitration as a form of offshore litigation.[10] This new focus initiated the 'judicialisation' of international arbitration. In spite of the strong influence of the American legal tradition on international arbitration, it would be erroneous to characterise international arbitration as 'Americanised'. Ultimately, American common law did not supplant the civil law tradition of international arbitration. Rather, certain areas of arbitral procedure appear to reflect some degree of convergence of the civil and common law traditions.[11] Even though it has proven possible to merge these legal systems in part, it is highly unlikely that this convergence will result in a single procedure for international arbitration over time. But a single international arbitration procedure may not be ideal, and it may be more appropriate at times if parties are able to select from a range of procedural options according to the circumstances of their disputes.-[12]

While the current state of international arbitration was largely shaped by the Europeans and the Americans, the reality is that cross-border trade is now a common occurrence in other regions where countries have pursued economic policies based on interdependence. For international arbitration to remain relevant and dynamic, there is a clear need for more arbitrators from diverse national and cultural backgrounds.[13] Disputing parties must be comfortable with the arbitration process. That end is served by having a pool of arbitrators who are not only impartial, well versed in the intricacies of international arbitration and bearing sound commercial sense, but who are also sensitive to differing cultural expectations that may create misunderstandings.

This is especially important in light of the continued suspicion by some in developing countries regarding the fairness of international arbitration, with the view that it represents a concerted effort to undermine national sovereignty and perpetuate western political hegemony.[14] Given their unfamiliarity and lack of experience with international arbitration, some local lawyers would prefer to remain within their comfort zones and recommend domestic litigation, regardless of their clients' best interests. This apprehension is perhaps borne from the fact that the early trends that guided the development of international arbitration had not taken into account the dominant legal cultures and traditions in the Asian, African, Latin American and Middle Eastern regions. For as long as they feel excluded from participating in the development of international arbitration, lawyers and judges from these regions may not have the incentive to study and verse themselves in international arbitration. The virtues of international arbitration are best spread through meaningful dialogue with the various domestic legal communities, where both sides participate and learn from each other. In this dialogue, the proponents of arbitration should avoid assuming that the system as it stands leaves no room for improvement through exposure to the legal practices and traditions of emerging countries. After all, the philosophies of international arbitration evolved from various infusions by scholars and practitioners from differing and

often contradictory backgrounds. In the long term, an international arbitration culture[15] will best develop by teaching international arbitration in the law schools, which will in turn need to overcome their tendency to adopt a parochial perspective in legal education. The end goal must be to foster a culture of inclusion that not only encourages the training, development and participation of arbitrators from these countries but for international arbitration to evolve and be more accommodating and incorporate these norms and traditions.[16] Ultimately, diversity is essential to international arbitration. Only when international arbitration is a global phenomenon and not just an affair of a select few countries will it enjoy wide-spread legitimacy. Beyond the continued survival of international arbitration, diversity is important, as an end in itself.

An empirical study conducted in 2007 on the appointment of arbitrators in ICSID arbitrations fortunately suggests that there is an increasing frequency of non-Western Europeans and non-Americans serving on ICSID tribunals. 2004 saw the appointment of arbitrators from 28 different countries.[17] More than half of these arbitrators found themselves appointed for the first time to arbitrate in an ICSID arbitration.[18] In 2005, 68 individuals served as an ICSID arbitrator at least once, and 20 of these were from developing states.[19] While women are increasingly serving as ICSID arbitrators, with Professors Gabrielle Kaufmann-Kohler and Brigitte Stern getting frequent appointments, it still remains a fact that only 14 out of the 279 individuals who have served as ICSID arbitrators were female.[20] Despite clear progress, there still is much to be done in the area of diversity.

No one is suggesting that international arbitration is perfect and that it is a panacea for all ills. But we have seen that it is a dynamic system that gradually evolves in order to better serve the needs of its users. The refinements in international arbitration have led to a more accommodating environment for its participants, for the system is not just about procedure, but also about culture. It fundamentally remains about people, businesses, and how they interact with one another.

While many challenges lie ahead, international arbitration has proven responsive to change and accommodating to innovations from many sources. A diverse international arbitration community with a global outlook will meet the challenges of tomorrow and ultimately rise above them.

Notes

1. Adapted from a paper presented at the International Arbitration Conference Brunei and the 2nd Regional Arbitration Institutes Forum (RAIF) Conference held in Bandar Seri Begawan, Brunei Darussalam, 16-17 August 2008.
2. Christopher R Drahozal, Commercial Norms, Commercial Codes, and International Commercial Arbitration, 33 VAND. J TRANSNAT'L L 79, 94 (2000).
3. Christopher R Drahozal, Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration 22 J. INT'L ARB. 291, 299 (2006).
4. Id.
5. The ICC Arbitration Rules of 1923 provide that the parties were honour-bound to comply with the arbitral award. See W Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 TEX. INT'L L J 1, 7 (1995).
6. See Yves Dezalay & Bryant G Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (1996).
7. Resolving international disputes through arbitration can be traced back to ancient Greece. See Henry T King, Jr & Marc A LeForestier, Arbitration in Ancient Greece, 49-SEP DISP. RESOL.

J. 38 (1994).
8. Dezalay & Garth, supra note 6, at 40 n.17 (As one Swiss arbitrator describes: 'I used to be fairly legalistic as an arbitrator. Give me the facts. Give me the law. And I'll decide it, okayÉ I was impressedÉ when I wasÉ secretary at several panels, for several arbitrations where Pierre Lalive was the chairman. HeÉ hardly ever decided a case. They would all be settled at some point. And that takes a lot of skillÉ from the chairman Ð skills which I clearly didn't have some years ago. And I think maybe I'm developing them a little more now. Probably a matter of aging.')
9. Id. at 41 n.19 (As one English barrister puts it: 'These people are just deciding by the seat of their pants. There's no such thing as the lex mercatoria.' An American in Paris expresses a similar view: 'And we don't want lex mercatoria. We want to know what law it is. In fact, we want to know which procedural law it is. We don't want to leave it up to the arbitrator.')
10. Roger Alford discusses that the Anglo-American law firms' success in international arbitration can be explained by their mastery of the 'soft power game'. Roger Alford, The American Influence of International Arbitration, 19 OHIO ST. J. ON DISP. RESOL. 69, 80-81 (2003) ('Soft power is cultural and economic power, and very different from its military kinÉ The United StatesÉ is definitely in a class of its own in the soft-power gameÉ This type of power Ð a culture that radiates outward and a market that draws inward Ð rests on pull not push; on acceptance not on conquestÉ [T]his kind of power cannot be aggregated, nor can it be balancedÉ All the movie studios [of Europe, Japan, China and Russia] together could not break the hold of Hollywood. Nor could a consortium of their universities dethrone Harvard et al., which dominate academia while luring the best and the brightest from abroad. So too we might add that the Anglo-American law firms are in a class by themselves in the soft-power game. The muscle of all of the other law firms of the world put together cannot match the attractive allure of these firms. It is their soft power Ð a power that rests on the magnetic attraction these firms hold on legal service providers and consumers that will ensure that they will be the defining feature in the future of international arbitration.') In contrast, Dezalay and Garth explain that the success of Anglo-American law firms in international arbitration is due to the clients' preference for the aggressive American style of advocacy. Dezalay & Garth, supra note 6, at 68 ('The U.S. 'lawyer,' in contrast, has no hesitation in demonstrating legal inventiveness and tactical aggressiveness. The cause of the client is defended by any available means. Far from considering the role of a mercenary as a liability, U.S. lawyers are proud of their effectiveness on behalf of their clients. Far from seeking to minimize tensions, therefore, the U.S. lawyers unapologetically exacerbate and magnify them. This characteristic U.S. focus on conflict, not surprisingly, appealed to the antagonistic situation in which the third-world leaders found themselvesÉ In such a fight, the third-world leaders could at least employ mercenaries who would, without any qualms, practice the tactics of total legal warfare Ð 'scored earth' litigation. In this way, the leaders could feel that their cause and their interests were defended as vigorously as possible.')
11. See Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, 36 VAND J.TRANSNAT'L L 1313 (2003).
12. Siegfried H Elsing & John M Townsend, Bridging the Common Law-Civil Law Divide in Arbitration, 18 J INT'L ARB 59, 65 (2002).
13. For a discussion on the lack of participation by US minorities in international arbitration, see Benjamin G Davis, The Color Line in International Commercial Arbitration: An American Perspective, 14 AM REV INT'L ARB 461 (2003).
14. See, for example, Amr A Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism, 41 HARV. INT'L L J 419 (2000); Ahmed

Sadek El-Kosheri, 'Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?', in International Dispute Resolution: Towards an International Arbitration Culture, ICCA CONGRESS SERIES, No. 8, 47 (Albert van den Berg editor, 1996).
15. For a discussion on the existence and development of an international arbitration culture, see International Dispute Resolution: Towards an International Arbitration Culture, ICCA CONGRESS SERIES, No. 8 (Albert van den Berg editor, 1996).
16. See Leon E Trakman, Legal Traditions and International Commercial Arbitration, 17 AM REV INT'L ARB 1 (2006).
17. Susan D. Franck, Empirically Evaluating About Investment Treaty Arbitration, 86 NCL REV 1, 77 (2007).
18. Id.
19. Id.
20. Id.

International Centre for Dispute Resolution

Australia

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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration 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 past 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 22 bilateral investment treaties (BITs), 19 of which have been in force as of 1 November 2008. Most of the BITs designate ICSID arbitration for the resolution of disputes arising under those treaties. Australia has further entered into free trade agreements (FTAs) with New Zealand, Singapore, Thailand, the US and most recently with Chile, and further FTAs are currently under negotiation with China, Malaysia, Japan, the Gulf Cooperation Council (GCC) and ASEAN-New Zealand.

On 30 July 2008, Australia and Chile entered into the Australia-Chile FTA. The agreement is expected to enter into force in January 2009 and will replace the existing BIT between the two countries. Section B of chapter 10 of the Australia-Chile FTA contains detailed provisions on investor-state dispute settlement. Where a dispute between a party and an investor is not resolved by negotiations and consultations, the investor may refer the investment dispute to either arbitration under the ICSID Convention, proceedings under the ICSID Additional Facilitations Rules, arbitration under the UNCITRAL Arbitration Rules, or arbitration under any other arbitration rules. The procedures and remedies available are significantly broader than those included in the existing BIT between Australia and Chile.

The Australia-Chile FTA is the most comprehensive outcome in trade negotiations since the Closer Economic Relations Trade Agreement with New Zealand in 1983, and will liberalise trade and investment between Australia and Chile.

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

Following the successful launch of the new arbitration rules of the Australian Centre for International Commercial Arbitration (ACICA) in 2005, ACICA has recently published its 'Expedited Arbitration Rules'. The ACICA Expedited Arbitration Rules have been drafted along ACICA's general arbitration rules, but provide special provisions to facilitate expedited proceedings. The objective of these rules is to provide arbitration that is quick, cost effective and fair, considering especially the amount in dispute and complexity of issues or facts involved.

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. AMTAC is committed to using the ACICA Expedited Arbitration Rules for maritime proceedings conducted under its auspices.

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 clarifies the meaning of 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. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

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 written requirement. Furthermore, the court found that a liberal and flexible approach should be 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. The judgment preceeded the decision by the UK House of Lords in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, which confirmed the more liberal approval with regard to interpreting the scope of an arbitration agreement.

However, as the Federal Court of Australia recently pointed out in its decision in Seeley International Pty Ltd v Electra Air Conditioning BV [2008] FCA 29, ambiguous drafting may still lead to unwanted results. In that case, the arbitration clause included a paragraph that provided that nothing in the arbitration clause would prevent a party from 'seeking injunctive or declaratory relief in the case of a material breach or threatened breach' of the agreement. The Federal Court interpreted that paragraph to mean that the parties intended to preserve their right to seek injunctive or declaratory relief before a court. The court was assisted in its interpretation by the fact that the agreement also included a jurisdiction clause.

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 clarified that this limitation applies to both insurance and reinsurance contracts (HIH Casualty & General Insurance Limited (in liquidation) v Wallace (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

Arbitrability

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) in respect of claims arising under the Corporations Act 2001.

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).

Third parties

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be a party in the arbitral proceedings. One situation in which this can possibly occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company.

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 (CAA, section 17) 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 section 19(3) of the CAA, 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, though 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 differently 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 in some regard in more recent decisions.

In the recent decision in Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255, the Victorian Court of Appeal set aside an arbitral award on the basis that the arbitrators provided inadequate reasons in the award which did not meet the judicial standard. The decision represented a significant departure from previous authority in respect of domestic arbitration and led to a rival of the discussion about a uniform legislation under the UNCITRAL Model Law for both domestic and international arbitration.

All the aforementioned rights to appeal may be excluded by the parties by way of an exclusion agreement (CAA, 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 has acceded to the New York Convention without reservation, though it should be noted that the IAA creates a quasi-reservation in that it requires a party seeking enforcement of an award made in a non-convention country to be domiciled or to be an ordinary resident of a convention country. So far no cases have been reported where this

requirement was tested against the somewhat broader obligation under the New York Convention, and given the ever-increasing number of convention countries, the likelihood that this requirement will become of practical relevance is decreasing.

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 awards, or section 33 of the CAA for 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.

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Is CIETAC Leading Arbitration in Asia into a New Era of Transparency?

Asia is seen by many as one of the fastest growing and important regions for international arbitration. This is reflected in recent initiatives by Europe-based world arbitral institutions: in November 2008, the ICC will open its first administrative office outside Paris in Hong Kong (complete with a secretariat counsel team). It is also planning to open a small marketing office in Singapore. The Permanent Court of Arbitration has also concluded host country agreements with Singapore and more recently with India,[1] to facilitate the administration of PCA arbitrations in Singapore and India. Parties from the region are also increasingly turning to local seats of arbitration, instead of the traditional choices of Paris and London.[2] Hong Kong has long been regarded as the premier arbitral seat in the region, having been one of the first jurisdictions to take full advantage of the benefits of adopting the UNCITRAL Model Law and the Hong Kong International Arbitration Centre (HKIAC) has a well-deserved reputation for excellence. China's vast economy, however, renders the CIETAC (China International Economic and Trade Arbitration Commission) potentially the most significant of the region's arbitral institutions. In 2007 alone, the CIETAC received 1,118 new arbitration references, almost twice as many as the ICC in Paris.[3]

The CIETAC's rules and practices have been subjected to close and critical international scrutiny, with some CIETAC awards being refused enforcement, even in Hong Kong,[4] having fallen short of New York Convention standards. The CIETAC's processes were seen as closed and lacking in transparency. This article focuses upon recent initiatives by the CIETAC to address criticisms of its international rules and practices, with particular reference to recent moves to improve its transparency by publishing its international arbitration awards. This article considers the possible impact of these initiatives upon arbitration in the region.

An obvious way for an arbitral institution to persuade a sceptical business community that its arbitrations are neutral and fair is to publish awards rendered under its auspices. Publication of awards, however, seems to undermine one of the perceived advantages of arbitration, namely the confidentiality afforded both to the proceedings and the award. This protection is not complete and is subject to exceptions,[5] (indeed, some seats of arbitration do not seem to recognise a general right to confidentiality in arbitration)[6] but confidentiality is nonetheless regarded by many as a fundamental feature of the arbitral process.[7]

There is another competing and conflicting principle, however, namely the need for consistency in similar cases. This principle favours greater transparency in order to build confidence in the dispute resolution process. Public court proceedings and the publication of national court decisions have traditionally been viewed as necessary to ensure procedural fairness within a court system, consistent with the maxim expounded by Lord Hewart that:

> *it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done.*[8]

With openness, however, comes publicity, and litigants who prefer to avoid 'airing their dirty linen in public' often turn to arbitration in order to resolve their disputes in private. The desire for confidentiality is one of the key reasons why arbitral awards are not generally published. While the publication and transparency of their rules of procedure have played a key role in the development of recognised institutions such as the ICC, LCIA and AAA, the publication of the arbitral decisions arising from the application of those rules has not traditionally been perceived as necessary to promote confidence and trust in the decision-making process.

Increasingly, however, as more and more international disputes are resolved by arbitration, there is pressure upon institutions and parties to open the arbitral process to further public scrutiny, while still preserving confidentiality, so far as possible, by redacting the names and any identifying features of the parties. Arbitrators, parties and their counsel are also looking to awards and decisions in other proceedings for guidance on how to approach similar problems and issues, even if such awards are not strictly of precedential value. This is particularly so in connection with decisions rendered by tribunals in the international investment treaty field, where publication of awards by the International Centre for the Settlement of Investment Disputes (ICSID) is now the norm rather than the exception. Increased publication of arbitral decisions has received widespread acceptance among the international arbitration community.[9]

Transparency is seen as desirable, particularly for those arbitrations involving large government projects which can have significant public ramifications.

The trend to publish is not simply the result of a wish to improve confidence and trust in the process; there are other market forces at play, triggered by the increasing volume of arbitrations worldwide (particularly in Asia)[10] and the increase in competition among arbitration and arbitral institutions around the world, which require the means to promote their services and improve their visibility.[11]

The ICSID Rules of Procedure for Arbitration Proceedings (Rule 48.4) and the ICSID Arbitration Additional Facility Rules (Article 53) allow ICSID to publish awards rendered by arbitral tribunals in ICSID proceedings, but only with the consent of the parties. The rules further provide that, absent such consent, excerpts of the legal reasoning of the tribunal shall be published by ICSID. ICSID publishes awards on its website (www.worldbank.org/ICSID/) and the availability of the awards (often within hours of the decisions being rendered) has done much to raise awareness of ICSID jurisprudence.

None of the commercial arbitral institutions presently offers the same transparency of arbitral decision making, although some address the possibility of publication in their rules. Article 30.3 of the LCIA Rules, for example, provides that the LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the arbitral tribunal.[12] In practice, however, the LCIA does not publish any awards made under its rules, although it has taken steps to improve its transparency in other ways, in particular, by deciding to publish decisions of the LCIA Court on challenges to arbitrators appointed by the LCIA. A report published last year, which analysed all decisions made by the LCIA Court on challenges to arbitrators since 1995, observed that publication in an appropriate form of the growing wealth of LCIA[13] learning and guidance on independence and impartiality will not only answer the call for greater transparency, but is also likely to make a unique contribution by providing guidance to the users of the arbitral process in deciding whether to nominate or challenge arbitrators.[14]

Also noteworthy are the recent International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (ICDR), which came into effect on 1 May 2008. Article 27.8 provides that, unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise. In practice, however, few awards are published. Some ICDR awards are available online on sites such as www.westlawecarswell.com.

The ICC rules of arbitration do not contain an express provision on the publication of awards, and confidentiality is strictly maintained by the secretariat and the court. Article 28(2) prohibits the delivery by the secretariat of copies of the award to anyone other than the parties, consistent with the provisions in the court's Internal Rules (Appendix II to the Rules, article 1) on the confidentiality of the court's work. However, neither Article 28(2) nor the Internal Rules have been construed as preventing the publication by the court of sanitised extracts of awards or their publication by others with the court's permission.[15] Such extracts are published in the Court's Bulletin, each year in the last issue of Clunet since 1974 and in the ICCA Yearbook.[16] Although the court does not normally solicit the parties' permission before publishing such extracts, it has for many years refrained from any such publication if it is instructed by either of the parties not to do so.[17]

For many years, decisions made by Chinese arbitrators under the CIETAC Rules were shrouded in mystery, only coming to light when attempts were made to enforce the awards outside China. Most notably in the field of the CISG (the United Nations Convention on Contracts for International Sale of Goods), however, CIETAC arbitral awards are increasingly published, in redacted form, in both Chinese and English translations. Traders, practitioners and scholars are now able to gain, for the first time, a real sense of how tribunals in China are approaching the construction and application of CISG principles.[18]

Unlike the rules of other major arbitral institutions, the CIETAC Arbitration Rules do not contain any express provision on publication of awards.[19] The CIETAC's practice is now to provide redacted and edited reports on arbitral proceedings selected by the Cases Edition Committee within CIETAC. These awards are published online at www.westlaw.com.au, principally in Chinese and also in English. In keeping with the principle of confidentiality, all of the awards that CIETAC has published have been redacted to avoid identification of parties. Also, as a general rule, CIETAC does not report arbitral awards until they are three years old.

In addition, in a separate initiative over the years, the Pace CISG Database[20] has identified and shared with the world trade community some 2,000 court and arbitral decisions on the CISG from around the world, published and accessible for free online.[21] The database currently reports 340 CISG cases from the People's Republic of China,[22] of which 289 are arbitration awards from CIETAC.[23]

China's contribution to the Pace database is particularly striking when compared with other arbitration jurisdictions and institutions. The Pace database currently does not report any arbitral awards on CISG proceedings from the AAA, although the AAA has handled a number of them. Likewise, the Pace database reports only three arbitral awards from the Stockholm Chamber of Commerce (SCC), although it is believed that there must have been many more CISG proceedings conducted under its auspices. Also, the number of awards reported on the Pace database from the ICC is only a fraction of the CISG cases handled by ICC arbitral tribunals.

In this regard, CIETAC has become a surprising world leader in transparency, in the sense that CIETAC has shared with the world trade community the full texts of more uniform international sales awards than any other arbitral institution.[24]

CIETAC's recent efforts in publishing and translating its arbitral awards would appear to be part of a wider campaign to demonstrate that the international community has nothing to fear from the legal reasoning or processes applied by CIETAC tribunals.[25] Having a large number of published awards available provides participants in the process with a useful guide for consistency and predictability in CIETAC arbitrations.[26] Whether CIETAC tribunals have shown a bias towards local Chinese parties or the 'hometown justice' can then be ascertained, at least from those published and translated awards, on a case-by-case basis.

The published awards do not necessarily provide a full picture, however, and CIETAC is still some way from being regarded as a transparent institution. It is not presently clear how the awards are selected for publication. The Cases Edition Committee is not a formal entity known to the public. Suspicions and speculation on the quality of the many unpublished awards cannot be eliminated. Concerns also remain about other aspects of CIETAC.[27] Nonetheless, CIETAC does appear to be leading the way in the Asian market as other arbitral institutions in the region also take steps to facilitate the publication of awards.

For example, on 1 September 2008, the Hong Kong International Arbitration Centre Administered Arbitration Rules came into effect, which contain an explicit provision on publication of awards. Under Article 39.3, publication of awards is allowed on the fulfilment of the following conditions:

- a request for publication is addressed to the HKIAC secretariat;
- all references to the parties' names are deleted; and
- no party objects to such publication within the time limit fixed for that purpose by the HKIAC secretariat — in case of an objection, the award shall not be published.

Also noteworthy are the rules of the Indian Council of Arbitration, which accord high importance to the publication of awards. Rule 68(d) provides that:

> *the Council may print, publish or otherwise circulate any award made under its rules or under its auspices, in any arbitration journal, magazine, report, etc. for the purpose of creating arbitration jurisprudence or precedents for the benefit and guidance of future arbitrations. No party to the arbitration shall have any objection to the publication of awards as above provided that the names and addresses of any Party to the dispute will be omitted from such publication and its identity duly concerned if so desired by such party.*

In other words, unlike the approach taken in Hong Kong, which only allows publication of awards if not objected to by the parties, the Indian rules preclude the parties from objecting to the publication of awards as long as their names and addresses have been omitted.

Transparency in arbitral proceedings is of course not restricted to the publication and translation of awards. Of fundamental importance is the transparency of the process for appointing arbitrators. In this regard as well, CIETAC has also changed its previous practice. In the past, CIETAC was criticised for having in place a restrictive panel system for the appointment of arbitrators. Under this system, the parties had to appoint an arbitrator from the names listed on the panel of arbitrators maintained by CIETAC and lacked the freedom to appoint an appropriate arbitrator outside the panel. However, in 2005, the CIETAC Rules[28]

were updated to bring the CIETAC appointment procedure in line with other major arbitral institutions[29], which largely allow parties the freedom to choose any person as an arbitrator subject to limited considerations.

Under the 2005 CIETAC Rules, parties are allowed to appoint arbitrators from outside the CIETAC panel of arbitrators and can also submit a list of up to three candidates for choosing the presiding arbitrator. In addition, the arbitrator appointed from outside the panel can be the presiding or sole arbitrator, subject to the appointment being confirmed by the chairman of CIETAC.[30] CIETAC's confirmation is largely a matter of formality. In practice, it would be unusual for the chairman of CIETAC to withhold the confirmation of such an appointment contrary to the parties' wishes.

Article 22 of the CIETAC Rules clearly intends to respect parties' freedom of selection of arbitrators, subject only to article 4(2), which provides that 'the parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration'. Despite the unambiguous stipulations in these rules, however, there is still anecdotal speculation that CIETAC appoints members of an informal and unpublicised CIETAC 'clique' as arbitrators.[31]

CIETAC has endeavoured, nevertheless, to increase the number of arbitrators on its panels of arbitrators to allow parties a wider choice of candidate from which to select their arbitrators. CIETAC maintains a domestic panel including only Chinese arbitrators and an international panel including both Chinese and foreign nationals. Over the years, the number of arbitrators on the international list has increased to more than 980.[32]

CIETAC has also engaged in other efforts to internationalise its procedure and services, and disseminate knowledge about CIETAC arbitration in non-English speaking countries and regions.[33] For example, CIETAC has recently published the French, Korean, Spanish and Japanese versions of its current rules.

It is in the area of publication of arbitral awards, however, where CIETAC has taken the clear initiative. By making CIETAC awards available to the world's arbitration and trade community, and by sharing and exchanging ideas, approaches and interpretation methodologies of an international uniform law instrument such as the CISG, CIETAC is now allowing the quality of CIETAC arbitration to be judged openly by the international arbitration community.

So far, the development of international arbitration and alternative dispute resolution in China and South East Asia in 2008 remains a mixed picture. On one hand, the international community continues to regard some jurisdictions as 'unfriendly'.[34] Others, such as Singapore and Hong Kong, are continuing to raise new initiatives. Also noteworthy is the setting up of the Asia Pacific Regional Arbitration Group, a collective of arbitration institutions, which aims to improve the standards and knowledge of international arbitration in the region.[35]

It remains to be seen how these latest initiatives by CIETAC will affect its standing within the Asian arbitration community and elsewhere. Although there remains a strong regional preference for Hong Kong as a seat of arbitration and Singapore is also a popular choice,[36] the sheer volume of cases expected to be handled by CIETAC over the next few years compared to other institutions means that it is likely to become the market leader in Asia if it is able to reassure the international business community that its processes and decisions are fair and of a high quality.[37]

The importance of Asia in the medium and long term as an economic region is clear. The need for region-based, high-quality dispute resolution processes is therefore fundamental. The recent efforts by CIETAC to publish awards and improve its transparency are therefore encouraging and represent moves in the right direction.

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Notes

1. On 19 September 2008, the Permanent Court of Arbitration and India concluded an agreement that established a legal framework under which future PCA-administered proceedings can take place in India on an ad hoc basis.
2. By contrast to this trend, in order to provide an alternative to arbitration in China to Chinese parties while taking into account Chinese sensitivities, the Chinese European Legal Association launched on 18 September 2008 the Chinese European Arbitration Centre, which will be based in Hamburg and will focus on Chinese disputes (see Global Arbitration Review, news dated 1 October 2008).
3. See www.hkiac.org/HKIAC/HKIAC_English/main.html for a comparison of the statistics of the leading institutions. The CIETAC number includes both domestic and international disputes.
4. See Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39, where the Hong Kong High Court set aside a CIETAC arbitral award on the ground that the defendant was denied a fair and equal opportunity of being heard because he had not been allowed to cross-examine experts appointed by the arbitral tribunal. However, the Paklito case appears to be an exception, given that the Hong Kong High Court has enforced between 1990 and 1992 approximately 40 CIETAC awards. The then Judge Kaplan commented that this was a creditable record and that he would not like it thought that problems such as those which occurred in the Paklito case are commonplace in CIETAC arbitrations. He added that, in all other CIETAC cases which he has considered, the due process requirements have been fairly met. It is also noteworthy that CIETAC subsequently amended its rules to meet the criticism. In the current 2005 CIETAC Rules, Section 3 (Articles 29-41) provides detailed rules on the hearing and examination of evidence.
5. The parties' agreement may not provide for confidentiality; confidentiality protections in arbitration rules and laws differ, and may be subject to overriding public policy or other exceptions.
6. See Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc, Swedish Supreme Court, 27 October 2000, Case No. T 1881-99; Esso Australia Resources Ltd v Plowman, High Court of Australia, 7 April 1995, Case No. 95/014.
7. Hans Bagner, 'Confidentiality: A Fundamental Principle in International Arbitration?' 18 J Int'l Arb No. 2 243 (2001); Patrick Neil KC, 'Confidentiality in Arbitration' 12 Arb Int'l No. 3 287 (1996); Jan Paulsson & Nigel Rawding, 'The Trouble with Confidentiality' 11 Arb Int'l No. 3 303 (1995).
8. See Rex v Sussex Justices, Ex parte McCarthy [1924] 1 KB 258. Referred to by: Cooper v Wilson [1937] 2 All ER 726; R v Salford Assessment Committee [1937] 2 All ER 98; R v Architects' Registration Tribunal, Ex parte Jaggar [1945] 2 All ER 131; Franklin v Minister of Town and Country Planning [1947] 2 All ER 289; R v Caernarvon Licensing Justices, Ex parte Benson (1948) 113 JP 23.
9. For recent writings discussing publication of awards, see Richard Garnett and Keith Steele, 'In Search of an Appropriate Standard for Reasons in Arbitral Awards' 10 Int Arb L Rev No.

4 111 (2007); Karen Halverson Cross, 'Arbitration as a Means of Resolving Sovereign Debt Disputes' 17 Am Rev Int'l Arb 335 (2006); Loukas A Mistelis, 'Confidentiality and Third Party Participation' 21 Arb Int'l No. 2 211 (2005); Anjanette H Raymond, 'Confidentiality in a Forum on Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?' 16 Am Rev Int'l Arb 479 (2005); Cindy G Buys, 'The Tension Between Confidentiality and Transparency in International Arbitration' 14 Am Rev Int'l Arb 121 (2003).

10. In 2007, Asia was the seat of 70 per cent of global reported cases, out of which 61 per cent were administered by CIETAC. Of the total recorded (2,567 cases), 1,759 had an Asian seat. Out of these 1,759 cases, 1,118 were administered by CIETAC. In terms of international caseload, CIETAC is among the top four international arbitration centres worldwide (see 'CIETAC and its Work — An Interview with Vice Chairman Yu Jianlong', Journal of International Arbitration, 24 — No. 6 (2007), p555-564).

11. One cannot underestimate the wish of arbitrators and practitioners to publicise their cases. Global Arbitration Review, for example, regularly reports on cases which would previously have been known only to a small number of people. See www.globalarbitrationreview.com.

12. Article 46 of the Arbitration Rules of the Stockholm Chamber of Commerce (SCC) provides that, unless otherwise agreed by the parties, the SCC Institute and the tribunal shall maintain the confidentiality of the arbitration and the award. Under the Singapore International Arbitration Centre Rules of Arbitration, Article 34, which deals with the obligation of confidentiality, contains provisions on publication of awards, and provides that the parties and the tribunal are required at all times to treat all matters relating to the proceedings and the award as confidential.

13. LCIA is the only major international arbitration institution that communicates reasoned decisions to the parties on a challenge application. The decisions describe the circumstances and grounds of the challenge and set out the reasons why the court has decided to accept or reject the challenge. See Geoff Nicholas and Constantine Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' 23 Arb Int'l No. 1 1,5 (2007).

14. Ibid, at p9. See also Leon Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered' 10 Int Arb L Rev No. 4 124 (2007); www.lcia.org/NEWS_folder/news_archive3.htm.

15. Derains and Schwartz, A Guide to the ICC Rules of Arbitration 2nd edition (2005) at p316.

16. Extracts of some ICC awards are published on www.iccwbo.org/court/english/awards.asp and on www.kluwerarbitration.com.

17. Derains and Schwartz, A Guide to the ICC Rules of Arbitration 2nd edition (2005) at p. 317.

18. See Professor Albert H Kritzer, 'Application and Interpretation of the CISG in the PR of China — Progress in the Rule of Law in China', a presentation in Wuhan Conference on 'The Application and Interpretation of the CISG in Member States With Emphasis on Litigation and Arbitration in the PR China', 13-14 October in Wuhan, China, published in 40 Uniform Commercial Code Law Journal (2007/2) 261-268; see also 'Creating The Framework For Trading Relationships With China', IACCM August 2007 Newsletter, available at: www.iaccm.com/newsletters.php?id=61&PHPSESSID=a116afda6410c8abb250d1b275188cd0#333. See also Fan Yang, The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice (December 2006) 26p, available at: www.cisg.law.pace.edu/cisg/biblio/yang2.html; see also Fan Yang, 'CISG in China and Beyond' 40 UCC Law Journal (Winter 2008) 373-389; Fan Yang, 'CISG, CIETAC Arbitration

and the Rule of Law in the PR of China: A Global Jurisconsultorium Perspective' in: Camilla B Andersen / Ulrich G Schroeter eds, Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (March 2008) 600-626.

19. In particular, Article 33 of the CIETAC Rules on confidentiality does not address the question of publication.

20. See http://cisgw3.law.pace.edu/.

21. Ibid.

22. See http://cisgw3.law.pace.edu/cisg/new-features.html (viewed 2 September 2008).

23. See http://cisgw3.law.pace.edu/cisg/text/CIETAC-awards.html (viewed 2 September 2008).

24. Professor Albert H Kritzer, 'Application and Interpretation of the CISG in the PR of China — Progress in the Rule of Law in China', a presentation at Wuhan Conference on 'The Application and Interpretation of the CISG in Member States With Emphasis on Litigation and Arbitration in the PR China' 13-14 October 2007 in Wuhan, China, published in 40 Uniform Commercial Code Law Journal (2007/2) 261-268.

25. Ibid.

26. Ibid. See also D'Souza, 'The Recognition and Enforcement of Commercial Arbitration Awards in the People's Republic of China' 30 Fordham Int'l LJ 1318, 1350-51 (2007).

27. The international arbitration community is still concerned about the recent imprisonment of one of CIETAC's former officers. See, for example, Wu Ming, 'The Strange Case of Wang Shengchang' 24 J Int'l Arb No. 1 63 (2007); Meg Utterback, 'Arbitration in India and China — Concerns and Options for International Businesses' 18 September 18 2006, available at: www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/Sep_18_2006/arbi.html.

28. Effective as from 1 May 2005.

29. ICC Rules of Arbitration, Articles 8 & 9; LCIA Rules of Arbitration, articles 5 & 6; SCC Rules of Arbitration, Article 13.

30. CIETAC Arbitration Rules, Article 21(2).

31. See, eg, Graeme Johnston, 'Bridging the Gap Between Western and Chinese Arbitration Systems — A Practical Introduction for Businesses' 24 J Int'l Arb No. 6 565, 570 (2007), in which it has been pointed out that there is no supervisory body within CIETAC to oversee the appointment process, which has led to the appointment of Commission staffers, and other individuals closely associated with the Commission, as presiding arbitrator.

32. Updated panel of arbitrators of CIETAC, effective as from 1 May 2008, available at www.cietac.org.cn/english/arbitrators/arbitrators.htm.

33. See www.cietac.org.cn/english/news/news12.htm.

34. In a recent arbitration meeting, eminent practitioners expressed concern that jurisdictions like Indonesia and China are not yet fully supportive of international arbitration. See: https://globalarbitrationreview.com/news/news_item.cfm?item_id+4768.

35. Since its inception in 2004, membership of the Asia Pacific Regional Arbitration group has grown to 30 members. See http://aprag.org.

36. A recent decision of the Singapore High Court sheds some light on the Singapore International Arbitration Centre (SIAC)'s practice regarding acceptance of jurisdiction. In Insigma Technology Co Ltd v Alstom Technology Ltd [2008] SGHC 134, the parties concluded an arbitration clause that provided for arbitration before the SIAC in accordance with the Rules of Arbitration of the International Chamber of Commerce. Upon a request from one of the parties, SIAC confirmed that it had prima facie jurisdiction to accept the request for arbitration, even though the clause provided for ICC Rules which have certain unique

features such as the terms of reference procedure and scrutiny of awards. This was made possible by SIAC's willingness to follow the ICC Rules, with the SIAC Secretariat undertaking the role of the ICC Secretariat, the SIAC Registrar the role of the ICC secretary general and the SIAC board of directors the role of the ICC Court. The Singapore High Court upheld this arrangement on the basis that the arbitration clause provided for an ad hoc arbitration and that SIAC's willingness to designate suitable actors to perform the functions envisaged under ICC Rules did not create any inconsistency between the two sets of rules.

37. In 2007, CIETAC administered 61 per cent of the global reported cases with an Asian seat. Out of 1,759 cases in all, 1,118 were administered by CIETAC. See www.hkiac.org/HKIAC/HKIAC_English/main.html.

Canada

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There are many reasons to choose Canada as the seat of international arbitrations. Canada is a desirable neutral venue with proximity to Europe, the United States and Asia. The legislative regime in Canada is modern, robust and attuned to the needs of the international commercial and arbitration communities. Canada is the home of sophisticated and experienced counsel and arbitrators who are active in the arbitration community, and well versed and trained in the law of arbitration. There are several cities in Canada that can host arbitrations at reasonable cost. And Canadian courts are consistent in according a high degree of deference to arbitral decisions and in protecting arbitration awards from an inappropriate amount of intervention in the arbitration process. Indeed, with one notable exception (in which one part of an award of an international arbitration panel was set aside),[1] there is simply no case in which a Canadian court has refused to enforce or has set aside an award of an international commercial arbitration tribunal on any of the grounds set out in the UNCITRAL Model Law. This article reviews recent cases that consider the limits of staying legal proceedings in deference to arbitration clauses where it appears the party seeking a stay in favour of arbitration may not be acting bona fide.[2]

The international arbitration regime in Canada

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

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

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

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]

Insofar as court intrusion on arbitration awards is concerned, all Canadian provinces have followed the Model Law in precluding all appeals, even on pure questions of law, except, of course, where the parties have otherwise agreed.[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 the 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 Resin Systems decision

In Resin Systems,[9] the Alberta Court of Appeal was asked to consider whether an arbitration agreement had become 'inoperative' within the meaning of the Alberta equivalent of article 8 (1) of the Model Law by reason of a refusal by the moving party to pay the advance of costs on an arbitration that had been commenced with the ICC.

The dispute arose out of two purchase agreements, both of which contained a common arbitration provision submitting all disputes to the Court of Arbitration of the ICC under its rules. The plaintiff, Resin, initiated an arbitration by a request for arbitration to the ICC in October 2006. The defendant, ISM, submitted its defences and by January 2007 an arbitrator had been appointed and a hearing was scheduled to take place in December 2007.

In February 2007, the ICC requested payment from each party of $87,500 as an advance on costs based on the calculation of Resin's claim being in excess of $27 million. ISM continued to take steps in the arbitration in defence of its claim, but refused to pay the advance costs required by the ICC on the basis of its assertion that there was a contractual limitation of damages of approximately $2.8 million, which would result in a significantly lower advance on costs being due from the parties. After having been granted two extensions of time by the ICC, in May 2007 ICM advised that it did not intend to make payment. The ICC invited Resin to substitute in paying ISM's share, but instead Resin took the position that the arbitration process was frustrated, and in June 2007 commenced a legal action in Alberta advancing essentially the same claim as had been made in the arbitration proceedings.

ISM then sought a judicial stay of the legal proceedings based on the arbitration provisions in the purchase agreements. Resin took the position that the arbitration had become 'inoperative' by reason of ISM's refusal to pay advance costs to the ICC. ISM argued that the fact that Resin could pay ISM's share of the advanced costs meant that arbitration was still available, and therefore the arbitration provisions had not become 'inoperative'.

The Alberta Court of Appeal upheld a lower court decision finding that the arbitration agreements had become 'inoperative' by reason of ISM's refusal to pay advanced costs. The court noted that ISM should not be entitled to rely upon its own breach of the ICC arbitration rules, and ought to have pursued the question of the limit on liability before the arbitrator, if indeed it preferred the arbitral forum. In effect, the court held that a party seeking to obtain a stay of legal proceedings in favour of arbitration must have demonstrated a willingness to comply with the rules selected in the arbitration agreement.

The Seidel decision

In the last edition of this review, we reported on the decision of the Supreme Court of Canada in the Dell case,[10] in which Canada's highest court endorsed the principle of Kompetenz-Kompetenz under the Code of Civil Procedure of Quebec, holding that, as a general rule, any challenge to an arbitrator's jurisdiction must first be resolved by the arbitrator; and that challenges solely made on legal questions may be entertained by courts subject to referral back to the arbitrator for initial determination where the application appears to be a delaying tactic or would unduly impair the conduct of the arbitration.

In a series of decisions among lower courts in Canadian common law provinces, the Dell decision has been distinguished in the context of class actions.[11] Of particular note for present purposes is the Seidel decision, in which Justice Masuhara of the British Columbia Supreme Court declined to stay a proposed class action in favour of arbitration notwithstanding the decision of the Supreme Court decision in Dell.

At issue in the Seidel case was the interpretation of section 15 of the Commercial Arbitration Act,[12] British Columbia's domestic commercial arbitration statute. That provision requires the court to stay legal action in favour of arbitration 'unless it determines that the arbitration is void, inoperative or incapable of being performed'. This, of course, is the same language that is used in article 8 (1) of the Model Law. However, as noted by Justice Masuhara, the remainder of the domestic commercial arbitration statute is not based on the Model Law, nor is it stated to be so in its preamble or in the legislative history.

In another case decided before Dell, the British Columbia Court of Appeal had determined that an arbitration is 'inoperative' within the meaning of section 15 of the Commercial Arbitration Act if a court determines that a class action is a preferable procedure.[13] The question before Justice Masuhara was whether this previous Court of Appeal decision had been superseded by Dell. In Seidel, Justice Masuhara held that the Supreme Court of Canada decision in Dell was not applicable in the circumstances, notwithstanding that the question before the court in Dell was the same, namely whether a proposed class action should be stayed in favour of domestic arbitration proceedings. He did so on the basis that the Quebec provisions in the Code of Civil Procedure are differently worded (referring to arbitration agreements that are 'null' without using the further words 'and void, inoperative or incapable of being performed'), that the Quebec provision covers both international and domestic arbitrations and must be interpreted in accordance with the New York Convention and the Model Law, while the same considerations do not necessarily apply to the domestic commercial arbitration statue in British Columbia, and that the Supreme Court of Canada had not considered in Dell whether an arbitration agreement becomes 'inoperative' if a court finds that a class action is the preferable procedure.

The issues arising from the Seidel case will shortly be considered by the British Columbia Court of Appeal in a pending appeal in another case.[14] It is hoped that when that appeal is decided, the court will adopt the reasoning of the Supreme Court of Canada in Dell, regarding the competence of arbitrators to decide their own jurisdiction, whether under the domestic or international commercial arbitration statutes, given that the language in them is substantially the same, and affirm the principle of Kompetenz-Kompetenz. It is also hoped that the Court of Appeal will revisit its earlier conclusion that arbitration may be rendered 'inoperative' where it is determined that a class action is the preferable procedure to resolve the dispute. This prior conclusion undermines the commercial efficacy of arbitration agreements, particularly where the arbitration in question would fall under the international

statute. There is no reason in principle why an arbitrator cannot determine whether a class action is the preferable procedure (and indeed available under the arbitration agreement) in preference to the court. Moreover, the issue that appears to be motivating these decisions is the fairness of arbitration clauses in standard form consumer contracts, an issue which is better left to legislatures to resolve, as indeed has been done in Ontario and Quebec, where legislation restricting the use of arbitration clauses in consumer contracts has been enacted.[15]

The Reliance Insurance decision

In Reliance Insurance,[16] Justice Pepall of the Ontario Superior Court of Justice was called upon to determine whether arbitration provisions in two reinsurance treaties had become 'inoperative' by reason of insolvency proceedings.

The insolvency proceedings in question were the liquidation of the Canadian branch of Reliance Insurance Company. Parallel liquidation proceedings had been initiated in Ontario and Pennsylvania in autumn 2001. Among the assets of the Canadian branch that the liquidator had been seeking to realise were the proceeds of reinsurance treaties with Swiss Re and some Lloyd's syndicates. The Swiss Re reinsurance treaty required arbitration under the Federal Arbitration Act sited in Philadelphia and the Lloyd's syndicates treaties required arbitration in London.

In the context of the Canadian insolvency proceedings, both Swiss Re and the Lloyd's syndicates took the position that they were entitled to reduce the amounts owing under the reinsurance treaties by certain set-offs. The Canadian liquidator of Reliance scheduled a court hearing to determine the validity of the set-off claims. Both Swiss Re and the Lloyd's syndicates moved to stay that hearing in favour of the arbitration provisions in the reinsurance treaties.

Justice Pepall found that the arbitration agreements had become 'inoperative' because of the insolvency of Reliance's Canadian branch. In this regard she noted the automatic stay of proceedings attendant upon the initiation of liquidation proceedings under the Canadian Winding Up and Restructuring Act, and referred to previous cases where it had been held that an automatic stay of proceedings under other insolvency legislation had the effect of staying extrajudicial proceedings such as arbitration. She also found that it would be inconsistent with the purpose of the Winding Up and Restructuring Act for there to be a multiplicity of proceedings dealing with recovery of the insolvent estate.

Justice Pepall went on to decline to lift or vary the insolvency stay in order to permit the arbitration agreements to be put into effect, again because of the potential for a multiplicity of proceedings and inconsistent rulings.

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While Canada remains an arbitration-friendly jurisdiction, these cases indicate that the willingness of Canadian courts to stay judicial proceedings in favour of arbitration may be limited where the facts are particularly unsympathetic towards the party seeking the stay or indicate a lack of bona fide intention to arbitrate. In general, however, it remains the case that arbitration proceedings may be conducted in any of Canada's provinces with assurance that the courts will give affect to the terms of arbitration agreements, that the courts will lend assistance where required in order to assist the securing of pre-hearing evidence, and the courts will accord deference to the arbitral tribunal's pronouncements on their own

competence, all consistent with the provisions of the New York Convention and UNCITRAL Model Law.

Notes

1. Resin Systems Inc v Industrial Services & Machine Inc, 2008 ABCA 104; Seidel v Telus Communications Inc, 2008 BCSC 933; Attorney General of Canada v Reliance Insurance Company, 2007 CanLII 41899 (Ont SCJ).
2. Jardine Lloyd Thompson Inc v SJO Catlin, [2006] AJ No. 32 (Alta. C.A.), and Dell Computer Corporation v Union des consommaterurs and Olivier Dumoulin, 2007 SCC 34 (Sup Ct Canada).
3. The federal Commercial Arbitration Act RSC 1985, c 17 (2nd Supplement) applies to international and domestic arbitrations where one of the parties is the Crown, a department of the federal government or where the subject-matter of the arbitration relates to marine or maritime matters.
4. Section 3.
5. Section 6.
6. Section 7. The acts of the other provinces are: Alberta: International Commercial Arbitration Act, RSA 2000, c I-5; British Columbia: International Commercial Arbitration Act, RSBC 1996, c 233; Manitoba: International Commercial Arbitration Act, CCSM c C-151; New Brunswick: International Commercial Arbitration Act, SNB 1986, c 112.2; Newfoundland and Labrador: International Commercial Arbitration Act, RSN 1990, c I-15; Northwest Territories and Nunavut: International Commercial Arbitration Act, RSNWT 1988, c I-6; Nova Scotia: International Commercial Arbitration Act, RSNS 1989, c 234; Prince Edward Island: International Commercial Arbitration Act, RSPEI 1988, c I-5; Quebec: An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, SQ 1986, c 73; Saskatchewan: International Commercial Arbitration Act, SS 1988-89, c I-10.2; Yukon: International Commercial Arbitration Act, RSY 2002, c 123.
7. Desputeaux v Editions Chouette (1978) Inc, [2003] SCR 178
8. Generally, in domestic arbitrations, appeals are permitted on questions of law where prior leave is obtained, with the applicant having to establish a degree of importance that transcends the immediate result in the award under appeal.
9. supra.
10. supra, 2007 SCC 34.
11. MacKinnon v National Money Mart Co et al, 2008 BCSC 710; leave to appeal granted 2008 BCCA 292; Smith Estate v National Money Mart Co, 2008 CarswellOnt 3310 (SCJ); Seidel, supra.
12. RSBC 1996 c 55.
13. McKinnon v National Money Mart Co, 2004 BCCA 573.
14. McKinnon v National Money Mart Co, 2000 BCCA 292.
15. Consumer Protection Act (Quebec), RSQ, c. P40-1, S 11.1; Consumer Protection Act, 2002 (Ontario), SO 2002, c30, S8(1)
16. supra.

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Hong Kong

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

Indeed, the Hong Kong International Arbitration Centre (HKIAC), which was established in 1985, is now one of the major players on the international arbitration stage, attracting business from all over the world and in particular from the People's Republic of China and the rest of the Asia-Pacific region. The HKIAC is active in finding ways to promote arbitration in Hong Kong and regularly hosts arbitration conferences in Hong Kong.

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

Hong Kong's legal system and sources of arbitration law

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

The principal statute governing arbitration in Hong Kong is the Arbitration Ordinance (Chapter 341).[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 (the Fifth Schedule to the Ordinance).

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

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

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

Proposed reforms

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

¥. to abolish the distinction between domestic and international arbitrations and to establish a unitary regime for arbitration law in Hong Kong;

- the Model Law should continue to be scheduled to the Ordinance and to have the force of law in Hong Kong subject only to necessary amendments; and
- the Ordinance should follow the order and chapter headings of the Model Law, and the Model Law and additional provisions should be set out in the main body of the Ordinance, to make it as user friendly as possible.

In addition, the HK committee recommended that the parties should still be able to agree to 'opt in' to provisions similar to those which are part of the current domestic regime. These provisions are 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, which covers the same point), and section 23 (relating to an appeal on a point of law arising under an arbitration award).[9]

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.' A consultation paper entitled 'Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill' was published in December 2007, inviting comment by 30 April 2008. Now that the public consultation process is complete, it is expected that the process for implementing the new Arbitration Ordinance will begin shortly.

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 a Hong Kong court can be confident that they will be resolved in a manner which is consistent, and in accordance, with international arbitration practice and procedure.

Interim measures

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

The Hong Kong courts also have jurisdiction to grant interim measures of protection in aid of foreign arbitration proceedings.

Jurisdiction currently derives from the Ordinance or from the court's inherent jurisdiction. The leading authority on this point is the decision of the Court of Appeal in The Lady Muriel [1995] 2 HKC 320. Following this case, where the applicant has not obtained the approval of the foreign tribunal to make the application, the Hong Kong court will only grant the relief if the applicant can show that justice dictates that the relief should be granted to prevent serious and irreparable damage to the position of the applicant in the arbitration.

As part of the civil justice reforms being introduced in Hong Kong in April 2009, section 2GC of the Ordinance has been amended to provide specifically that the Hong Kong courts do have the power to grant interim relief in aid of arbitration proceedings outside Hong Kong (as well as in aid of arbitrations taking place in Hong Kong). New subsection (1A) of section 2GC adds the proviso, however, that the Hong Kong courts will only grant an interim measure in support of arbitration proceedings outside Hong Kong if those proceedings are capable of giving rise to an arbitral award (interim or final) which may be enforced in Hong Kong.10

Kompetenz-Kompetenz

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

Representation

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

Interest

The tribunal is given power under the Ordinance to award compound as well as simple interest on any award from such dates and at such rates as it considers appropriate for any period ending not later than the date of payment.[12] Where claims are of a commercial nature, the general rule is that the commercial lending rate prevailing in Hong Kong (relating to the currency of the claim) plus 1 per cent should be the interest rate applied on an award of damages.

Arbitration institutions

The primary arbitration institution in Hong Kong is the HKIAC. Although it has been funded by both the Hong Kong business community and the Hong Kong government, it is independent of both and financially self-sufficient. The HKIAC has adopted the UNCITRAL Arbitration Rules as one set of suggested 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 also issued new Administered Arbitration Rules, which took effect from 1 September 2008. These Rules, which apply to both domestic and international arbitration in Hong Kong, should serve to ensure Hong Kong's popularity as a venue for PRC-related arbitration providing as they do for a 'light touch' administered arbitration, with economical administration charges. This addresses the requirement under PRC arbitration law that arbitrations must be administered and not ad hoc.

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

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), American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) in terms of the number of arbitration cases heard. In 2007 it had 448 cases, of which 183 were classified as construction cases, 103 as general commercial cases and 27 as shipping cases.

Many arbitrations have also had their seat in Hong Kong and been administered by, and in accordance with, the rules of the London Court of International Arbitration, the AAA and, particularly, the ICC. On 12 March 2008, the ICC announced that it would be opening a branch of the Secretariat of the Court in Hong Kong with a case management team to administer cases in the region under the ICC Rules of Arbitration.

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

Hong Kong and the People's Republic of China

As a result of its relationship with, and proximity to, the mainland,[14] 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 one-third involved parties from the mainland.

Since its handover back to the People's Republic of China in 1997, Hong Kong has been uniquely placed as the People's Republic of China's window to the world and, for the rest of the world, the gateway to the People's Republic of China. It enjoys close economic ties with the mainland: according to statistics provided by the Hong Kong Trade Development Council, Hong Kong is the largest source of overseas direct investment in the mainland. By the end of 2007, among all the overseas-funded projects registered in the mainland, 45.2 per cent were tied to Hong Kong interests. Similarly, the mainland is one of the leading sources of inward investment in Hong Kong. According to Hong Kong's Census and Statistics Department, the total of the mainland's direct investment in Hong Kong was just over HK$2 trillion (US$260 billion) at the end of 2006 (up from HK$1.3 trillion at the end of 2005), accounting for 35.1 per cent of Hong Kong's inward direct investment and, as of December 2007, 439 mainland companies were listed in Hong Kong (up from 367 as of December 2006), with total market capitalisation of US$1,544 billion. In 2007, Hong Kong was also the mainland's third largest trading partner (after Japan and the United States), accounting for 9 per cent of its total external trade, and the mainland has been Hong Kong's largest trading partner since 1985.

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

By the same token, Hong Kong is a popular choice for western parties: from a legal perspective — Hong Kong has retained its well-respected common-law legal system even after the handover — and from a commercial perspective Đ 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 by virtue of the United Kingdom's accession on its behalf. After the handover, the People's Republic of China extended its own membership of the Convention to Hong Kong (the People's Republic of China having acceded to the Convention on 22 January 1987). Thus, after the handover, arbitration awards have continued to be enforced in Hong Kong under the Convention. The Hong Kong courts are pro-enforcement and have an excellent record in enforcing foreign arbitration awards in accordance with the Convention. Their approach, depending on the particular circumstances of the case in question and where appropriate, is to enforce the award even if the respondent manages to make out one of the limited grounds under the Ordinance[15] 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, that is, 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: '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.'[16] Non-Convention awards can be enforced in Hong Kong in a similar manner.

In respect of the People's Republic of China, it was identified that after the handover, the Convention no longer applied to the enforcement of mainland 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 SAR of the People's Republic of China). To overcome this difficulty, the vice president of the People's Republic of China Supreme People's Court and the Hong Kong secretary for justice signed a memorandum of understanding on the 'Arrangement between the Mainland and the Hong Kong SAR on the Mutual Enforcement of Arbitral Awards' in 1999, which came into force in both the mainland and Hong Kong in early 2000. Under this arrangement, a mainland award can be enforced in Hong Kong and a Hong Kong award can be enforced in the People's Republic of China on terms more or less the same as those that would apply to an application to enforce a Convention award. Its implementation resolved two years of uncertainty following the handover and served to re-establish Hong Kong as the pre-eminent jurisdiction in which to conduct People's Republic of China-related arbitrations. The Hong Kong courts have continued to enforce People's Republic of China awards under the arrangement.

The PRC—HKSAR Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (Judgment Arrangement)

On 14 July 2006 the vice president of the PRC Supreme People's Court and the Hong Kong secretary for justice signed the Judgment Arrangement, providing for the enforcement of People's Republic of China judgments in Hong Kong and vice versa. The Judgment Arrangement came into force on 1 August 2008: via the Mainland Judgments (Reciprocal Enforcement) Ordinance in Hong Kong, and a Supreme People's Court Judicial Interpretation (Fa Shi [2008] No. 9) on the mainland. Broadly speaking, the Judgment Arrangement applies only where:

-. an enforceable final judgment is given on or after 1 August 2008 by one of the Hong Kong courts, or a designated mainland court;[17]
- the judgment has been given pursuant to an exclusive jurisdiction agreement entered into on or after 1 August 2008, giving exclusive jurisdiction to the Hong Kong courts or a designated mainland court as appropriate, and
- the judgment orders the payment of a sum of money under a civil or commercial contract.

A detailed discussion of the Judgment Arrangement is outside the scope of this review and it remains to be seen how the Judgment Arrangement will work in practice. It should, however, in appropriate circumstances, provide a practical alternative forum to arbitration, namely litigation in Hong Kong, for disputes involving the People's Republic of China and Hong Kong interests, and where there are assets on the mainland against which enforcement may need to be made.

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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 People's Republic of China-related contracts, its proximity to, and relationship with, the People's Republic of China.

Notes

1. Less than a year after the former colony was formally established on 26 June 1843.
2. The Sino-British Joint Declaration, formally known as the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, was signed on 19 December 1984 in Beijing.
3. As amended by the Arbitration (Amendment) Ordinance 1996, the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance 1997, the Arbitration (Amendment) Ordinance 2000 and the Arbitration (Amendment) (No. 2) Ordinance.
4. S 2(1) Ordinance.
5. Ss 2L and 34B Ordinance.
6. Ss 2M and 34A (2) Ordinance.
7. In the same way as they would before the Hong Kong courts (noting that decisions of higher English courts are no longer of 'binding' authority post-handover).
8. The HKIArb was set up in September 1996 by a group of Hong Kong professionals; it is funded by annual membership fees and is financially independent.
9. Both powers under sections 23 and 23A of the Ordinance can currently be excluded by an exclusion agreement in writing once the arbitral proceedings have commenced or, as the case may be, a question of law arises.
10. S 11 of the Civil Justice (Miscellaneous Amendments) Ordinance which will come into force on 2 April 2009.
11. This is the effect of article 16 of the Model Law which applies to domestic arbitrations by virtue of Section 13B of the Ordinance.
12. Ss 2GH and 2GI of the Ordinance.
13. In respect of domestic arbitrations, the Ordinance refers only to impartiality: S 2GA; although in practice there may be little distinction between the two. The UNCITRAL Rules and the arbitration rules of most major institutions, including the recently published HKIAC Administered Arbitration Rules, also require arbitrators to be both 'independent' and 'impartial'.
14. It is considered politically correct to refer to the People's Republic of China as the mainland in the context of dealings between Hong Kong and the mainland.
15. Set out in S 44 of the Ordinance which replicates, with minor modifications, article V of the Convention.
16. The grounds for refusing enforcement of a non-Convention award are set in article 36 of the Model Law and are the same as the grounds set out in section 44 of the Ordinance.
17. (the Supreme People's Court, a Higher People's Court, an Intermediate People's Court or a recognised Basic People's Court; an initial list of recognised Basic People's Courts is set out in the Annex to the Judgment Arrangement).

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Singapore

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Arbitration as a dispute resolution mechanism has gained acceptance in many Asian countries. Between 2000 and 2007, Asian arbitral institutions registered a general increase in the number of arbitration cases heard while, in some instances, sharp increases were registered (see Table 1). The increase in arbitration cases is likely to continue against a backdrop of increasing cross-border disputes as the world's economies face some of their most challenging times. This article discusses the recent developments in the arbitration landscape of Singapore and the continued pro-arbitration efforts made by the Singapore government and its judiciary.

Table 1: Number of International Cases Administered by Arbitral Institutions and Number of International Cases Received by the HKIAC.

Arbitral Institution	2000	2001	2002	2003	2004	2005	2006	2007
Number of international cases administered by arbitral institutions (source: www.siac.org.sg/facts - statistics.htm)								
CIETAC (China)	543	562	468	422	461	427	442	429
SIAC (Singapore)	41	44	38	35	48	45	65	70
KCAB (South Korea)	40	65	47	38	46	53	47	59
BAC (China)	11	20	19	33	30	53	53	37
VIAC (Vietnam)	23	16	19	16	32	22	23	21
JCAA (Japan)	8	16	8	14	15	9	11	15
KLRCA (Malaysia)	20	3	3	5	3	7	1	2
Number of international cases received by HKIAC (source: www.hkiac.org/HKIAC/HKIAC_English/main.html)								
	298	307	320	287	280	281	394	448

HKIAC (China)								

Between 2000 and 2007, the Singapore International Arbitration Centre (SIAC) has seen its arbitration caseload increase by almost 50 per cent to a total of 86 cases (see Table 2). The number of arbitrations held in Singapore is in fact higher as ad hoc arbitrations are not included in the statistics in Table 2.

Table 2: All Cases Administered by the SIAC

All cases administered by the SIAC (source: www.siac.org.sg/facts - statistics.htm)								
Desc.	2000	2001	2002	2003	2004	2005	2006	2007
Cases administered under SIAC rules	52	57	57	44	65	52	56	67
Cases administered under other rules	6	7	7	20	13	22	32	19
Total	58	64	64	64	78	74	88	86

The increase in arbitration cases in Singapore is no accident. Through the years, the Singapore government has taken a pro-active role in building Singapore's reputation as the premier arbitration venue in the region. In 2007, Singapore was able to attract international arbitration bodies such as the Permanent Court of Arbitration and the International Centre for Dispute Resolution to set up their regional headquarters in Singapore.

Features of international arbitration in Singapore include:

- independent, neutral third-country venue;
- international commercial arbitration modelled on the UNCITRAL Model Law;
- party to the 1958 New York Convention (on enforcement of arbitration awards);
- strong tradition of the rule of law;
- maximum judicial support of arbitration, minimum intervention;
- freedom of choice of counsel in arbitration proceedings;
- strong arbitration institution (the SIAC);
- competent arbitration professionals — lawyers, arbitrators and experts; and
- lower costs than many other major centres of arbitration.

Arbitration initiatives

In 2008, Singapore's Ministry of Law introduced two new measures to help Singapore thrive as an international arbitration hub.

Tax exemption

A tax exemption scheme has been introduced for law practices in Singapore. Law practices can now take advantage of this tax exemption on a portion of their arbitration income derived

from international arbitration cases with hearings held in Singapore for a period of up to five years.

Waiver of work passes for entry into Singapore

The entry requirement for non-residents entering Singapore for arbitration and mediation work has been relaxed. From 1 February 2008, non-residents are no longer required to apply for work passes to carry out arbitration and mediation services in Singapore, instead such services can now be performed while holding a social visit pass, subject to a maximum of 60 days. However, the cases heard must not be religious, racial or political in nature. Social visit passes are granted on entry at Singapore's immigration points and do not require advance application. Once in Singapore, the applicant simply makes an e-notification using the online form available at www.enotifywpe.mom.gov.sg.

The wavier is applicable to the following persons entering Singapore for arbitration and mediation-related services:

- arbitrators;
- legal counsel; and
- other professional service providers involved in the proceedings, including translators and transcribers.

Integrated Dispute Resolution Complex

Some time in mid-2009, Singapore can expect to welcome a dedicated facility for arbitration in the form of the Integrated Dispute Resolution Complex (IDRC), which will house both the SIAC and the Permanent Court of Arbitration.

Key features of the IDRC include:

- hearing rooms that are custom designed for arbitrations;
- caucus rooms for break-out sessions;
- world-class telecommunications and teleconferencing equipment;
- secure document storage facilities;
- 24-hour facility; and
- concierge services for foreign users of hearing rooms.

A pro-arbitration judiciary

One of Singapore's strengths that has helped arbitrations thrive is the Singapore courts that adopt a policy of limited and cautious curial intervention, recognising that they should only play a supportive role in arbitrations. Some of more interesting cases involving arbitrations in Singapore are discussed below.

VV and Another v VW [2008] SGHC 11

This case marks the first time in Singapore that any party to an international arbitration has tried to set aside an award on costs under the International Arbitration Act.

VV and Another (VV) and VW entered into a contract pursuant to which VV was to plan, design and provide work supervision services for an infrastructure project in VW's country. The contract provided for disputes to be referred to arbitration. Subsequently, a dispute arose and VV referred the dispute to arbitration where it claimed against VW for US$927,000. VW raised two defences and 10 counterclaims amounting to US$20 million. The arbitrator dismissed VV's claim. The arbitrator ruled that he had no jurisdiction over the counterclaims because insofar as they constituted defences of equitable set-off, it was unnecessary to consider them since VV's claim had been dismissed and, insofar as they were independent

claims, no jurisdiction had been conferred on him to decide them. The arbitrator ruled that VW was entitled to costs and ordered VV to pay VW US$2.25 million (the cost award) for legal fees, disbursements and witnesses' expenditures. VV sought to set aside the cost award on the grounds that: the cost award conflicts with public policy in Singapore as it offends the principles of proportionality; the arbitrator lacked jurisdiction to award costs in respect of VW's counterclaim since the arbitrator had declined to assert jurisdiction; and the arbitrator acted in breach of natural justice in awarding costs on a scale based on alleged international arbitration practice on which no evidence was given.

The application was dismissed. The High Court found that:

- the parties to an arbitration have contracted to settle disputes in a private litigation such that an award no matter how unreasonable could not ever be considered injurious to the public good or shocking to the conscience. As such, it is not part of the public policy of Singapore to ensure that costs incurred in an arbitration are to be assessed on the principle of proportionality;
- the arbitrator's jurisdiction to determine VV's claims included a jurisdiction to hear and determine VW's defence as well as the set-off claims. The arbitrator is not deprived of jurisdiction merely because of the failure of a claim; and
- there is no breach of natural justice because the arbitrator was not bound by domestic decisions on costs. Further, the arbitrator had communicated his views to the parties. Any mistake of the arbitrator in assessing the legal costs would be a mistake of fact and the cost award could not be set aside on that ground.

NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5

NCC International AB (NCC) and Alliance Concrete Singapore Pte Ltd (Alliance) entered into a contract pursuant to which Alliance supplies ready-mixed concrete to NCC. A subsequent ban on the export of sand — one of the essential ingredients of ready-mixed concrete — imposed by the Indonesian government caused Alliance's supply of concrete to cease save for small quantities required to maintain structural integrity of the construction works. The Singapore government then intervened through the Building and Construction Authority (BCA) and the Singapore Contractors Association Ltd, by establishing a procedure for the distribution of sand from the Singapore government's stockpile. However, NCC and Alliance failed to agree on how to collect and pay for the sand distributed by the BCA. NCC took the position that Alliance should collect the sand and supply ready-mixed concrete to it at the fixed price stipulated in the contract. In contrast, Alliance took the position that NCC should arrange for delivery of the allocated sand to Alliance's batching site according to the BCA's procedure. NCC then applied to the High Court for an injunction compelling Alliance to deliver ready-mixed concrete under the terms of the contracts.

The High Court dismissed NCC's application on the basis that NCC had failed to show that it deserved the court's assistance in the issuance of the injunction. The judge took into account, inter alia, NCC's failure to follow the process of dispute resolution set out in the contract.

On appeal, the Court of Appeal affirmed the High Court's decision to refuse NCC's application for the injunction and dismissed the appeal. The Court of Appeal stated, inter alia, that:

- where the court had concurrent jurisdiction with the arbitral tribunal, it would only intervene to support arbitration, for instance, where third parties over whom the arbitral tribunal had jurisdiction were involved, where matters were very urgent, or where the court's coercive powers of enforcement were required; and

- NCC's conduct amounted to an abuse of process because it sought an injunction from the court despite having no genuine intention to commence arbitration.
- Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH [2008] SGHC 67
- Dongwoo Mann+Hummel Co Ltd (Dongwoo) and Mann+Hummel GmbH (M+H) were parties to various agreements, including a Technical Assistance and Trade Mark Licensing Agreement (TATLA). Pursuant to the TATLA, M+H was obliged to supply Dongwoo with certain technical information. Dongwoo experienced difficulties with M+H and eventually terminated the TATLA. M+H challenged the termination and referred the question of its validity to arbitration. The arbitral tribunal decided that Dongwoo had failed to establish that M+H had breached its obligations under the TATLA and found in favour of M+H.
- Dongwoo then commenced an action in the High Court to set aside the final arbitration award on, inter alia, the following grounds:
- that the principles of natural justice had been breached because the tribunal had failed to direct M+H to extend copies of certain confidential documents to Dongwoo; and
- that the tribunal had made an award contrary to public policy by:
- allowing M+H to flout the tribunal's directions in relation to discovery; and
- not drawing an adverse inference from M+H's refusal to disclose documents as directed.

The action was dismissed. The High Court found, inter alia, that there was no breach of the principles of natural justice because there was no connection between the alleged breach and the award made. The tribunal had properly concluded that there was no material breach of the TATLA because M+H had fulfilled its obligations based on all credible evidence disclosed to the tribunal. The court then held that a deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in an arbitration allows the tribunal to impose the possible sanction of an adverse inference being drawn. Dongwoo had not demonstrated that upholding the award would be 'wholly offensive to the ordinary and reasonable fully informed member of the public'. As such, the court was not satisfied that upholding the award would be contrary to public policy.
Insigma Technology Co Ltd v Alstom Technology Ltd [2008] SGHC 134

Insigma Technology Co Ltd (Insigma) and Alstom Technology Ltd (Alstom) entered into a license agreement which provided, inter alia, at article 18 that disputes are first to be settled through friendly consultations, and:

In case no agreement can be reached through consultation: Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect.

Subsequently, a dispute arose between the parties regarding the calculation of annual royalties. Discussions were held to resolve the dispute but failed. Alstom then requested that the matter be resolved through arbitration before the International Chamber of Commerce (ICC). Insigma disputed the jurisdiction of any arbitral tribunal constituted by the ICC, arguing that the parties had intended for the SIAC to administer the arbitration under ICC Rules.

At the arbitration, the tribunal heard preliminary issues pertaining to its jurisdiction and decided that it had jurisdiction to hear the dispute. Insigma commenced an action before the High Court to set aside the tribunal's decision. Insigma argued, inter alia, that article 18 was not a valid arbitration agreement.

The action was dismissed. The High Court decided that the parties had bargained for an SIAC-administered arbitration on an ad-hoc basis which applies ICC Rules rather than an ICC institutional arbitration. The High Court states that there is 'in principle, no problem with one institution administering arbitration proceedings in accordance with another set of rules chosen by the parties'. The High Court went on to state that the administering or supervising authority and the procedural rules adopted for the arbitration do not have to be of the same institution so long as the choices made do not result in significant inconsistency.

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As the economic crisis of 2008 unfolds, there will no doubt be immense economic uncertainties across Asia, many of which will result in disputes resolved by arbitration in Singapore as a key arbitration centre in the Asian region.

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International Arbitration in Asia

Michael J Moser

International arbitration has come of age in Asia. The number of cases being reported in the region is on the rise, local arbitration institutions are growing in importance and serious efforts are being made to modernise local arbitration legislation. Most Asian nations are party to the New York Convention and the ICSID (or Washington) Convention. Although the number of investor-state arbitrations in the region remains small, recent developments suggest that this is likely to change in the near future.

Growth

The growth of arbitration in Asia in recent years can be seen clearly in the statistical reports (see Table 1). Whereas 10 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; 10 years later the number of cases topped 1,000. In 1985 the number of cases referred to the Hong Kong International Arbitration Centre (HKIAC) was nine; today, the number is approaching 500.

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.

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 2006, nearly 17 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.
Table 1: international arbitration cases filed, 2000-2007

AAACIETACHKIACICCLCIASIACSIACSwiss RulesSCC

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	586	981	394	593	130	119	47	141
2007	621	1118	448	599	137	119	59	97

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

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

As discussed earlier, a distinctive feature of arbitration in China is the requirement that all proceedings be conducted by a designated 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 and 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.

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	-
Vietname	1995	C/R

Enforcement

Most jurisdictions in the Asia-Pacific region have acceded to the New York Convention of 1958 (see Table 2). Widespread acceptance of the principles contained in the Convention is deserving of applause.

Unfortunately, however, there appears to be less uniformity throughout the region with respect to the implementation of the Convention. 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.

Notes

1. International arbitration cases received by major institutions. Prepared by HKIAC with the assistance of the named institutions; www.hkiac.org/hkiac/hkiac_english/en_statistics.html; www.swissarbitration.ch/pdf/newsletter_2007_1.pdf (accessed 26 October 2006). NB: statistics for CIETAC, ICC and LCIA in some years include domestic and international arbitrations — accordingly, figures are not directly comparable.

FDI Growth in Asia: The Potential for Treaty-Based Investment Protection

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In recent years, Asia, the world's export powerhouse, has become a major source of foreign direct investment (FDI). Combined annual outbound FDI from and between east, south and south-east Asian countries has exceeded US$100 billion every year since 2003.[1]

Capital-exporting countries in Asia have also been broadening and strengthening their networks of international investment agreements (IIAs). This increased activity by governments reflects an appreciation of the importance of investment protection in safeguarding their investors and hedging against risk.

As national economies and supply chains in Asia become more and more intertwined, with elements of the production process outsourced across Asia, it becomes more and more important to create stable and predictable conditions for investment as part of a comprehensive foreign economic strategy. Governments may choose to negotiate comprehensive free trade agreements (FTAs) or economic partnership agreements (EPAs) incorporating provisions on investment protection, or they may prefer stand-alone bilateral investment treaties (BITs). Either way, the trend is toward more IIAs and higher-standard IIAs. Even China, which has been historically reluctant to enter into high-standard IIAs, has sought high-level protection in its latest BITs.

If governments build an IIA network, it will be used. Well-advised Asian investors will use their rights under IIAs as leverage in negotiating with governments. Well-advised investors will also plan their investments in advance to maximise their IIA rights and hedge against risk.

Asian investors have also shown they are willing and able to use IIAs to enforce their rights when necessary. Japanese and other investors have taken cases to investment arbitration and won — in some cases obtaining hundreds of millions of dollars, such as in the Saluka case discussed below. And 2007 saw the first investment claim ever brought by a Chinese investor, under the China-Peru BIT.

For investment protection, Asia is the next frontier. But more importantly, for Asian investors, treaty-based investment protection can provide a risk hedge that can pay for itself in enhanced bargaining leverage in difficult times.

Asia has become a major source of foreign direct investment

Asian investors have been increasingly looking abroad for opportunities. The growth in the outflow of FDI from Asia has been substantial in recent years. According to data reported by the United Nations Conference on Trade and Development (UNCTAD), in 2007 annual FDI outflow from countries in Asia exceeded US$200 billion for the first time ever, surging from US$168 billion in 2006 to US$224 billion.[2] The 2007 outbound FDI reached US$73.5 billion for Japan, US$22 billion for mainland China, US$15 billion for Korea, US$14 billion for India, US$12 billion for Singapore and US$11 billion for Malaysia.3 Not surprisingly, cumulative total FDI from Asia also set a new record in 2007, reaching US$2.2 trillion.[4]

As an example, Japan's outward FDI is large and growing. Its 2007 FDI flow of US$73.5 billion, the largest in Asia, increased 46 per cent over the year before, and Japan's total FDI stock reached a record US$543 billion by the end of 2007.[5] Japan's role as a source of outward FDI has outstripped its role as an export superpower. Since 2004, the net income from Japanese outward FDI has been larger than Japan's trade surplus. Sales by Japanese-owned manufacturing companies abroad reached ´80 trillion (US$830 billion) in 2006, equal to about 18 per cent of total sales.[6]

This development reflects underlying economic trends. The production chain of Japanese industry has shifted to incorporate offshore manufacturing in East Asia and elsewhere, impelled by labour shortages in Japan. As Japan has few energy or mineral resources, Japanese companies have attempted to assure security of energy and resource supplies by upstream investment abroad. Because Japan's population is declining, service industries such as construction must expand abroad in order to grow; because delivery of these services involves presence in the customer's market, exports of these services also necessarily involve FDI.

China too is a rapidly growing FDI source, with outward flows from mainland China of US$22 billion in 2007, almost double the level of 2005[7] – a remarkable development, considering China's history as a capital-importing economy.[8] The Chinese government has taken important steps to encourage outbound FDI. A recent study of China's approach to FDI found that 'the Chinese government's approval process for [outbound FDI] has been streamlined and decentralized in order to promote foreign investments by Chinese enterprises' and '[t]he Chinese government has also introduced several incentives to promote Chinese [outbound FDI] in specific areas'.[9] And indeed, the outflow of FDI from China has been growing more rapidly than FDI inflow, suggesting that while China may still be a net capital-importing country, the export of capital is growing in importance, and China's importance as a capital exporter is growing along with it.[10] Hong Kong's outbound FDI flow (much of which may consist indirectly of outflows from mainland China) exceeded US$53 billion in 2007 alone,[11] and by the end of 2007, Hong Kong's total FDI abroad exceeded US$1 trillion for the first time.[12]

Smaller Asian countries are also important as FDI sources. UNCTAD reports that '[f]or the first time in 2007, outflows from Malaysia and the Philippines exceeded inflows of FDI'.[13] Malaysian and Philippine companies 'are investing overseas to acquire or build brand names, access markets, technologies, and natural resources and strengthen value chains'.[14]

Foreign direct investment from Asia is being actively sought by developed and developing countries alike. UNCTAD's 2008 World Investment Report noted that investment promotion agencies from developed countries have begun establishing offices in countries such as

China, Singapore and India to attract FDI, and, in fact, 'India is now among the top investors in the United Kingdom'.[15]

The recent surge in outward investment from Asia has been particularly directed toward developing countries. FDI flows to southern Africa grew more than fivefold in 2007,[16] and much of this growth was a result of increased FDI from Asia, and from China in particular.[17] UNCTAD reports that '[i]n 2007, the Export-Import Bank of China financed over 300 projects in the [African] region, constituting almost 40% of the Bank's loan book'.[18] While China's outbound FDI was formerly focused on developed countries,[19] developing countries in Africa, Asia and Latin America now receive the vast majority of outbound FDI flow from China.[20] Japan recently announced the creation of 'a facility within the Japan Bank for International Cooperation' for investment (ie, equity investment, guarantees and local financing) in Africa of [US]$2.5 billion over the next five years', an amount that is equal to 'twice the total FDI flows from Japan to Africa during the past five years'.21

While there is no doubt that global markets are experiencing a period of extreme volatility, predictions for outbound FDI from Asian countries remain positive. UNCTAD predicts that '[p]rospects for outbound FDI are encouraging because of the strong drive of Asian corporations to internationalize, as well as significant M&As expected to be completed in 2008'.[22] The economic fundamentals impelling foreign investment, noted above in the case of Japan, also apply in China, Korea, Malaysia and other middle-income Asian countries, all of which are experiencing to some extent increasing lifespans, declining birthrates, and high savings rates. All of these factors add up to an increasing need for pension funds and other sovereign wealth funds to invest abroad, so that these countries can diversify risk and obtain the best return on capital.

Given the recent surge in outward investment and its expected sustainability, Asian countries are likely to continue to expand their investments abroad. It is critical that Asian countries with strong outbound FDI ensure their investors are appropriately protected by strong international investment agreements that guard their investments and reduce risk.

Why well-advised investors use international investment agreements to reduce foreign investment risk

Governments worldwide are building an ever-broadening network of IIAs — which now includes over 2,600 BITs and many EPAs and FTAs with investment chapters. Almost all countries in the world (179 of 195) are party to at least one investment agreement.[23]

Governments have created this network to promote and protect foreign investment. These agreements respond to investors' requests, and provide a valuable tool to attract desirable inward FDI. Investing abroad inevitably carries increased political and economic risks, particularly when an investment involves large sunk costs or a long-term commitment of capital. As outward FDI from Asia turns increasingly toward developing countries with less stable legal and judicial frameworks, the risks associated with foreign investment increase. And in an era of capital shortage, investment destinations will compete to obtain the most desirable investment projects.

IIAs serve the interests of capital-exporting and capital-importing governments, as well as foreign investors. The investor gains legal protection that reduces business risk and increases certainty; its government gains protection for the investor; and the host state government gains the employment and technology benefits of the investment.

From an investor's standpoint, IIAs have desirable benefits, flowing from the specific legal guarantees. Modern IIAs provide protection against arbitrary and discriminatory acts by the host government. They can also guarantee valuable commercial freedoms, such as the freedom to transfer funds and repatriate profits. These agreements also permit the investor to bring claims against the state directly to a neutral arbitration tribunal, which can award monetary compensation for treaty violations that have harmed the investor.[24]

One typical IIA legal provision prohibits host countries from expropriating foreign investment without compensation. This guarantee against expropriation is not limited to seizures of physical property, or forced divestures of assets or equity. It can cover any government measure that deprives an investor of the economic value of its investment. Since IIAs define 'investment' broadly, IIAs can provide a remedy when, for example, a government arbitrarily revokes a licence or a concession contract, or takes away the investor's intellectual property rights.

IIAs also often guarantee investors 'fair and equitable treatment' for their investments. Tribunals have interpreted this standard to require that states provide due process to the investor through courts or administrative tribunals, act transparently and free from ambiguity, refrain from unreasonable or arbitrary regulatory actions, and protect investors' 'legitimate expectations', including assurances made to an investor regarding its investment. And IIAs often guarantee 'full protection and security' for investments, requiring host governments to take reasonable action to protect foreign investments from theft or harm.

IIAs can also protect investors and their investments against government discrimination in favour of similarly situated domestic investors (national treatment) or foreign investors from a different country (most-favoured-nation treatment). These guarantees bar the host government from targeting foreign investors for unfavourable treatment.

Finally, IIAs often give foreign investors the right to transfer funds freely, both into and out of the host country, without delay. These provisions typically protect both additional inflows of financial resources, and repatriation of profits, interest or proceeds from liquidation.

IIAs also provide powerful dispute resolution mechanisms. The signature of a modern IIA constitutes an advance agreement to allow foreign investors to resolve disputes with the host government through binding international arbitration. An IIA may allow investors to choose between multiple fora, such as arbitration at the World Bank-affiliated International Centre for Settlement of Investment Disputes (ICSID), or before an ad hoc arbitral tribunal organised under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

IIAs thus provide important procedural rights in addition to substantive protections against government mistreatment, lowering the risks of investing abroad.

Asian governments are broadening and strengthening their international investment agreements to protect investors

Asian governments are actively enhancing their IIA networks. UNCTAD reports that Asian countries concluded 29 of the 44 new BITs in 2007, describing the effort as the 'most intensive treaty-making activity' in 2007, and as confirmation of the 'sustained high level of commitment from policymakers in this region for closer economic integration and investment protection and liberalization'.[25]

China negotiated five new BITs in 2007 and, at the end of 2007, had the second highest number of BITs in the world (120). In the past five years, China has shifted focus toward treaty-making with developing countries; the majority of China's new BITs in the past five years were with African countries. China is also engaged in an ambitious negotiating programme for BITs, or FTAs with investment provisions, with Russia, Japan, Australia and Korea. China has also upgraded and strengthened 15 of its earlier BITs. The new Chinese BITs, such as China's 2004 BIT with the Netherlands or its amended BIT with Germany, eliminate some of the reservations and gaps that severely reduced the value of older Chinese BITs. The China-Canada BIT, currently under negotiation, even features environmental considerations.[26]

China's increasing focus on outward investment has brought with it a shift in policy toward stronger substantive and procedural investment protections in BITs.[27] Though still a developing country and a net capital importer, when negotiating BITs China has increasingly taken the position of a capital-exporting country, pushing for strong protections for its investors.[28] The China-New Zealand FTA, which entered into force on 1 October 2008, includes strong substantive protections for investments and provides for investor-state arbitration.[29] China's new FTA with Singapore, signed on 23 October 2008, reportedly also includes an investment chapter.[30]

Japan too has gone through a major shift in policy toward negotiation of IIAs. With the increasing difficulties in making headway in WTO negotiations, in 2002 Japan launched a series of EPAs liberalising trade in goods and services, and including strong investment protection provisions covering both manufacturing and services investment. Like NAFTA, almost all of Japan's EPAs are negotiated on the principle of liberalising all areas of investment except for those in a negotiated 'negative list'. This formula effectively opens markets for new investment by providing pre-establishment national treatment for investors.

Japan is engaged in an ambitious negotiating programme for EPAs and BITs, targeted at the destinations for Japanese overseas investment, countries with natural resources, regional investment gateways or others targeted by business. Since 2002, Japan has concluded EPAs containing investment protections with Singapore, Mexico, Malaysia, the Philippines, Chile, Thailand, Brunei, Indonesia and Switzerland; also, BITs with Korea, Vietnam, Cambodia, Laos and Uzbekistan. India and Japan have announced plans to complete FTA negotiations by the end of 2008. Japan is also negotiating with Saudi Arabia, Peru and the Gulf Cooperation Council, and negotiating a Japan-Korea-China BIT to replace the existing Japan-China BIT.

As Korea, India, Malaysia and other countries in Asia become sources for foreign investment by major international investors, they too are turning toward strengthening BIT and FTA/EPA networks. The prospects favour ever wider use of IIA protections by investors of these and other Asian countries.

Maximising the potential of international investment agreements as a risk-management, problem-solving tool

Since the modernisation of Asia's IIA network is fairly recent, business can be expected to take time to appreciate the new possibilities opened by the new-model EPAs and BITs of Asia. Asian investors that have sustained damage from IIA violations by governments can use their rights to obtain compensation through arbitration before an independent tribunal. Yet even if an investor is reluctant to seek arbitration due to the potential for business disruption, it is useful for that investor to know its treaty rights and use them to bargain effectively with

a host state government. Investors can also plan investments in order to maximise their IIA rights in the event that problems occur some time in the future.

This decade has already seen a number of examples of successful investment litigation by Asian investors. In 2004, the Malaysian company MTD Equity won a multimillion-dollar award against Chile for breach of the Chile-Malaysia BIT.[31] After receiving approval by one Chilean agency, MTD's project was blocked by another; a tribunal found that this sequence of actions by the Chilean government constituted unfair and inequitable treatment. In another case in 2004, a Singapore investor, Cemex Asia Holdings, brought a claim for US$400 million in damages under the 1987 ASEAN Agreement for the Promotion and Protection of Investments against the Indonesian government for blocking investment in an Indonesian firm.[32] This case was settled — as are many investment claims. The first registered investment arbitration request by a Chinese investor came in 2007; Tza Yap Shum claimed US$20 million in damages under the China-Peru BIT for an alleged expropriation.[33]

The most well-known example may be Saluka v Czech Republic,[34] brought in 2001. In June 2000, the Czech government seized a foreign-owned Czech bank and sold it to a competitor for 1 Czech koruna (US$0.04), after injecting cash into the foreign bank's domestically owned competitors. The bank was owned by Nomura of Japan through a Dutch special-purpose corporate vehicle, Saluka Investments BV. Saluka brought an investment claim against the Czech Republic in 2000; in 2006, an investment tribunal found that the government had violated its duty of fair and equitable treatment to foreign investors, and the parties agreed on a method to settle the amount of damages. The Czech Finance Ministry announced in June 2008 that it will pay Nomura compensation of US$263 million, including interest.

No investor will seek arbitration as a first choice; in our experience, many investors settle their cases successfully by negotiating with the host government. Knowing and using a company's IIA rights can provide very useful leverage to get a dispute settled and to get the settlement amount paid.

Investors can plan ahead and structure their investments to maximise IIA coverage. The Saluka case provides an example: because Nomura held its investment in the Czech bank through a subsidiary incorporated in the Netherlands, Nomura was able to use the Netherlands-Czech BIT and was able to recover damages even though there is no BIT between Japan and the Czech Republic. The modest cost of structuring an investment so that an investor can take advantage of the protections provided under an IIA can pay enormous dividends if difficulties occur down the road.

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Asia is now an important and growing source of FDI worldwide. Foreign investment provides Asian companies significant opportunities for diversification and business growth, but also increased risks, amplified by the market difficulties and volatility facing global investors today. IIAs provide important and robust protections. Investors should look closely at how they can effectively use these protections to manage risk and capitalise on investment opportunities in the years to come.

Notes

1. UNCTAD, World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge (WIR 2008) Đ 'Major FDI Indicators' Direct Investment Abroad (FDI Outward) Flow, http://stats.unctad.org/FDI ('UNCTAD 2008 FDI Outward Flow'). In this article, following the UNCTAD statistics, 'East Asia' refers to China, Hong Kong, Macao,

Taiwan, North Korea, South Korea, Mongolia and Japan; 'South Asia' refers to Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan and Sri Lanka; 'South East Asia' refers to Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Timor-Leste and Vietnam; and 'Asia' includes all three of these regions.

2. UNCTAD 2008 FDI Outward Flow, supra note 1.

3. Id.

4. WIR 2008 Ð 'Major FDI Indicators' Direct Investment Abroad (FDI Outward) Stock, http://stats.unctad.org/FDI ('UNCTAD 2008 FDI Outward Stock').

5. UNCTAD 2008 FDI Outward Stock, supra note 4.

6. Japan Ministry of Economy, Trade, and Industry, 'Japan's Policies and Strategies on Bilateral Investment Treaties', available at www.rieti.go.jp/jp/events/08072501/pdf/3-1_E_Mita_t.pdf (last visited 27 October 2008).

7. UNCTAD 2008 FDI Outward Flow, supra note 1.

8. Id at p1.

9. See Axel Berger, 'China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach', Discussion Paper, German Development Institute, 10/2008, at p17.

10. For further discussion of this relationship and its implications, see id at p14.

11. UNCTAD 2008 FDI Outward Flow, supra note 1.

12. UNCTAD 2008 FDI Outward Stock, supra note 4.

13. WIR 2008, available at www.unctad.org/Templates/webflyer.asp?docid=10502&intItemID=2068&lang=1, at p49 (citation omitted).

14. Id. at p49.

15. Id.

16. Id at p41.

17. Id.

18. Id at p44.

19. See Berger 2008, supra note 9, at p11.

20. Id.

21. WIR 2008, supra note 13, at pp44-45.

22. WIR 2008, supra note 13, at p46.

23. WIR 2008, supra note 13, at p14.

24. For example, France Telecom v Lebanon, in which the investor was awarded US$266 million for violations by Lebanon of the FranceÐLebanon BIT; Azurix Corp v Argentina, in which the investor was awarded US$165 million for violations by Argentina of the USÐArgentina BIT; and CMS Gas Transmission Company v Argentina, in which the investor was awarded US$133 million for violations by Argentina of the USÐArgentina BIT.

25. WIR 2008, supra note 13, at pp14-17.

26. WIR 2008, supra note 13, at p15.

27. See Berger 2008, supra note 9, at pp19-21.

28. See Berger 2008, supra note 9, at p21.

29. See New ZealandÐChina Free Trade Agreement Guide, available at http://chinafta.govt.nz.

30. See, eg, 'China, Singapore Sign Free Trade Pact', China Daily, 23 October 2008, available at www.chinadaily.com.cn/bizchina/2008-10/23/content_7135029.htm. The text of the China-Singapore FTA was not publicly available as of October 2008.

31. MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No. ARB/01/7, Award of 25 May 2004 (subsequent application for annulment denied, Decision on the Application for Annulment, 21 March 2007).
32. Cemex Asia Holdings Ltd v Republic of Indonesia, ICSID Case No. ARB/04/3; see also 'Cemex to End ICSID Claim Against Indonesia', 30 June 2006, Global Arbitration Review, available at www.globalarbitrationreview.com/news/article/3491/cemex-end-icsid-claim-against-indonesia/.
33. Tza Yap Shum v Republic of Peru, ICSID Case No. ARB/07/6; see also 'First Chinese Claimant Registered at ICSID', 16 March 2007, Global Arbitration Review, available at www.globalarbitrationreview.com/news/article/3739.
34. Saluka Investments BV v Czech Republic (UNCITRAL).