The Asia-Pacific Arbitration Review

2010

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Global Arbitration Review is delighted to publish *The Asia-Pacific Arbitration Review 2010*, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The Arbitration Review of the Americas* and *The European and Middle Eastern Arbitration Review*, *The Asia-Pacific Arbitration Review* provides an unparalleled annual update - written by the experts - on key developments.

In preparing this report, Global Arbitration Review has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge - enabling them not only to explain law and policy, but also to put theory into context - which makes the report of particular value to those conducting international business in the Asia-Pacific region today.

Global Arbitration Review would like to thank our contributors, specialists in arbitration across the Asia-Pacific region, who have made it possible to publish this timely regional report.

Although every effort has been made to provide insight into the current state of domestic and international arbitration across the Asia-Pacific region, international arbitration is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought.

Subscribers to Global Arbitration Review will receive regular updates on changes to law and practice throughout the year.

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Introduction

I was delighted when David Samuels, the managing editor of Global Arbitration Review, asked me to write a short introduction for The Asia-Pacific Arbitration Review. The first thing I must do is to congratulate GAR on its decision to publish The Asia-Pacific Arbitration Review. I say this not only out of self-interest, as a person intimately connected with arbitration in Asia, but because of my conviction that the Asian region is assuming an ever greater significance to the world of international arbitration. This is borne out by the available statistics and by the decisions of leading law firms from Europe and North America to open arbitration practices in Singapore, Hong Kong, mainland China and elsewhere in the region. Moreover, it is not only the law firms that are establishing offices in Asia. Recently, the London Court of International Arbitration (LCIA) opened an office in India and the ICC International Court of Arbitration has opened a branch office in Hong Kong and a representative office in Singapore. In addition, the leading indigenous Asian arbitration centres in Singapore, Hong Kong and mainland China are showing a healthy increase in case numbers and market penetration. This development is good for consumers who insert arbitration clauses in their agreements, who now have a broad range of alternatives, as far as administered arbitrations are concerned.

I now turn to highlight some recent developments in the region. My overview is by no means comprehensive and merely highlights some recent developments of which I am aware.
Statistics[1]

Commencing with mainland China, the China International Economic and Trade Arbitration Commission (CIETAC) had 1,230 cases. The Beijing Arbitration Commission had 2,057 cases of which 56 were classified as international cases.

The total caseload of the Hong Kong International Arbitration Centre (HKIAC) was 602 cases. 373 of these cases concern commercial disputes and 229 were domain name disputes. Of the 373 cases, 12 cases were administered by HKIAC and the rest were cases where HKIAC had other involvement such as performing statutory functions (deciding the number of arbitrators or appointing the arbitrator or providing other services, or both).

The Singapore International Arbitration Centre (SIAC) received 85 new administered cases. These brought the total number of cases administered in 2008 to over 200. Of the 85 new cases received, 71 were international and 14 were domestic. In addition, the SIAC appointed arbitrators or provided facilities for a further 43 cases.

The number of cases registered with the Korean Commercial Arbitration Board (KCAB) was 166. Of these cases, 30 were international and 130 were domestic.

For the first seven months of 2009, HKIAC received over 20 administered arbitration cases. For the first eight months of 2009, SIAC received 76 new administered cases.

For the first eight months of 2009, KCAB received a total of 220 case registrations, of which 56 were international and 164 were domestic.

The statistics for the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for 2008 are 30 domestic arbitrations and eight international arbitrations.
Legislation

There has been significant legislative activity in the region. In November 2008, the Attorney General of Australia announced the Australian government's intention to review the International Arbitration Act 1974. Comments and submissions were sought in relation to

a number of questions set out in a discussion paper. Some of these relate to overturning what are regarded as unsatisfactory judicial decisions. One question inquires whether the Act should be amended to make it clear that the grounds for refusing to recognise and enforce an arbitral award as set out in the New York Convention are exclusive. This would overcome dicta of the Supreme Court of Queensland in Resort Condominiums International Inc v Bolwell [1995] 1 Qd R 406 where it was suggested that the grounds are not exclusive and that the court retains a general discretion whether or not to enforce a foreign arbitral award. Likewise, another question focuses on the decision in Eisenwerk v Australian Granites Ltd [2001] 1 Qd R 461 where it was held that by adopting a set of arbitral rules, the parties had evinced an intention to exclude the UNCITRAL Model Law and inquires whether it should be overturned by legislation. In this regard, it is interesting to note that the Eisenwerk decision was followed in Singapore in John Holland Pty Ltd v Toyo Engineering Corp [2001] 2 SLR 262 but was subsequently reversed by an amendment to the International Arbitration Act of Singapore (subsection 15(2)).

Other questions posed for review in Australia include broadening the definition of the writing requirement for an arbitration agreement, clarifying that when the UNCITRAL Model Law applies, it excludes the application of state law, removing inconsistencies in drafting and adopting recent amendments to the UNCITRAL Model Law. Another question asks whether the International Arbitration Act should be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law. A final but significant question inquires whether the Federal Court of Australia should be given exclusive jurisdiction for all matters arising under the International Arbitration Act, thereby excluding the jurisdiction of the state courts. This is an interesting proposal and is perhaps aimed at overcoming the inconsistent or patchy approaches to, and appreciation of, international arbitration as demonstrated by various state courts in Australia.

It will be interesting to see which proposals, if any, are adopted and enacted. Legislation is likely to be introduced into the Australian parliament in the latter part of 2009.

In Hong Kong, significant legislation is also planned. At present, the existing Arbitration Ordinance provides separate regimes for the conduct of domestic and international arbitrations in Hong Kong. The former is largely based on United Kingdom legislation while the latter is based on the UNCITRAL Model Law. The Bill gives effect to those provisions of the Model Law that are to apply in Hong Kong subject to such modifications and adaptations as are appropriate and will provide one law for all arbitrations in Hong Kong. If passed, the Arbitration Bill will therefore simplify the law in Hong Kong which, it is hoped, will make the law more user-friendly.

In Singapore, the Arbitration (Amendment) Bill will amend the International Arbitration Act of Singapore. The proposed amendments are as follows. First, the Singapore courts will be empowered to grant interim orders (including discovery of documents and orders to freeze assets) in aid of arbitrations held outside Singapore, which they are not presently able to do. Secondly, it is proposed to broaden the definition of an arbitration agreement to make it clear that Singapore recognises an arbitration agreement contained in electronic communications such as electronic emails or electronic data exchange. Thirdly, the minister for law will be empowered to designate entities to authenticate arbitration awards made in Singapore.
Regional Organisation and APRAG

Asia has its own regional organisation of arbitration institutions. The Asia Pacific Regional Arbitration Group (APRAG) was formed in November 2004 as an association of arbitration institutions in the Asia-Pacific region. It aims to improve standards and knowledge of international arbitration and to make submissions on behalf of the region to national and international organisations. APRAG also maintains a panel of arbitrators. There are now 31 members of APRAG which comprise almost all the arbitration centres, associations and institutions in the region.

Approximately every two years the APRAG council meets to elect a new executive. At the same time, a major conference is organised. The first APRAG conference was held in Sydney in November 2004, followed by a conference in Hong Kong in 2006. In June 2009, the third Asia Pacific Regional Arbitration Group Conference was held in Seoul, Korea. Some 300 people attended the two-day conference and speakers included experts from the region including Michael Moser, Michael Hwang, Neil Kaplan, Cecil Abraham, Philip Yang and Sally Harpole. There were also distinguished speakers from Europe including Wolfgang Peter, John Beechey and Lucy Reed. Expert speakers from North America included David Rivkin and Richard Naimark.

At the council meeting, the following offices were elected: co-presidents - president Seung Wha Chang (Korean Council for International Arbitration) and Mr Doh Jae Moon (Korean Commercial Arbitration Board). The vice presidents elected are: Doug Jones (ACICA), Mr Shishir Dholakia (Indian Council for Arbitration), Dr Michael Moser (HKIAC), Dr Colin Ong (Arbitration Association of Brunei Darusalem), Mr Sundaresh Menon (SIAC), Ms Hongsong Wang (Beijing Arbitration Commission), Mr Kosuke Yamamoto (JCAA) and Mr Jian Long Yu (CIETAC).

Maxwell Chambers

A purpose built dispute resolution facility has recently been completed in Singapore. Known as Maxwell Chambers, it houses a number of organisations including SIAC, ICDR and WIPO. It also provides outstanding facilities for the conduct of arbitrations, including 14 custom-designed and fully equipped hearing rooms and 12 preparation rooms. In addition, there is a lounge for arbitrators and a gymnasium. This state-of-the-art facility provides for wireless internet coverage, long-term document storage, catering, technical support, and concierge and secretarial services.

The formal opening of Maxwell Chambers will take place in January 2010 and the Inaugural Singapore International Arbitration Forum will be held in conjunction with the official opening on 21 and 22 January 2010.

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Arbitration in Asia is on the move. Foreign law firms and arbitral institutions are opening offices in the region and the leading local firms and arbitral institutions are enjoying growth. The available statistics indicate a healthy increase in arbitrations, which suggests a bright future for practitioners and a broad range of services available to disputants.

About the author

Michael Pryles is a well-known international arbitrator with offices in Melbourne, Singapore and London. He has sat in over 200 cases involving both commercial and investor-state disputes. These have included ad hoc and institutional arbitrations under the rules of all of the leading arbitral organisations.

Currently, he is chairman of the Singapore International Arbitration Centre and a member of the board of trustees of the Dubai International Arbitration Centre. He was the foundation president of the Asia Pacific Regional Arbitration Group (an association of 31 arbitration centres and organisations) and has held senior appointments at the ICC and LCIA. Formerly, he was a partner in a major Australian law firm and prior to that he held a chair in Law in Australia's largest law school. Further information can be found at www.michaelpryles.com.

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Ajay Thomas
London Court of International Arbitration (India)

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Light at the end of the tunnel

'Light at the end of the tunnel' is often used as a metaphor for hope, and the phrase most appropriately describes the recent signs of recovery from the recession that had the world reeling over the past 18 months.

Recent months have borne witness to the remarkable recovery by Asian economies from the global financial crisis. The latest growth forecast released by the Asian Development Bank predicts the GDPs of developing and emerging Asian economies to grow by 6.4 per cent in 2010.1 Leading the charge are the economies of China and India, which are expected to grow by 8.9 per cent and 7 per cent, respectively.2

Recent statistics released by Bloomberg also reveal the extent of the recovery made by Asian economies, especially India. In 2009, Indian firms raised a record amount of US$52 billion through syndicated loans and equity offerings. In the syndicated loans market, India has raced to the front in Asia, mobilising US$37.71 billion.3

Given the Indian economy's remarkable recovery and its consistent year-on-year growth over the previous two decades, one cannot but remark on how global perceptions towards India have changed over the past few years; a general disinterest having gradually been replaced with admiration and respect.

Dispute resolution in India

A modern, efficient dispute resolution system that is in tune with best-of-class international dispute resolution procedures is key to investor confidence. Unfortunately, India's dispute resolution sector has failed to match up to its economic growth.

Traditionally the public justice system represented by the state courts has been the first port of call for corporates. However, with over 30 million cases pending in the Indian courts, arbitration and other ADR processes have come to be seen as increasingly viable and attractive alternatives to litigation in a court of law.

India's ascendency on the global economic scene has therefore had the effect of throwing its arbitration sector into the spotlight, and what is revealed is a system in need of reform. So, while anecdotal evidence suggests that arbitration is the most popular of the ADR processes in India, as elsewhere, arbitration as is practised in India has not turned out to be the perfect alternative to court proceedings, as was intended.

The lack of a dispute resolution system that is credible, speedy and efficient can be a significant deterrent to potential investors and, although there is no empirical evidence to show the extent to which the current state of dispute resolution has hampered the flow of foreign investment into India, it must create concern in the minds of potential investors.

Issues

Many consider arbitration as a highway to resolving their disputes; however, in India it is a path riddled with speed bumps and potholes.

Legal discipline

Some parties and their counsel in India appear to think of arbitration as a mere adjunct to litigation in a court of law, often as a part-time activity to be conducted for a few hours after the official court working hours or on weekends.

Further, an almost slavish adherence to court procedures has resulted in arbitration being sometimes almost indistinguishable from litigation. Quite often, parties or their counsel

agree to have a series of adjournments and, once they agree, the arbitrators are unwilling to disallow such adjournments, leading to unacceptably protracted proceedings.

The tendency of parties to challenge awards seems to be the rule rather than the exception, with the deleterious effect of holding up enforcement proceedings - not to mention adding to the judicial logjam.

The Law Commission of India, in its 2001 report on arbitration,4 commented on the 'casual fashion' in which arbitration proceedings were conducted. The commission, with a view to injecting a certain sense of discipline into the process, proposed that respective high courts take the lead in framing appropriate rules 'to compel arbitration to go on continuously from day to day at least for three or more days on each occasion and that on each day the proceedings go on from 10.30am to 4.30pm with a break of one hour or carry on proceedings at least for five hours of each day'.

Unfortunately, nothing has changed on the ground.

In 1981, a division bench of the Supreme Court of India, in its decision in Guru Nanak Foundation,5 observed that the way in which arbitrations were concluded and, without exception, challenged in the courts had made 'lawyers laugh and legal philosophers weep'.

Although it has been 28 years since the Supreme Court made these observations, it is regrettably a commonly-held view that this still sums up the arbitration scene in India.

Judicial attitudes

The overriding legislative intention of the Arbitration and Conciliation Act, 1996 (the Act) was to provide for an arbitral procedure that would be fair, efficient and cost-effective, and would also minimise the supervisory role of the courts in the arbitral process.

Today, even mild shifts in the attitude of the judiciary towards arbitration can create confusion in the minds of investors, both present and potential.

Given the manner in which arbitrations are conducted in India and the all-pervasive 'ad-hocism', it would be fair to state that courts have generally come to distrust the arbitration process. This would perhaps explain the tendency of Indian courts, in their efforts to maintain a balance between intervention and arbitral autonomy, to lean more towards the former than the latter,6 as, for example, reflected in the decisions of the Supreme Court of India in Saw Pipes,7 Bhatia International8 and Satyam Computer Services.9

The Supreme Court, by purporting in these decisions to correct anomalies in arbitration law and practice, has actually undermined fundamental principles of arbitration and the underlying legislative intention.

Enforcement of awards

Given the clogged judicial system and the tendency of parties on the losing end to challenge awards as a matter of practice, enforcement of awards can be fraught with delay.

A further complication arises in the enforcement of foreign awards, in the requirement of Indian law that the territory in which the award has been issued must not only be a reciprocating New York Convention state, but must be expressly notified by the central government of India as a reciprocating territory to which the New York Convention applies, by means of the official gazette. Given that to date only 43 countries have been so notified, one needs to be extremely cautious when choosing the seat of arbitration in an arbitration in which the award might have to be enforced in India.

Retirees

A characteristic feature of arbitration in India is the predominance of retired judges, bureaucrats and technocrats sitting as arbitrators who, though most have competency and integrity of the highest order, have sometimes been found to be lacking in will (and sometimes the relevant skills) to conduct arbitrations expeditiously.

Flawed legislation

The legislature's unfortunate failure to distinguish between the differing needs of domestic and international arbitration has led to the judiciary resorting to some innovative decisions to fill the gaps in the Act, especially in the context of international arbitration - Bhatia and Satyam (supra) being cases in point.

Public policy

The most common ground of challenge to arbitral awards in India is that the award is contrary to 'public policy'. In Saw Pipes, the Supreme Court of India, by judicial innovation, expanded the definition of the term to include the head patent illegality. This has unfortunately opened awards to challenge on merits.10 Although this extended public policy definition was intended to apply only to domestic arbitrations, the Supreme Court by its decisions in Bhatia and Satyam (supra) has paved the way for the applicability of this wider definition of public policy to foreign arbitral awards as well.

The absence of any guidelines as to when courts could interfere on the ground of patent illegality creates a situation of great uncertainty.

The way forward

One solution to the crisis confronting arbitration in India would be to amend the Act to undo past and forestall future aberrant decisions of the Supreme Court. However, so long as the attitude of the court, especially the Supreme Court,11 towards arbitration remains an anxiety, a solution based purely on the amendment of the law is unlikely to work.

If one could create a credible arbitration process in which parties, lawyers and judiciary can have confidence, then inappropriate court intervention would be significantly reduced and, in due course, eliminated. The adoption of institutionally administered arbitration with its emphasis on controlled costs, professional arbitrators, monitoring of the process, ensuring time-bound completion and the safety net of tried and tested rules is one solution that could introduce such credibility and trust.

Then, as in Hong Kong and Singapore, it would be helpful to have specialised divisions in the Supreme Court and the various high courts to deal with arbitration-related cases (including setting-aside and challenge proceedings), comprising judges well-versed in the law and practice of arbitration. This would have the added benefit of eliminating one level of litigation in the optional three tier challenge procedure.

There is also an urgent need to shed the baggage of litigation, through sensitising arbitrators and counsel to global best practices in arbitration, perhaps in a programme organised jointly by arbitral institutions and training institutions such as the Chartered Institute of Arbitrators.

With a view to creating the future generation of arbitrators, it would serve well for institutions to identify young competent lawyers with an interest in the subject to serve as administrative secretaries to tribunals. These lawyers, having been sufficiently exposed to the dynamics and procedures of arbitration, would themselves, in due course, be appointed as arbitrators.

Institutions could also be expected to identify and persuade outstanding established lawyers to serve as arbitrators, thus injecting further dynamism and professionalism into arbitrations.
Light at the end of the tunnel?

Though no fortune teller with a crystal ball is at hand to predict the future, certain recent events do hold out the promise of a brighter future.

In a welcome move, the Indian Ministry of Law and Justice, mindful of the general unhappiness among end-users with the state of arbitration in India, and confronted with the spectre of Indian arbitration's descent into obscurity, appears intent upon introducing changes that will lead to India finally becoming an arbitration-friendly jurisdiction.

The Indian law minister in recent statements to the press has talked about plans to roll out a series of law reforms. Terming it as a 'legislative stimulus for industry', these reforms inter alia include proposals to amend the Arbitration Act.12 It is expected that these amendments would include introducing provisions in the Act to deal with the aberrant decisions of the Supreme Court noted above, the setting up of specialist arbitration divisions in courts to deal exclusively with arbitration related cases and provisions to distinguish between the differing needs of domestic and international arbitration.

On the judicial front, the recent 'pro-arbitration' stance taken by the Delhi High Court in Max India13 signifies a welcome change in judicial attitudes. And, in a further piece of good news, a division bench of the Supreme Court of India in Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Services Inc,14 differing on the correctness of the law laid down in Bhatia and Satyam (supra), has referred the issue to the chief justice of India for reference to a larger bench.

With the government serious about reform, and the judiciary making a conscious effort to be seen as arbitration-friendly, there is room for some guarded optimism about the arbitration scene in India, which after all, has a legal profession and judiciary of outstanding ability and reputation.

Given these circumstances, the establishment of LCIA India could not have come at a more appropriate time, and it will certainly add traction to the current reform process.

About the author

As registrar with the London Court of International Arbitration (India), Ajay head its Delhi-based secretariat.

He holds a Masters in Law (LLM) from the National University of Singapore, where he read International Commercial Arbitration and Admiralty & Maritime Law. On being called to the Bar, he practised mainly at the Bombay High Court, as a counsel at a leading maritime law chamber. Prior to joining LCIA India, Ajay was counsel and head of the South Asia desk of an arbitral institution based in Singapore.

Ajay is a member of the Singapore Institute of Arbitrators, the Maritime Law Association of Australia and New Zealand, the Australasian Forum for International Arbitration, Singapore Corporate Counsels Association and the Asian Society of International Law.

He is also the India correspondent to the Global Sales Law Handbook, a comprehensive work on international sales law encompassing all legal systems.

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London Court of International Arbitration (India)

ICC Arbitration in Asia

Khong Cheng-Yee

International Chamber of Commerce

Introduction to ICC Arbitration in Asia

The Court's origins

It is important to emphasise that from its creation in 1919, the International Chamber of Commerce (ICC) has used its neutrality and independence to promote international trade. In 1923, it created a special court to facilitate the peaceful resolution of international trade disputes, now known as the ICC International Court of Arbitration. One of the first arbitrations administered by the Court was an Asia-related case concerning the manufacture of lanterns. Since then, the Court has never looked back.

To date, over 16,700 cases have been filed with the Court and its Secretariat. They have covered a vast range of commercial and investment disputes involving many different applicable laws in both the civil and common law systems. Proceedings have taken place in numerous languages and in all four corners of the world. The Court is undeniably a leading global arbitral institution, trusted and used by businesses and, increasingly, state parties worldwide. The wide popularity of ICC arbitration is testimony to the impartiality and expertise of the Court, ably assisted by its Secretariat, enabling the ICC to maintain consistently high standards in the administration of international arbitrations.

The Court and its Secretariat

The Court presently consists of 125 members from some 86 countries worldwide. The members are eminent arbitration practitioners whose reputations often exceed national boundaries. Almost a fifth of Court members originate from South and East Asia and the Pacific region.

The Court oversees and administers the ICC arbitration process and is responsible, among other things, for appointing and confirming arbitrators, deciding upon challenges of arbitrators, scrutinising and approving all arbitral awards and fixing arbitrators' fees.

The Secretariat, which is made up of some 75 staff, over half of whom are qualified lawyers, acts as a neutral interface between the parties, the arbitrators and the Court, is responsible for the day-to-day administration of ICC arbitrations and provides the Court with the information it needs to make its decisions.

The allocation of a new arbitration to a case management team within the Secretariat (each team consists of one counsel and at least two deputy counsel) is decided by the secretary general of the Court, who will consider the characteristics of the new arbitration when making his decision. There are currently eight case management teams, each specialising in specific geographical zones or legal systems and able to work in the languages commonly used within those zones. All in all, the Secretariat is able to operate in over 15 different languages. The two most recently created teams specialise in Eastern Europe and Asia.

In Asia, ICC arbitration has developed steadily and now constitutes a large part of the Court's caseload. Last year, some 22 per cent of new cases filed with the Court involved one or more

parties from South and East Asia. Singapore is the most popular choice for the place of arbitration, although parties often prefer alternative locations such as Hong Kong, Manila or New Delhi.

The Asia office

In response to rising demand for the Court's services and in anticipation of the expected development of arbitration in Asia, the ICC opened its first-ever branch office in Hong Kong in November 2008. The extension of the Court's Secretariat into Asia demonstrates ICC's commitment towards continuously improving the Court's services and bringing them closer to their users. The Asia office of the Court's Secretariat is conveniently located in the heart of Hong Kong's Central district, from where it currently handles some 120 Asia-related arbitrations.

Thanks to an amendment to article 5 of Appendix II to the ICC Rules of Arbitration, new requests for arbitration may now be filed directly with the Asia office in Hong Kong, thereby saving time and costs for the parties and the ICC. Approximately half of all new arbitrations from the region are now filed directly in Hong Kong.

The Asia office operates in English and Chinese, although the arbitrations it administers may be conducted in other languages, such as Japanese and Korean. The three permanent legal staff, originating from Asia, provide information and assistance to the parties, their counsel and the arbitrators involved in the proceedings. The Asia office is in constant contact with the rest of the Secretariat and participates in all Court sessions by means of a videolink.

ICC dispute resolution services in Asia

In addition to the Asia office, the ICC will shortly open a liaison office in Singapore, dedicated to developing and promoting ICC dispute resolution services, including arbitration and mediation (under its Amicable Dispute Resolution (ADR) Rules), as well as training courses on the entire range of dispute resolution procedures proposed by the ICC, including arbitration, ADR, dispute boards for construction disputes and DOCDEX for documentary credits disputes. Some of these courses have already won considerable success in the region.

The Court's regional director for Asia will be based in the liaison office, and will form part of ICC's network of regional representatives covering Asia and the Pacific, North America, Latin America, Eastern Mediterranean, the Middle East and Africa, and the United Kingdom.

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ICC's unabated efforts to develop the use of arbitration and other methods of dispute resolution in international trade and investment have led to cooperation with many other independent transnational bodies, including the International Bar Association (IBA) and the International Federation of Consulting Engineers (FIDIC). The ICC was a moving force behind the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has helped to give international commercial arbitration the worldwide appeal it today enjoys.

The ICC's latest projects in Asia aim to promote and develop user confidence in international arbitration and ADR in this fast-growing region. As the 'merchants of peace' who founded the ICC in 1919 clearly understood, dispute resolution is essential to the prosperity of international trade.

About the author

Ms Khong Cheng-Yee is the director and counsel of the Asia office of the ICC International Court of Arbitration Secretariat, based in Hong Kong.

Ms Khong trained in England where she graduated in law with honours and then obtained a Masters in International Business and Management. She is admitted as a solicitor of the Supreme Court of England and Wales and as an advocate and solicitor in Malaysia. A former member of the ICC Court Secretariat in Paris, Ms Khong practised with a leading international law firm in London and Paris, as well as in Kuala Lumpur, where she specialised in international arbitration.

Prior to heading the ICC Court Secretariat's Asia office, Ms Khong was the ICC International Court of Arbitration's director for Asia.

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The rise of arbitration in Asia

Chong Yee Leong and **Qin Zhiqian**
Rajah & Tann Singapore

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The rise of arbitration in Asia

From the advent of the 21st century, the world has seen a dramatic growth in Asia-based international commercial arbitration. Over the years, China[1] has consistently surpassed the ICC International Court of Arbitration in terms of the volume of new cases filed each year. Other reputable arbitration centres in Asia have also seen a steady increase in the number of international cases submitted for their purview.[2]

Number of international cases administered by arbitral institutions[3]

Arbitral Institution	2000	2001	2002	2003	2004	2005	2006	2007	2008
ICC^	541	566	593	580	561	521	593	599	663
CIETAC (China)	543	562	468	422	461	427	442	429	548
LCIA (UK)	87	71	88	104	87	118	133	137	213
SCC (Sweden)	66	68	50	77	45	53	64	81	74
SIAC (Singapore)	41	44	38	35	48	45	65	70	71
BAC (China)	11	20	19	33	30	53	53	37	59
KCAB (South Korea)	40	65	47	38	46	53	47	59	47
JCAA (Japan)	8	16	8	14	15	9	11	15	12
KLRCA (Malaysia)	20	3	3	5	3	7	1	2	8
PDRC	0	1	2	0	0	0	1	1	0
AAA - ICDR (USA)	510	649	672	646	614	580	586	621	703
VIAC (Vietnam)	23	16	19	16	32	22	23	21	#
BCICAC (Canada)	3	4	4	4	4	2	5	3	#
HKIAC (China) *	298	307	320	287	280	281	394	448	#

The World Intellectual Property Organization (WIPO) has announced that it will be setting up an arbitration centre in Singapore in January 2010 to promote IP protection. All these trends and statistics can only mean that arbitration in Asia is fast gaining prominence in the world of dispute resolution. This paper discusses the factors that account for this phenomenon and conducts a review on why arbitration has become particularly popular in countries like China, Hong Kong, Singapore, Malaysia, South Korea, Japan and Vietnam.

Why is arbitration gaining prominence in Asia?

The typical reasons in support of arbitration apply to Asia with equal or greater force. For instance, arbitration is generally more expedient, less formal and a greater degree of privacy and confidentiality can be observed and enjoyed by the parties. Unlike litigation in open court, arbitrators are, as a rule, forbidden to disclose any information whatsoever about arbitral proceedings or the results to a third party. Unwanted intrusion into the dispute resolution process is generally avoided and unnecessary publicity is much less foreseeable.

As barriers to international trade diminish, global commerce has prospered. Concomitant to this has been the rise in disputes between international parties. In an international dispute, it is common that the parties will have their places of business in different countries. Unwillingness by commercial parties to have matters resolved in the foreign court of the other disputing party, with perhaps unfamiliar law, language and culture, adds to arbitration's appeal.

As such, arbitral proceedings are usually held in neutral locales, with expert arbiters agreed and appointed by respective parties applying internationally recognised arbitration rules such as the ICC Rules of Arbitration (ICC Rules) or the UNCITRAL Model Law on International Commercial Arbitration (Model Law) as opposed to submission of jurisdiction to national courts of the other disputing party, where aside from the questionable expertise of judges in some less developed countries, there remains the nagging concern about long drawn-out procedural rules which obstruct the speedy resolution of international commercial disputes. Inherent limitations of domestic courts to hear international commercial disputes are also notoriously well known. Complex issues of jurisdiction, problems of foreign state immunity and concerns over the enforcement of any resulting judgment may all complicate and limit the effectiveness of litigation and the enforceability of court judgments as opposed to arbitral awards.

It is thus widely acknowledged and indeed appreciated that the strongest advantage of arbitration in cross-border commercial transactions is that arbitral awards are more readily enforceable than court judgments, pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides for international recognition and enforcement of foreign arbitral awards in over 120 countries worldwide, subject to very limited defences set out in the New York Convention.

The meteoric growth of arbitration in Asia is largely due to the tremendous growth of Asian economies and their increased participation in global commerce. Asian economies have also proven to be better able to cope with the 'financial crisis' as compared to their western counterparts. Because Asian economies have been making impressive recovery from the global and Asian financial crisis, and the Australian and Asian currencies remain weak against the US dollar, this has caused a surge in exports across the region.[4]

Furthermore, the increased economic openness of the most populous country in the world (China) and its accession to the WTO marked a new phase of China's opening and China will take part in the economic globalisation on a larger scale at a deeper degree and a faster speed.5 It has created unprecedented opportunities for trade and investment for China and the rest of Asia. This has led to the increase of economic interest and investment in Asia.

Professor S Jayakumar,6 when delivering his introductory remarks at the biannual meeting of the ICC Commission on Arbitration said: 'With Asian economies booming and increasing in sophistication, there is an expected rise in international commercial disputes and a concomitant growing acceptance of arbitration as a form of dispute resolution.' With the increasing integration of global markets, the demand accelerates for neutral dispute resolution forums that are international in scope yet responsive to diverse users and cultures. In future years, commercial arbitration will no doubt continue to 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.

Another reason proffered for the rise of arbitration in Asia is that Asians are generally less inclined towards litigation as compared to westerners. Asians prefer non-confrontational means of conflict resolution, such as arbitration and mediation. There is a historical or cultural basis for the Asian inclination to stress personal rather than contractual obligations. In particular, with regard to East Asia and the west, concepts of individual versus collective identity as well as dialectical versus non-dialectical thinking have influenced unique preferences for adversarial or mediated approaches to dispute resolution and a strong sense of collective identity in the Asian culture impacted preferences for alternative dispute resolution as opposed to litigation.7

A further reason accounting for the rise of arbitration in Asia is the inadequacies of the local courts in dealing with disputes of a complex and industry-specific nature. Judges sitting in the local courts may not possess the relevant knowledge of specialised industries and they may be put to decide disputes in areas that they may not be familiar with. In arbitration, parties are free to choose their own panel of arbitrators to decide their disputes. The selection of commercially experienced adjudicators who are wise to the intricacies and complexities involved in sector-specific disputes offers greater appeal than the court process. Furthermore, arbitration is preferred in cases where a particular nation has a stake in the outcome of the case and the parties would like to avoid the potentially biased disposition of national courts.

Also, actual and perceived corruption in the local courts also compels foreign investors to insist on settling disputes via arbitration and not submit the dispute to the local courts. Much of Asia did not fare too well in the 2008 Corruption Perception Index. 8 This Index published by Transparency International9 ranks countries of the world according to 'the degree to which corruption is perceived to exist among public officials and politicians'. As can be seen from the index, many Asian countries languishes in the bottom of the index with the exception of Singapore (4th out of 180), Hong Kong (12th of 180) and Japan (18th of 180) - the only three Asian countries which made it to the top 20. In particular, much of South East Asia did not fare too well in the Index - Thailand (80th of 180), India (85th of 180), Vietnam (121st of 180), Indonesia (126th of 180), Laos (151st of 180) and Myanmar (179th of 180).

Case study: China, Hong Kong, Singapore, Malaysia, South Korea, Japan and Vietnam

China

China's economic ascendancy over the past two decades has brought an astonishing increase in international cooperation between Chinese and foreign entitles. Along with the growth of Sino-foreign business, China has witnessed a corresponding rise in the number of commercial disputes. Foreign investors in China have long been frustrated by the challenge of dispute resolution in a country that lacks a well-established legal framework. These difficulties are compounded due to the varying quality of law enforcement by judicial officers nationwide, as well as the continuing influence of politics over judicial decisions. In consequence, instead of seeking recourse through the court system, arbitration has become the preferred method of resolving commercial disputes. Thus, it comes as no surprise that international commercial contracts generally include a provision for the arbitration of disputes. Recent years have witnessed an increase in the numbers opting to use the services of the China International Economic and Trade Arbitration Commission (CIETAC).

There is a general acceptance that foreign investors consider the domestic judicial process to be grossly underdeveloped. In light of the need to provide impartiality and transparency in the dispute resolution process, Chinese entities have relied on arbitration to provide foreign investors with confidence and reassurance to encourage investment. By and large, Chinese entities also prefer alternative dispute resolution like arbitration and mediation over litigation in court when it comes to dispute resolution. The root of the Chinese approach to dispute resolution is one that has sprung out of a rich set of traditions, history, culture and values. Early Confucian society mirrored, in many respects, the business community's preference for resolving interpersonal conflict outside of the confines of formal law through relational networks. Legal sanctions were used only when no alternative existed or the gains were thought to outweigh the costs of compromised relations and trust. In general, informal mechanisms, rather than formal legal rules, were used to resolve most civil disputes in traditional China.

This preference is very much reflected in CIETAC where CIETAC uses a 'unique combination of arbitration with conciliation'. According to CIETAC officials, this represents 'an advantageous mixture of the merits of both, which not only resolve disputes, but also renews positive business and personal relations between the parties'.

Furthermore, arbitration in China continues to be less costly than in European or American forums. One member of a Chinese arbitration commission noted that there has been a 'huge development in the number of arbitration cases handled in China as well as the amounts in dispute. This rapid development is likely due, among other reasons, to the fact that arbitration is relatively inexpensive in East Asia.' Another Chinese arbitrator added: 'Arbitrators must be organised and must consider how they can cut costs and must have a sense of social responsibility to the parties.' A western attorney in China noted:'If you look at the costs of using the ICC and compare it with the costs of using CIETAC, there is a massive difference.'[10]

Hong Kong

The leading Asia arbitration centre is undoubtedly Hong Kong. The Hong Kong International Arbitration Centre (HKIAC) was established in 1985.

HKIAC's success can be attributed to the fact that Hong Kong has one of the most progressive legal regimes for arbitration in the world, a well-equipped and professionally administered international arbitration centre, a vibrant arbitration community with knowledgeable and experienced arbitrators, and a prime location at the crossroads of trade and commerce in Asia Pacific region. Now that it is part of China, but with a separate

and distinct legal system under the concept of 'one country, two systems', there are many opportunities for HK's continued growth as a regional and international arbitration centre.

Like CIETAC, dispute resolution through HKIAC offers a variety of approaches to resolving disputes, including negotiation, conciliation, mediation and arbitration. Parties to arbitration may select domestic rules which provide that a conciliator may later act as an arbitrator if conciliation is unsuccessful. While parties to an international dispute can choose domestic arbitration rules, the applicable rules for international arbitrations at HKIAC are the 1976 UNCITRAL Arbitration Rules which do not permit the blending of conciliation and arbitration. Some commentators have explained that the parallel rule structure in Hong Kong provides, on the one hand, consistency with western practices separating the use of arbitration and mediation, and on the other hand, consistency with Mainland Chinese practices which allow for the combination of arbitration and mediation. 11

With the benefits of maximum party autonomy, an open legal system, expert legal practitioners and a free economy, Hong Kong continues to exude immense arbitration appeal within Asia.

Singapore

Singapore has shown itself to be a progressive force in the region in terms of implementing arbitration laws that conform to international standards. The Singapore international Arbitration Centre (SIAC) was incorporated in 1990 and commenced operation in 1991. SIAC handles a wide array of cases with diverse subject matter and parties from different countries.12 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. While domestic arbitrations are encouraged, a distinction was deliberately made between international and domestic arbitration to enhance Singapore's attractiveness as an international arbitral forum. It was for this reason that the IAA was enacted.

The Arbitration Act enacted in 1953 was the first Singapore statute to establish a legislative regime regulating arbitration proceedings and the enforcement of arbitral awards. In 1997, the Attorney General set up the Review of Arbitration Act Committee. The objective of this committee was mainly to update the law as well as to narrow the differences between the domestic and the international regimes existing in Singapore. The result of the review was a completely new arbitration act, namely the Arbitration Act (Cap. 10, 2002 Edition) which came into operation in 1 March 2002.

Arbitration is being utilised with increasing frequency in Singapore, reflecting the country's status as a leading global financial and commercial centre. With its common law heritage, well-respected legal system and diverse Asian population, Singapore offers an attractive environment for international commercial arbitration in South East Asia. The arbitral landscape in Singapore is very conducive to international arbitration for the following reasons:

- Singapore is an independent neutral third-country venue;
- The well-established UNCITRAL Model Law is the basis of Singapore's law on international commercial arbitration;
- Singapore is a party to the New York Convention of enforcement of arbitration award. Thus, Singapore arbitration awards are enforceable in almost any country of the world;

- Singapore has a strong tradition of the rule of law;
- There is maximum judicial support of and minimum intervention with international arbitration;
- There is freedom of choice of counsel; and
- Singapore has a strong world-class arbitration institution, the SIAC which has competent arbitration professionals (lawyers, arbitrators and experts), excellent support facilities and services, and it offers lower costs as compared to other major centres of arbitration.

Malaysia

In Malaysia, arbitration is regulated by the Arbitration Act 2005. This Act deals with both domestic and international arbitrations. The Kuala Lumpur Regional Centre of Arbitration was established in 1978 and has become the principal organisation responsible for international commercial arbitrations in Malaysia. There has been a steady increase in international arbitration cases administered by KLRCA. There are many reasons leading to the steady increase in arbitration in Malaysia. First, the March 1993 amendment to the National Language Act 1963 provided for all court proceedings to be conducted in Bahasa Malaysia, with the court having the power, either on its own motion or on application and 'after considering the interest of justice', to order that the proceedings be conducted partly in the national language and partly in English. The uncertainty of potentially being subject to proceedings conducted entirely in an unfamiliar language has become a major motivation for international businessmen to opt for arbitration where they could include a clause to stipulate the language of choice in the arbitration.

The second factor leading parties to favour arbitration concerns legal representation. In arbitration, parties may be represented by a foreign lawyer or even a non-lawyer in the proceedings.

The third factor relates to the flexibility of the arbitration process as a result of the statutory exclusion of the Evidence Act 1950 that defines and regulates the reception of evidence in judicial proceedings. Section 2 of the Evidence Act excludes proceedings before an arbitrator from the Act's application and section 3 clarifies that arbitrations are excluded from the operation of the act.

The fourth factor that has contributed to the development of arbitration is that parties may opt for a system which allows the arbitral process to be conducted completely free of any court intervention. 13

South Korea

In the 1960s, Korea emerged as one of the significant trading countries in Asia. This led to a rapid increase in the use of arbitration as a convenient and reliable tool to resolve international business disputes. Korea first enacted its Arbitration Act in 1966. Although the history of arbitration in Korea dates back to the Chosun Dynasty (1392-1910), the practice of commercial arbitration as applied in contemporary international trade is a recent phenomenon. Arbitration first appeared in modern commercial treaties such as the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States in 1957. Korea has also acceded to special international conventions on dispute settlements such as the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) of 27 August 1965.14

The new Korean arbitration law entered into force on 31 December 1999. It is mainly modelled after the UNCITRAL model law. The previous 1966 Arbitration Law was modelled after old German arbitration law. Korean Law in general has been heavily influenced by the German legal system. On the other hand, Korean arbitration practices have been more influenced by major international arbitration centres such as AAA in New York, ICC in Paris and LCIA in London. As a result, there was a large gap between arbitration law and practice. Hence, the 1999 amendment serves to mend the gap and to meet the need of internationalising the Korean arbitration system by adopting the UNCITRAL Model Law and repealing the old arbitration law and practices.

In 1970, Korean Commercial Arbitration Board (KCAB) was formed. In 1973, Korea ratified the New York Convention. Due to Korea's unprecedented economic growth and the explosive increase in international trade since that time, the KCAB has dealt with a rapidly growing number of arbitration cases not only between domestic companies but also involving foreign entities. Korea has also become a place of arbitration for many disputes supervised by internationally renowned arbitral institution such as the ICC. Thus, arbitration has taken firm root as a major dispute resolution tool for international transactions in Korea.15

Ad hoc arbitration is rare in Korea. KCAB arbitration is most widely used in Korea because it is considered less expensive than arbitration administered by other international arbitral institutions. According to a recent study, the administrative costs that the parties pay to the KCAB are on average about one-fifth those of the ICC if the claim amount is less than US$150,000; about one-ninth if the claim amount is between US$150,000 and US$10 million; and about one third if the claim amount is larger than US$10 million.16 Another reason accounting for the popularity of arbitration in Korea is that parties have autonomy to agree on the method of appointing arbitrators. Under Korean law, there is no restriction on the nationality of arbitrators or lawyers representing parties to a dispute.

Japan

Despite Japan's importance to world trade and technology, Japan has not frequently been selected as a place for international arbitration. The Japan Commercial Arbitration Association (JCAA), a representative institution for international commercial arbitration in Japan, hosted only 12 new cases in 2009. Considering the size of the national economy and transnational transaction, it is rather surprising that the number of international arbitration cases in Japan has been relatively small.

This trend has been explained in several ways. One reason is explained by a cultural aversion to adjudicative processes, which represent a disruption of social harmony. The Japanese have a strong preference for negotiated settlements. To them, arbitration is like litigation in court, which is analogous to engaging in a full-out war.17

Another is the fact that until recently, even when arbitration took place in Japan, foreign lawyers were not allowed to appear in Japanese arbitrations. As a result, non-Japanese practitioners in large international law firms considered Japan as an undesirable locale for arbitration and so advised their clients. 18

Prior to 2004, Japan's failure to modernise its 100-plus year old arbitration law (Law Concerning Procedures for Public Notice and Arbitration) had been a significant disadvantage to its selection as an arbitral site when so many other jurisdictions had adopted the UNCITRAL Model Law. This reason is believed to be the biggest impediment to popularising international arbitration in Japan. 19

In 2003, Japan adopted new arbitration legislation called the Arbitration Law, which followed UNCITRAL Model Law on International Commercial Arbitration and which came into effect in 2004. There are three distinguishing features of the new law. First and most significant is that it essentially adopts the key feature of New York Convention as well as the Model Law. Second, the new law granted broad autonomy to the parties over the procedures relating to arbitration. Third is its clarification of the support role for Japanese courts in interim measures and enforcement. 20

The Arbitration Law is one which is progressive for its time as it provided several deviations from the UNCITRAL Model Law in order to incorporate global trends in international arbitration. For instance, the Arbitration Law provides that agreements made by way of exchange of 'data messages', such as e-mails, are valid. 21

Another example is with regard to the choice of law by the arbitral tribunal. While article 28(2) of the UNCITRAL Model Law provides that 'falling any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable', article 36(2) of the Arbitration Law provides that 'failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected'. The Arbitration Law directs arbitral tribunals to apply the appropriate law of a particular nation without applying conflict of laws rules of any particular nation.22

An additional deviation from the UNCITRAL Model Law addresses criticism of the former practice of arbitration in Japan. Formerly, it was not rare for Japanese arbitrators to recommend that parties enter into settlement during the course of arbitration, such practice being a reflection of Japanese court practices. However, the practice was often criticised, especially from foreign parties with common law backgrounds who generally consider that once the arbitrators act as mediators, they should not resume their roles as arbitrators when the settlement fails. To eliminate such criticism, the Arbitration Law provides that the arbitral tribunal may attempt to settle the dispute only if the parties consent to do so. The Arbitration Law provides that such consent shall be in writing unless both parties agree otherwise. 23

Simultaneous with Japan's enactment of the Arbitration Law, the JCAA updated its arbitration rules in light of the new arbitration law. The rules generally followed the UNCITRAL Arbitration Rules and bring the practice and rules of the JCAA into alignment not only with the new arbitration law but also with the rules in effect at other leading international commercial dispute resolution organisations.

Japan's enactment of an arbitration statute based on the UNCITRAL Model Law, along with amendments to the JCCA rules, indicates that Japan has warmed up to international arbitration and would like to become an international arbitration centre. Furthermore, Japan's political climate and society are stable. In conducting arbitration in Japan, a country with an independent judiciary and a stable political and social environment, there are unlikely to be surprising, unreasonable interventions in arbitral proceedings or arbitral awards by Japanese courts. However, as can be seen from statistics, arbitration has not exactly picked up years after the changes made to the laws and JCCA rules. Ultimately, Japan's growth as an arbitral centre may depend on whether the culture's distaste for adjudicatory processes will evolve to accept international arbitration as the last step of a negotiation continuum. 24 Also, the JCAA needs more political and financial support from the Ministry of Justice and perhaps

other bodies such as the Japan Chamber of Commerce and the Nichibenren. 25 It remains to be seen whether significant change will happen.

Vietnam

Although Vietnam joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, many foreign awards have not been enforced because of the country's narrow definition of commercial activities. In 1987, Vietnam embarked on a process of comprehensive economic and political renewal, known as 'doi moi', which has resulted in important social, economic and legal changes in the regulation and support of domestic and international commercial activity.

To deal with today's diversified and complex economic disputes there must be an organisation with sufficient authority and jurisdiction to resolve disputes that arise. To meet this need Vietnam has established two arbitration institutions to settle economic disputes. They are the Vietnam International Arbitration Centre (VIAC) and the Economic Arbitration Centres. The VIAC's jurisdiction extends to both international and domestic commercial disputes; the Economic Arbitration Centres are responsible for domestic disputes only. In addition, Vietnam has passed a new Ordinance on Commercial Arbitration which was passed on 25 February 2003 by the XI National Assembly Standing Committee of Vietnam. The new ordinance adopts the provisions of the UNCITRAL Model Law, in line with a general trend in jurisdiction across Asia. This created a viable infrastructure for commercial arbitration in Vietnam.

The preamble of the ordinance clearly states that it aims to contribute to settling disputes arising from commercial activities, to ensure the rights to business freedom, to protect the rights and legitimate interest of the involved parties, and to develop the market economy. Practically, the ordinance aims to keep arbitration in Vietnam current with international arbitration practice.26

The enactment of the ordinance was a significant development in arbitration in Vietnam. Moreover, it contains not only a lot of changes but also clear definitions and terms used in arbitration proceedings. For example, the term 'commercial' used to be interpreted narrowly under Vietnamese law. Now, in the ordinance, Vietnam adopted the broad definition of 'commercial' that covers virtually any economic or business transaction.

Party autonomy is specifically provided for in the ordinance and in the Arbitration Rules of VIAC. For instance, parties are free to decide on whether to embark on ad hoc or institutionalised arbitration; number of arbitrators; procedure for appointment of arbitrator; to determine the language to be used in the arbitration proceedings. The role of the court under the ordinance is to act as a facilitator to ensure the smooth functioning of the arbitration process rather than to interfere in it.

The establishment of VIAC, the joining of the New York Convention and the enactment of the ordinance which follows the UNCITRAL Model Law are all clear evidence of Vietnam's interest in and awareness of the special features and needs of international commercial arbitration. This is encouraging and certainly bodes well for other measures still to be taken in order to provide a stable and hospitable legal climate for economic growth, foreign investment, and successful and reliable commercial dispute resolution. 27

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The interrelation between arbitration and the growth of Asian economies is inseparable. The consequence of Asian economies like China and India bourgeoning is the increase in international commercial disputes. This would without a doubt lead to a concomitant growing acceptance of arbitration as a form of dispute resolution and therefore lead to continued growth of arbitration in the region. At the same time, countries with established arbitration institutions and progressive arbitration laws would be deemed attractive to foreign investors who are interested in investing in Asia. Thus, countries with established arbitration institutions and progressive arbitration laws in place must maintain their advantage and less developed countries must draw alongside with their more developed Asian counterparts.

Endnotes

Wider prospects for ICSID arbitration under China's BITs

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Summary

ENDNOTES

Wider prospects for ICSID arbitration under China's BITs

Despite the economic downturn, cross-border investment throughout Asia remained strong in 2008. Notably, intra-regional investment, particularly investment originating from Hong Kong and mainland China, grew in 2008. FDI outflows from China to its Asian neighbours more than doubled from US$22 billion in 2007 to US$52 billion in 2008.1 Similarly, inbound investment to both mainland China and Hong Kong also continued to grow in 2008.2

As the region, and China in particular, continues to be a powerful force of both inbound and outbound investment, the legal protections afforded under investment treaties to Asian investors abroad, and to foreign investors in Asia, continue to be important for investors and governments. Given the significant role of both Chinese investors abroad and foreign investors in China, one of the most notable developments for investment treaty arbitration over the past year is the Decision on Jurisdiction and Competence in the case of Tza Yap Shum v the Republic of Peru (Tza Yap Shum), which involved an investment treaty between China and Peru.3

Background - investment treaty (ICSID) arbitration under China's BITs

China has an extensive network of bilateral investment treaties (BITs), with more than 90 BITs in force with a diverse grouping of developed and developing countries in Asia and far beyond. BITs provide foreign investors with legal protections against government mistreatment. Importantly, BITs typically allow foreign investors to enforce such promises directly against the government in international arbitration, such as arbitration under the auspices of the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

However, with the exception of a few recent 'modern' BITs,4 the majority of China's treaties have generally been thought to be of little immediate use to foreign investors, because they provide only limited rights for an investor to resort to international arbitration if China breaches its treaty obligations to such investors. Now, that perception may change as a result of the recent Tza Yap Shum decision (which was brought under the 1994 China-Peru BIT).

In the vast majority of its BITs, China has consented only to allow investors to seek investor-state arbitration in fora such as ICSID if the dispute involves 'the amount of compensation for expropriation.'5 For all other disputes, China's BITs typically provide that an investor may seek arbitration only 'if the parties to the disputes so agree.'6 Without such ad hoc consent to international arbitration, the BITs direct investors to local courts. To date, no such arbitrations based on post hoc consent by China have been registered with ICSID, the most popular forum for BIT arbitration.

On 19 June 2009, the ICSID tribunal in the case of Tza Yap Shum released its Decision on Jurisdiction and Competence, which may change the perception of China's early generation of BITs and their clauses limiting international arbitration to 'the amount of compensation for expropriation'. The Tza Yap Shum decision is the first published investor-state arbitration decision under a Chinese BIT. It is the first time that a tribunal has interpreted the scope of China's limited arbitration clause. Prior to the issuance of the tribunal's decision, many thought that tribunals could only determine the amount due to an investor after an acknowledged expropriation, but not whether an expropriation had occurred in the first instance. The tribunal in Tza Yap Shum asserted a broader scope for its jurisdiction,

determining that it could also assess whether the claimant had suffered an expropriation at the hands of the government (in this case, the Peruvian government).

As a result, the tribunal's decision suggests that the broad network of Chinese BITs may provide greater protections than previously thought. This will be of particular interest not only to foreign investors making investments into China, but also to Chinese investors making investments abroad.

Overview of the Tza Yap Shum decision

Tza Yap Shum, a Chinese national resident in Hong Kong, was the majority shareholder of TSG Peru SAC (TSG), a Peruvian food products company and one of the largest manufacturers and distributors of fish flour in Peru. Claimant alleged that in 2004 the Peruvian Tax Administration initiated actions against his investment that resulted in the total destruction of TSG's operations. In particular, Mr Tza alleged that the Peruvian Tax Administration imposed unlawful and arbitrary tax liens on his company's accounts that prevented it from operating. As a result, his investment was no longer economically viable.

Peru asserted three main objections to the tribunal's jurisdiction. First, it argued that Mr Tza did not qualify as an investor under the China-Peru BIT because he was a resident of Hong Kong. Second, Peru asserted that Mr Tza's investment was not protected because it was held indirectly through investments in the British Virgin Islands. Third, Peru argued that the tribunal only had jurisdiction to determine the value of the expropriated property, and not whether an expropriation had actually occurred in violation of the treaty. In response, Mr Tza argued, inter alia, that, pursuant to the most-favoured nation clause, the tribunal was required to apply the substantive protections of the Peru-Colombia bilateral investment treaty, which includes a much broader dispute resolution clause allowing investor-state arbitration for disputes related to protection and the application of the fair and equitable treatment standard (among other provisions).

Residency

Peru argued that because Mr Tza was a resident of Hong Kong, he was not entitled to protections of a BIT between Peru and China. Notably, Peru argued that because Hong Kong is a Special Administrative Region with broad autonomy - including the right to enter into international treaties - Mr Tza could not seek protection under a Chinese treaty. The tribunal rejected this logic, concluding that nationality was fundamentally a question of domestic law and, under Chinese law, 'Hong Kong residents of Chinese descent and born in Chinese territories (including Hong Kong) are Chinese nationals.'[7]

However, because certain of China's BITs may exclude Hong Kong from their coverage, investors from Hong Kong should carefully review any such BITs to ensure that they include sufficiently broad language before relying on them for investment protections. As an additional note of caution, the Tza Yap Shum decision only addresses the nationality of a natural person, not issues surrounding corporate ownership or nationality. Corporate investors must always examine carefully both the BIT in question and the law of their home state in order to determine whether or not they satisfy the nationality criteria as a matter of domestic law.

Indirect investments

Peru also argued that Mr Tza failed to make a covered investment in Peru because Mr Tza made his investment through a shell company established in the British Virgin Islands. Mr Tza owned 100 per cent of the BVI entity, which in turn owned 100 per cent of the Peruvian company. Peru argued that indirect investments were not covered by the BIT.

The tribunal concluded that such a structure was permitted under the China-Peru BIT, and flatly rejected Peru's argument, saying that '[t]he Tribunal would expect such a limitation would have been included explicitly in the BIT.'[8] However, the tribunal warned that a number of other BITs entered into by China with third parties do include such explicit limitations.[9] Thus, investors should carefully examine any potential restrictions on indirect investment prior to structuring their investments in order to ensure maximum protection from a Chinese (or indeed any) BIT.

Expropriation

In probably the most significant argument on jurisdiction, Peru argued that Mr Tza's claims fell outside of the scope of article 8(3) of the Peru-China BIT, which provides that '[i]f a dispute involving the amount of compensation for expropriation cannot be settled within six months . . . it may be submitted at the request of either party to the international arbitration."

Specifically, Peru argued that it had consented to arbitration under the BIT '[o]nly if the investor alleges that the State accepting the investment expropriated his investment and the domestic courts determine that the investment was, in fact, expropriated.'[10] Peru further clarified its position, arguing that 'the only type of dispute that may be settled by ICSID arbitration is that involving the amount of compensation owed to the investor, once the occurrence of an illegal expropriation has been confirmed.'[11] Peru asserted that the negotiating history of the BIT supported this view and presented witness statements from former negotiators supporting its position.[12] Peru further argued that indirect expropriation is not covered by the BIT.

Mr Tza argued that Peru's interpretation of the BIT was 'literal and formalistic' and urged a broader reading of the BIT.[13] Of particular note, he argued that 'it would be inappropriate to interpret the BIT as requiring a preliminary determination by Peruvian courts regarding the legality of an alleged expropriation, especially since, according to the analysis of Claimant, Peruvian law does not recognize or provide legal action in case of indirect expropriation.'[14]

The Tza Yap Shum tribunal sided with Mr Tza and held that it was required to analyse more than simply the amount of compensation due. It based its determination on a number of factors, including the text of the treaty, as well as the negotiating history and the object and purpose of the treaty. Specifically, the tribunal concluded that in order 'to give meaning to all the elements of the article [on expropriation], it must be interpreted that the words "involving the amount of compensation for expropriation" includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due if any.'[15]

The tribunal primarily based its determination on the text of the treaty, using the interpretive guidance provided in the Vienna Convention on the Law of Treaties. The tribunal first examined the meaning of the phrase 'a dispute involving the amount of compensation for expropriation' and determined that 'the broadest interpretation, happens to be the most appropriate.'[16] In particular, the tribunal focused on the use of the word 'involving' and determined that it was not limiting, but rather should be read to include disputes related to the amount due, not simply the amount itself.[17] The tribunal identified a number of such potential issues, including 'whether (i) an instance of expropriation, nationalization, or similar measure has taken place; (ii) the same has met the requirement of public interest; (iii) the same has followed an appropriate domestic legal procedure; (iv) there

has been discrimination, (v) compensation will be paid, (v) (sic) such compensation has been equivalent to the value of investment expropriated, paid in a convertible and freely transferable currency and without unreasonable delay.'[18]

In addition, the tribunal found support for its interpretation by looking at the 'fork in the road' provision in article 8(3), which requires an investor to make an irrevocable choice between taking its dispute to local courts or to international arbitration under the BIT. The tribunal explained that the effect of the fork in the road provision was that 'if an investor submits a dispute to the competent tribunal of the Contracting State accepting the investment, the investor may not have access to ICSID arbitration at all.'[19] The tribunal thus reasoned that Peru's argument that the tribunal must defer to local courts as to whether an expropriation had occurred would effectively prevent investors from ever seeking ICSID recourse, since such recourse would be conditioned on seeking a judgment from a local court, which, as a result of the fork in the road provision, would make ICSID arbitration impossible. Thus, the tribunal concluded that investors must be able to have all claims related to the expropriation heard by an international arbitral tribunal.

The tribunal found additional support for its interpretation in the negotiating history of the treaty. Both sides put forth testimony of negotiators and submitted written negotiating history in order to support their interpretation. The tribunal concluded that the negotiating history supported its broader interpretation, based on statements of negotiators, proposed revisions that were not adopted by the BIT parties, and other BITs entered into by the parties.-[20]

Finally, the tribunal also examined other arbitration decisions and awards. While no Chinese BIT's 'amount of compensation for expropriation' language had yet been interpreted, several investor-state tribunals have interpreted similar provisions with respect to other countries' BITs, and reached conflicting conclusions. In some cases - notably Saipem v Bangladesh-[21] and Telenor Mobile Communications AS v Hungary[22] - the tribunals found that they had 'jurisdiction to try the disputes regarding the existence and/or lawfulness of an expropriation.'[23] Others, however, reached the opposite conclusion.[24] The tribunal reviewed these decisions, and concluded that the weight of the evidence in the immediate case was consistent with the decisions establishing a broader scope of jurisdiction.[25]

Thus, the tribunal's decision reinforces the possibility that investors relying on China's BITs may bypass local courts and proceed directly to international arbitration if a dispute arises with the host government regarding expropriation of the investment. An investor need not first procure confirmation from a local court that an expropriation has occurred. Rather, under the reasoning of the Tza Yap Shum tribunal's decision, an investor may bring all disputes related to expropriation directly before an international tribunal under the Chinese BIT. While prior tribunals' decisions are not formally binding on future investor-state BIT tribunals, they can have significant persuasive force, particularly as multiple decisions begin to accumulate on one side of an issue.

Most favoured nation (MFN)

While the Tza Yap Shum tribunal read the China-Peru BIT's dispute settlement provision expansively, it read the most favoured nation (MFN) clause narrowly. The MFN clause requires that the host government's treatment of investments covered under the BIT 'shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third party.' Mr Tza argued that the MFN provision operated to incorporate the protections afforded to investors of a third party through other treaties

(in this case the Peru-Colombia BIT) into the China-Peru BIT. In particular, Mr Tza argued that the dispute resolution clause of the Peru-Colombia BIT, which allows for investor-state arbitration of 'any dispute of [a] legal nature,' must also be afforded to Mr Tza. Thus, Mr Tza argued that 'he is entitled to submit to the Arbitral Tribunal not only disputes related to expropriations, but also disputes related to protection and fair and equitable treatment.'26

Peru argued that the MFN provision could not incorporate additional arbitration protections as the BIT was complete without amendment. In addition, Peru argued that it had not consented to arbitration of these matters.27

The tribunal sided with Peru, citing the plain meaning of the text, and using the interpretive principles established by the Vienna Convention on the Law of Treaties. The tribunal concluded that it could not import the dispute resolution provision from the Peru-Colombia BIT into the China-Peru BIT. In part, it based its decision on the specificity of the limitation in the Peru-China BIT, reasoning that such specific limitations should trump more general obligations found in the MFN clause. The tribunal concluded that 'the specific wording of Article 8(3) [discussing the scope of consent to investor-state arbitration] should prevail over the general wording of the MFN clause in Article 3.'28 The tribunal relied heavily on the recent decision in Plama v Bulgaria,29 which interpreted the MFN clause narrowly, while at the same time differentiating its opinion from other recent awards which interpreted the MFN clause more broadly based on the facts of the case.30

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The tribunal's decision in Tza Yap Shum marks the first time (at least as a matter of public record) that an investor has brought a claim under a BIT with China. The Tza Yap Shum tribunal afforded an expansive reading to the China-Peru BIT's arbitration provision, allowing investors to bypass local courts and have their disputes arising from expropriatory actions addressed directly in international arbitration. While the tribunal did not allow the investor to import an even broader dispute resolution clause by means of the MFN clause, the expanded scope of the arbitration provision is still notable.

If other tribunals follow the Tza Yap Shum decision's approach, many of China's BITs will be more powerful, and may provide more meaningful legal protections for foreign investors than previously anticipated. As additional ICSID cases are brought under Chinese BITs, foreign investors in China, and Chinese investors abroad, should monitor developments closely to ensure that they can take advantage of all available BIT protections.

Given the continued growth of both outbound investment from Chinese investors and inbound investment into China, the protections afforded by BITs with China continue to be of particular importance to both investors and governments throughout the Asian region. The wider prospects for arbitration suggested by the tribunal's decision in Tza Yap Shum provides direction for investors to carefully evaluate available treaty protections before investing in Asia, or making investments from Asia into other countries around the world.

Endnotes

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Summary

ENDNOTES

Malaysian Arbitration Act 2005

Arbitrations in Malaysia are governed by the Arbitration Act 2005 (Act 646) (the 'Act') and the Arbitration Act 1952 (Act 93). The Act came into force on 15 March 2006 and repealed the Arbitration Act 1952 as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320). However, the Arbitration Act 1952 continues to apply to arbitrations commenced prior to the date of commencement of the Act. This article shall primarily discuss the various provisions of the Act with regard to arbitral tribunals and arbitral awards, and will also consider several issues that have arisen in regard to the application of the Act.

The enactment of the Act has been long sought as the Arbitration Act 1952 was unsuitable for the effective resolution of modern commercial disputes. The legislature received numerous proposals and suggestions on how the laws governing arbitrations, which were increasingly being used as a method of dispute resolution in Malaysia, should be drafted. The Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and with the passing of the Act, Malaysia is in line with modern international practice.

The Act is divided into four parts as follows:

- part I: preliminary - sections 1 to 5 (includes provisions on the commencement and definitions);
- part II: arbitration - sections 6 to 39 (the essence of the Act);
- part III: additional provisions relating to arbitration - sections 40 to 46 (provides for the courts to exercise some control over the arbitrations); and
- part IV: miscellaneous - sections 47 to 51 (deals with issues such as liability of arbitrators and immunity of arbitral institutions).

Arbitral tribunal

Section 12(1) of the Act states that parties are free to determine the number of arbitrators to preside over the arbitration. In this regard, the parties may have decided on the number of persons and have it specified in the arbitration clause itself and if not, at the commencement of arbitration. Section 12(2) of the Act states that where the parties are unable to agree on the number of arbitrators, depending on whether it is a domestic or international arbitration, the Act prescribes that a sole arbitrator shall be appointed for domestic arbitrations and three arbitrators shall be appointed for international arbitrations.

The procedures for appointment of arbitrators are laid down in section 13 of the Act. This section also provides ample liberty to the parties to determine the procedures that are to be adopted with regard to the appointment and further provides methods that are to be used if parties are unable to agree. Section 13(1) states that a person's nationality shall not be a reason to preclude someone from acting as an arbitrator unless agreed otherwise by the parties. If the parties cannot agree on the procedure for the appointment of arbitrators or on who shall sit on the arbitration panel, section 13(3) stipulates that in an arbitration consisting of three arbitrators, both parties shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator as presiding arbitrator. Section 13(4) further states that if the appointed arbitrators are unable to agree on the third arbitrator, either party may apply to the director for the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for such appointment. Section 13(5) states that if parties are unable to agree on the arbitrator

in the case of a single arbitrator, either party may apply to the director for the KLRCA for the appointment. Section 13(7) of the Act provides that should the director for the KLRCA fail to act in the manner required as stated previously, either party may then apply to the High Court for appointment.

The KLRCA has adopted the UNCITRAL Rules and therefore its appointment procedures are according to the said rules. In this regard, the appointment will be carried out based on the list procedure (as provided in article 6 of the UNCITRAL Rules). Both parties would be given a list of at least three arbitrator's names (including other details such as qualifications and nationality) and the parties are required to delete the names of those to whom he objects. The remaining names should be ranked in order of preference and returned to the KLRCA within 15 days. KLRCA would then elect the arbitrator in accordance with the returned lists. In the event that this method fails, the KLRCA shall then use its discretion to make the appointment. In making an appointment, the KLRCA shall have due regard to all such considerations that are likely to secure an independent and impartial arbitrator and shall also consider the issue of the arbitrator's nationality with the nationality of the parties in mind. The aforementioned considerations stated in the UNCITRAL Rules are also provided for in section 13(8) of the Act. Section 13(9) states that the decision of the director for KLRCA or High Court is final and is not appealable.

Section 14 of the Act makes it mandatory for a person who is to be appointed to act as an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to that person's impartiality or independence. The section also states that an arbitrator may be challenged if the circumstances give rise to justifiable doubts as to his impartiality or independence or if he does not possess the qualifications agreed to by the parties. Section 15 stipulates the procedures that are to be adopted when challenging an arbitrator.

Section 16 deals with a situation when an appointed arbitrator fails to act or it becomes impossible for the arbitrator to act, whereas section 17 specifies the matters relating to the appointment of a substitute arbitrator.

Unlike the Arbitration Act 1952 which did not allow the arbitral tribunal to determine its own jurisdiction, the Act by virtue of section 18 grants the arbitral tribunal the authority to rule on its own jurisdiction, including on matters related to the validity of the arbitration agreement. Section 18 of the Act also provides for the procedures and time limits imposed for raising an objection as to the arbitral tribunals' jurisdiction. It also stipulates the manner of an appeal to the court (which shall have the final say) in regard to the arbitral tribunal's ruling on the issue of its jurisdiction. In the case of Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor,[1] the court observed as follows:

> Parliament has clearly given the arbitral tribunal much wider jurisdiction and powers. And, such powers would extend to cases even when its own jurisdiction or competence or scope of its authority, or the existence or validity of the arbitration agreement is challenged. A further point to note is that even when an arbitral tribunal holds that an agreement is null and void, it "shall not ipso jure entail the invalidity of the arbitration clause" since "an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement".

Also, in the case of CMS Energy Sdn Bhd v Poscon Corp,[2] the court stated as below:

> […] the language used in that section (Section 18) confers on the arbitration broad and wide powers to decide on issues raised before it - not only the substantive issues but also on the point of preliminary objections as to its jurisdiction. That section also allows any party to the arbitration who is not happy with the preliminary rulings by the arbitrator to appeal to the High Court against such rulings within 30 days of its receipt.

Section 19 of the Act allows an arbitral tribunal to grant interim measures, which includes among others, security for costs and discovery of documents. However, the Act is silent on whether the arbitral tribunal could grant any of the interim measures on an ex parte application. It is to be noted that similar provisions for arbitral tribunals were not found in the Arbitration Act 1952 and therefore the considerations that the arbitral tribunal may have when deciding on such an interim measure has not been tested. It is likely that in the event parties are to agree that the substantive laws to be applied in the arbitration are Malaysian laws, the arbitral tribunal would be influenced by how the Malaysian courts have decided on similar issues relating to interim measures.

The court may order security for costs if the plaintiff is insolvent or has changed its address in the process of the proceedings. However, these are not conclusive grounds that would automatically result in the court granting an order for security for costs. Ultimately, the court has discretion to grant or refuse an application for security for costs. In the exercise of the court's jurisdiction on such an application, the court will consider various other matters and these include whether the plaintiff's claim is made in good faith, the plaintiff's prospect of success, whether the application for security for costs has been made at a very late stage of the proceedings or whether it is being used oppressively.

Discovery of documents, which is the process of obtaining, within certain limits, full information and contents of all documents relating to the matters in question between the parties, is often done without any intervention by the court in actions commenced by way of writ. However, should such be necessary, the courts have discretion on application by one party, to order either party to make the necessary disclosures of documents or inspection of the same by the other party and also production of documents in court at trial. Similar to an application for security for costs, the court in exercising its discretion in an application for discovery considers various factors. The essence of the court's decision either to allow or to refuse a discovery application is the importance of the matters which are sought to be discovered for the purposes of a fair, just and speedy trial. There are limited grounds in which discovery may not be ordered and these include instances where the documents are protected by reason of legal professional privilege or where a person exercises his right to refuse to incriminate himself.

Procedures of arbitration

Upon the arbitral tribunal being appointed, the parties are then free to agree on the procedures to be followed by the arbitral tribunal in conducting the proceedings. Section 21(2) of the Act provides that the arbitral tribunal may conduct the arbitration in the manner it deems appropriate (subject to the Act) if the parties are unable to agree on the procedures. These include the powers to determine the admissibility, relevance and weight of any evidence and the fixing and amendment of time limits for the various steps of the arbitration.

Section 22(1) of the Act states that the parties are free to determine the seat of arbitration and failing their agreement, the seat of arbitration shall be determined by the arbitral tribunal. It is pertinent to note that determining the seat of arbitration is an important aspect of the arbitration process for the reasons stated below. As with the procedure for conducting the arbitration, parties are also free to determine the language that may be used for the arbitral proceedings. If parties are unable to agree, the arbitral tribunal may decide on the language to be adopted. Section 24(3) of the Act states that the language determined to be used shall apply to all written statements, hearings and the award. The arbitral tribunal may also order any documentary evidence to include a translation of the language agreed.

Section 25 of the Act stipulates that, with regard to the statement of claim and defence, the claimant shall state the facts to support the claim, the points at issue and the remedy sought, whereas the respondent shall set out his defence in respect of the matters stated by the claimant. However, the parties may agree otherwise on the elements that are to be included in these statements. The parties also may submit any relevant documents with their statements or make the necessary reference to the same or any other evidence which they will submit. Unless otherwise agreed, the parties may also amend these statements subject to the arbitral tribunal's approval.

Section 26 of the Act provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to have oral hearings or whether to conduct the proceedings by way of documents and other materials. Unless the parties agree that no hearings shall be held, the arbitral tribunal may, upon application by any party, hold oral hearings at an appropriate stage of the proceedings. The parties shall be given reasonable notice prior to any hearings. The parties are to ensure that all statements, documents and information given to the arbitral tribunal are also forwarded to the other party. The arbitral tribunal shall also communicate to the parties all expert evidence and evidentiary documents relied on in making its decision.

Section 27 of the Act lays down how the arbitral tribunal should deal with instances where parties are in default in regard to the proceedings. For instance, in the case of a claimant failing to communicate the statement of claim, the arbitral tribunal shall terminate the proceedings and in the event the respondent fails to communicate the statement of defence, the arbitral tribunal shall continue with the proceedings and not treat the failure as an admission to the claimant's allegations. If either party fails to attend the hearing or produce the documentary evidence, the arbitral tribunal may make an award on the evidence before it and if the claimant fails to proceed with his claim, the arbitral tribunal may make an award dismissing the claims or give such directions for speedy determination of the claim.

Arbitral awards

Section 2(1) of the Act defines 'award' as a decision of the arbitral tribunal on the substance of the dispute and it includes any final, interim or partial award, and any award on costs or interests. Section 36(1) of the Act states that all awards are final and binding.

Section 33 of the Act stipulates that the awards should be in writing and signed by the arbitral tribunal. If there is more than one arbitrator, the signatures of the majority of all the members would be sufficient provided that the reason for any omission is stated. Section 33 further provides that the award should state the reasons upon which it is based unless the parties to the arbitration had agreed otherwise or if the award is on agreed terms. The award shall also state the date and the seat of the arbitration.

Section 37 of the Act provides two bases in which an award may be set aside by the High Court. The first basis is when a party making the application provides proof of several limited instances which justify the setting aside of an award. Among these are if it is proven that the other party did not have the capacity to enter into the arbitration agreement or the arbitration agreement is invalid under the laws of Malaysia. Other instances which if proven would enable the High Court to set aside the award are where proper notice of the appointment of the arbitrator or arbitral proceedings were not given or that the award deals with a dispute not falling within the terms of submission of arbitration. The second basis for setting aside the award is when the High Court finds that the dispute is not capable of being settled by arbitration under the laws of Malaysia or that the award is in conflict with the public policy of Malaysia. It is worth noting that the grounds given in section 37 for setting aside an award does not relate to the merits of the case.

Section 42 of the Act, which provides that any party may refer any questions of law arising out of an award to the High Court, also provides that one of the options available to the High Court after determination of the award is to set aside the award in whole or in part. It worth noting that section 42 is in part III of the Act and thus parties to the arbitration, depending on the nature of the arbitration, may opt-in or opt-out as explained below.

Recognition and enforcement of awards, both of domestic arbitrations and that of awards from foreign states, are dealt with in sections 38 and 39 of the Act. However, section 38 of the Act is silent on whether it applies to awards of international arbitrations in Malaysia. With regards to awards from a foreign state, the section specifies that only awards from countries which are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 are recognised. Thus, it appears that awards from countries that are not party to the said convention would not be recognised and cannot be enforced under the Act.

In the recent case of Sri Lanka Cricket v World Sports Nimbus Pte Ltd,[3] the Court of Appeal held that a gazette notification by His Majesty Yang Di-pertuan Agong was a pre-requisite before enforcement of an award from a state is allowed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (this case was in regard to enforcement of an award pursuant to the Arbitration Act 1952), notwithstanding that the state was indeed a signatory to the New York Convention. This decision was reaffirmed in the case of Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd.[4]

There are no similar provisions in the Act and accordingly it appears that the requirement of the gazette notification by His Majesty as previously held may not be necessary for the recognition and enforcement of an award under the Act. It is certainly arguable that these cases are not applicable to a party seeking recognition and enforcement of an award from a foreign state which is a signatory to the New York Convention under the Act.

Section 38 also lays down the procedures that a party needs to comply with when seeking to enforce an award. Section 39 of the Act sets out the grounds in which the recognition or enforcement of an award shall be refused.

The Act does not repeal the Reciprocal Enforcement of Judgments Act 1958, which provides for the enforcement of arbitral awards from Commonwealth countries and scheduled countries as if it were a foreign judgment, provided that it is first registered in courts of the country in which the award was given.

Arising issues

Domestic and International Arbitrations under the Act

Although the Act applies to both domestic and international arbitrations, the Act makes a distinction between domestic and international arbitrations with regard to the application of part III of the Act.

Section 3 provides that parts I, II and IV apply to all arbitrations in Malaysia. However, section 3 of the Act further states that part III applies to domestic arbitrations unless the parties exclude its application in writing (opt-out) and part III would only apply to international arbitrations if the parties agree in writing to the same (opt-in).

An international arbitration is defined in section 2 of the Act as an arbitration where:

> (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;
>
> (b) one of the following is situated in any State other than Malaysia in which the parties have their places of business:
>
> (i) the seat of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

It is pertinent to consider if the character of a particular arbitration is deemed to be domestic or international as the parties may then choose to 'opt-out' or 'opt-in' with regard to part III of the Act as the case may be.

Further to the varying application of part III of the Act to domestic and international arbitrations, a determination of whether an arbitration is of domestic or international nature is necessary as section 12(2) provides that in the event parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators in the case of an international arbitration and a single arbitrator in the case of a domestic arbitration.

Also, section 30 of the Act states that in respect of a domestic arbitration, the substantive laws that are applicable shall be those of Malaysia. In regard to international arbitrations, the applicable substantive laws shall be decided by the parties to the arbitration. In the event that parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.

As stated above, the character of the arbitration is also necessary with regard to the recognition and enforcement, as an award from an international arbitration in Malaysia does not come within the ambit of sections 38 and 39 of the Act.

Based on the above definition of international arbitrations, it appears that the Act also does not apply to arbitrations where the seat of the arbitration is outside Malaysia. The courts in Malaysia have taken different approaches in dealing with this issue specifically in regard to the application of section 10 of the Act (the stay of proceedings provision).

In the case of Innotec Asia Pacific Sdn Bhd b Innotec GmBh,[5] where an arbitration was commenced in Germany by a German company against a Malaysian company, the Malaysian company sought an injunction to prevent the German company from proceeding with the arbitration, whereas the German company applied for a stay of the proceedings. The Malaysian company in opposing the stay application argued that the Act does not apply to foreign arbitrations. The High Court did not accept this argument and granted the stay stating that the Act does not only apply to arbitrations held in Malaysia. However, in the case of Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & 2 Ors,[6] the High Court held that it had no jurisdiction, statutory or inherent or by exercise of residual powers, to grant injunctive relief in matters where the seat of the arbitration is outside Malaysia. This decision was upheld by the Court of Appeal. Thus as it stands now, the Act has no application to arbitrations with seats outside Malaysia.

Absence of procedural rules

Order 69 of the Rules of the High Court provides the procedural laws that are to be adopted in the event that resort to the courts is necessary pursuant to Arbitration Act 1952. However, with the Act repealing the Arbitration Act 1952, these procedural laws (with the exception of rule 6, which is in regard to Reciprocal Enforcement of Judgments Act 1958) have become redundant to arbitrations commenced from 15 March 2006.

Although section 50 of the Act stipulates that any application to the High Court pursuant to the Act is to be made by originating summons, it is uncertain whether this mode of application in general form adequately provides for the various matters that may arise with regard to the role of the courts in arbitrations under the Act.

It is also worth noting that despite section 50 of the Act specifying that any application to the High Court is to be by way of an originating summons, an application for stay of proceedings would naturally be made in the existing proceedings for which the application is made.

Role of the courts

Section 8 of the Act states: 'Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.'

The Act specifies the instances where the courts are given a role with regard to certain matters. These include, among others, staying proceedings (section 10), the granting of interim measures of protection (section 11), assistance by the courts in the taking of evidence (section 29) and applications to the courts to set aside an arbitral award (section 37).

It is necessary to consider if the limitation placed on the court's intervention could be superseded by the court invoking its inherent powers. Prior to the commencement of the Act, there are two conflicting decisions of the Court of Appeal in this regard. The court held in the case of Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd[7] that it has no powers to intervene unless statutorily provided. In contrast, the Court of Appeal in the case of Bina Jati Sdn Bhd v Sum Projects (Bros) Sdn Bhd[8] was of the view that the courts have a supervisory jurisdiction over arbitration and arbitrators, and that the court may invoke order 92 rule 4 of the Rules of the High Court 1980 to make any order that may be necessary to prevent injustice. It remains to be seen how the courts will apply section 8 and whether its powers to intervene in arbitration proceedings would be limited to those that are specifically stated in the Act.

As stated above, section 10 of the Act allows a court to stay proceedings with regard to an arbitration agreement. Section 10 is similar to section 6 of the Arbitration Act 1952, which also provided for staying proceedings in court when its subject is that of an arbitration agreement. However, unlike section 6 of the Arbitration Act 1952, which granted the courts the discretion to grant a stay or otherwise, section 10 of the Act makes it mandatory that a stay be granted. There are only two instances in which the court does not need to grant a stay: first, if the arbitration agreement is null and void, inoperative or incapable of being performed; and secondly, if there is no dispute between the parties with regard to the matters to be referred. Also, unlike other applications made to the High Court pursuant to the Act by way of originating summons, a stay application pursuant to section 10 of the Act may be made in the proceedings for which a stay is applied; this includes proceedings that are commenced in the subordinate courts.

Section 11 gives the High Court the power to grant interim measures with regard to security for costs, discovery of documents, giving of evidence by affidavit, etc. Tthe arbitral tribunal, as stated above, is given similar powers to grant interim measures by way of section 19 of the Act. However, the powers given to the arbitral tribunal are fewer than those given to the High Court. For example, the powers to prevent the dissipation of assets is only given to the High Court.

As explained above, section 38 of the Act provides for the recognition and enforcement of arbitral awards by the courts.

Section 41 of the Act allows any party to an arbitration to refer a preliminary question of law arising out of the arbitration to the High Court either with the consent of the arbitral tribunal or every other party to the arbitration. Section 41 is in part III of the Act and depending on the nature of the arbitration, the parties may opt-in or opt-out.

Application of the Act to all arbitrations commenced after 15 March 2006

As stated above, the Act came into force on 15 March 2006 and repealed the Arbitration Act 1952. Therefore by virtue of section 51 of the Act, it appeared that the Act would apply for all arbitrations commencing after the said date, while the Arbitration Act 1952 would apply to arbitrations commenced before 15 March 2006. However, in light of the decision by the High Court in the case below, this is not so.

In the case of Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd,[9] the plaintiff and the defendant entered into a building contract in 2002, which contained an arbitration clause. In July 2007, the defendant served a statutory notice under section 218 of the Malaysian Companies Act 1965 on the plaintiff for the sum of 383,689.10 ringgit, being an alleged debt due under the building contract. To counter the notice, the plaintiff took out a writ action seeking a declaration that the statutory notice was wrong and premature as there was a bona fide dispute of the demanded sum, and there was a permanent injunction against the defendant from presenting a winding-up petition against the plaintiff. The defendant then filed a defence and counterclaim against the defendant. The plaintiff also filed an application to stay the defendant's action under section 10 of the Act. The court acknowledged that if the Act was applicable, it would have no choice but to stay the defendant's counterclaim. However, in view of the fact that the building contract between the plaintiff and the defendant was entered into prior to the Act and owing to the existence of clause 63.5 of the building contract (arbitration agreement), the court was of the view that it had to consider whether the Act or the Arbitration Act 1952 was the applicable. The court then decided that the Arbitration Act 1952 applied.

In arriving at its decision, the court considered the fact that the arbitration agreement, particularly clause 63.5 which referred to the Arbitration Act 1952, granted the defendant the right to make reference to the Arbitration Act 1952 should any dispute between the parties arise. The court also took into consideration the different wordings used in the Bahasa Malaysia version of the Act, which states that the Act does not apply to an arbitration agreement entered into before 15 March 2006 or when the arbitration proceedings were commenced before 15 March 2006. This decision was followed in the case of Hiap-Taih Welding & Construction Sdn Bhd v Bousted Pelita Tinjar Sdn Bhd (formerly known as Loagan Benut Plantations Sdn Bhd).10

Despite the position taken by the courts with regard to which statute applies to an arbitration, it should be noted that this has not been consistent. Before the decision of Putrajaya Holdings, the High Court in the case of Majlis Ugama Islam Dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor11 in deciding which act applies to a dispute arising out of an agreement entered into by the parties in 1992, held that since the arbitration was deemed to have commenced on 16 October 2006, the Act would apply instead of the Arbitration Act 1952. Also, in the yet to be reported case of Total Safe Sdn Bhd v Tenaga Nasional Bhd & TNB Generaltion Sdn Bhd,12 the court held that the statute applicable to a dispute arising from an agreement dated 5 July 2002 shall be the Act, as the arbitration had commenced subsequent to the Act coming into force. Also, it is interesting to note the observations of the court in the case of Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Anor,-13 where the arbitral proceedings governed under the Arbitration Act 1952 ended and both parties being dissatisfied with the award given, commenced separate judicial proceedings. One party referred certain questions of law under the Act and the other challenged the award itself pursuant to the provisions of the Arbitration Act 1952. The High Court ruled that the applicable statute was the Act as all proceedings relating to the final award were instituted after the coming into force of the Act.

In light of these decisions, there appears to be an ambiguity as to which statute would apply to arbitrations commenced after 15 March 2006, particularly with regard to disputes arising from agreements entered into well before the said date. It is necessary that the courts, particularly the appellate courts, reconsider this issue and also that the translation of the Bahasa Malaysia version of the Act be amended.

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The Act, which closely follows the Model Law, has certainly been long overdue and its enactment is welcomed by all relevant parties. However, it is evident that despite its infancy stage, there are already issues that hamper the smooth application of the Act and loopholes that may give rise to problems in the application of the Act in the future. Notwithstanding these problems, the implementation of the Act clearly shows Malaysia's commitment to recognising arbitration as an effective method of dispute resolution and to keep abreast with the rest of the international community.

Endnotes

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Australia

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 have further advanced the use of arbitration in other areas, particularly the energy and trade sectors. From an Australian perspective, the opening of foreign markets - especially in Asia - is also increasing the significance of the protection of foreign direct investment under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). While the number of investment arbitrations with Australian participation is expected to increase significantly over the next decade, the level of awareness about the different options of investment protection available under investment treaties still needs to be raised.

Australia is a party to 21 bilateral investment treaties (BITs), 20 of which were in force as at 1 November 2009. Most of the BITs designate ICSID arbitration for the resolution of disputes arising under these treaties. Australia has further entered into free-trade agreements (FTAs) with New Zealand, Singapore, Thailand, the United States and Chile, and is a party to the recently signed ASEAN-Australia-New Zealand FTA. Further FTAs are currently under negotiation with China, Malaysia, Japan, Korea and the Gulf Cooperation Council (GCC), in addition to the Pacific Agreement on Closer Economic Relations (PACER) Plus and the Trans-Pacific Partnership (TPP) Agreement.

Some of Australia's FTAs contain investment protection provisions similar to those commonly found in BITs. For example, 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 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 to 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. With the aim of providing a more modern and efficient arbitration law in Australia, the federal government announced a revision of the International Arbitration Act 1974 (Cth) (IAA). Following public submissions on potential amendments the revised act is expected to come into force in early 2010. At the same time, a move by several Australian states (including New South Wales and Victoria) to overhaul states' domestic arbitration legislation has gained significant momentum. Although no decision has yet been made, it appears that there is also strong support for adopting the UNCITRAL model law for domestic arbitrations, subject to some minor amendments to adapt the processes to particular domestic requirements.

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 launched its Expedited Arbitration Rules in late 2008. These have been drafted along the lines of ACICA's general arbitration rules, but provide special provisions to facilitate expedited proceedings. The objective of these rules is to provide quick, cost-effective and fair arbitration, 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 or going out of Australia by sea, this will pave the way for Australia to take 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 IAA which, as mentioned above, is under revision. Section 16 of the IAA adopts the UNCITRAL Model Law. It is possible for parties to opt out of the application of the Model Law by express written statement (IAA, section 22). The Model Law provides for a flexible and arbitration-friendly legislative environment, granting 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, making 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 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 reservation and it extends to all external territories.

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 states that an 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by both parties or contained in an exchange of letters or telegrams, the Model Law is more expansive in its definition, which 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 preceded the decision by the UK House of Lords in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, which confirmed the more liberal approach with regard to interpreting the scope of an arbitration agreement.

However, as the Federal Court of Australia 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 providing 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, although 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 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 the contract. There is authority from the High Court of Australia in relation to domestic arbitrations suggesting 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 may 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 must be made before the party has delivered pleadings or taken any other steps in the proceedings, other than the filing of an appearance, unless it is 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 they involve the determination of a matter 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 making 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 definitively 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 made clear 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 has not yet been fully resolved. Particularly in relation to competition, bankruptcy and insolvency matters (with regard to the latter, see

Tanning Research Laboratories v O'Brien (1990) 64 ALJR 211, as reported in Yearbook of Commercial Arbitration XV (1991), pp521-529), courts have occasionally refused to stay proceedings - 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 a 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 consumer protection matters under the Trade Practices Act are capable of settlement by arbitration. Further, 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. It 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 may seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An increasingly common issue that courts face arises when multiple claims are brought by one party, only some of which are capable of settlement. So far the courts have approached this issue by staying court proceedings only for those claims it considers 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 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 impose no special requirements with regard to the arbitrator's professional qualification, nationality or residence. However, arbitrators must be impartial and independent. Article 12 of the Model Law requires arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This duty continues throughout 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 containing 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 must 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 alleging the arbitrator's lack of impartiality, incompetence or unsuitability for the position (CAA, section 45).

Liability of arbitrators

Both the CAA, at section 51, and the IAA, at 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 arbitration procedure 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 strong 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 arbitrations than there are in domestic arbitrations. Under section 29(2) of the IAA, a party may either represent itself or choose to be represented by a duly qualified legal practitioner from any legal jurisdiction or, in fact, by any other person it chooses. This applies to all international arbitrations irrespective of whether or not the Model Law applies (in case the parties choose 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 in 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 have 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 in the absence of 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 manner 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 & Orient Shipping Corp [2006] SGHC 127, granting such interim measures 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 provision 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 sees 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 to make 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 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 be delivered to all parties to the proceedings. This date will be relevant for determining the period in which a party may 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, in either 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 a time limit in Model Law proceedings is not settled. 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 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 a 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 must be satisfied that there is 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 in some regards the latter case has been criticised 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 because 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 discussion about 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

Often, the most crucial moment for a party that has obtained an award is 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 in, 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 obligations 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 and in accordance with the laws of that state or territory. However, section 8 of the IAA only applies to awards made outside 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, and 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 courts may therefore 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.

China

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Summary

China

The principal legislation regulating arbitration proceedings in China is the PRC Arbitration Law (the Arbitration Law) promulgated by the National People's Congress on 31 August 1994 and taking effect from 1 September 1995. The Arbitration Law contains 80 articles which govern areas such as arbitration commissions, arbitration agreements, arbitration proceedings and the setting aside and enforcement of arbitral awards.

The Arbitration Law regulates both domestic and foreign-related arbitrations.1 It is silent on the meaning of the term 'foreign-related' but in a 1992 opinion of the Supreme People's Court on 'foreign-related civil litigation',2 'foreign-related' civil cases were described as 'cases in which either or both parties are a person of foreign nationality or a stateless person, or a company or organisation domiciled in a foreign country; or in which the legal facts that establish, change or terminate the civil legal relationships between the parties take place in a foreign country; or in which the subject matter of the dispute is situated in a foreign country.'

In 1986, the PRC became a member of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (the New York Convention), subject to reciprocity and commercial reservations.3 The PRC also became a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention) in 1993 and is a party to approximately 126 bilateral investment treaties.

Arbitration agreements

In order for a contractual dispute resolution mechanism to fall within the Arbitration Law, there must be a valid arbitration agreement. Article 16 of the Arbitration Law provides that an arbitration agreement shall be in writing and must contain the following elements: (i) an expression of the intention to resolve disputes by arbitration; (ii) the matters to be decided by arbitration; and (iii) a designated arbitration commission. An arbitration agreement can be concluded either before or after the dispute arises and may also be contained in a supplementary agreement.4

The principle of separability of the arbitration agreement is expressly acknowledged. Article 19 of the Arbitration Law provides that 'an arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement.' Accordingly, should the contract within which the arbitration clause is contained become invalid, such invalidity would not affect the enforceability of the arbitration clause. Therefore, the parties to the contract would still be bound to submit their disputes to arbitration in accordance with the terms of the arbitration clause. Article 19 specifically provides that 'the arbitration tribunal shall have the power to affirm the validity of the contract.'

Arbitration commissions

The requirement for an arbitration agreement in the PRC to specify a 'designated arbitration commission' to supervise the arbitration is contained in article 16 of the Arbitration Law. Although there is no definition of what constitutes a 'designated arbitration commission' in the Arbitration Law itself, it is generally accepted that this refers to one of the established arbitration commissions. Currently there are more than 180 such commissions, many of which are located in cities throughout the PRC, mostly dealing with domestic disputes. Among those most recently established is the new Shanghai Intellectual Property Arbitration Commission, opened on 29 October 2008 to resolve intellectual property disputes.

In the event that an arbitration agreement does not clearly identify the arbitration commission to which the dispute is to be referred, article 18 of the Arbitration Law provides that the parties may reach a supplementary agreement identifying the commission. If no such agreement is reached, then the arbitration clause is treated as null and void. On 23 August 2006, an Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (the 2006 SPC Interpretation) was issued by the Supreme People's Court providing that, where an arbitration commission is not expressly designated, the arbitration agreement will nevertheless be valid if the commission can be ascertained under the applicable arbitration rules specified in the agreement.5 However, where the arbitration agreement designates two arbitral commissions and the parties cannot agree on one of them, then the agreement will again be invalid.6

It can therefore be seen that the arbitration commissions, which derive their authority directly from the Arbitration Law,7 are a sine qua non of arbitration in China.

While not expressly prohibited by the Arbitration Law, it is generally accepted that ad hoc arbitration is not allowed in the PRC - a proposition for which there is some judicial authority found in the case of People's Insurance Company of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd.8 Although PRC judicial decisions, following the civil law tradition, are of no precedential value, this case nevertheless evidences the view of the Supreme People's Court, the highest court in the PRC.

Institutional Arbitration in China

Among the arbitration commissions in the PRC, China International Economic and Trade Arbitration Commission (CIETAC) is the principal institution for non-maritime international arbitration disputes.9 CIETAC, also known as the 'Court of Arbitration of the China Chamber of International Commerce',10 is based in Beijing and has a South China Sub-Commission in Shenzhen, a Shanghai Sub-Commission and a new Southwest Sub-Commission, which was set up by CIETAC in Chongqing in March 2009. In May 2008 CIETAC also established the Tianjin International Economic and Financial Arbitration Centre for the professional resolution of financial disputes. CIETAC is one of the world's busiest arbitration institutions, handling a total of 1,230 arbitrations in 2008.11

The CIETAC Arbitration Rules (the CIETAC Rules) were revised in 2005. The CIETAC Rules provide that CIETAC can accept cases involving: (i) international or foreign-related disputes; (ii) disputes relating to the HKSAR, Macao SAR or the Taiwan region; and (iii) domestic disputes.12 One significant change introduced in the 2005 revision is that the parties can agree in their arbitration agreement to apply other arbitration rules, or to modify provisions in the CIETAC Rules subject to compliance with the mandatory law of the place of arbitration.-13 On 1 May 2009, CIETAC implemented the CIETAC Online Arbitration Rules to regulate the resolution of e-business disputes in which the entire arbitration process is conducted using online communication methods.14

The general view is that arbitrations conducted under the auspices of foreign arbitration institutions are not recognised within the PRC, despite the absence of any express prohibition in the Arbitration Law. Although a case has been made for the recognition of such arbitrations under the existing Arbitration Law,15 it is generally thought unlikely that a PRC court would enforce an award made in circumstances where a foreign arbitration institution was involved in the supervision of arbitration proceedings within China.

The Arbitration Law does not purport to affect the validity of foreign institutional arbitrations, such as HKIAC, ICC or ad hoc arbitrations, where the seat of arbitration is outside the PRC. Therefore, if enforcement proceedings are brought by a successful party to such an arbitration, the PRC court should enforce the award under the New York Convention16 (or, if the seat is in Hong Kong, under the arrangements referred to in the final section below).

Place of arbitration

The new CIETAC Rules provide that 'where the parties have agreed on the place of arbitration in writing, the parties' agreement shall prevail'.17 Prior to the 2005 amendment to the CIETAC Rules, CIETAC arbitrations could only be held in China. However, by allowing the agreement of the parties to prevail, CIETAC is potentially allowed to administer arbitrations outside the PRC. Where the parties have not agreed on the place of arbitration, this will be at CIETAC's headquarters in Beijing or at one of its sub-commissions18 in Shanghai, Shenzhen or Chongqing.

Arbitrators

An arbitral tribunal may be composed of either one or three arbitrators, according to the agreement of the parties.19 The Arbitration Law provides specific qualifications for a person seeking an appointment as arbitrator, and also requires arbitration commissions to maintain a register of arbitrators in different specialisations.20 Prior to the 2005 amendment of the CIETAC Rules, arbitrators could only be appointed from the CIETAC panel. Subsequent to the revision, parties can agree to appoint non-panel arbitrators as co-arbitrator, presiding arbitrator or sole arbitrator subject to confirmation by the chairman of CIETAC.21 The 2005 amendment also introduced a list system for selecting the presiding arbitrator in which each party can nominate up to three arbitrators. If there is a common candidate in the parties' list, that person would automatically be appointed as the presiding arbitrator. If there is more than one common candidate, the chairman of CIETAC is required to select the presiding arbitrator from the list, or if there is no common candidate, from outside the list.22

The 2005 amendment to the CIETAC Rules introduced a requirement for arbitrators to sign a declaration and disclose in writing any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence.23 Article 34 of the Arbitration Law identifies specified circumstances24 in which the arbitrator must withdraw, or the parties have the right to challenge the arbitrator. A party can submit a request in writing to CIETAC for the arbitrator's withdrawal if it has justifiable doubts as to his or her impartiality or independence, and the chairman of CIETAC makes a final decision on the challenge.25

Jurisdictional challenges

Article 20 of the Arbitration Law provides that 'if a party challenges the validity of the arbitration agreement, he may request an arbitration commission to make a decision or apply to the People's Court for a ruling'.26 Therefore, the arbitral tribunal does not have the power to rule upon the question of whether or not it has jurisdiction to decide the dispute, as is the case with many jurisdictions and under many institutional rules today. The 2006 SPC Interpretation provides the further guidance that, where an arbitration commission has made a determination of the validity of an arbitration agreement, the court will not interfere with that determination.27 Hence, once the arbitration commission has decided the issue of the jurisdiction of the arbitral tribunal, the parties cannot appeal that decision further.

In this regard the CIETAC Rules28 give CIETAC 'the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case.' In addition, they also give the power to CIETAC to 'delegate, if necessary, such power to the arbitral

tribunal.' An objection to an arbitration agreement and/or jurisdiction of the arbitral tribunal is required to be made before the first oral hearing, if there is one, or before the first substantive defence if it is a document-only arbitration.29 Also, it is expressly provided that such jurisdictional challenge would not affect the progress of the arbitration proceedings; hence, there is no stay pending a decision by CIETAC on the jurisdiction of the arbitral tribunal.30

Consistent with article II of the New York Convention, the existence of a valid arbitration agreement would prevent a party applying to the court to resolve a dispute covered by that agreement.31 Article 5 of the Arbitration Law provides that 'if the parties have concluded an arbitration agreement and one party institutes an action in a People's Court, the People's Court shall not accept the case, unless the arbitration agreement is null and void'. If court proceedings have already been commenced, the party wishing to object to the court's jurisdiction on the basis of a valid arbitration agreement is required to do so before the first hearing, otherwise it would be considered to have renounced the arbitration agreement.32 However, it is advisable for a party who wishes to bring a jurisdictional challenge before the court to do so as soon as possible, and preferably before submission of its defence.33

Conciliation by arbitral tribunal

Traditionally, conciliation is the preferred method of dispute resolution in the PRC,34 and conciliation by an arbitral tribunal has been a prominent feature of PRC arbitrations. Article 51 of the Arbitration Law provides that: 'The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation.' Conciliation may either be initiated by the parties themselves, or by the arbitral tribunal with the consent of the parties. If the conciliation leads to a settlement agreement, the arbitral tribunal may make either a written conciliation statement or an arbitration award in accordance with the terms of the settlement agreement. If the conciliation procedure fails to result in a settlement, the arbitral tribunal will proceed with the arbitration.

The CIETAC Rules also provide for the combination of conciliation and arbitration.35 These contemplate both tribunal-facilitated and non-tribunal-facilitated conciliation of the dispute, and provide that in both cases, the arbitral tribunal is to make an award in accordance with the terms of any settlement agreement.36

One of the perceived problems with the same arbitral tribunal acting as both conciliator and arbitrator at different stages of the proceedings is the effect upon its neutrality and impartiality. For conciliation to be effective, parties must be able to discuss their own case openly with the conciliator, including its strengths and weaknesses. However, in the event that the conciliation fails, the conciliator would resume the role of an arbitrator and render an arbitral award which should not reflect matters which may have been disclosed for settlement purposes only. In this regard, article 40(8) of the CIETAC Rules provides that 'where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defence or counterclaim in the subsequent arbitration proceedings'. However, it is difficult to see how views formed or, more particularly, expressed by the tribunal during the conciliation process could be expected to change when the tribunal later acts in an arbitration role, and why conclusions formed during the conciliation process would not therefore be expected to find their way into the award.37

In a recent opinion issued by the Supreme People's Court on 24 July 2009, it has been confirmed that a settlement agreement reached by way of conciliation has the force of a contract and is binding and enforceable, irrespective of whether the conciliation is carried out by the court, an arbitration institution or privately between the parties.38 In relation to conciliation by the court, however, a judge is not permitted to hear a case in which he previously served as the conciliator without the consent of the parties.39

Enforcement of arbitral awards

If the parties specify in the arbitration agreement a place of arbitration within a Convention state outside the PRC, the CIETAC award rendered by the arbitral tribunal would be a foreign arbitral award, enforceable in the PRC under the New York Convention. This applies to awards in both foreign institutional and foreign ad hoc arbitration proceedings. Enforcement of a Convention award can only be refused on very limited grounds.40 However, where the foreign CIETAC arbitration is between two PRC parties, it is generally considered that such award may not be enforceable in the PRC.41 Enforcement of awards as between the PRC, Hong Kong and Macao is dealt with separately below.

Arbitral awards made pursuant to an international treaty or agreement such as the ICSID Convention or a bilateral investment treaty would be enforceable in the PRC in accordance with the relevant treaty or agreement. Otherwise, a foreign arbitral award made in a non-Convention state is, prima facie, unenforceable in the PRC.

In relation to an arbitral award made within the PRC, different provisions govern enforcement depending on whether it is a foreign-related or domestic award. The rule is set out in article 62 of the Arbitration Law which provides that 'if a party fails to perform the arbitration award, the other party may apply to the People's Court for enforcement in accordance with the relevant provisions of the Civil Procedure Law'. Enforcement of an arbitral award can be refused only on limited grounds, under the relevant provisions of the Civil Procedure Law. Broadly speaking, the grounds for refusal of enforcement of a foreign-related award are more stringent than those applicable in the case of a domestic award. For a foreign-related award, enforcement can only be refused where: (i) there was a lack of a valid arbitration agreement; (ii) the party was not given notice of arbitration and was unable to present its case; (iii) the composition of the tribunal or the procedure was not in conformity with the rules or (iv) the matter was beyond the scope of the arbitration agreement.42 For a domestic award, in addition to the grounds above, enforcement may be refused on grounds such as insufficient evidence or error of law. Therefore, in practice the enforcement court is able to consider the merits of the domestic arbitral award, in addition to refusing enforcement on grounds relating to serious procedural irregularity or breach of natural justice.43

Previously, an application for enforcement was required to be submitted to the Intermediate People's Court within one year of the award if one of the parties was a natural person, and within six months if both parties were legal persons or other organisations.44 The time limit for enforcement was extended to two years for both individual and corporate entities by article 215 of the Civil Procedure Law, which came into effect on 1 April 2008.

Reciprocal enforcement of arbitral awards between PRC/Hong Kong and PRC/Macao

Prior to 1 July 1997, Hong Kong was a participant of the New York Convention regime by virtue of the UK's accession to the treaty, and arbitral awards were mutually enforceable as between the PRC and Hong Kong. After the resumption of sovereignty, the PRC formally extended the terms of its accession to the New York Convention to include Hong Kong, so that arbitral awards could be mutually enforced between Hong Kong and other Convention

states. However, this arrangement did not create mutual enforceability of arbitral awards between the PRC and Hong Kong, since the New York Convention does not provide for enforcement of arbitral awards within the same state.

On 21 June 1999, a Memorandum of Understanding on the Mutual Enforcement of Awards was signed by the Supreme People's Court and the Hong Kong government, providing for reciprocal enforcement of arbitral awards between the PRC and Hong Kong. Subsequently, the Hong Kong Arbitration Ordinance was amended to provide for enforcement of PRC arbitral awards in Hong Kong, on a basis similar to that which is applicable to enforcement of Convention awards.

On 12 December 2007, the Supreme People's Court entered into a parallel arrangement for reciprocal enforcement of arbitral awards between the PRC and Macao, which became effective as of 1 January 2008.45

Endnotes

Singapore

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Singapore

The case for Singapore as a centre for international arbitration has strengthened over the past year, with significant mileage gained through cumulative support from, and initiatives taken by, the government, judiciary and leading legal professionals.

Arbitration is gaining wider acceptance as the preferred method of dispute resolution in Asia, due to the mobility, flexibility and - perhaps most importantly - confidentiality of the process, as reflected in statistics of cases administered by the Singapore International Arbitration Centre (SIAC) and reproduced below:

Arbitrations with SIAC oversight									
Description (year)	2000	2001	2002	2003	2004	2005	2006	2007	2008
Cases administered under SIAC rules	52	58	57	44	65	52	58	67	85
Cases for appointment of arbitrators	6	6	7	20	13	22	32	19	14
Total	58	64	64	64	78	74	90	86	99

Source: www.siac.org.sg/facts-statistics.htm, as of 12 November 2009.

Government, SIAC and private initiatives

The Singapore government has taken robust steps to cement Singapore's profile as an arbitration hub, the most prominent manifestation of which was the unveiling of Maxwell Chambers in July 2009. This was the result of a government initiative to better facilitate arbitrations in Singapore with an integrated full-facility, world-class arbitration and dispute resolution complex. Leading international arbitral institutions have set up offices in Maxwell Chambers, including the Permanent Court of Arbitration, the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR). In addition, members of two sets of barristers' chambers in London (20 Essex Street and Essex Court

Chambers) have also set up offices within Maxwell Chambers to conduct their arbitration practices out of Singapore.

More recently, the World Intellectual Property Organization (WIPO) has set up an Arbitration and Mediation Centre (AMC) at Maxwell Chambers with operations due to commence in January 2010. This, the first such AMC outside Geneva, will hear intellectual property-related disputes, such as trademark issues involving internet domain names, as well as copyright and patent disputes. The Singapore government also signed a memorandum of understanding to develop a new dispute arbitration scheme specifically designed to handle niche film-related disputes.

In May 2009, Singapore also won the bid to host the International Council for Commercial Arbitration (ICCA) conference in 2012, which is expected to attract about 500 international arbitration experts. This will be the first time since 2003 that the conference is held in Asia.

The SIAC has also taken further steps to improve its position as a leading international arbitral institution: it recently internationalised its Board with the appointment of nine leading international arbitration practitioners, led by Professor Michael Pryles as chairman. In addition the SIAC has set up an International Council of Advisors, enabling eminent leaders of the international arbitration community to offer their expertise and assistance to the SIAC Board.

The Singapore Chamber of Maritime Arbitration (SCMA) was also reconstituted in May 2009, with the aim of providing a framework for maritime arbitration responsive to the needs of the maritime community. The SCMA has members from all countries and sectors of the maritime community. The chairman of the SCMA is Mr Goh Joon Seng, a retired judge of the Supreme Court of Singapore and previously the chairman of the SIAC.

Changes to the IAA

Changes proposed by the Singapore Ministry of Law to improve arbitration legislation, so as to facilitate and support arbitration in Singapore, have recently been passed by the Singapore Parliament.

The amendments to the International Arbitration Act (IAA) are in three main areas:

- to empower Singapore courts to make interim orders in aid of arbitrations held outside Singapore;
- to widen the definition of an "arbitration agreement" to expressly include those concluded by way of electronic communications; and
- to ease enforceability by simplifying the authentication process of arbitration awards "made in Singapore".

The first area of change is the introduction of a new Section 12A to the IAA, which will confer powers on the Singapore Courts to make interim orders in aid of international arbitrations, including freezing parties' assets. However, the proposed extension of such powers will not include the power to make orders for discovery, interrogatories and security for costs, as these are procedural matters within the arbitral tribunal's purview.

Prior to the amendments recently passed, the position in Singapore law as regards the power of Singapore courts to grant interim relief to assist an arbitration with its seat abroad was set out in Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR 629. In that case, the Singapore Court of Appeal rejected an application for an interim order by one of the parties to the foreign

arbitration in question, as the Singapore Courts did not have the power to grant interim relief to assist an arbitration with a foreign situs. This had remained the position in Singapore, with the only recognised exception thus far in granting interim relief for foreign arbitrations being where the Singapore Courts have some form of jurisdiction over the arbitration (ie, where there is a substantial claim being made in Singapore).

More recently however, the High Court in Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others [2009] 1 SLR 1000 had cast some doubt on the position that an interim relief would only be ordered if it was ancillary to a claim that would be granted by the Singapore Courts. In this case, the Court took a slightly less restrictive approach, holding that as long as the applicant is able to show that it has a justiciable cause of action in Singapore (whether or not the applicant has commenced proceedings in Singapore and/or whether there will be a final judgment by the Singapore courts on the issue), the High Court may grant interim relief to aid the foreign arbitration. The changes to the IAA should clarify the position.

Nonetheless, bearing in mind that the purpose of such powers is to aid and not interfere in arbitral proceedings, it is provided that the discretion should only be exercised by the Court where it is appropriate to do so in the circumstances and, more importantly, only if the foreign arbitral tribunal has no power or is at present unable to act effectively, or where the foreign tribunal has power to make an interim order but that order cannot otherwise be enforced in Singapore, apart from an application made under the IAA. As a further safeguard, the application for the interim order must be urgent, failing which the Court may only grant an interim order if the following conditions are satisfied:

- the applicant must have given notice of the application to the other parties of the arbitration proceedings and the arbitral tribunal; and
- the application has been made with the permission of the arbitral tribunal, or there is an agreement in writing with all other parties of the arbitration proceedings.

The second main area of change to the IAA is the broadening and updating of the definition of "arbitration agreement" at section 2 of the IAA to include "an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference", thereby recognising modern forms of communication. The amendment would also introduce new terms such as "data messages" and "electronic communications", in line with the definitions found in option I of article 7 of the Model Law on International Commercial Arbitration, as amended by the United Nations Commission on International Trade Law (UNCITRAL) in 2006.

Finally, the third area of change to the IAA seeks to remove procedural difficulties in authenticating Singapore arbitral awards for enforcement in foreign jurisdictions. Typically, a party seeking to enforce an arbitral award outside Singapore under the New York Convention 1958 is required to submit to the foreign court an authenticated original award or a certified true copy; and the original arbitration agreement or a certified true copy. A new section 19C to the IAA would empower the minister to appoint any person holding office in an arbitral institution or other organisation to authenticate the award or arbitration agreement, or to certify true copies thereof for the purposes of enforcing an award outside Singapore under the New York Convention 1958.

Pro-arbitration approach in the Judiciary

Three cases decided in 2009 are of special note, namely: PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited [2009] SGHC 13 (PT Tri-MG); Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24 (Insigma); and Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] SGCA 41 (Tjong Very Sumito).

In PT Tri-MG, the parties' contract contained both an arbitration clause and a jurisdiction clause, with the applicant seeking a stay of court proceedings pursuant to section 6 of the IAA. The High Court held that, although ex facie the clauses seemed to conflict, they could be reconciled. Citing the English decision of Paul Smith Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127, the Singapore High Court held that the arbitration clause prevailed, and the jurisdiction clause was construed as a reference to the law governing the arbitration. The Court accordingly ordered a stay of proceedings. In reaching this conclusion, the High Court noted that this construction would "best give effect to the expressed intentions of the parties in the context of an international commercial contract".

In Insigma, interesting issues concerning a kind of "hybrid" arbitration clause were raised before the Court of Appeal. The arbitration agreement in question provided that:

> 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 and the proceedings shall take place in Singapore and the official language shall be English[…]

The respondents in Insigma initially commenced the arbitration in the International Chamber of Commerce. The appellant challenged this and contended that the arbitration should be properly commenced in and administered by the SIAC and governed by the ICC Rules. The SIAC had confirmed that this arrangement was possible. Accordingly, the respondents withdrew their arbitration from the ICC and recommenced their arbitration with the SIAC under ICC Rules. Subsequently, upon the constitution of the arbitral tribunal, the appellant sought to challenge the arbitration clause on the grounds that it was void for uncertainty. The appellant then applied to the Singapore High Court to set aside the arbitral tribunal's finding that it had jurisdiction to hear the dispute, arguing, inter alia, that the arbitration agreement was uncertain. This was rejected by the High Court.

On appeal, the Court of Appeal upheld the High Court's finding that the arbitration clause was valid and agreed that there was "no practical problem in, and no objection in principle to, providing for a hybrid ad hoc arbitration administered by one arbitration institution but governed by the rules (adapted as necessary) of another arbitration institution", if the parties had agreed for the arbitration to be conducted in this manner.

The Court of Appeal reiterated that it would seek to give effect to parties' clear intention to arbitrate their disputes, even if there may be some ambiguity or uncertainty in the wording of the clauses, so long as this would not prejudice any of the parties' rights or result in an arbitration that was not contemplated by the parties. The Court also emphasised that the parties' choice of arbitration rules would be respected by Singapore law and given the fullest effect possible, and a hybrid form of arbitration was simply a matter of agreement between the parties and was wholly consistent with Singapore's policy of supporting arbitration.

In the recent case of Tjong Very Sumito, the Court of Appeal set out and summed up the judicial policy as regards arbitration in Singapore:

> 28 [...] An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.
>
> 29 There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation. The learned authors of Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 4th Ed, 2004) ("Redfern and Hunter") offer two principal reasons: first, the opportunity to choose a "neutral" forum and a "neutral" tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the IAA is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration. Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.

***

The changes effected by the Singapore government, together with the Singapore judiciary's clear policy to support arbitration with minimal intervention, in line with international

arbitration practices, sends a clear message to the international arbitration community on the growing strength of Singapore as a world-class international arbitration centre.

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Hong Kong

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Summary

Hong Kong - recent developments

In previous editions of this chapter, I have provided a general overview of the arbitration regime in Hong Kong, emphasising the increasing role that arbitration plays in Hong Kong.

In this edition, I have focused on the more recent developments that we have seen in Hong Kong, both in the context of arbitration and dispute resolution generally. Although many of these recent developments have been highlighted in previous editions, they are worth discussing in more detail, including how such developments impact on arbitration in Hong Kong.

Such developments are:

- a working group on mediation (the Mediation Working Group) has been established in Hong Kong, and had its first meeting on 26 February 2008. Since its first meeting, the Mediation Working Group has worked closely with its three subgroups to consider issues such as the availability of suitable venues for mediation in Hong Kong, and whether there should be a draft Hong Kong Mediation Code. In addition, one of the matters being considered by the Regulatory Framework Subgroup is whether Hong Kong should enact a Mediation Ordinance. Mediation has been a hot topic in Hong Kong following the implementation of the Civil Justice Reform (CJR) in Hong Kong on 2 April 2009 (see below), which promotes mediation as an effective form of dispute resolution;
- the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned (the Judgment Arrangement), which came into force in both Hong Kong and the Mainland on 1 August 2008;
- the issuance by the Hong Kong International Arbitration Centre (HKIAC) of the HKIAC Administered Arbitration Rules (HKIAC Rules), which came into effect on 1 September 2008;
- the Hong Kong CJR, which came into effect on 2 April 2009. The CJR implemented, inter alia, legislative amendments which now make it clear that the Hong Kong courts can grant interim relief in aid of arbitrations and foreign proceedings as an independent, free-standing form of relief, without being ancillary or incidental to substantive proceedings in Hong Kong; and
- reform of the arbitration regime in Hong Kong: the new Arbitration Bill was published in the Hong Kong Gazette on 26 June 2009 and is expected to become law in summer 2010 (the new Arbitration Bill).

Mediation Working Group

Since its first meeting in February 2008, the Mediation Working Group has been working closely with its three subgroups (public education and publicity; accreditation and training; and regulatory framework) and considering, inter alia, the following issues:

- the availability of suitable venues for mediation in the Hong Kong community;
- mediation courses offered by law schools;
- the promotion of mediation to the commercial sector;

- a draft Hong Kong Mediation Code and options for enforcement of the Code;
- standards for accrediting mediators; and
- the need for legislation on mediation (ie, a Hong Kong Mediation Ordinance).

The three subgroups are to report their findings and recommendations to the Mediation Working Group towards the end of 2009. In turn, the Mediation Working Group plans to complete its report with recommendations in December 2009 for public consultation in early 2010.

The establishment of the Mediation Working Group is an indication of the greater importance being placed on mediation (and alternative dispute resolution generally) in Hong Kong, and more so recently following the implementation of the CJR, which came into force on 2 April 2009. The CJR has introduced to civil procedure in Hong Kong a number of 'underlying objectives', one of which is the facilitation of the settlement of disputes. The Hong Kong courts now have a duty, as part of their active case management, to further this objective by encouraging parties involved in litigation to use an alternative dispute resolution procedure (if the court considers this appropriate), as well as facilitating the use of such a procedure.

A new Practice Direction 31 (Mediation) has also been issued dealing with mediation. At the request of the Law Society, the coming into effect of this Practice Direction was deferred until 1 January 2010, to enable practitioners to prepare themselves better in this regard. In particular, Practice Direction 31 requires parties to litigation to inform the court at the case management conference[1] whether they are willing to attempt mediation, as well as providing that an unreasonable failure to engage in mediation could potentially entail adverse costs consequences.

Going forward, therefore, Hong Kong is likely to see a significant rise in the number of mediations taking place onshore.

The 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 PRC 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: a enforceable 'final' judgment is given on or after 1 August 2008 by one of the Hong Kong courts, or a designated Mainland court;[2] 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.

After the implementation of the Judgment Arrangement, the question has arisen as to whether this has provided a viable alternative to arbitration for the resolution of PRC-related disputes, namely by litigation in Hong Kong. Arbitration has always been the preferred method for resolving all PRC-related disputes, largely because of the ability to enforce arbitral awards in the PRC pursuant to the New York Convention 1958 (or, in the case of Hong Kong, the Arrangement between the Mainland and the Hong Kong SAR on the Mutual Enforcement of Arbitral Awards).[3]

While making use of the Judgment Arrangement may be attractive in certain circumstances, for example where a summary (monetary) judgment is likely, enforcement need only take place in the PRC, as opposed to other jurisdictions outside Hong Kong, and the amount in dispute is not significant,[4] arbitration is still preferred for the following reasons:

(i) the Judgment Arrangement has only recently come into force and is largely untested, particularly in the context of enforcing Hong Kong judgments in the Mainland;

(ii) by contrast, the PRC regime for the enforcement of arbitral awards is much more established;

(iii) in the context of (ii) above, the PRC Supreme People's Court has implemented safe guards which in essence mean that only the Supreme People's Court can make the final decision to refuse to recognise or enforce a foreign (or foreign-related)[5] arbitral award, such that the power is taken away from the local courts. Similar safeguards have not yet been implemented for Hong Kong court judgments in the context of the Judgment Arrangement; and

(iv) the Judgment Arrangement applies only to monetary judgments; again, there is no such restriction for arbitral awards.

The HKIAC Rules

The HKIAC has issued the HKIAC Rules, which took effect from 1 September 2008. The HKIAC Rules, which apply to both domestic and international arbitration in Hong Kong, serve to ensure Hong Kong's popularity as a venue for PRC-related arbitration. They provide for a 'light touch' administered arbitration, with economical administration charges, thus directly addressing the requirement under the PRC Arbitration Law 1995 that arbitrations must be administered and not ad hoc. As such, the HKIAC Rules are recommended for Hong Kong arbitrations involving PRC parties, replacing the previous formulation of adopting the UNCITRAL Rules together with the HKIAC Procedures for the Administration of International Arbitration.[6]

Since the HKIAC Rules came into effect, over 20 cases under the HKIAC Rules have been referred to the HKIAC for arbitration, of which approximately half involved a PRC element.

Under the HKIAC Rules, parties can only designate arbitrators and such designations are subject to confirmation by the HKIAC Council, after which the appointments become effective (article 10, HKIAC Rules). In addition, article 11.2 of the HKIAC Rules provides that where the parties are of different nationalities, a sole arbitrator or the chairman of a three-member tribunal shall not have the same nationality as any party to the arbitration, unless specifically agreed otherwise by all parties in writing. Such nationality restriction (which is not found in the UNITRAL Rules) is particularly important, if only as a matter of perception, in a PRC context.

CJR - interim relief in aid of foreign arbitrations and litigation proceedings

Prior to the implementation of the CJR the Hong Kong courts had been held to lack power to entertain an application for a Mareva injunction (or other interim relief) in aid of foreign litigation proceedings, namely without being seised of any action to enforce a substantive legal or equitable right in respect of a defendant amendable to their jurisdiction.

The CJR Working Party considered the question of possible reform worthy for a number of reasons:

- first, policy considerations militated in favour of the courts having a discretionary power to provide such relief. In this regard, Lord Nicholls gave the following statement in his dissenting opinion in the case of Mercedes Benz AG v Leiduck [1996] 1 AC 284:7 'The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is no a black hole into which a defendant can escape out of sight and become unreachable';
- second, the strictness of the approach adopted by the House of Lords in the case of Siskina (Cargo Owners) v Distos SA [1979] AC 210 (which was the decision followed by the majority in the Privy Council in the Leiduck case) had been increasingly eroded and confined by several lines of authority; and
- third in the UK, the court had the power to grant interim relief 'in aid of substantive proceedings elsewhere of whatever kind and wherever taking place'.8 As such, 'the effect of The Siskina in relation to such Mareva injunctions and the position maintained in the Leiduck case have been swept away in the United Kingdom.'9

Thus, as part of the CJR, both the High Court Ordinance (by section 21M) and the Arbitration Ordinance (by section 2GC(1)) have been amended to make it clear that interim relief can be sought in aid of foreign proceedings and foreign arbitrations as an independent, free-standing form of relief, without being ancillary or incidental to substantive proceedings in Hong Kong.

Before the implementation of the CJR, the Hong Kong courts did not have power to award interim relief in aid of foreign litigation proceedings. In the case of foreign arbitrations, there was, however, Hong Kong case authority to the effect that the Hong Kong courts had power, under their inherent jurisdiction, to grant interim relief in aid of foreign arbitration proceedings, subject to certain guidelines. After the implementation of the CJR, and amendment of the Arbitration Ordinance (and High Court Ordinance), the position is now clear.

Section 2GC(1)(c) of the Arbitration Ordinance provides that the Court of First Instance may grant an interim injunction or direct any other interim measure to be taken in relation to particular arbitration proceedings that have been or are to be commenced in a place outside Hong Kong, subject to the condition that the arbitration proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under the Arbitration Ordinance or any other ordinance.

This express power given to the courts applies notwithstanding that:

- the subject matter of the arbitration proceedings would not otherwise give rise to a cause of action over which the court would have jurisdiction; and
- the order sought, the interim injunction or other interim measure is not ancillary, or incidental, to any arbitration proceedings in Hong Kong.

Section 2GC(1C) expressly states that the courts shall have regard to the fact that the power is: ancillary to arbitration proceedings outside Hong Kong; and for the purpose of facilitating the process of a court or arbitral tribunal outside Hong Kong which has primary jurisdiction over the arbitration proceedings.

New Arbitration Bill - the reforms to the arbitration regime

In 1997 British rule ended in Hong Kong and control of the territory was returned to the PRC. Under the Joint Declaration,10 however, Hong Kong is guaranteed a high degree of autonomy from the PRC for 50 years as a special administrative region (SAR) of the People's Republic of China under the principle of 'one country/two systems'. Thus, Hong Kong continues to use a common law legal system based closely on English law and will do so until 2047 at least.

The principal statute governing arbitration in Hong Kong is currently the Arbitration Ordinance.11

The Arbitration 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 that, 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 that do not satisfy these criteria are regarded as domestic arbitrations.12 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,13 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.14

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.

In 1998, the Hong Kong Institute of Arbitrators (HKIArb)15 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, being section 6B (consolidation of arbitrations by the court); section 23A (obtaining the courts' opinion on a preliminary point of law - the HK Committee also recommended that this 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).16

The new Arbitration Bill, which has adopted the above recommendations, was published in the Hong Kong Gazette on 26 June 2009. It is currently at Bill Committee stage (second reading) and is expected to come into force in the summer of next year. While a detailed review of the Bill is outside the scope of this chapter, it is certain that these reforms can only serve to reinforce Hong Kong's appeal as a venue for international arbitration.

The Legislative Council Brief describes the Bill as follows:

> The proposed reform on the law of arbitration in Hong Kong is to create a unitary regime of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration […] adopted by the United Nations Commission on International Trade Law […] for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.
>
> The purpose of the Bill is to implement the proposed reform which will make the law of arbitration more user friendly to arbitration users both in and outside Hong Kong. It will enable the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. The Bill, when enacted, may attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings. It will also help promote Hong Kong as a regional centre for dispute resolution.

***

Hong Kong is becoming increasingly popular as a venue for resolving international arbitration disputes. In particular, and as a result of its relationship with, and proximity to, the Mainland, Hong Kong is often selected as an arbitral seat for PRC-related arbitration.

Between 2007 and 2008, the HKIAC saw a 34 per cent increase in the number of arbitrations handled by it, which was a significantly bigger increase than those enjoyed by fellow heavy weights AAA, CIETAC and ICC.

The recent developments that have taken place in Hong Kong and that are referred to above will all contribute to making Hong Kong an increasingly attractive, and friendly, place for arbitration, as well as reinforcing Hong Kong as a hub for international arbitration in the Asia-Pacific region.

Endnotes

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South Korea

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Since its rapid development beginning in the 1960s, Korea has emerged as one of the world's most advanced and sophisticated economies. But Korea's spectacular economic achievements were not attained in a vacuum; rather, they came about as a result of Korea's deliberate and vigorous interaction with the developed free market economies of the world, such as the United States and Europe. Since Korea joined the ranks of these developed economies, Korean companies have also turned their attention to the developing economies in Asia and elsewhere to sustain their growth and secure their future as market leaders. Korea's economic status in the global economy is thus inextricably linked to its vibrant commerce with countries all over the world, spanning numerous legal jurisdictions, languages and cultures.

Inevitably conflicts will arise in any business relationship, but this is even more likely when factors such as distance, language and culture are factored into the mix. As international arbitration has emerged as the favoured method for resolving cross-border

commercial disputes, it should come as no surprise that Korea is one of the most active users of international arbitration. The International Chamber of Commerce (ICC), for example, reports that in 2008, Korea was third in Asia only to China and India in the number of participants in ICC arbitrations. If Chinese parties were counted separately from Hong Kong and Macau, Korean parties would be second only to Indian parties in use of ICC arbitration, and only by one. This is remarkable given the relative size of these countries' populations and economies.

As Korean companies gain more leverage in their contract negotiations, we can expect to see more and more arbitrations seated in Korea, governed by Korean law, and under the rules of the Korean Commercial Arbitration Board (KCAB). In addition, given the likely continued rise in the number of Korean parties, it is likely that foreign and Korean parties will increasingly be seeking enforcement of foreign arbitral awards in Korea. This article is intended to serve as an introduction to the law and procedures of international arbitrations conducted in Korea and under the international rules of the KCAB, as well as the recognition and enforcement of foreign arbitral awards in the Korean courts.

The Korean Arbitration Act

First promulgated in 1966, the Korean Arbitration Act (the Arbitration Act or the Act) was completely overhauled in 1999 to substantially adopt the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The Arbitration Act applies to all arbitrations seated in Korea, but also contains some provisions which apply to international arbitrations seated elsewhere. For example, article 9 provides that a Korean court shall dismiss an action where the respondent can show that the dispute is subject to an arbitration agreement in Korea or abroad, and article 10 allows a party in an arbitration in Korea or elsewhere to seek interim relief such as preliminary injunctions or attachments in the Korean courts. Both of these provisions are intended to promote, rather than interfere

with, international arbitrations both at home and abroad. Articles 37 and 39 address the recognition and enforcement of foreign arbitral awards, which will be discussed in more detail below.

The 1999 revisions to the Arbitration Act did not adopt the Model Law in its entirety, and a few important differences between the Act and the Model Law should be pointed out. While the Model Law confers final jurisdiction upon the arbitral tribunal to determine its own jurisdiction, for example, article 17 of the Arbitration Act allows a party to appeal the tribunal's decision on its jurisdiction to a competent court for a final ruling. In addition, unlike the Model Law, article 27 of the Arbitration Act allows a party to challenge the tribunal's appointment of an expert, first to the tribunal but with a right of appeal to the court. Finally, article 32 of the Act requires that the original signed award be deposited with the court of competence, while the Model Law contains no such requirement. Certain differences with respect to the legal effect of the arbitral award and the procedures for enforcing or setting aside the award will be discussed in more detail below.

The Korean Commercial Arbitration Board

The KCAB is the only officially recognised arbitration institution in Korea. Following the 1999 revisions to the Arbitration Act, the KCAB also amended its commercial arbitration rules (the KCAB Rules), although these revisions were not as sweeping as the complete overhaul of the Act. The KCAB Rules apply to all arbitrations under the KCAB, regardless of whether the underlying disputes are between domestic Korean parties or of an international nature. However, in 2007, the KCAB implemented an entirely separate set of Rules of International Arbitration (the International Rules), which now exists alongside the KCAB Rules. The International Rules were promulgated in order to encourage foreign parties to arbitrate disputes in Korea under the auspices of the KCAB, and are modeled closely on the Rules of Arbitration of the ICC (the ICC Rules).

This situation can create confusion, however, as the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated. Many foreign parties have agreed to 'arbitration under the KCAB Rules' in the mistaken belief that they were agreeing to the International Rules, when in fact they were designating the original KCAB Rules. This distinction is important because the two sets of rules have significant differences. For example, the default language of the arbitration under the KCAB Rules is Korean, and the default method for selecting arbitrators is entirely different. Given the rapid growth in both domestic and international arbitration, it may make sense in the future for the KCAB to handle domestic disputes in Korean and under the KCAB Rules, while an international arbitral institution modeled on the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC) could be established in Korea to handle international arbitration cases. This might go a long way towards both alleviating the confusion which currently arises by having two sets of arbitral rules under the KCAB, and encouraging foreign parties to agree to resolve their disputes in Korea under the rules of a truly international arbitral institution.

The KCAB International Arbitration Rules

As the International Rules are most likely to be of relevance to readers of this publication, this article primarily addresses the International Rules of the KCAB. Most foreign parties to international arbitrations under the auspices of the KCAB will choose the International Rules. As noted above, however, this choice must be explicit. Article 3 of the International Rules states that they shall apply where the parties have agreed in writing to refer their disputes to international arbitration 'under the KCAB International Arbitration Rules.' Otherwise, a

reference to arbitration under the rules of the KCAB will be deemed to refer to the original KCAB Rules. When agreeing to a KCAB arbitration, therefore, foreign parties are advised to be sure that the arbitration agreement specifically states that the International Rules shall apply to the arbitration.

As noted, the International Rules will be familiar to anyone acquainted with the ICC Rules. Nevertheless, there are some differences which should be noted. For example, while the ICC Rules provide that any counterclaims shall be filed with the answer (article 5(5)), the International Rules provide that the counterclaims may be filed at a later stage in the arbitral proceedings if the tribunal determines that the delay was justified under the circumstances (article 9(4)). In most cases this will be of little practical import: a tribunal operating under the ICC Rules is unlikely to dismiss a counterclaim simply because it is a little late (or the grounds for the counterclaim were reasonably discovered after the filing of the answer), and a tribunal operating under the International Rules may require reasonable justification for any significant delay in filing the counterclaim. However, it is important to keep these procedural differences in mind as they may affect the duration and cost of the proceedings. Below are some additional areas of more significant difference between the International Rules of the KCAB and the ICC Rules.

Appointment of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators is one. However, under the ICC Rules, the ICC Court may sua sponte decide, in light of the circumstances, to appoint three arbitrators (article 8(2)). Under the International Rules, the Secretariat of the KCAB will appoint a sole arbitrator unless a party petitions the Secretariat to appoint three. The Secretariat must then weigh factors such as the size and complexity of the dispute, determine whether three arbitrators should be appointed, and notify the parties of its decision (article 11). In addition, where the arbitration agreement calls for each party to nominate an arbitrator, the International Rules provide that a respondent who fails to submit an answer or to otherwise nominate an arbitrator within the time permitted by the Secretariat is deemed to have irrevocably waived the right to nominate an arbitrator (articles 9(6) and 12(2)). In most other respects, the International Rules track the ICC Rules fairly closely with respect to the appointment of arbitrators.

Challenge and replacement of arbitrators

The processes for challenging and replacing arbitrators under the International Rules are closely modeled on the ICC Rules. However, under the International Rules the parties are given less time (15 days as opposed to 30 days) to raise a challenge (article 13). The International Rules also add a provision that, where an arbitrator is challenged, he or she may simply withdraw as an arbitrator (with or without agreement between the parties), and that such a withdrawal does not imply acceptance of the validity of the grounds for the challenge. With respect to the replacement of an arbitrator who has been removed or withdrawn, the International Rules provide that the replacement arbitrator must be chosen by the same method applicable to the appointment of the arbitrator he or she is replacing (article 14(3)), whereas the ICC Rules allow the ICC Court the discretion as to whether to follow such procedures (article 12(3)).

Procedural timetable; new claims

After consulting with the parties, the tribunal is required to produce and forward a provisional timetable to the KCAB Secretariat within 30 days of the constitution of the tribunal (article 15). However, the International Rules do not provide for a Terms of Reference (TOR) or similar document as provided for in the ICC Rules. As such, there is no bar to raising new claims

after the TOR, and a party may amend or supplement its claim, counterclaim and defenses at any time during the arbitral proceedings, unless the tribunal considers it inappropriate because of delay or prejudice to the other party. However, a party may not amend its claim or counterclaim to include matters outside the scope of the arbitration agreement (article 17).

Jurisdiction of the arbitral tribunal

Article 19 of the International Rules explicitly provides that the arbitral tribunal shall have the authority to rule on objections to its jurisdiction, and the existence or validity of the contract of which the arbitration agreement is a part. A determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Article 19 also provides that any jurisdictional objections should be raised no later than the date of the filing of the answer (or, with respect to a counterclaim, the reply to the counterclaim), and that while the tribunal should generally rule on a plea concerning its jurisdiction as a preliminary matter, it may do so in the final award as well.

Despite these provisions of the International Rules, it should be recalled that the Arbitration Act applies to all arbitrations which take place in Korea, and that article 17 of the Act allows a party to appeal to the courts for a final ruling on the tribunal's jurisdiction. Thus, while the tribunal will have the first opportunity to rule on its own jurisdiction, it is the courts which may have the final say.

Evidence and experts

The International Rules are more detailed and forceful than the ICC Rules with respect to the production of evidence. Typical of parties from civil law jurisdictions, Korean parties traditionally have been somewhat reluctant to voluntarily produce documents and other evidence unfavourable to them in litigation and arbitration. The International Rules are drafted to address this issue in order to ensure a level playing field with respect to the production of evidence. Article 22 of the International Rules explicitly empowers the tribunal, unless the parties have otherwise agreed in writing, to order the parties to produce documents and other evidence, and to make a property or site under its control available to the tribunal, the other party, and any expert appointed by the tribunal. The tribunal is also specifically empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Under article 20(4) of the ICC Rules, the tribunal may appoint an expert after consultation with the parties. Article 23 of the International Rules confers the same power, but the tribunal is not required to consult with the parties. This power is subject to article 27(1) of the Arbitration Act, however, which permits the tribunal to appoint an expert unless the parties have otherwise agreed. In addition, as noted above, the parties have the right under the Arbitration Act to challenge the tribunal's appointment of an expert in the Korean court of competence, so as a practical matter the tribunal does consult with the parties and ensure that the expert is free of conflicts or perceived prejudices. The tribunal is empowered to require the parties to cooperate with the expert by providing relevant information and evidence, and the parties may examine and comment on the expert's report and the evidence relied upon by the expert in drafting it. While the International Rules do not provide for the participation of the expert in the hearing, article 27(2) of the Arbitration Act provides that the expert may participate in the hearing (unless the parties have agreed otherwise), whereupon the parties shall have the right to question the expert appointed by the tribunal as well as present their own expert witness to testify on the points at issue.

Confidentiality

Unlike the ICC Rules, article 45 of the International Rules explicitly provides that the arbitral proceedings, and the records thereof, shall be confidential. Except by consent of the parties, or where required in court proceedings or applicable law, neither the parties nor the tribunal (or the KCAB) may disclose any facts related to the arbitration learned through the arbitration proceedings.

Time limit for award

Under the ICC Rules, the tribunal must render its award within six months from the date of the TOR (article 24), though in practice this deadline is frequently observed in the breach. Under article 33 of the International Rules, unless the parties agree otherwise, the arbitral award must be rendered within 45 days of the date the hearings are closed or final submissions are made, whichever is later. This deadline may be extended by the Secretariat of the KCAB upon request from the tribunal or on its own initiative. Thus, like the ICC deadline, this time limit is more aspiration than practice. However, setting the time limit from the date of the last submissions or the close of the hearing is a more sensible and realistic alternative than the ICC procedure of fixing a deadline six months from the TOR, as many unforeseen events may make this deadline immediately and obviously unattainable.

Additional award

Unlike the ICC Rules, the International Rules contain a provision at article 37 permitting a party to petition the tribunal, within 30 days of receipt of the arbitral award, for an 'additional award' as to claims presented in the arbitral proceedings but not addressed in the award. If the tribunal agrees to hear the request, it must render any such additional award within 60 days of receipt of the request. This provision is separate from the provisions regarding the correction and interpretation of the award, which mirror the ICC Rules, and is meant to avoid challenges to the arbitral award by a party alleging that the tribunal has failed to deal with a claim raised in the arbitration. If no request is made under article 37, Korean courts will normally deem a challenge on this basis to have been waived.

Costs

Like the ICC, the KCAB bases administrative costs and arbitrators' fees upon the amount of the claims to be decided in the arbitration. KCAB arbitrations cost significantly less than ICC arbitrations, however, as both the administrative fee scale and the arbitrators' pay are lower.

The payment of advance costs can be a thorny issue, especially where there is a respondent with no counterclaims and no interest in participating in the arbitration. The ICC Rules provide that where one party refuses to pay its share of the advance costs, the other party pay this amount in order to ensure that the arbitration proceeds (article 30(3)). The International Rules go a step further, providing at article 39(5) that a party who is forced to pay the whole of the advance on costs may request the tribunal to order the other party to pay its share in the form of an enforceable interim, interlocutory or partial award.

There is quite a difference between the ICC Rules and the International Rules with respect to the allocation of costs by the tribunal at the end of the arbitration. The ICC rules consider 'costs' to include all of the administrative expenses, fees and expenses of the arbitrators (and experts appointed by the tribunal) as well as the reasonable legal and other costs incurred by the parties for the arbitration. These costs are allocated at the discretion of the tribunal. The International Rules, on the other hand, distinguish between the arbitration costs (such administrative expenses, fees and expenses of the arbitrators and experts) on the one hand and the costs incurred by the parties (such as legal fees and expenses for experts and

witnesses, etc) on the other. Article 40 of the International Rules provides that administrative arbitration costs shall, in principle, be borne by the losing party, subject to the discretion of the tribunal. Article 41, on the other hand, provides that the legal costs and expenses incurred by each party shall be borne by such party, again subject to the discretion of the tribunal. The parties are free to agree otherwise, of course, so it is advisable to consider this issue when drafting the arbitration clause if the International Rules will apply.

The Recognition and Enforcement of Arbitral Awards Domestic arbitral awards

Article 35 of the Arbitration Act states that an arbitral award rendered in Korea shall have the same effect on the parties as the final and conclusive judgment of the court. It should be noted, however, that article 36 of the Act provides procedures for a party wishing to apply to the court of competence to set aside an arbitral award rendered in Korea. The grounds for setting aside a domestic award in Korea are similar to the grounds for declining to recognise or enforce a foreign arbitral award, discussed below. No application to set aside an award may be made after three months from the date on which a party received a duly authenticated copy of the award, nor may any such action be entertained after a conclusive judgment of recognition or enforcement of the award has been rendered by a Korean court. There is no corresponding provision under Korean law permitting a party to apply for the setting aside of a foreign arbitral award, as article 36 of the Act does not apply to foreign awards.

Foreign arbitral awards

Article 37 of the Arbitration Act sets forth only two procedural requirements for the recognition and enforcement of a foreign arbitral award. First, a party seeking enforcement must submit the original, or a duly authenticated copy of, the award and the agreement to arbitrate. If these are not in Korean, duly certified translations must also be submitted. These straightforward procedural requirements are consistent with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Korea is a signatory, and Korean courts have shown themselves to be extremely friendly to foreign arbitral awards. However, it should be noted that enforcement proceedings are full adversarial court litigations which are subject to multiple appeals, so enforcement against a recalcitrant party can become a time-consuming and expensive undertaking. As noted above, as there is no procedure for setting aside a foreign arbitral award in Korea, a party wishing to resist enforcement of a foreign arbitral award will simply refuse to comply with the award and force the other party to bring an enforcement action pursuant to article 37 of the Act.

Article 39 of the Arbitration Act provides that the recognition or enforcement of a foreign arbitral award which is subject to the New York Convention shall be governed by that Convention, while foreign arbitral awards which are not subject to the Convention shall be governed by the same procedures applicable to the recognition and enforcement of foreign court judgments. As a practical matter, however, the vast majority of foreign arbitral awards for which recognition and enforcement is sought will be subject to the New York Convention. In addition, there is little practical difference these days between the grounds for recognition and enforcement of awards subject to the New York Convention and foreign court judgments under Korean law.

Article V of the New York Convention sets forth the very limited grounds which may permit the refusal of recognition and enforcement of an arbitral award. Among these, the most commonly tested in Korea has been that the recognition or enforcement of the award would be contrary to the public policy of Korea (section V(2)(b) of the Convention), although other

grounds have also been raised. Korean courts have proven very friendly to foreign arbitral awards, taking a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on any of the grounds provided under article V of the Convention. The Korean Supreme Court has repeatedly held that a violation of 'public policy' giving rise to a refusal to enforce a foreign arbitral award under section V(2)(b) of the New York Convention should be restrictively interpreted in light of the need for certainty and stability in international commercial transactions, and that the so-called 'public policy exception' to the enforcement of arbitral awards was intended to protect only Korea's most fundamental moral beliefs and social order.

Most recently, the Supreme Court reaffirmed in 2009 that a foreign arbitral award rendered in jurisdiction which is a signatory to the New York Convention is recognised as having the same res judicata effect as a domestic Korean court judgment, unless there are grounds under the New York Convention to refuse recognition and enforcement (Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009). While this demonstrates the supportive attitude of Korean courts toward arbitration, as a practical matter it also serves to underscore the distinction between 'recognition' and 'enforcement'. An award which is recognised for its legal effect in Korea may still have to be enforced against an uncooperative party, and absent a final enforcement judgment from a Korean court under the procedures of article 37 of the Act, it may be difficult to force a party to comply with an arbitral award against it.

Conclusion

Korea will inevitably become the locus of an increasing number of international arbitrations, whether under the auspices of the KCAB or other well established arbitral institutions. Korean companies are sophisticated users of international arbitration, and their increased leverage and influence on the global stage will create a demand for first rate international arbitration services in Korea. The promulgation of the International Rules by the KCAB has improved the environment for international arbitration in Korea, but it is only the first step. Perhaps the Korean government should consider taking a page from the playbook of Singapore, which has given full support to SIAC as a truly international centre for dispute resolution. Notably, the board of SIAC is comprised of well-known arbitrators and practitioners from around the world, and SIAC conducts its affairs in English. Korea may be well advised to establish a Korean International Arbitration Center, based upon the work that the KCAB has already done (and perhaps as a spin-off or associated institution of the KCAB), in order to handle international arbitrations.

Korea already has much to offer, however. In addition to the International Rules of the KCAB and the Arbitration Act based upon the Model Law, the Korean courts are extremely supportive of arbitration. They generally do not interfere with arbitral proceedings, and support such proceedings with interim relief, dismissals of cases where there is an arbitral agreement, and final rulings on issues such as jurisdiction (usually in favour of arbitration) where required under the Arbitration Act. No doubt these factors bode well for the future development of Korea as a regional centre for international arbitration.

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