The Asia-Pacific Arbitration Review

2012

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Global Arbitration Review is delighted to publish *The Asia-Pacific Arbitration Review 2012*, 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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Arbitral practice in 2011 continued its march towards universal application. The main reason behind the rise and popularity of the alternative dispute resolution process with the ability to transcend national boundaries lies with enforcement efficacy enabled by the New York Convention, parties having autonomy on the procedures and the choice of arbitrator, reduced interference and influences from the government, judiciary and political will of a particular nation and numerous other positive attributes including confidentiality.

The global economy has anchored well in the Asia-Pacific region. It promises to grow strongly in time to come. International arbitration is similarly shifting into this region. Many arbitral institutions are gearing up in anticipation of more disputes and the increased demand for their services. Many are striving to be more successful by promoting their rules and facilities to attract the international trade community. In so doing, they are also actively seeking governmental and judicial support.

The users and arbitral practitioners may be the ones creating the demand and supply, but to sustain and achieve the objectives of a universally accepted, applicable, effective and best practices of arbitration very much relies on the accomplishment of transformation in these arbitral institutions, the business community, the government, judiciary and the political will of each locality.

Over the past 50 years, international arbitration has enjoyed growing popularity with venues like London, Paris, New York and institutions like the International Chamber of Commerce (ICC), London Court of Arbitration (LCIA) and the American Arbitration Association's International Centre for Dispute Resolution (AAA/ICDR). However, with the world economic progression, in order to accommodate a counterpart in the Asian region, there has been a tendency to refer disputes to arbitral institutions located in Asia, namely, the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC), the Singapore International Arbitration Association (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Korean Commercial Arbitration Board (KCAB), ICC Asia and others. These institutions are now crowded with case references. However, there is still talk of new arbitral institutions, alternative platforms and venues.

The survey conducted in 2010 on international arbitration 'Choices in International Arbitration' by the School of International Arbitration at Queen Mary, University of London (as published by White & Case LLP) reveals a number of interesting points such as:

- choice of seat of arbitration:
    - influenced by 'formal legal infrastructure', the law governing the contract and convenience;
    - London is the most preferred and widely used;
    -

London, Paris, New York and Geneva are the seats that were used most frequently by respondents over the past five years; and

- Singapore has emerged as a regional leader in Asia.

- choice of arbitration institution:
    - corporations look for neutrality and 'internationalism' in their arbitration institutions;
    - there is expectation for institutions to have a strong reputation and widespread recognition;
    - ICC is the most preferred and widely used; and
    - ICC, LCIA and AAA/ICDR are institutions used most frequently in the past five years;

- appointment of arbitrators:
    - corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators; and
    - 75 per cent of respondents want to be able to assess arbitrators at the end of a dispute. Of these, 76 per cent would like to report to the arbitration institution (if any) and 30 per cent would like to be able to submit publicly available reviews.

The survey further indicates the characteristics of an institution appealing to international arbitration users as follows:

- previous experience of the institution;
- global presence of the institution and ability to administer arbitration worldwide;
- free choice of arbitrator (non-exclusive institutional list);
- strong profile and enjoying broad acceptance among arbitration users;
- ability to review decisions for which the ICC has become appealing;
- effective case management mechanism; an ability to ensure that parties keep to their timetable; in other words, a high level of administration; and
- most important considerations remain the overall costs of the services.

In the Asia Pacific Region, CIETEC, BAC, SIAC, HKIAC, ICC and KCAB have been successful in boosting arbitration. In turn, this has created a sufficient surge for other arbitral institutions in the region to emulate the best practices of each other and create products to meet the growing demand of arbitral users.

The rise of new arbitral institutions and rebranding of existing arbitral institutions is best seen as providing good, complementing alternatives and not competitors. There is room for all with the increasing demand. Arbitral institutions gain mutual benefit in collaborating with one another.

The statistics for year 2010 represent the resulting shifts in international arbitration towards this region and certainly the numbers continue to increase in both the established and

emerging arbitration institutions. Number of international cases administered by Arbitral Institution:

	AAA	CIETAC	ICC	JCAA	KCAB	LCIA	SIAC	HKIAC	VIAC	AFEC
2010	888	418	793	26	52	237	140	175	37	N/A

Institutional transformation

As one of the emerging institutions in the region, at the beginning of the year 2010, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) underwent revitalisation and a re-branding exercise, made possible by the strong support of Asian-African Legal Consultative Organisation and the Malaysian government.

KLRCA adopted with some modifications, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010 on 15 August 2010, and, on the same date, the UNCITRAL Rules were officially ratified for implementation, replacing the rules of 1976. This has been the most notable move by the KLRCA to make available the most current, universally accepted best practices to appeal to the international arbitral user.

The revitalisation process began from an internal reorganisation and streamlining of the Centre's structure, the strengthening of its capacity and further expansion of the panel of arbitrators. The Centre embarked aggressively on activities to raise awareness and visibility of the institution and what it has to offer, thereafter entering into strategic partnerships and collaborations with international arbitral organisations and corporate bodies, and engaging with and reaching out to the international arbitral user through numerous programmes.

Recently, in July 2011, the KLRCA successfully hosted the Asia Pacific Regional Arbitration Group Conference (APRAG) intended to position Malaysia as a preferred venue for alternative dispute resolution and further assumed the presidency of the APRAG for the next two years.

The success of Maxwell Chambers in Singapore denotes a new trend that appeals to the international arbitration users. The concept of an arbitration hub with modern purpose-built hearing facilities and the ability to house, in one location, all the related Alternative Dispute Resolution (ADR) providers in the region emphasises that an institution has to go beyond just providing specified rules, administration and basic facilities. The chamber's concept has been adopted by Australia in a recognition of the trend, with the set-up of the Australian International Disputes Centre in Sydney in the latter part of 2010.

KLRCA embraced the idea and is scheduled to move to its new premises by early 2013. The plans are for a five-storey building behind an art deco façade, situated close to Kuala Lumpur's colonial-era railway station and cricket ground. The building will house the secretariat of the KLRCA as well as 23 hearing rooms, support and office facilities for users, a business centre, breakout rooms, an arbitrator's lounge and an auditorium.

Other interesting initiatives taken by the institutions in the region in the recent year include:

- CIETAC's Online Arbitration Rules (Online Arbitration Rules) focuses on e-business disputes and the entire arbitration process being conducted by online communication methods, supplemented by traditional communication methods. In order to resolve disputes efficiently, besides the standard procedure, the Online Arbitration Rules contain summary and expedited procedures. Currently CIETAC is also revising its Arbitration Rules 2005. Revised rules, aimed at granting more party autonomy, are expected to take effect in 2011; and

- SIAC's fourth edition arbitration rules, which came into effect on 1 July 2010. The amendments primarily aim to improve the efficiency and speed of arbitration proceedings with two key features, namely:
    - a mechanism for emergency interim relief prior to the formation of an arbitral tribunal through appointment by the SIAC Chairman of an emergency arbitrator with the power to order or award any interim relief deemed necessary; and
    - a framework for an expedited arbitration procedure that is only applicable if the amount in dispute does not exceed S$5 million, if all parties agree or in cases of exceptional urgency;
    - The Australian Centre for International Commercial Arbitration (ACICA) has also updated its arbitration rules on 1 August 2011 to include provisions on emergency arbitration that is designed to be an effective alternative to seeking pre-arbitration emergency relief in court, prior to and after the commencement of arbitration, but before the constitution of the arbitral tribunal;
- LCIA India, the first independent subsidiary of the LCIA, also adopted new arbitration rules in April 2010. The LCIA India rules are intended to adapt the general LCIA Arbitration rules for Indian conditions with three key features, namely:
    - a provision addressing Indian case law: article 32(6) expressly excludes certain provisions of Part I of the Indian Arbitration and Conciliation Act 1996, which is directed at domestic arbitration and contains extensive court supervisory powers when the place of arbitration is outside India. This provision is in response to the Indian Supreme Court decision in Bhatia International v Bulk Trading SA (2002) 4 SCC 105, which held that, unless excluded by the parties, Part I would apply even to arbitrations taking place outside India;
    - tailored costs provisions: the rules include a costs regime that provides for a capped hourly rate for arbitrators (rather than the Indian practice in some ad hoc arbitrations of arbitrators charging expensive daily sitting fees, plus additional costs for drafting the award and other duties); and
    - to shorten applicable time limits: the rules provide that an award must be issued within six months (reasons may be given in summary form) and technical amendments, such as the shortened time period from 21 to 14 days to nominate an arbitrator, as well as the removal of the requirement for a Memorandum of Issues that aims to speed up and de-clutter the conduct of proceedings.

Legislative transformation; judicial receptivity

Following the survey on international arbitration mentioned earlier, 62 per cent of the respondents opined that formal legal infrastructure or statutory framework was the most decisive factor in choosing a place of arbitration. In the spirit of encouraging international commercial arbitration, there have been a number of arbitration legislative changes in this region recorded from the years 2009 to 2011. Such changes have been based on UNCITRAL Model Law 2006. In some jurisdictions, the change is aimed at creating a unitary arbitration framework, namely, removal of differentiation between international and domestic arbitration.

Malaysia

As part of its strategy to increase prominence as a seat of international arbitration, the Malaysian Government introduced an amendment to the Arbitration Act 2005. The Arbitration (Amendment) Act 2011 has come into operation, effective from 1 July 2011. The amendments are designed to reassure parties in international arbitrations seated outside Malaysia of the court's limited powers of intervention, the availability of interim measures for maritime arbitrations and the likelihood of enforcement of arbitral awards by the courts.

Australia

In Australia, recent amendments to the International Arbitration Act 1974 (IAA) were passed on the 17 June 2010, resulting in a more uniform and efficient framework for international arbitration practices that are based on international standards. The different states and territories in Australia agreed to adopt uniform national laws on domestic arbitration based on the UNCITRAL Model Law. There are now limited grounds for Australian courts to refuse enforcement of an award. The changes to Australian IAA and the adoption of a new model law for domestic arbitration means that Australia will have a harmonised system for both domestic and international arbitration.

Recent Supreme Court decisions in New South Wales and Queensland have largely reversed the common law position that any reference to state arbitration acts operate as an exclusion of the model law. The decisions suggest that courts accept the need for supportive, noninterventionist jurisdiction if international arbitration is to be effectively administered. The shift in judicial reasoning is important as it provides greater certainty that the model law will be given full effect in judicial proceedings.

Singapore

On 1 January 2010, Singapore's International Arbitration Act (IAA) was amended with the coming into force of the International Arbitration (Amendment) Act 2009. The mainspring for the amendment act was changes made to the UNCITRAL Model Law in 2006. Singapore's IAA is based on the 1985 UNCITRAL Model Law and the recent amendments reflect some of the changes made in the 2006 UNCITRAL Model Law to 'refine' the IAA and ensure that Singapore's laws remain consistent with modern international standards.

One of the key changes to the IAA is a new Section 12A that empowers the Singapore High Court to order interim measures for arbitrations seated outside Singapore. This is a welcome change in support of foreign arbitrations.

Prior to this change, the High Court had interpreted the power conferred by the IAA as excluding the making of interim orders to assist foreign arbitrations. In the case of NCC International AB v. Alliance Concrete Singapore Pte Ltd (2008) 2 SLR 565, the Singapore Court of Appeal held that Singapore courts would generally play a more interventionist role in granting interim injunctions in domestic arbitration as compared to international arbitration because the domestic arbitration conferred the power to grant interim injunctions solely on the court, whereas the IAA conferred the same power on both the court and the arbitral tribunal. The Court of Appeal made it clear that where the court had concurrent jurisdiction with the arbitral tribunal, it would only intervene to support arbitration where matters were very urgent or where the court's coercive powers of enforcement were required.

Now, the High Court may grant interim orders and relief including discovery of documents and freezing of assets in foreign arbitrations in line with 2006 Model Law.

Hong Kong

In Hong Kong SAR, a new Arbitration Ordinance 2010 (Chapter 609) came into effect on 1 June 2011. Very much like the previous legislation but limited to the international regime, it has adhered to the spirit of the UNCITRAL Model Law. The previous Arbitration Ordinance created a dual system that imposed different rules for 'international' and 'domestic' arbitration. While the 'international' arbitration law followed the UNCITRAL Model Law, the 'domestic' regime was derived from long-standing UK law.

The new Ordinance emphasises the arbitrator's primacy and is directed at ensuring the quick and efficient resolution of disputes. The arbitral tribunal has absolute power to deal with all matters that might arise before and during the proceedings which includes the authority to rule on any question of law or procedure and to make binding orders to enforce its decisions without judicial interference.

The new Ordinance is not substantially different from the previous regime but it does significantly alter the potential for judicial review of arbitral proceedings. Under the existing rules for domestic arbitration, the court could make a variety of preliminary orders in relation to domestic arbitration and review any determination of law made by an arbitral tribunal. However, unless the parties expressly agree otherwise, the new Ordinance does not allow judicial review of questions of fact or law that arise during arbitration.

As a consequence, an award can only be set aside under the proposed system in the limited circumstances of it having been made under an invalid agreement or if it was contrary to the terms of an agreement or the prevailing public policy. The only other notable functions that courts (specifically the Court of First Instance of the High Court of Hong Kong) will be able to perform, include hearing challenges to a tribunal's jurisdiction, making interim orders before proceedings have commenced and assisting the tribunal with gathering evidence.

The new Ordinance also introduces many of the current features of domestic arbitration 'opt-in' provisions so that parties can continue to utilise them. These 'opt-in' provisions will automatically apply to any arbitration clauses that currently refer to 'domestic' arbitration. This allows those parties more familiar with the domestic regime to continue using these rules. Similarly, it enables all parties (whether local or foreign) to take advantage of the forms of judicial review currently applicable to domestic arbitration.

China

In the past there had been considerable uncertainty with regard to the enforcement of arbitral awards rendered by foreign arbitration institutions with their seats in China. However, a landmark decision by the Ningbo Intermediate Court, enforced in 2009, provides a positive indication of courts beginning to recognise awards rendered in ICC proceedings seated in Mainland China.

A clear regulation allowing international institutions such as the ICC to administer arbitrations within mainland China would give the parties greater choice and lead to healthy competition between various institutions. Further, this flexibility could also be extended to allow ad hoc arbitration, which for the time being is not permitted in China.

India

The Government of India's Ministry of Law and Justice has issued a consultation paper on the proposed amendments to the Indian Arbitration and Conciliation Act (IACA) 1996 (IACA), such as the need to amend the Section 2(2) to ensure that Part 1 applies only to arbitrations in India, while there is continued applicability of Section 9 and 27 to international commercial arbitration where the place of arbitration is not in India.

There is another important proposed amendment to section 34 dealing with the term 'public policy' of India wherein, currently, the courts may set aside foreign awards that violate Indian statutory provisions and also that are contrary to public policy. This is to negate the effect of the decision in Oil & Natural Gas Corporation Ltd (ONGC) v Saw Pipes Ltd (2003), where the Supreme Court held that the term 'public policy' be given a wide interpretation.

In the meantime, it is more important than ever for parties, wishing to minimise intervention by Indian courts, to carefully draft their arbitration clauses, and specifically exclude the applicability of Part 1 of the IACA.

Vietnam

In June 2010 the Vietnamese National Assembly passed the Arbitration Law 2010, which came into effect on 1 January 2011 and replaced the former Ordinance on Commercial Arbitration 2003. By virtue of article 14 (1) of the Arbitration Law 2010, the law of Vietnam is applicable to disputes without a foreign element. Any national laws selected by the parties shall be applicable 'for disputes with a foreign element'. Unlike article 7(2) of the previous Ordinance, tribunals are now able to apply foreign laws chosen by the parties without having to first consider whether it contravenes the fundamental principles of Vietnamese law.

However, if the law of Vietnam or the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, then the arbitration tribunal may apply international customs in order to resolve the dispute if such application or the consequences thereof are not contrary to the fundamental principles of the law of Vietnam.

As one of very few countries, Vietnam still has restrictions as to the requirements for arbitrators constituting the arbitration tribunal. The new act, however, provides exceptional instances where any local or foreign person meeting certain qualifications may act as an arbitrator.

As to the enforceability of foreign arbitral awards, Vietnam's court decisions in the recent past have indicated some development from the previous rather anti-arbitration attitude towards pro-enforcement of foreign arbitral awards.

Conclusion

The year 2011, records yet another year of vast positive changes in international arbitration, both in terms of experiences and initiatives undertaken by arbitral institutions, legislative bodies and judiciaries of various jurisdictions in the Asia-Pacific Region.

With global economic expansion in this part of the world, there are a lot of opportunities and room for improvement in arbitration practice. Besides having the best practices in place, costs and time control are still two of the most important considerations and concerns of arbitral users.

How each institution and legal framework work around these concerns would be a useful guide and reference and these calls for greater cooperation between institutions in the form of sharing of experiences and integration of services that inevitably will lead to the creation of a larger pool of arbitral users across the world.

Kuala Lumpur Regional Centre for Arbitration

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Out with the Old, In with the New

James Kwan and **Haig Oghigian**

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Introduction

The Asia arbitration market is experiencing a boom. The economies of most Asian states have been resilient to the financial crisis. Intra Asian trade is on the rise, meaning an increase in transactions in the region.

Arbitration is usually the preferred mechanism for resolving cross border disputes, due to the ease of enforceability of an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). Although bilateral reciprocal enforcement treaties for the enforcement of court judgments exist, these are relatively limited.

Arbitration is also attractive due to its neutrality, flexibility and, generally, finality and confidentiality.

A greater number of Asian parties are specifying arbitration seats in Asia for the following reasons:

- institutions in Asia are becoming more mature. Last year, the Hong Kong International Arbitration Centre (HKIAC) celebrated its 25th anniversary. In 2008, the ICC Court of Arbitration established its first Secretariat outside of Paris to administer proceedings in Hong Kong. Institutions such as the HKIAC, the Singapore International Arbitration Centre (SIAC) and the ICC have an excellent reputation for transparency and independence. Their rules can be easily assimilated. They have capable staff to administer the proceedings;
- the rise of China and the shift in bargaining power. Chinese entities are more willing to arbitrate outside of Mainland China. Hong Kong has become the pre-eminent venue for the arbitration of Chinese disputes outside of Mainland China; and
- Asian states have updated their arbitral legislation to reflect international best practice.

A constant theme in Asia is the harmonisation of arbitral procedure due to the uniformity of arbitral legislation. A growing number of Asian states have updated their outdated arbitral legislation by adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

India (1996), Korea (1999), Thailand (2002), Japan (2003), The Philippines (2004), Malaysia (2005) and Singapore (with recent amendments in 2010) have all adopted the UNCITRAL Model Law. The only two notable states which have not adopted the Model Law are the PRC and Indonesia.

Recently, Australia adopted Model Law revisions in July 2010. Hong Kong's Arbitration Ordinance which has been in force since June 2011 is based on the Model Law. Vietnam has also amended their arbitration legislation which has been in force since 1 January 2011.

This article examines the main changes to those pieces of legislation.

Given that most states in Asia have adopted the Model Law, the parties can theoretically have a process that is effective and efficient. However, what is more important is how state courts apply the Model Law in support of arbitral proceedings and whether the courts are arbitration friendly or ambivalent towards arbitration. Courts in Hong Kong, Singapore, Korea and Japan are known to be arbitration friendly with minimal interference and delay to the arbitral process. This is an important consideration in selecting the place of arbitration.

The new Hong Kong Arbitration Ordinance

The new Hong Kong Arbitration Ordinance came into force on 1 June 2011. It is based on the UNCITRAL Model Law and incorporates elements of the 2006 amendments to the Model Law. The new Ordinance unifies domestic and international arbitrations. Arbitrations commenced on or after 1 June 2011 are governed by the new Ordinance.

The major changes under the new Ordinance are provided below.

One unifying regime

Previously in Hong Kong, the now repealed Arbitration Ordinance (chapter 341) provided for distinct and separate regimes for domestic and international arbitrations. International arbitrations, including domestic arbitrations, where parties agree to use the international regime, were governed by the UNCITRAL Model Law (as adopted in 1985, excluding the 2006 amendments). On the other hand, domestic arbitrations were governed by provisions in the old Ordinance which were based on the English Arbitration Act 1996.

This former distinction was regarded as unnecessary and problematic. It sometimes gave rise to disputes regarding the appropriate governing regime in particular cases. A significant difference between the two regimes was that the domestic regime provided the Hong Kong courts with additional powers to intervene in and assist with the arbitration process, that were not available under the international regime. This includes appeals on questions of law with leave of the court, consolidation of proceedings and determination of a preliminary point of law.

By contrast, the international regime as based on the UNCITRAL Model Law, followed the principle that the Hong Kong courts should support, but not interfere with, the arbitral process. The new Ordinance, with an aim to simplify and streamline the administration and process of arbitration in Hong Kong, harmonises both domestic and international arbitration proceedings under a single unified framework. The UNCITRAL Model Law (as amended in 2006) will now apply to all arbitrations commenced in Hong Kong. This new framework will increase efficiency as well as provide greater certainty and consistency for both domestic and foreign parties to arbitration.

The new Ordinance is also more user friendly in that it is easily readable since it follows the order and chapter headings of the UNCITRAL Model Law. Amendments to the Model Law can also be easily identified.

Opt-in provisions

While the new Ordinance provides for a unified regime, there is an opt-in system which allows parties to agree to apply the provisions governing domestic arbitrations under the

old Ordinance. These provisions are set out in schedule 2 of the new Ordinance and include the following:

- arbitration by a sole arbitrator in the absence of agreement;
- appeal against an arbitral award on a question of law;
- consolidation of arbitrations by the court;
- determination of a preliminary question of law by the court; and
- challenging an arbitral award on the grounds of serious irregularity.

The opt-in system was included mainly as a result of lobbying by the construction industry, which was interested in preserving some features of the old domestic regime with which they were familiar. Therefore, parties from the construction sector and parties that prefer greater court intervention are most likely to utilise the opt-in provisions.

The provisions in schedule 2 will also automatically apply to arbitration agreements that provide for 'domestic' arbitration and were entered into before, or are entered into within six years of the introduction of the new Ordinance. Arbitration clauses that involve construction projects in agreements involving the Hong Kong Government provide for domestic arbitration. Developers and employers in construction projects also prefer to stipulate domestic arbitration in their clauses.

Stricter confidentiality requirements

Previously, confidentiality in arbitration proceedings was governed by the common law duty; the old Arbitration Ordinance was silent on confidentiality.

The new Ordinance imposes more stringent confidentiality requirements on parties to an arbitration (section 18). It aims to balance the demand for confidentiality in arbitration proceedings and public interest relating to the need for a transparent, open and fair judicial process.

By expressly codifying the common law duty of confidentiality, the new Ordinance provides greater certainty and assurance as to confidentiality in arbitrations seated in Hong Kong.

The provisions regarding confidentiality also extend to cover court proceedings relating to arbitration. Under section 16 of the Ordinance, the starting point is that all arbitration-related court proceedings are to be conducted in camera, unless the court in its discretion, on the application of any party or on its own initiative, orders proceedings to be heard in public.

This marks a shift from the position under the previous Ordinance, under which the default position was that arbitration-related court proceedings would be heard in open court. It is also different from the New Zealand Arbitration Act 1996 (as amended in 2007) where the starting position is that proceedings are conducted in public unless the court makes an order that the whole or any part of the proceedings must be conducted in private.

Under the New Zealand Arbitration Act, the court may make an order for proceedings to be conducted in private:

- on the application of any party to the proceedings; and
- only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

In considering whether or not to make an order for proceedings to be conducted in private, the court must consider the terms of the arbitration agreement between the parties, among other matters.

In conjunction with section 16, section 17 of the Ordinance imposes restrictions on the reporting of closed court proceedings in relation to arbitration, while at the same time recognising that the publication of judgments of major legal interest provides an important foundation for the development of commercial arbitration law.

Hong Kong cases on the Model Law will increase as a result of court judgments interpreting the Model Law on issues such as setting aside. This will benefit other Model Law countries in Asia, particularly those with a less sophisticated arbitration judiciary. There is no reason why judges in other Model Law countries should not have recourse to Hong Kong judgments when ruling on provisions under the Model Law. It is hoped that courts in Asia will be influenced by arbitration friendly Hong Kong case law.

The provisions on confidentiality are desirable from the parties' point of view as they reinforce the importance of confidentiality of the arbitral process and related proceedings in court.

It remains to be seen whether the provisions balance public interest considerations relating to transparency. It is hoped that the introduction of the provisions regarding confidentiality will not mean that the helpful statistics that are regularly published by the HKIAC on its website regarding the number of cases in which parties have sought to set aside or resist enforcement of arbitral awards before the Hong Kong courts are now unavailable.

These statistics show that Hong Kong is pro-arbitration and highlight the willingness of the Hong Kong courts to uphold and enforce arbitral awards.

Interim measures and relief granted by an arbitral tribunal and the courts

Under the old Ordinance, the term 'interim measures of protection' was not specifically defined.

The new Ordinance adopts the UNCITRAL Model Law amendments in 2006 in respect of interim measures. It expressly defines interim measures (that includes injunctions, Mareva injunctions and Anton Pillar orders) and provides conditions for the granting of such measures. The arbitral tribunal may require security from the party requesting an interim measure (sections 35 and 36).

Preliminary orders were not previously addressed. Under the new Ordinance, there is a specific and detailed regime. These include preliminary orders made on an ex parte basis (sections 37 and 38).

A new regime for the enforcement of interim measures, separate from the recognition and enforcement of awards, has been created. This means that orders and directions for interim measures can be enforced by the court as a judgment, whether made in or outside of Hong Kong (sections 43 and 61).

Greater efficiency in arbitration proceedings

The new Arbitration Ordinance enhances efficiency in the following ways:

- by providing that the arbitral tribunal give the parties a reasonable opportunity to present their case and to deal with the cases of their opponents[1] as opposed to a 'full' opportunity[2] (which is provided in the Model Law);

- judicial recourse to an arbitral award is only in limited circumstances, namely, setting aside;
- the default number of arbitrators is either one or three as decided by the HKIAC.3 The Model Law provides that the default number of arbitrators shall be three4; and
- minimising judicial intervention.

Under the domestic regime of the old Ordinance, parties could apply to seek a determination of a preliminary point of law, consolidation of proceedings and appeal an arbitral award on a question of law. Parties now have limited scope to seek judicial interference (unless the parties agree to opt in for schedule 2 of the Ordinance).

Under the new Ordinance, the court should interfere only as expressly provided for under the Ordinance.5 Moreover, certain supervisory functions of court are assumed by the HKIAC, such as the default appointment of arbitrators and mediators6 and deciding on the number of arbitrators.7 This will reduce costs and delays as it obviates making an application to court.

The circumstances in which court intervention is allowed include:

- challenging an arbitrator (section 26);
- terminating the mandate of an arbitrator (sections 26 and 27);
- setting aside an arbitral award (section 81); and
- assistance in taking evidence (section 55).

Hong Kong courts arbitration friendly

Upholding arbitration agreements

The Hong Kong courts are pro-arbitration; they recognise the importance and usefulness of arbitration and endeavour to uphold the parties' agreements to arbitrate (see, for example, China Link Construction Co Ltd v China Insurance Co (2002) 1 HLKRD 844 and Downer & Co Ltd v Airport Authority (2000) 1 HKLRD 556). A stay of proceedings is mandatory. A stay will only be refused if an arbitration clause is null and void, inoperative or incapable of being performed (Tommy CP Sze & Co v Li & Fung (Trading) Ltd & Ors (2003) 1 HKC 418).

In Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd (2011) 4 HKLRD 262, the Hong Kong Court of First Instance granted a stay in favour of arbitration in respect of litigation proceedings commenced for the payment of goods supplied. It was held that the MOU that contained an arbitration clause with the words 'any dispute, controversy, or claim between the parties hereto arising out of or relating to this MOU' covered the disputes commenced in court. Leave to appeal the stay of court proceedings was refused.8

The court referred to the seminal decision of Fiona Trust & Holding Corp & Ors v Privalov & Ors (2007) 4 All ER 951 HL, (2008) 1 Lloyd's Rep 254, in which the House of Lords held that an arbitration clause should be construed in accordance with the presumption that the parties intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

An unusual case which highlights the pro-arbitration nature of the Hong Kong courts is Chok Yick Interior Design & Engineering Co Ltd v Fortune World Enterprises Limited (2010) HKEC. The Hong Kong Court of First Instance granted a stay of litigation proceedings in favour of

the plaintiff who had commenced litigation and then subsequently sought a stay in favour of arbitration.

The application for a stay was not made under section 6 of the old Arbitration Ordinance or article 8 of the Model Law. The Court used its inherent jurisdiction to order a stay in favour of arbitration despite ongoing court proceedings for 18 months, noting the following:

- the parties' contract contained an arbitration clause indicating an agreed forum for dispute resolution;
- initiating court proceedings did not necessarily waive an arbitration agreement;
- the disputes involved technical construction issues and items for which an experienced construction arbitrator would be more appropriate; and
- the costs of the pleadings would not have been wasted, as the existing proceedings helped define the issues an arbitrator would have to determine.

Courts of other arbitration friendly jurisdictions in Asia have upheld ambiguous arbitration clauses. For example, in PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited (2009) SGHC 13, the Singapore High Court ordered a stay of proceedings in favour of arbitration in a dispute relating to a contract that, on its face, contained an arbitration clause as well as a jurisdiction clause.

The court held that the two clauses could be reconciled by interpreting the jurisdiction clause as a reference to the law governing the arbitration and as a submission to the Singapore courts' supervisory jurisdiction over the arbitration.

In Insigma Technology Co Ltd v Alstom Technology Ltd (2009) SGCA 24, the Singapore Court of Appeal upheld a 'hybrid' arbitration clause which provided for SIAC to administer an arbitration based on the ICC Rules. The choice of a hybrid form of arbitration was a matter of agreement between the parties.

Where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to that intention even if certain aspects of the arbitration agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars.

The arbitration agreement was rendered certain and workable by the SIAC who agreed to administer the arbitration in accordance with the ICC Rules and to nominate appropriate functional bodies that corresponded to the bodies required under the ICC Rules to, among other matters, supervise the arbitration.

This was wholly consistent with Singapore's policy on the role of international commercial arbitration in resolving commercial disputes in Singapore.

These decisions confirm the arbitration friendly approach of the Singapore courts. However, there is no guarantee that such an approach would be adopted in other Asian jurisdictions. Such ambiguous clauses often lead to costly and time consuming battles in respect of jurisdiction. The key point therefore remains to ensure that dispute resolution clauses are drafted in unambiguous terms.

Public policy construed narrowly by Hong Kong courts

Another area that highlights the pro-arbitration nature of the Hong Kong courts is in the area of enforcement, in particular, how the Hong Kong courts apply the public policy exception as a ground raised to oppose enforcement of an arbitral award. This provides guidance

as to how a Hong Kong court would approach a future setting aside application based on the public policy ground as contained in section 81(1) of the Arbitration Ordinance (that incorporates Article 34 of the Model Law).

The cases below are examples of the Hong Kong courts dismissing arguments as to contravention of public policy as a ground for resisting enforcement.

In Karaha Bodas Co LLC v Perushaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (2009) 12 HKCFAR 84 at 99, paragraph 47, Ribeiro PJ said this, when dealing with section 44 of the old Arbitration Ordinance (regarding grounds for refusal for enforcing an award): 'It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal's award'.

As such, the argument that the award of US$150 million for loss of profits contained double-counting did not fall within any of the section 44 categories permitting the Hong Kong court to refuse enforcement of a Convention award. It amounted to an impermissible attempt to re-argue the merits of a point decided by the tribunal against Pertamina.

To succeed in resisting enforcement of an award on the basis of public policy, the Court of First Instance ruled that Pertamina would have to show that enforcement of the award would be contrary to the fundamental conceptions of morality and justice of Hong Kong.9

Compare the Hong Kong court's approach with that of the Central Jakarta District Court. Pertamina is an Indonesian state-owned oil and gas corporation. Geneva was the place of arbitration. Pertamina's application to the Swiss Supreme Court (which was the supervisory court for the arbitration) to set aside the award was dismissed.

An attempt was then made to have the award annulled by the Indonesian Court. The Central Jakarta District Court set aside the arbitral tribunal's award on the basis that:

- the tribunal had exceeded its authority in failing to apply Indonesian law;
- the award violated Indonesian ordre public;
- the arbitral tribunal erred in its construction of the force majeure clause under Indonesian law; and
- the arbitral tribunal should not have consolidated the disputes.

However, the Central Jakarta District Court wrongly decided that it was a competent authority to vacate the award, when the place of arbitration was Geneva. In this respect, the Hong Kong courts rejected Pertamina's contention that the Indonesian court's annulment precluded enforcement because Swiss procedural law, as opposed to Indonesian law, applied.

Further, under the Indonesian Arbitration Law,10 public policy is not a ground for annulment but is only relevant to enforcement.

The annulment proceedings in Indonesia were not initiated to block enforcement in Indonesia (although that was one effect) but to stop or delay enforcement in other Convention states by operation of article V(1)(e) of the New York Convention.11 However, the courts of Hong Kong, Singapore, Canada, Texas and New York allowed enforcement and execution on Pertamina's assets to proceed.

The Central Jakarta District Court's decision was overturned by the Indonesian Supreme Court.

In the case of A v R (2010) 3 HKC 67, the applicant obtained an award for US$3 million plus interest and costs in arbitral proceedings in Denmark. It sought to enforce the award against the respondent, a Hong Kong company. The respondent's argument was that the award involved payment under contractual penalty clauses, which was invalid under both Danish and Hong Kong law. Accordingly it would be contrary to Hong Kong public policy for the award to be enforced.

The court rejected the argument and reaffirmed the pro- enforcement rationale underlying the New York Convention and the wider importance of keeping the public policy exception within narrow limits.

Normally the winning party is awarded costs on a 'party-party' basis. Here, the court decided that the respondent should pay costs on a higher indemnity basis to punish the respondent for asserting a spurious challenge. According to the court, a party seeking to enforce an award should not have to contend with such a challenge. There would be encouragement of unmeritorious challenges if costs were only awarded on a conventional basis. In the absence of special circumstances, when an award is unsuccessfully challenged, the court will normally consider awarding costs against a losing party on a higher indemnity basis.

The case of Xiamen Xinjingdi Group Ltd v Eton Properties Ltd & Anor (2009) 4 HKLRD 353 concerned enforcement in Hong Kong of a Beijing CIETAC arbitral award for specific performance. The respondents applied to set aside ex parte leave granted to enforce the award in Hong Kong on the ground that it was now impossible to perform that part of the award so that it would be contrary to public policy to enforce the award.

The respondents' application was dismissed by Reyes J in the Court of First Instance[12] on the basis that the court's role in an application for enforcement of a Mainland arbitral award under section 2GG of the old Arbitration Ordinance was essentially that of an overseer, it should not 'second-guess' the award, and that the role of the Hong Kong courts should be as 'mechanistic' as possible unless an award was plainly incapable of performance.

The respondents appealed. The Court of Appeal dismissed the appeal on the basis that impossibility of performance was not a ground to justify refusal of enforcement and that did not satisfy the public policy exception. In any event, the respondents failed to demonstrate any impossibility of performance and the respondents' group restructuring, that was argued as a reason for impossibility of performance, had been self-inflicted.

The Court of Appeal refused leave to appeal to the Court of Final Appeal.

Enforcement against a sovereign state in Hong Kong

The recent case of FG Hemisphere v Democratic Republic of Congo (judgment of the Court of Final Appeal handed down on 8 June 2011) regarding the non-enforcement of an award against a sovereign state does not affect the choice of Hong Kong as a place of arbitration.

FG Hemisphere concerned a distressed debt fund trying to enforce an arbitral award against the Democratic Republic of Congo (DRC) in Hong Kong.

The Court of First Instance granted FG Hemisphere leave to enforce the arbitral awards against DRC. On appeal, the Court of Appeal held that the pre-1997 doctrine of restrictive immunity continued to apply in Hong Kong.

Prior to the handover of Hong Kong to China in 1997, the common law and subsequently the United Kingdom's State Immunity Act 1978 governed state immunity. Within this framework, states did not benefit from immunity from suit or enforcement when they were engaged in purely commercial transactions and restrictive immunity applied.

However, the Court of Final Appeal overturned that. It ruled that as a constitutional imperative, the Central People's Government (CPG) was responsible for policy on state immunity, so the Hong Kong courts or any other institution should not be responsible. The PRC's Standing Committee of the National People's Congress confirmed the Court of Final Appeal's provisional judgment in its interpretation (26 August 2011, as confirmed by the Court of Final Appeal's judgment of 8 September 2011).

Hong Kong arbitral awards will still be enforceable in other jurisdictions under the New York Convention and enforcement of awards against commercial entities is unaffected. This decision applies only to enforcement of arbitral awards in Hong Kong against foreign states. The situation is the same regardless of whether the place of arbitration is Hong Kong, Singapore, or London.

It is clear that an arbitration clause, which is contractual in nature, will provide the arbitral tribunal with adjudicative jurisdiction over any dispute. There are also reasons to expect that an arbitration clause will amount to a waiver of immunity in respect of the supervisory jurisdiction of the Hong Kong courts in support of the arbitral process.

For example, there were obiter Court of Appeal remarks, endorsed by the Court of Final Appeal in FG Hemisphere that the law of Hong Kong accords with customary international law on the issue of immunity from the supervisory jurisdiction of the courts of Hong Kong over the arbitration. Furthermore, court proceedings in support of arbitration are limited by the new Hong Kong Arbitration Ordinance. From the above, the new Arbitration Ordinance empowers the HKIAC to appoint arbitrators in default and to decide on the number of arbitrators, functions which have traditionally been part of the supervisory role of the courts.

There are two ways to waive immunity:

- in the face of the court, namely, by submission to the Hong Kong courts at the time when they exercise jurisdiction (for example, by filing a defence or taking a step in the proceedings). In practice, the waiver must be made at the time when the court exercises its jurisdiction. Accordingly, it will be insufficient for an effective waiver of immunity to be made by way of a pre-dispute contractual provision, such as an express waiver clause; and
- in a state-to-state treaty.

DRC, the state counterparty which claimed immunity in FG Hemisphere, was not a party to the New York Convention. As the New York Convention contains a representation that each state party shall enforce arbitral awards against another state party where both are signatories, the Court of Appeal considered that the decision would have been different had the DRC been a party to the New York Convention. However, this still remains to be tested.

If an arbitration clause is adopted, it is only in relation to enforcement proceedings and execution in Hong Kong against assets that the combination of absolute immunity and the ineffectiveness of express waiver clauses that will cause difficulties.

In many cases the counterparty will have assets in other jurisdictions, many of which adopt a restrictive immunity regime or a more permissive approach to express contractual waivers, in which case enforcement in Hong Kong may be unnecessary.

Australia International Arbitration Amendment Act 2010

The Australian courts have not always, historically, provided a supportive framework for arbitration.

For example, in Esso Australia Resources Limited v Plowman (1995) 183 CLR 10, the Minister for Energy and Minerals of Victoria declared his intention to release all information disclosed by Esso in the arbitrations. The Minister's application was accepted by the trial judge, as well as on appeal to the Supreme Court of Victoria and High Court of Australia.

The High Court of Australia ruled that confidentiality is not an implied term or part of the inherent nature of arbitration. There may well be a custom for confidentiality, but that is not sufficient. If the parties want confidentiality, they must provide for it. The reasoning was based on existence of a general 'public interest' exception.

In Einsenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd (2001) 1 Qd R 461, it was held that where the parties had selected the ICC Arbitration Rules, they have contracted out of the Model Law. Accordingly, the state-based Commercial Arbitration Act applied. The Einsenwerk decision was criticised in the New South Wales Supreme Court decision of Cargill International SA v Peabody Australia Mining Ltd (2010) NSWSC 887. It confirmed that the Model Law and the ICC Rules could co-exist: 'simply by referring their disputes to arbitration under the ICC Rules', the parties had not 'impliedly opted out of the Model Law'.

Both the Esso and Einsenwerk decisions have now been addressed by the International Arbitration Amendment Act 2010, which updates the International Arbitration Act 1974. The changes came into effect on 6 July 2010.

The main features of the International Arbitration Amendment Act 2010 are as follows:

- the adoption of the 2006 amendments to the UNCITRAL Model Law: the International Arbitration Act adopts a majority of the amendments made to the UNCITRAL Model Law in 2006. It gives them the force of law in Australia (section 16). The only part of the Model Law that the International Arbitration Act did not adopt is the right to obtain preliminary orders from the arbitral tribunal on an ex parte basis (Article 17B of the Model Law). This differs from the Hong Kong Arbitration Ordinance. The Act also amends the Model Law position of granting the parties a 'full' opportunity of presenting their case by stating that parties are taken to have been given a full opportunity to present their case if given a 'reasonable' opportunity (section 18C). This is similar to the Hong Kong Arbitration Ordinance;
- guidance on how the Model Law is to be interpreted: for the purposes of interpreting the Model Law, reference may be made to UNCITRAL documents relating to the Model Law and its working group for the preparation of the Model Law (section 17);
- the modernisation of the International Arbitration Act: as the 2006 amendments to the Model Law are adopted, they modernise the International Arbitration Act by expanding the ways in which an arbitration agreement can be made to include electronic communications (such as emails and text messages). An 'arbitration agreement' has the meaning given in option 1 of article 7 of the Model Law, namely, it adopts

the writing requirement (section 16). The Hong Kong Arbitration Ordinance has also adopted the writing requirement for arbitration agreements provided in option 1 of article 7 of the Model Law;

- application of the Model Law: the International Arbitration Act makes it clear that if the Model Law applies to an arbitration, the law of a state or territory relating to arbitration does not apply (section 21). The International Arbitration Act, including the Model Law, is the exclusive law governing international arbitration in Australia. This addresses the Einsenwerk decision, which held that the Commercial Arbitration Act of the State or Territory can apply to international arbitration;
- increased power for arbitrators: arbitral tribunals are given increased powers to conduct arbitral proceedings, unless the parties agree otherwise. These powers include the following:
    - ordering interim measures. By incorporation of the Model Law, the International Arbitration Act provides a definition as to interim measures and the conditions for grant.
    - consolidation of proceedings (section 24). This is on the ground that (a) a common question of law or fact arises in all those proceedings; (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or (c) it is desirable to do so. The arbitral tribunal is further empowered to order that the arbitrations be heard at the same time, in a sequence specified in the order, or stay the proceedings pending the determination of other proceedings. This is an opt-in provision where the parties agree that it will apply. It differs from the Hong Kong position in that consolidation is ordered by the arbitral tribunal, as opposed to the Hong Kong courts;
    - ordering security for costs (section 23K). This applies unless the parties agree to opt out of the provision;
    - limiting the amount of recoverable costs (section 27(2)(d)). This applies unless the parties agree to opt out of the provision. The Hong Kong Arbitration Ordinance has a similar provision (section 57);
- confidentiality: the International Arbitration Act provides a detailed framework for protecting confidentiality (section 23C to G). The prohibition on disclosure of confidential information expressly applies to both the parties and the arbitral tribunal. This is an opt-in provision where the parties agree that it will apply. There is a wide definition of what constitutes confidential information. However, this does not include judgments or court proceedings or both related to the arbitration and there is no provision addressing whether related court proceedings are to be held in camera, like the Hong Kong Arbitration Ordinance;
- test of impartiality or independence: the amendments modify the test of impartiality or independence of an arbitrator. There are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias (section 18A). The Hong Kong Arbitration Ordinance adopts article 12 of the Model Law: justifiable doubts as to the impartiality or independence (section 25); and
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immunity: arbitrators are immune from liability for anything done in good faith in their capacity as arbitrators (section 28(1)). The Hong Kong Arbitration Ordinance provides for immunity unless the arbitrator's act or omission was carried out dishonestly (section 104(1)).

Although relatively new on the international arbitration scene, Australia is a jurisdiction to look out for. It has a predictable and stable legal system. Amendments to the International Arbitration Act based on the Model Law make Australia more attractive as a place of arbitration and they bring Australia in line with international practice.

There is a wealth of arbitration expertise in Australia; many Australian arbitrators and lawyers have experience operating in the region. There is a proliferation of natural resources and energy transactions. It will be interesting to see if Australia can establish itself as the premier Asia Pacific venue for these sectors. The Supreme Court of Victoria has an arbitration list which is managed by the Honourable Mr. Justice Clyde Croft, a judge highly experienced in arbitration.

However, the barrier to Australia becoming a preferred destination for arbitration in the Asia Pacific remains distance.

Vietnam Arbitration Law on Commercial Arbitration (Arbitration Law)

Vietnam has a fast growing economy and improved investment regime. In 2007, Vietnam acceded to the WTO and the United States granted permanent normal trade relations. WTO entry has made Vietnam an attractive destination for foreign investment. The increased investment means there is greater likelihood of disputes.

The strategy of Japanese multinationals moving investment from China to other regional countries has made Vietnam the target of investment for Japanese multinationals. Korean entities have invested in real estate and manufacturing heavy industries. China is one of Vietnam's largest trading partners. There has been an increase in Chinese construction companies on infrastructure projects.

The Arbitration Law has been in effect since 1 January 2011. It supersedes the Ordinance of Commercial Arbitration. Although not based on the UNCITRAL Model Law, it represents a significant step forward for arbitration in Vietnam.

The main features of the Arbitration Law are provided below.

Appointment of arbitrators

Previously under the Ordinance, only Vietnamese arbitrators could be on panels of arbitration centres in Vietnam. Appointments made by arbitration centres which could not appoint outside their lists were limited to Vietnamese arbitrators.

Although the Ordinance recognised that foreign arbitrators could be appointed in foreign related disputes, the third arbitrator or chairman tended to be a Vietnamese national. Parties usually could not agree on the choice of the third arbitrator and appointment by default was off the panel list of the institution. This was a concern for foreign entities arbitrating in Vietnam.

Under the Arbitration Law, foreign nationals may be appointed as arbitrators and may be admitted to the panels of arbitration centres.

Choice of law

Similar to the PRC, arbitration in Vietnam has a bifurcated regime - 'foreign related' and 'domestic' disputes. Under the Vietnam Civil Code, a foreign element exists where:

- at least one of the parties is foreign;
- at least one of the parties is a Vietnamese national residing overseas; or
- the basis for establishment or modification of the relationship was the law of a foreign country or such basis arose in a foreign country or the assets involved in the relationship are located overseas.

Under the Ordinance, the arbitral tribunal may only apply a foreign law chosen by the parties-13 if the choice of law and its application are not contrary to the fundamental principles of Vietnamese law.

Under the Arbitration Law, the arbitral tribunal shall apply the law chosen by the parties in a dispute with a foreign element, without considering whether the chosen law is inconsistent with Vietnamese law. However, consideration should be given as to whether an award rendered would be upheld at the enforcement stage by the Vietnamese courts if the choice of law is inconsistent with local legislation.

The arbitral tribunal must apply Vietnamese law for 'domestic' disputes.

Language

Under the Ordinance, the default language was Vietnamese for disputes with a foreign element.

Under the Arbitration Law, in a dispute with a foreign element, where the parties have not agreed on the language of the arbitration, the arbitral tribunal is empowered to determine the language that is most convenient.

'Domestic' disputes must be conducted in Vietnamese, unless one of the parties is a foreign investment enterprise.

Interim relief

Under the Ordinance, arbitral tribunals were not empowered to order interim relief. Although parties could seek interim relief from the courts, one of the problems was that some courts were efficient in hearing and granting interim measures, whereas others were slow.

Under the Arbitration Law, arbitral tribunals are empowered to grant interim measures.

Foreign arbitral institutions

Under the Arbitration Law, branches of foreign arbitral institutions can be established in Vietnam, thus increasing competition and the choice for users.

There are no foreign arbitral institutions in Vietnam at present.

Choice of supervisory court

Under the Ordinance, various courts had jurisdiction over arbitration proceedings. This made it difficult to identify the appropriate court and resulted in multiple proceedings, causing delay and increased costs.

Under the Arbitration Law, the parties can agree on the supervisory court to have jurisdiction.

Attitude of the judiciary

The success or otherwise of the new Arbitration Law will be dependent on the willingness of the Vietnamese courts to recognise and give effect to the arbitral process.

The Vietnamese courts have a history of being ambivalent towards arbitration.

In Energo-Novus Co (Russia) v Vietnam Textile Corporation (Vinatext) (Case No. 58, 16 May 2000. Decision of the Appeal Court of the Supreme People's Court of Vietnam in Hanoi), enforcement was denied on the ground that Vinatext lacked capacity to enter into the arbitration agreement.

An example of the Vietnamese court's domestic approach to the issue of public policy is Tyco Services Singapore Pty Ltd v Leighton Contractors (VN) Ltd (Judgment No. 02/PTDS, 21 January 2003. Decision of the Appeal Court of the Supreme People's Court in Vietnam in Ho Chi Minh City). A contract to construct a hotel in Vietnam was governed by the law in force in the state of Queensland, Australia. The place of arbitration was Queensland.

Two awards were made in favour of Tyco, who sought to enforce in Vietnam. Tyco, as a Singaporean company, did not have a foreign contractor permit for the construction. Accordingly, Tyco's activities as a subcontractor were illegal. The Appeal Court reversed the enforcement decision of the lower court by holding that the award was contrary to the basic principles of Vietnamese law.

The contract also provided that Tyco was not subject to Vietnamese tax law. The court stated that the provision negatively affected the interests of Vietnam by showing Tyco's failure to respect local law.

In addition, the Court also adopted a restrictive interpretation of 'commercial' in respect of the construction contract so the award did not come within the terms of the old Ordinance and could not be enforced.[14]

Conclusion

Asian states have found it necessary to adopt favourable arbitral legislation to encourage foreign investment and to compete as a place for international commercial arbitration. They have done this by adopting the UNCITRAL Model Law or by updating their outdated arbitral legislation. This, in turn, aids economic development and the legal services sector of the state.

Adopting the UNCITRAL Model Law or updating national arbitral legislation to reflect international best practice is by no means the way to achieve a predictable arbitration regime. Predictability is dependent on how the supervising courts interpret the UNCITRAL Model Law and whether they are arbitration friendly. The successful implementation of the UNCITRAL Model Law depends on a pro-arbitration, smoothly working judiciary.

Some states in Asia have historically been hostile towards international arbitration. Courts in these jurisdictions have been determined to find for a party at all costs. This undermines stability, predictability and confidence in the judiciary and the arbitral process. It takes a long time to repair the damage to the reputation of the supervisory courts of the arbitration and hence the place of arbitration.

It is hoped that pro-arbitration jurisdictions which have adopted the UNCITRAL Model Law will influence other Asian states that have traditionally been ambivalent towards arbitration through case law on the UNCITRAL Model Law. There is no reason why supervising courts in other jurisdictions should not have recourse to decisions under the UNCITRAL Model Law on issues such as the validity of an arbitration agreement and the setting aside of an award based on public policy grounds when interpreting the Model Law.

Notes

1
Section 46(3)(b) of the Arbitration Ordinance.

2Article 18 of the Model Law.

3Section 23(3) of the Arbitration Ordinance.

4Article 10(2) of the Model Law.

5Section 12 of the Arbitration Ordinance.

6Sections 13(2), 24, and 32(1) of the Arbitration Ordinance.

7Section 23(3) of the Arbitration Ordinance.

8Leave application heard on 7 September 2011, with reasons for decision handed down on 9 September 2011.

9(2003) 380 HKCU 1.

10Law No. 30. article 70 provides for three grounds of annulment: (i) proof that a party submitted false documents; (ii) court finds key documents were withheld; and (iii) fraud during the arbitration proceedings.

11Article V(1)(e) of the New York Convention: '[...] the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

12(2008) 6 HKC 287.

13Vietnamese law restricts the rights of the parties to choose foreign law (i) in real estate transactions where the land and property is located in Vietnam; or (ii) if the contract is signed and performed in Vietnam. The court also has exclusive jurisdiction in disputes over rights to real property located in Vietnam.

14See Garnett and Nguyen, Enforcement of Arbitration Awards in Vietnam (2006), Asian International Arbitration Journal, volume 2, 137 at 141.

Comparative Arbitration Law in Asia

Chong Yee Leong and **Qin Zhiqian**

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Introduction

In the past year there has been an increasing investment focus in Asia with a phenomenal surge in the number of foreign investors within the region. As such, it has become imperative that the various countries develop their arbitration systems in order to pave the way for a stable and healthy investment climate. Asia has responded to such demands effectively with the dominant players displaying nothing short of stellar growth, coupled with significant efforts to update and improve their arbitration laws. This article seeks to chart such development in Singapore, Malaysia, Hong Kong, China, and Indonesia, and examine the increased receptiveness to arbitration in Asia, along with the current state of harmonisation of arbitration laws and its effects.

Singapore

In the past 15 years, Singapore's profile as an international arbitration centre has been on a spectacular uptrend. Its increase in recognition may be attributed to the efforts of the Singapore Government, the Singapore International Arbitration Centre (SIAC) and a pro-arbitration judiciary. 2010 marked an eventful year that saw significant developments in international arbitration in Singapore. Major contributing factors include significant legislative changes, the opening of the Maxwell Chambers, and the revision of the SIAC Rules in the fourth edition of the Arbitration Rules. Singapore's neutrality and impartiality has been a major contributing factor for the growth of the SIAC. In the Corruptions Perception Index 2010, Singapore was ranked first (it was ranked third in the 2009 Index) out of 178 nations and is thus perceived as being the least corrupt country in the world.1

General statistics

This year, Singapore continues to promote its jurisdiction as the preferred choice for international arbitrations. From 2009 to 2010, the total number of new cases handled by the SIAC increased from 160 to 198, amounting to a healthy 24 per cent increase in workload. Significantly, the number of international cases administered by the SIAC increased from 114 to 140, an increase of 23 per cent.2

The 2010 International Arbitration Survey reveals that Singapore has become the most favoured arbitral seat in Asia in 2010, placing it ahead of Hong Kong.3 Recently, the biannual Singapore International Arbitration Forum (SIAF) was held on 1 June 2011. Presented by Maxwell Chambers and co-organised by the SIAC, SIAF brought together arbitration practitioners from around the world to discuss trends and concerns in arbitration, with a focus on Asia. Specifically, this year's SIAF dealt with insurance arbitration, which has become a key area of arbitration and dispute resolution following the global financial crisis.

Effect of the revision of the SIAC Rules

A key change introduced in the 4th edition of the Arbitration Rules of the SIAC (SIAC Rules 2010) is the availability of the expedited procedure prior to the full constitution of the tribunal.[4] This streamlined the procedures for limited-value disputes of S$5 million or less. Another critical introduction in the SIAC Rules 2010 would be the provision for emergency interim relief prior to the constitution of the tribunal.[5]

In 2010, 20 cases (including a number of linked claims) included a request for the new expedited procedure introduced in the 2010 rules. 12 of these were accepted, in the majority of cases on the basis that the amount in dispute was under S$5 million. Two cases also involved the appointment of an emergency arbitrator under the new procedure also introduced in the SIAC Rules 2010.[6]

The pro-arbitration stance of the Singapore courts

In Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd (2011) 3 SLR 118, the plaintiff was the sub-contractor of the defendant. There was an arbitration clause in the two sub-contracts. The plaintiff filed an originating summons to stop the arbitration proceeding that included a request for a declaration that the arbitration be terminated, pursuant to an alleged settlement agreement entered into between the plaintiff and the defendant on 15 February 2011 (Settlement Agreement). The defendant disputed the existence of the Settlement Agreement and contended that the arbitral tribunal had the power to determine the existence of the Settlement Agreement. The defendant also submitted that the plaintiff had argued that due to the operation of the Settlement Agreement, the arbitral tribunal had become functus officio (lacking authority and power in this case). Such an argument, the defendant submitted, amounted to a challenge to the jurisdiction of the arbitral tribunal and that the arbitral tribunal was competent to judge its own jurisdiction.

The High Court held that the arbitration should proceed. The court found that the jurisdiction of the arbitral tribunal is invoked once a dispute arises and that a tribunal has jurisdiction to determine whether there was any dispute at all. The court held that even though the Settlement Agreement was an independent contract to the sub-contracts, the dispute over the existence of the Settlement Agreement was a dispute that arose due to the parties' relationship established by the sub-contracts. The issue of whether there was a dispute (and whether it had subsequently been resolved) was a basic question that went to the root of the disagreement between the parties and fell within the arbitral tribunal's jurisdiction. The court relied on section 3 of the International Arbitration Act read in conjunction with article 16 of the Model Law to hold that the tribunal would be entitled to rule on its own jurisdiction. The court concluded that unless the wording of the arbitration clause clearly stated otherwise, the existence of the Settlement Agreement (and the scope of the arbitration agreement) was for the arbitral tribunal to determine.

This case demonstrates the pro-arbitration stance that has been adopted by the Singaporean courts. The case highlights the fact that when there is an arbitration clause in an agreement, disputes arising out of that agreement are to be heard by the tribunal. Further, the tribunal has wide powers to rule on its own jurisdiction as well as the scope of the arbitration agreement.

In Larsen Oil and Gas Pte Ltd v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) (2011) SGCA 21, the Court of Appeal upheld the decision of the Singapore High Court that most insolvency-related disputes are not suitable for arbitration due to public interest considerations. However, this decision is more an exception than the norm. Singapore Courts are generally more pro-arbitration and will enforce a valid arbitration agreement. VK Rajah JA stated at paragraph 44:

> That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

The 'presumption of arbitrarility' would still be subject to public interest considerations. This decision will prove a useful guide in the future to help determine which claims involving an insolvent company are arbitrable and which are not.

In Makassar Caraka Jaya Niaga III-39 (2011) 1 SLR 982, the agreement in contention contained an arbitration clause, providing that 'all disputes' arising under the agreement would be referred to arbitration. The assistant registrar, on hearing the issue, ordered, in favour of the respondents, that the ship to be released and that the proceedings and sale of ship be stayed in favour of foreign arbitration. The appellants then appealed on both points. One of the appellant's contentions was that there was no 'dispute' between parties and in support of this proposition, the appellant relied on previous correspondence and a letter of undertaking in which the respondent admitted to owing 'an estimated US$2.8 million'. The respondent claimed that the letter of undertaking did not provide an unequivocal admission to the claim and, if there had been any previous admission of liability, it had been by mistake.

The High Court affirmed that the proceedings should be stayed. It held that the word 'dispute' must be interpreted broadly. Tan Lee Meng J relied on Tjong Very Sumito v Antig Investments Pte Ltd (2009) 4 SLR(R) 732 (Tjong), at paragraphs 43-44:

> 43
> In Tjong Very Sumito v Antig Investments Pte Ltd (2009) 4 SLR(R) 732 the Court of Appeal reiterated that section 6 of the IAA acknowledges the primacy of the specific arbitration agreement in question and made it clear at (22) that if there is a dispute, a stay under section 6 of the IAA is mandatory if there is an applicable arbitration agreement 'unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, ie, that the arbitration agreement is 'null and void, inoperative or incapable of being performed". In the present case, there is no allegation that the arbitration agreement is null and void, inoperative or incapable of being performed.
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> The word 'dispute' is interpreted broadly and courts will 'readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable.

In Tjong, the Court of Appeal explained at paragraph 69:

> (c) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court will interpret the word 'dispute' broadly [...], and will readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable [...].The court should not be astute in searching for an admission of a claim, and would ordinarily be inclined to find that a claim is not admitted in all but the clearest of cases.

> (d) There is undoubtedly a 'dispute' referable to arbitration if the defendant expressly asserts that he denies the claim [...].

This case reinforces the minimalistic intervention policy that the Singapore courts have adopted towards matters where parties have agreed to refer to arbitration. Notwithstanding whether the defendant has previously mistakenly made an admission, as long as the defendant expressly denies a claim, Singaporean courts will readily find that a dispute exists. Where the dispute falls within the terms of the arbitration agreement, the court will be obliged to grant a stay of proceedings in respect of that dispute, subject to certain statutory exceptions.

In Rockeby Biomed Ltd v Alpha Advisory Pte Ltd (2011) SGHC 155, the defendant initiated arbitration proceedings against the plaintiff due to the plaintiff's failure to pay certain invoices. The arbitrator held in favour of the defendant, and the plaintiff filed an application to set aside the arbitration award on the ground that the award is in conflict with the public policy of Singapore as expressed and embodied in the Securities and Futures Act (chapter 289, 2006 Rev Ed) (SFA) and the subsidiary legislation thereunder. The Singapore High Court held that both the International Arbitration Act and the Model Law do not permit appeals against arbitration awards. They only provide limited grounds (for example, public policy) upon which parties may apply to set aside an arbitration award. The High Court then considered previous decisions by the Court of Appeal which discussed the scope of public policy. It found that the public policy exception must be construed very narrowly (PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA (2007) 1 SLR(R) 597).

Thus, it is clear that Singapore Courts are generally supportive of arbitration and will enforce valid arbitration awards. The fact that the public policy exception is narrowly construed promotes the enforceability of arbitration awards.

Singapore Law Reform Committee

On 12 April 2011, the Singapore Law Reform Committee published a report calling for Singapore's International Arbitration Act (IAA) to be amended so as to grant a right to judicial review of negative jurisdictional rulings made by arbitral tribunals in arbitrations governed by the IAA.

The report considers the arguments for and against extending the right to judicial review, as well as the growing consensus in favour of such an amendment. The report concludes that there is a strong case for changing the current law.

Those listed as supporting reform include the SIAC, the International Chamber of Commerce (ICC), all members of the International Council for Commercial Arbitration (ICCA), many of whom were part of the UNCITRAL working group that revised the Model Law in 2006, and the majority of the Singapore members of the Chartered Institute of Arbitrators.

Two of the reasons given were that:

> First, the current law conflicts with one of the principle purposes of international arbitration, namely to avoid litigation in the national court of one of the parties. An incorrect negative jurisdictional ruling forces upon the parties the very thing they wished to avoid by submitting to arbitration, that is litigation in the national court of one of the parties.

[...]Third, the current law risks undermining Singapore as an arbitral seat of choice for potential claimants, as they are likely to favour seats where the courts are permitted to review negative rulings.

This demonstrates the intention of the Singapore Law Reform Committee to promote Singapore as an international arbitration hub.

By granting a right to judicial review, Singapore will enhance its reputation as a pro-arbitration nation. The Singapore Government has yet to comment on the report's conclusion.

Harmonisation

Singapore recognises a need for clarity and uniformity in arbitration laws throughout the international arbitration community. To date, substantial measures have been employed in order to modernise and harmonise Singapore's arbitration law.

In this regard, an interesting case would be Altain Khuder LLC v IMC Mining Inc (2011) VSC 1. In summary, the Supreme Court of Victoria dismissed a defendant's summons to set aside an order for the enforcement of a foreign arbitral award. In doing so, the Supreme Court of Victoria relied on the decision of the Singapore High Court in Aloe Vera of America v Asianic Food (S) Pte Ltd & Anor (2006) 3 SLR(R) 174 (Aloe Vera) to hold that a party resisting enforcement of an arbitral award bears the burden of establishing a ground for doing so under section 8(5) of Australia's International Arbitration Act 1974. In particular, the Supreme Court cited Aloe Vera's approval of the US District Court case, Sarhank Group v Oracle Corporation (2005) USCA2 109.

This case illustrates the readiness of courts, where appropriate, to endorse a judgment on arbitration law from a foreign jurisdiction.

Aloe Vera and Altain Khuder also show how courts of many countries that have adopted the New York Convention are reluctant to create obstacles to the enforcement of foreign arbitral awards, which would be contrary to the purpose of the convention.

In Strandore Invest A/S and others v Soh Kim Wat (2010) SGHC 174, the Singapore High Court held that it is generally inappropriate to conduct any substantive examination of the documents filed in support of an application to enforce a foreign arbitral award; the court's task is largely formalistic.

An emerging arbitration consensus

Singapore is a party to the 1958 New York Convention (on enforcement of arbitration awards). Singapore arbitration awards are thus enforceable in all signatories to the convention.

The Singapore International Arbitration Act adopts almost all of the UNCITRAL Model Law on International Commercial Arbitration without modification, which is regularly revised to incorporate internationally accepted codes and rules for arbitration.

However, Singapore still maintains a distinction between domestic and international arbitrations. The Arbitration Act (chapter 10) governs the former while the Singapore's International Arbitration Act governs the latter. Despite this, Singapore's domestic Arbitration Act is modelled after the Model Law provisions, and therefore its provisions are largely reflective of those of the Singapore International Arbitration Act.

Malaysia

Introduction

Arbitration law in Malaysia adopts a two-pronged approach. The Arbitration Act 2005, repealing the Arbitration Act 1952, governs all arbitrations commenced in Malaysia on or after 15 March 2006. The Arbitration Act 1952 is still applicable for arbitration cases commenced before 15 March 2006.

In Asia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) was the first arbitral institution to adopt the 2010 UNCITRAL Rules on 15 August 2010, subject to certain modifications. This represents a move forward in modernising and streamlining its arbitration rules, thereby bringing the KLRCA Rules in line with international standards.

Malaysia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which means that arbitral awards rendered in Malaysia are enforceable in countries that are also signatories to this convention.

Prior to March 2010, the KLRCA was trailing far behind the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). Mr Sundra Rajoo, the director of KLRCA since 1 March 2010, openly admitted that 'even disputes which involved only Malaysian parties were going off-shore to arbitral centres around the world'.7

Since then, Malaysia has been undertaking steps to develop itself into the preferred arbitration nation and is now fast becoming one of the key arbitration hubs in Asia-Pacific. This is due to its arbitration-friendly courts and a supportive government that strongly encourages arbitration as an alternative dispute resolution tool.

Pro-arbitration steps

A commitment to reform the KLRCA

As director of the KLRCA, Mr Sundra Rajoo has been spearheading certain measures to rejuvenate and revitalise the arbitral centre. He now heads a 23 member management team compared to a paltry four member team just a year ago. Further, the KLRCA now has 556 arbitrators on its panel compared to less than 200 previously.

Mr Sundra Rajoo's team has also been responsible for aggressively marketing the KLRCA as a preferred arbitral centre, engaging companies in Malaysia and abroad to explain the advantages of utilising the KLRCA.

A key selling point for the KLRCA would be cost savings. The KLRCA has a very transparent fee structure and its cost is only about 60 per cent of what it would cost in Singapore. Further, ancillary costs such as food and lodging are lower in Malaysia as well. As a whole, almost everything else is more cost competitive in Malaysia.

KLRCA has also introduced new 'products' such as a fast track option, with its own set of rules - the KLRCA Fast Track Arbitration Rules 2010 - that was created in collaboration with the Malaysian Institute of Arbitrators. Special arbitration rules have also been drawn up to cater for Islamic banking.

Legislative amendments

Malaysia recently passed the Arbitration (Amendments) Act 2011, amending the Arbitration Act 2005, which has been in force since 15 March 2006.

A number of amendments will be of interest to users of international arbitration in the region. In particular, section 8 of the Arbitration Act 2005 now contains a provision that limits court intervention to situations specifically covered by the Arbitration Act and discourages the use of inherent powers. Specifically, section 8 of the Arbitration Act 2005 provides:

> Extent of court intervention
> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

Section 11 of the Arbitration Act 2005 has also been amended to clarify that to secure the amount in a dispute, the court may order the arrest of property, bail or other security before or during arbitral proceedings. In particular, section 11(3) of the Arbitration Act 2005 now empowers the court to make orders for any interim measures even if the seat of arbitration is outside Malaysia. This will be of particular interest to parties involved in disputes relating to Malaysian assets that are being arbitrated in other jurisdictions, such as Singapore.

The goal of the legislature in making the amendments is to better facilitate arbitral proceedings and make Malaysia a more arbitration-friendly destination.

The pro arbitration stance of the Malaysian courts

In Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd (2010) 4 MLJ 332, the appellant attempted to set aside an arbitration award made pursuant to the UNCITRAL arbitration and KLRCA Rules. The appellant's application was dismissed by the High Court. The High Court instead allowed the respondent's application for leave to enforce the award. On appeal, the Putrajaya Court of Appeal dismissed the appellant's appeal and held that section 34 of the Arbitration Act 1952 excluded the application of the Arbitration Act 1952 or other written law to any arbitration held under the UNCITRAL arbitration and KLRCA Rules.

This case illustrates how the Malaysian Courts adopt a pro-arbitration stance by endorsing the UNCITRAL Rules, and is indicative of a minimalist intervention policy.

In CMS Energy Sdn Bhd v Poson Corporation (2008) 1 LNS, the Malaysian court accepted that under the Arbitration Act 2005 that 'there is unmistakeable intention of the legislature that the court should lean towards arbitration proceedings'.

In Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor (2010) 3 MLJ 569, the first respondent gave written undertakings to release the documents of title to the appellant when the matter was decided by the arbitrator or the court or both. The arbitrator handed down an award in favour of the appellant, however the first respondent refused to hand over the documents and filed the summons seeking interpleader reliefs. The High Court allowed the first respondent's interpleader application and decided that the first respondent ought to continue to hold the documents of title pending proceedings by the second respondent to remove or restrain, or both, the arbitrator as well as an injunction to have the arbitral award set aside, as well as, a pending proceedings by the appellant for leave to enforce the arbitral award against the second respondent. The appellant appealed against this decision.

It was held that the order for the immediate return of the documents of title was final and binding, irrespective of whether there was any pending appeal to have it set aside. Once the arbitral order was handed down, the undertaking of the first respondent would come into play and must be given effect. Further, the first respondent had, in his affidavit, employed the disjunctive word 'or' in regard to what had to be complied with, namely, either an arbitral award 'or' a court order. Thus, when the dispute between the parties ended with an arbitral award the first respondent must by their own admission comply with it.

At (31), the court stated that '[we] must emphasise that in his affidavit in reply, Mr Teh Kim Teh had employed the disjunctive word 'or' in regard to what has to be complied. It was either an arbitration award or a court order. And since the dispute between the appellant and the second respondent ended with an arbitration award by the arbitrator, the first respondent must by their own admission comply'. While the emphasis of the decision is based on the first respondent's own undertaking to comply with either a court order or arbitral award, it is telling that the court recognises and places arbitration on a level footing with court resolution. Furthermore, it is significant that the court application for interpleader relief was incapable, in the case of the first respondents, to defeat the arbitral award.

At (53), 'Next, we have this to say about the arbitral award. It is akin to a judgment'. At (57), 'Thus, the award under our Arbitration Act 1952 (Act 93) is expressly stated to be final and binding irrespective of whether there is any pending appeal to have it set aside.' The words 'akin to a judgment' is affirmative of Malaysia's position vis-à-vis the status of a decision from the arbitration panel.

At (83) and (84), 'It is obvious that the learned judicial commissioner's reliance on section 7 of the Arbitration Act 1952 (Act 93) is misconceived because the arbitration proceedings had concluded with an arbitral award dated 4 May 2007 [...] It is apparent that the learned judicial commissioner failed to have due regard to section 17 of the Arbitration Act 1952 (Act 93) which has been reproduced earlier. That section 17 is the correct section to rely upon bearing in mind that the arbitration has ended with an arbitral award in favour of the appellant.' The strongly worded judgment points to the court's readiness to overturn a court decision in favour of an arbitral award.

In Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd (2010) 2 MLJ 23, there was an arbitration in the United Kingdom that went in favour of the appellant. Relying on section 27 of the Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFA) the High Court ordered the enforcement of the foreign award. The respondent filed an appeal in the Court of Appeal and argued that the award was unenforceable because there was no Gazette notification made under section 2(2) of the CREFA declaring the UK as a party to the New York Convention (NYC) and that, therefore, the appellant could not rely on the CREFA to enforce the award. The Court of Appeal decided in favour of the respondents, paving the way for the appellant to appeal to the Federal Court as to whether the failure of the Yang di-Pertuan Agong under section 2(2) of the CREFA to declare the UK to be a party to the NYC rendered the award unenforceable in Malaysia, notwithstanding the fact that all the other conditions required for its enforcement had been satisfied.

It was held that section 2(2) of the CREFA was not an interpretation provision but merely an evidential provision. Thus, if the Yang di-Pertuan Agong had issued a gazette notification declaring a particular state to be a contracting state, that notification merely formed conclusive evidence of the fact that the state was a contracting state under the NYC. Therefore, the issue as to whether a state is a party to the NYC can be proved by adducing other evidence as may be appropriate. True to this, the court proceeded to find in favour of the appellant and considered the UK a party to NYC Convention despite the non-notification.

At paragraph 21, 'The critical issue is whether a declaration in the Gazette notification by the Yang Di Pertuan Agong is a condition precedent before an award made in a state, who is a party to the NYC, could be regarded as a convention award under the CREFA. In my view, the answer to this question does not depend on whether the word 'may' appearing in section

2(2) of the CREFA has to be read to mean 'must' or otherwise.' The Court demonstrated its willingness to depart from previous case law Sri Lanka v World Sport Nimbus Pte Ltd, which primarily upheld the objection to a foreign award's enforceability on the account of its non-notification.

The Court of Appeal in Sri Lanka construed the word 'may' as 'must', rendering it mandatory for the Yang Di-Pertua Agung to extend the benefit under the CREFA for a foreign award to be enforceable. However, in Lombard Commodities, the court case elected to construe 'may' as simply conferring a power, and proceeded to examine whether a duty to exercise the power is imposed. This extended the ambit of the word 'may' and exemplified the court's pro-arbitration stance by construing the test (to decide the enforceability of a foreign award in Malaysia) in a manner that lowers the required threshold, thus making foreign arbitration more accessible in Malaysia.

Harmonisation

As discussed above, Malaysia has undertaken several measures to bring its arbitration law in line with international standards. However, it still has some way to go before it reaches the heights attained by the SIAC and HKIAC.

Hong Kong

Hong Kong has long been recognised as one of the premier arbitration centres within Asia, not least because of its progressive legal regime and strategic position at the crossroads of trade and commerce. Especially because of its proximity to mainland China, it has been the preferred venue for China-related business disputes.

Summary of the development of arbitration laws

The main statute governing arbitration in Hong Kong is the Arbitration Ordinance.[8] The previous statute[9] has been based on a split regime - an international regime based on UNCITRAL Model Law and a domestic regime. The newest Arbitration Ordinance as of 1 June 2011, however, unifies both regimes and extends the UNCITRAL Model Law to all arbitrations in Hong Kong, regardless of their international or domestic nature.

Other features of the newest Arbitration Ordinance include provisions that give arbitral tribunals powers to grant interim measures, for example to preserve assets or evidence or to maintain or restore the status quo; an express provision for confidentiality prohibiting parties from disclosing any information relating to the arbitral proceedings.[10]

A final feature worth mentioning is with regard to the enforcement of arbitral awards. Provisions in the new ordinance provide that arbitral awards are enforceable in the same manner as a court judgment but distinguish between awards rendered in Mainland China and other New York Convention States, such that awards rendered in China may not be enforced if the application for enforcement is also outstanding in China.

The main arbitration institution in Hong Kong is the Hong Kong International Arbitration Centre (HKIAC), an independent body set up in 1985 that has been the main focus of arbitration activity in the country. The HKIAC has two primary functions under the Arbitration Ordinance:

- where the parties fail to appoint an arbitrator, the appointment of the arbitrator shall be made by the HKIAC; and
-

> where the parties have failed to agree to an appointment procedure or parties fail to appoint the appropriate number of arbitrators, the HKIAC may determine whether a tribunal of one or three arbitrators should consider a dispute.11

In addition to the Arbitration Ordinance, there are laws that govern court applications in relation to arbitration proceedings. These laws are found in the Rules of High Court of Hong Kong.

Other laws that may impact the arbitral process include the Control of Exemption Clauses Ordinance12 that prohibits the making of agreements to refer future disputes to arbitration where one party is a consumer and the Companies Ordinance13 that empower the Hong Kong High Court to restrain arbitration proceedings involving a party against which a winding-up petition has been made, pending determination of such petition by the High Court.

Increasing receptiveness to arbitration

Hong Kong has long been recognised as a leading Asian arbitration centre and the substantial number of arbitration cases being handled by the HKIAC is clear evidence of this. Over the years, the HKIAC has handled a substantial and increasing volume of arbitration cases. In 2004, the HKIAC dealt with a total of 280 arbitration cases. This number increased to 602 by the end of 2008.14 In 2010, out of the 291 arbitration matters handled by the HKIAC, 175 (or 60 per cent) of them were international matters.

The Arbitration Ordinance has long been praised for its 'hands-off' and 'party autonomy'15 approaches, which have cemented respect and trust in Hong Kong's system of arbitration. For instance, the Arbitration Ordinance is clear that where an arbitration agreement exists and a party to such agreement commences legal proceedings in the court against the other party, the latter has the right to apply to the courts for a stay of proceedings and the courts are under an obligation to grant the stay of proceedings and refer the parties to arbitration. The only qualifications to the rule are technical ones - that the party requesting the stay must not do so 'later than when submitting his first statement on the substance of the dispute'16 or 'if the agreement is null and void, inoperative or incapable of being performed'.17 This has served to assert arbitration's position in the Hong Kong jurisdiction as a real and, most importantly, independent alternative to the courts in the dispensation of justice.

The development of arbitration in Hong Kong owes much also to the court's supportive attitude towards arbitration. The courts have proven more than willing on a number of occasions to refer a matter to arbitration. In Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd (1993) 2 HKLR 249, the courts held that a party seeking to enforce an arbitration agreement need only establish an arguable case that there is an agreement before the court will refer the matter to arbitration. This concept was further developed upon in the more recent case of Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd (2003) 3 HKC 659 where the courts ruled that as long as the evidence presented to support a referral to arbitration was cumulative, cogent and arguable, it would be satisfactory enough to warrant a referral to arbitration. This low threshold for granting referrals reflects a general willingness of the courts to refer matters to arbitration.

Another yardstick by which the strength of arbitration as an alternative means of dispute resolution may be measured is, paradoxically, by observing the challenges made in court to the arbitral process. One particularly telling case is that of A v R (2010) 3 HKC 67 where the

courts rejected the respondent's application that the New York Convention award obtained in Denmark was contrary to public policy. In his dismissal of the application, Reyes J was adamant that the court should be vigilant in ensuring that the objection to the award on the ground of public policy was not abused as it would result in the courts undermining 'the efficacy of the parties' agreement to pursue arbitration'. He went on to explain that it was, in fact, in the interest of public policy to enforce foreign arbitral awards 'as a matter of comity' and the courts should only choose to refuse an award if there was a 'substantial injustice […] which was so shocking to the court's conscience as to render enforcement repugnant'. These comments reflect the robust stance of the Hong Kong courts in resisting, as far as is possible, any interventions with arbitral proceedings.

One setback, perhaps, in the development of arbitration within Hong Kong came in the landmark provisional judgment of Democratic Republic of the Congo v FG Hemisphere Associates FACV numbers 5, 6 & 7 of 2010. The dispute in this case concerned a country that was not party to the New York Convention and the question of whether or not the country was entitled to immunity from jurisdiction of an arbitration decided within was put forward to the Court of Final Appeal (CFA). In the judgment, with a 3:2 majority, the CFA held that absolute sovereign immunity applies with no exception for purely commercial transactions and, as such, the Democratic Republic of Congo had sovereign immunity against the arbitration award. In reversing the Court of Appeal's original ruling, it would appear that the decision of the CFA has only served to limit the effectiveness of arbitrations especially over disputes relating to contracts with states or state entities. This has an obvious consequence for post arbitration enforcement strategy, particularly whether or not to seek enforcement against state held assets in Hong Kong. On 26 August 2011, the Chinese government affirmed that absolute sovereign immunity applies to Hong Kong. This would render Hong Kong an unsuitable forum to resolve disputes with states because parties will be unable to compel a state to honour arbitration agreements in Hong Kong. The direct consequence of this would be that parties in dispute with a state or state owned entities will seek other jurisdiction to resolve their disputes.

While the above appears to be a step back in the development of arbitration in Hong Kong, there are those who argue that the judgment should not be overstated. In a briefing analysis on the said judgment, it is pointed out that there are still 'compelling grounds to expect that an arbitration clause will amount to a waiver of immunity in respect of the supervisory jurisdiction of the Hong Kong courts'.18 Considering how far arbitration has developed in Hong Kong and all the other merits of the system, this judgment is likely to have only a limited effect on arbitrating parties' decision to make Hong Kong their choice as an arbitration venue.

Harmonisation of arbitration laws

Arbitration is doubtless a well established and widely accepted procedure in Hong Kong reinforced by a clear statute and system of arbitration laws, a well-respected arbitration institution and limited intervention from the courts. Hong Kong's next step forward is to harmonise the arbitration procedures with that of the rest of the world so as to make it more appealing, especially to international parties seeking to arbitrate in Hong Kong.

This was the inspiration behind the Arbitration Ordinance, especially the move to introduce a unified regime instead of preserving the old distinction between domestic and international arbitrations. The consultation paper for the reform of the Arbitration Ordinance saw the benefit in 'enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime that accords with widely accepted international arbitration

practices and development'.19 The Model Law is familiar to practitioners from both civil law and common law jurisdictions and by adopting an international standard, Hong Kong makes its arbitration system more accessible and more attractive to international business parties.

China

Arbitration in China is governed by the Arbitration Law of the People's Republic of China and the Interpretation of the Supreme People's Court on Arbitral Matters. Traditionally, China's arbitration system strictly distinguished between domestic and foreign arbitration. Domestic arbitration commissions were subordinated to administrative departments (the Administration of Industry and Commerce) and jurisdiction was based on law rather than agreement. On the other hand, foreign-related arbitrations were administered by the Foreign Trade Arbitration Commission (that later became the China International Economic Trade Arbitration Commission (CIETAC).20

Today, however, international and domestic arbitration have been increasingly harmonised. CIETAC has continually responded to criticisms and market demands by amending its rules - six times since 1988. These revisions reflect two general trends: convergence with international best practices and greater autonomy for parties. In the latest (2005) revision,21 major changes included the following:

Convergence with international practices

- express introduction of domestic disputes into the jurisdiction of the CIETAC for the first time;22
- acceleration of the entire arbitration process by stipulating the panel to render the award within six months (previously nine months);
- setting up of specialist arbitration centres with arbitration rules tailor-made to specific industries; and
- tighter disclosure rules where there may be a conflict of interest; arbitrators are required 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.

Greater party autonomy

- allowing for the application of other arbitration rules (apart from CIETAC rules) if parties so agree in their arbitration agreement, subject to compliance with the mandatory law of the place of arbitration;23
- allowing parties to choose the place of arbitration and the place of hearing (distinction between the two recognised); and
- permitting appointment of non-panel arbitrators as co-arbitrator, presiding arbitrator or sole arbitrator subject to confirmation by CIETAC.

Further, there were additional developments in the Chinese arbitration field as the Beijing Arbitration Commission's new Arbitration Rules and stand alone Mediation Rules came into force on 1 April 2008. Most notably, fees chargeable by non-Chinese arbitrators were no longer limited. The mandatory fee scales that provide for arbitrator fee levels much lower than international standards thus remained less of a problem, and experienced arbitrators could be attracted to sit in a Chinese arbitration.24

Similarly, the CIETAC online arbitration rules were introduced in 2009 to regulate the resolution of e-business disputes where the entire arbitration process is conducted using

online communication methods, thus easing the resolution of lower value and less complex disputes. Further reforms to the CIETAC arbitration rules are underway and expected to be completed by October 2011.

China's growing popularity as an arbitration venue

Such progress, together with China's giant economy and ever-increasing role in global trade, has led to the surge in attractiveness of China as a location for arbitration, for domestic and foreign-related disputes alike. CIETAC's caseload has risen dramatically in just 20 years, from a mere 37 cases in 1985 to an enormous 1,482 arbitration cases in 2009, the highest volume of disputes by any international arbitral institution. The variety of nationalities of parties involved in CIETAC arbitrations has also increased, reaching 51 in 2010 compared to 34 in 2006.

In addition, CIETAC has become the nationwide leader and its role is no longer limited to foreign-related cases. In fact, statistics published by the CIETAC show that the number of domestic cases (934 in 2010) has exceeded the number of foreign-related cases (418 in 2010) since 2005.

As can be seen, CIETAC's imperious position within the global arbitration environment is unquestionable. The 2011 reforms to the CIETAC rules mentioned above are slanted to increase CIETAC's competitiveness even further.

However, an agreement for the reciprocal enforcement of commercial court judgments between Mainland China and Hong Kong was recently signed in 2006. With the emergence of this potential alternative to specifying arbitration as the means for resolving disputes that require cross-border enforcement, it remains to be seen whether arbitration levels will be affected.25

Suggestions

Despite the rising emergence of China as an arbitration centre, differences remain between the arbitration law of China and the rest of Asia's. One obvious example is how Chinese arbitration law is not formulated based on the UNCITRAL Model Law unlike many other Asian jurisdictions.

However, even though the Model Law has no official status within China's legal system, the use of the Model Law is not expressly prohibited, especially after the 2005 reforms of the CIETAC rules that provide for greater focus on the parties' agreement. Yet there have been suggestions for China to officially open the door to foreign arbitration institutions (such as the ICC International Court of Arbitration) and allow them to handle arbitration cases within Mainland China. A clear regulation allowing international institutions such as the ICC to administer arbitrations within Mainland China would give the parties greater choice, and lead to healthy competition between various institutions. Further, there have also been calls to extend this flexibility to allow arbitration agreements without reference to arbitral institutions (ad hoc arbitration), which Chinese arbitration law uniquely does not provide for as of now.26

However, it has to be noted that the coherent development of Chinese arbitration law will always remain hindered as long as the current tension between two opposing forces in arbitration in legal circles is in place- one clamouring for the harmonisation of China's arbitration with internationally accepted norms and practice, the other viewing arbitration as a 'quasi-judicial' mechanism that requires, in particular, closer supervision of arbitration by the courts than is considered appropriate in most 'arbitration friendly' jurisdictions.27

Indonesia

Indonesia is the world's largest archipelago with over 17,000 islands and is a South East Asian country that is immensely rich in natural resources. It has a relatively secure political environment and has managed to contain civil unrest issues in the past decade, thus paving the way to increased foreign investment in a substantial number of Indonesian businesses. This is coupled with a heightened awareness of the inefficiencies and corruptive practices of the judicial process, and has, in turn, brought about a desire for alternative methods of dispute resolution. In our increasingly globalised world that witnesses an exponential increase in the number of cross-border commercial relationships, there is, at present, an elevated recognition of the need for arbitration. Karen Mills states that 'as business transactions become more and more sophisticated and complex, we are finding a market increase in contractual documentation calling for arbitration rather than litigation in Indonesia.'28

Summary of development of laws

Indonesia's legal system is a civil law legal system derived from the Dutch system, and in contrast to common law, there is no legal principle of stare decisis and each case is decided anew based on its own facts and the court's interpretation of the law. Although arbitration has existed and been applied as a formal means of dispute resolution in Indonesia since the mid-19th century, until late 1999 there was no specific law governing arbitration. With the enactment of the new Arbitration Act no. 30 of 1999 concerning arbitration and alternative dispute resolution (ADR), several of the provisions with regard to the Dutch Code of Civil Procedure have been revoked and replaced in an attempt to integrate and strengthen the institution of arbitration in Indonesia.

Badan Arbitrase Nasional Indonesia (BANI) (Indonesian National Arbitration Institution) is Indonesia's primary national arbitration institution and was established in 1977 with the support of the Indonesian Chamber of Commerce. Over time, BANI has developed its own rules and procedures for arbitrations, including the time frame in which an arbitral tribunal has to render an award. Indonesia also has two other arbitration institutions such as the Indonesian Capital Market Arbitration Board (BAPMI) and the Shariah National Arbitration Body (BASYARNAS).

Increased receptiveness to arbitration

The rising number of cases registered in BANI is a testament to the growing interest for arbitration in Indonesia. For example, before 1999, the number of cases registered for arbitration averaged seven, whereas between 2000 and 2006 it was recorded that there were 20 cases. Furthermore, the number is increasing exponentially as there were 31 cases in 2006 alone.29 Moreover, the Arbitration Act now allows arbitrators to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and the sale of perishable goods.30 Previously, no such power could be exercised by arbitrators.

A very significant development in 2010 for many oil and gas companies operating in Indonesia is that BPMigas (the Indonesian Upstream Oil and Gas Supervisory Agency) has relaxed its stance in requiring BANI arbitration clauses in regulated contracts. It has been stated officially that contracts in Indonesia may be governed by other arbitral institutions such as the SIAC or the International Chamber of Commerce (ICC), provided that the seat of the arbitration is within Indonesia, and thus not necessarily Jakarta. The effects of such a decision are widespread, as Indonesia is a very attractive country for foreign investment in the energy industry and new international investors, particularly from China and India, are increasingly being drawn into Indonesia's energy industry.

With such a development, companies will be able to choose to arbitrate in another institution, which they may be more familiar and comfortable with, and this would lead to further receptiveness to arbitration as an alternative means of dispute resolution.

Harmonisation of arbitration laws and its effects The basis of arbitration in Indonesia is the Dutch Code of Civil Procedure and not the UNCITRAL Model Law, and to the date of writing, there has been no indicated intention to amend it in order to adopt any of the Model Law provisions with which it differs. There are various differences; for example, the Arbitration Law states that the case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas Model Law requires hearings unless the parties agree otherwise.

Furthermore, BANI's practices and procedures still differ from most internationally recognised arbitral institutions. For example, BANI requires that the arbitrators are chosen from its own approved list and the pool of non-Indonesian, international arbitrators in Jakarta is limited. Also, a Jakarta seat for arbitrators may fuel worries that there is an increased risk of one party seeking to use and influence the local courts to interfere with the arbitral process.

Even though Indonesia has ratified both the New York Convention and the ICSID (The International Centre for the Settlement of Investment Disputes) Convention, the pro-enforcement spirit of these conventions has not been completely adopted in the Indonesian judiciary system. In practice, foreign parties have experienced considerable difficulty in enforcing foreign awards. Firstly, enforcement will only proceed in respect of disputes arising from legal relationships that are considered 'commercial' under Indonesian law and not any other sorts of disputes. Secondly, courts may deny a writ of execution for specious 'public policy', also known as public order, reasons that are not based on an international standard, but on the subjective domestic climate.

The lack of enforcement of foreign arbitral awards in Indonesia is further exacerbated by the non-existent central jurisdiction in Indonesia. The fact that there are two institutions dealing with the writ of execution of foreign arbitral awards is a hindrance to the aim of arbitration resolution, which seeks to avoid a multiple proceeding of domestic litigation and promote a single, centralised dispute resolution procedure in a single forum.31 In the case of E.D. & F. Man (Sugar Ltd) v. Yani Haryanto, the Central Jakarta District Court had annulled the underlying contract based on the violation of the Indonesian public policy. On the other hand, the Indonesian Supreme Court rendered the exequatur (writ of execution) upon this case. However, it was considered unenforceable since the underlying contract was invalid.

Furthermore, even after the 1999 Act, in practice, Indonesian courts usually disregard an 'agreement to arbitrate'. Even though articles 3 and 11 of the Act embody 'limited court involvement values' and clearly state that domestic courts have no authority or competency to litigate the case of the contracting parties, it is not always so in practice. In the case of Bankers Trust Company and Bankers Trust International PLC (BT) v. Mayora Ltd, the District Court of Jakarta had no authority to settle this dispute based on article 11 but paid no attention to the arbitration clause provision of the contract and issued a court decision no. 46/Pdt.G/1999 due to the lack of commerciality.

However, this tendency does appear to be subsiding, particularly since the Supreme Court has made it clear it will not tolerate such abuses where an unethical counsel would persuade courts that a contractual dispute is a tort case, and therefore not arbitrable, and thus ignore both provisions of the Arbitration Law and the Supreme Court's holdings and advisories.

In one recent case, a party respondent to an arbitration applied to the court to stay the arbitration on the ground that it was precipitously brought. The court refused to hear such an application where the other party contested its jurisdiction on the basis of an agreement to arbitrate and where an arbitration had already commenced.32

The ratification of various conventions and new developments of BPMigas and the Arbitration Act of 1999 all point to a greater number of foreign investors, and an increasing number of parties are choosing arbitration as an alternative means of dispute resolution. However, judicial hostility as a reflection of territorial sovereignty has become a common ground of the unenforceability of foreign arbitral awards.33 Domestic courts should thus refrain from opposing the enforcement of foreign arbitral awards and involvement of the courts should be limited. There should thus be a balance between the supervisory jurisdiction and a limitation of court intervention in order to support the final and binding characteristic of foreign arbitral awards.34 This would lead to greater harmonisation of arbitration laws worldwide, and would pave the way for a globalised world working towards greater arbitration.

Conclusion As observed from the Asian case studies above, arbitration is indeed on the rise in Asia, and such receptiveness and demand for arbitration signal that its slice of the dispute resolution pie will only grow.

In particular, Singapore and Hong Kong have witnessed a proliferation of arbitration cases under their sophisticated institutions and rules for arbitration. Domestic courts in these countries have also played supportive roles and made contributed significantly to the rise of arbitration. They have led the way for the development of alternative forms of dispute resolution in Asia.

The next step forward would be to further harmonise the Asian arbitration systems so as to increase its accessibility to international parties. However, to achieve complete harmonisation and enjoy its positive effects, effort on all parties involved is essential. Thus, it would be highly desirable for the rest of Asia to follow in the footsteps of Singapore and Hong Kong so that Asia will continue to be recognised internationally as an attractive destination for arbitration.

Notes

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9Arbitration Ordinance chapter 341.

10Subject to the usual exceptions regarding disclosure to professional advisors or disclosure required by law.

11Section 24(1) - (5), article 11 of UNCITRAL Model Law (Appointment of arbitrators) LN 38 of 2011.

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Singapore

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Introduction

This article will look at the continual growth of international arbitration in Singapore that, over the last year, has shown no sign of slowing. We will also discuss in detail the significant cases in international arbitration that came before the Singapore courts in the last 12 months since August 2010. The Singapore courts had occasion to deal with the following matters:

- the novel issue of whether claims based on insolvency provisions ought to be submitted to arbitration or pursued in court;
- the importance of pleading all material facts when commencing arbitration proceedings;
- the need for a party seeking to challenge an arbitration award to elect whether to make that challenge before the supervising court or before the court of the jurisdiction where the award is sought to be enforced;
- the enforcement of an arbitral award confirming a Dispute Adjudication Board decision issued under the FIDIC Conditions of Contract for Construction; and
- the public policy considerations in relation to the setting aside of an arbitral award under Article 34(2)(b)(ii) of the Model Law.

International arbitration in Singapore continues to grow

Singapore is fast emerging as a venue of choice for settling commercial disputes out of court, alongside global leaders such as New York, London and Paris. The number of disputes referred to the Singapore International Arbitration Centre (SIAC) rose for the 10th consecutive year in 2010, with 198 new filings from a total of 160 in 2009. During the course of 2010, SIAC also made 100 individual appointments of arbitrators to a total of 160 tribunals, from a diverse group of nationalities.

Table showing growth in the number of new cases handled by the SIAC between 2000 and 20101.

The new cases in 2010 involved parties from 45 jurisdictions, with India, Hong Kong, Indonesia, China and Vietnam being the most represented in the new cases, besides parties from Singapore. There has also been a rise in the number of cases having no Singapore link, these cases accounted for 46 per cent of all cases referred to the SIAC in 2010.

We reported in last year's edition the progressive changes that SIAC introduced in its Arbitration Rules. Two novel changes were with respect to the introduction of an expedited procedure under a new Rule 5.1 and the provision for the appointment of an Emergency Arbitrator before a tribunal is constituted under a new Rule 26. In 2010, the SIAC reported that it received 20 requests for cases to be placed under an expedited procedure of which 13 cases were accepted. The SIAC also reported that in 2010 there were two applications for the appointment of an Emergency Arbitrator. We understand that there has been continued usage of these new provisions in 2011.

The SIAC has unsurprisingly received recognition for its progress. It was ranked fourth in the Queen Mary College international arbitration survey, just behind the Court of Arbitration of the International Chamber of Commerce (the ICC), the London Court of International Arbitration and the American Arbitration Association. Further accolades came for the SIAC in the form of a nomination for institution of the year at the 2011 GAR30 Awards.

Maxwell Chambers, the integrated dispute resolution complex in Singapore, was also nominated for an award in the most significant development of the year category at the 2011 GAR30 Awards.

The growth of international arbitration in Singapore is not just reflected in the increased number of filings at the SIAC but also in the statistics concerning ICC arbitrations with Singapore seats. The ICC had opened a Regional Office at Maxwell Chambers in 2009. The efforts of the regional office are clearly significant in that Singapore continues to be the most popular seat for ICC arbitrations in Asia. In 2009, a total of 38 ICC arbitrations seated in Singapore were commenced. It is expected that Singapore will continue to be the top venue in Asia for ICC arbitrations in 2010.

In 2010, an International Centre for the Settlement of Investment Disputes (ICSID) case was heard in Singapore and it is expected that more ICSID matters will be heard in Singapore moving ahead.

Singapore's arbitration-friendly laws continue to be among the factors credited as contributing to Singapore's popularity as an international arbitration hub and emergence as not only a leader in Asia, but also a significant player on the global stage. Some of the recent case law developments in Singapore are now reported below.

Arbitrability and non-arbitrability

A key concept in arbitration law is arbitrability. What matters are arbitrable and what are not is a list that continues to evolve. It is generally accepted, for example, that certain matters that may have public interest elements cannot be arbitrated. This would include matters relating to family law, the validity of trade marks or patents, and the administration of wills and estates.

We reported last year on a Singapore High Court decision (Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v Larsen Oil and Gas Pte Ltd (2010) SGHC 186) concerning the issue of whether disputes under claw-back provisions in insolvency law are arbitrable.

In May 2011, the Singapore Court of Appeal confirmed in Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore (2011) SGCA 21, that such disputes could not be determined by arbitration.

Facts of the case

Petroprod Ltd (Petroprod), and its four wholly-owned subsidiaries, which had no employees, had entered into a Management Agreement with the defendant, Larsen Oil and Gas Pte Ltd (Larsen). Petropod asserted that as a result of the Management Agreement, the finances of it and its subsidiaries came under Larsen's control. Larsen used this control to pay itself various sums purportedly due under the Management Agreement. When Petropod was placed in liquidation, its Singapore liquidators sought to claw-back these monies paid to Larsen. They brought their claims in the Singapore courts.

Larsen sought a stay of the liquidator's actions on the basis that it should be resolved by arbitration on account of an arbitration clause in the Management Agreement. Petropod countered that as the claims were based on various insolvency regime provisions, these claims were not arbitrable. The claims were as follows:

- that the payments that Larsen caused Petropod to make amounted to unfair preferences or transactions at an undervalue within the meaning of sections 98

and 99 of the Singapore Bankruptcy Act (read with section 329(1) of the Singapore Companies Act) and were hence avoidable by the liquidator or judicial manager of the company; and

- that Larsen had caused its subsidiaries to make various payments with the intent to defraud Petropod as a creditor of the subsidiaries and, accordingly, that such payments were avoidable under section 73B of the Singapore Conveyancing and Law of Property Act.

The Court of Appeal's decision

The Court of Appeal held that as a matter of construction, the arbitration clause in question did not cover avoidance claims. It noted that since avoidance claims could only be pursued by the liquidators or judicial managers of insolvent companies, there was no reason to objectively believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement.

However, the Court also went on to consider whether, as a matter of principle, avoidance claims were arbitrable. It noted that the insolvency regime was intended for the protection of all of the company's creditors and, accordingly, as a matter of public policy, the company could not enter into agreements with individual creditors that had the effect of opting out of the regime. This, accordingly, meant that with respect to avoidance claims, such claims should be dealt with as follows:

- where a claim arose only from the onset of insolvency due to the operation of the insolvency regime, such claims were not arbitrable;
- where a claim arose from the insolvent company's pre-insolvency rights and obligations, such claims would not be arbitrable if they affected the substantive rights of other creditors; and
- where a claim arose from the insolvent company's pre-insolvency rights and obligations and involved only the prior private disputes between the company and the other party, then ordinarily such a claim could be arbitrated.

Those claims made by Petropod, that were based on sections 98 and 99 of the Bankruptcy Act, were clearly claims arising only from the onset of insolvency due to the operation of the insolvency regime, and, accordingly, those claims could not be arbitrated.

For those claims that were based on section 73B of the Conveyancing and Law of Property Act, the court noted that such a claim may straddle both a company's pre-insolvency state of affairs, as well as its descent into the insolvency regime. The essence of the claim at hand was that Petropod's subsidiaries had transferred property to Larsen despite (or thereby causing) their insolvent status, to Petropod's detriment. This made it similar to the claims under sections 98 and 99 of the Bankruptcy Act, where the prerequisite was that the debtor must be either insolvent at the time of the transaction, or had become insolvent in consequence of it. In the view of the Court, such a section 73B claim must be regarded as one that is intimately intertwined with insolvency since it was entirely contingent on the insolvent status of the debtor. Accordingly, Larsen's section 73B claims against Petropod were also not arbitrable.

In its decision, the Singapore Court of Appeal provided valuable guidance on the concept of non-arbitrability. While the Court of Appeal confirmed its approach that arbitration clauses should be 'generously construed such that all claims, whether common law or

statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise', the Court of Appeal was right in recognising that claims arising from statutory insolvency provisions were non-arbitrable, especially when third-party creditors of the insolvent company would be affected.

The role of pleadings in arbitration proceedings

Arbitration is usually conducted in a manner that is less formal than court proceedings. Parties may often agree on the scope and extent to which procedures common to court proceedings will apply. Institutional arbitrations, however, can be subject to fairly detailed procedural rules. Regardless of the forum, a key step in any arbitration proceeding is for parties to set out what their claims and defences are. This enables the arbitral tribunal to know exactly what it needs to decide. In Kempinski Hotels SA v PT Prima International Development (2011) SGHC 171 (Kempinski Hotels), the Singapore High Court made it clear that ensuring all material facts are properly pleaded in arbitration proceedings is just as important as in proceedings before the court.

Facts of the case

In Kempinski Hotels, the Swiss-incorporated applicant had entered into a hotel management contract with the respondent, the owner of a hotel in Jakarta, Indonesia. The contract was to be governed by Indonesian law. Subsequently, the Indonesian government issued three decisions (Three Decisions) that, essentially, made it compulsory for the contract to be carried out by a company incorporated in Indonesia. The applicant's lawyers advised that formation of an Indonesian company was not necessary, but proposed certain amendments to the contract which were agreed to by the parties. These amendments were, however, never made.

A dispute arose between the parties and the respondent gave the applicant written notice of purported termination of the contract. Two months later, the respondent notified the applicant that that it had entered into a management contract with another hotel group. The applicant took this to be a breach of the contract and commenced arbitration proceedings for wrongful termination. The respondent pleaded a defence of supervening illegality by reason of the Three Decisions, which the arbitrator heard as a preliminary issue before issuing the first award, holding inter alia that the contract was valid but was incapable of being performed. The arbitrator then sought a further hearing to determine whether damages were still available to the applicant under Indonesian law.

Based in particular on the evidence given by the applicant's expert, the arbitrator published a Second Award which broadly held that it was still possible for the applicant to carry out the contract in compliance with the Three Decisions and, accordingly, the possibility of damages was still available to the applicant if it could show that the contract was wrongfully terminated.

The respondent subsequently discovered that the applicant had, prior to the publication of the second award, entered into a contract to provide management services to another hotel. The respondent's solicitors wrote to the arbitrator seeking 'clarification' of the first and second awards in light of this information. After further submissions on the issue, including opinions from the parties' experts, the arbitrator issued a third award, which held that, as the new management venture entered into by the applicant was inconsistent with the contract between the parties, the possibility of specific performance was no longer available. The arbitrator subsequently issued a fourth award, which held that as no steps had been taken to make performance of the contract lawful, an award of damages was not possible as it

would be contrary to the public policy of Indonesia. The arbitrator also issued a fifth award on the issue of costs.

The applicant filed proceedings in the High Court to set aside the third, fourth and fifth awards (Challenged Awards). The Court was asked to determine inter alia whether the Challenged Awards should be set aside on the basis that they dealt with an issue that had not been formally pleaded, namely, the new hotel management venture.

The High Court's decision

The Court held that the Challenged Awards should be set aside. In coming to this decision, the court noted that under article 34(2)(a)(iii) of the Model Law, one of the grounds on which an arbitration award may be set aside was where matters decided by the tribunal were beyond the scope of the submission to arbitrate. It reasoned that in order to determine the scope, a reference to the pleadings would usually have to be made.

The Court held that pleadings were an essential component of a procedurally fair hearing before both a court and a tribunal, and particularly essential in arbitration proceedings where the right of appeal was severely limited. It was therefore incorrect for the respondent to argue that there was no rule of pleading that required all material facts to be stated and specifically pleaded as would be required in court litigation.

What the respondent should have done in the circumstances was to apply to amend its pleading to include the allegation that the existence of the new management contract made it impossible for the applicant to perform the contract. The fact that the respondent raised these new issues as 'clarifications' did not allow for the proper investigation and determination of the factual matrix that was necessary to make an informed decision.

Challenging or enforcing an arbitration award

A party seeking to challenge an arbitration award has two courses of action open to it. It can either apply to the supervising court to set aside the award, or it can apply to the enforcement court to set aside any leave granted to the opposing party to enforce the award. The argument put forward by plaintiffs in Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd (2010) SGHC 304 (Glory Wealth Shipping) was that these were alternative options and not cumulative ones and the fact that the defendants had already commenced proceedings in the English courts to challenge the arbitration award on the grounds of irregularity precluded them from making an application to set aside the order granting leave to the plaintiffs to enforce the award.

Facts of the case

The defendants, Glory Wealth Shipping Pte Ltd (GWS) had chartered a vessel from the plaintiffs, Galsworthy Limited of the Republic of Liberia (Galsworthy) and, in turn, sub-chartered that vessel to a third party. Both charters were not performed and the resulting disputes were referred to separate London arbitrations. Glory Wealth Shipping concerned the final award pertaining to the charter between GWS and Galsworthy, where Galsworthy was successful in its claim for hire and damages in the sum of approximately US$1.15 million.

GWS applied to challenge the final award in the English court and Galsworthy successfully applied for £30,000 in security for costs. GWS failed to provide the security and its application challenging the final award was dismissed. Galsworthy then came to the Singapore courts and obtained leave to enforce the final award, an order against which GWS appealed.

The High Court's decision

The High Court held that GWS was not entitled to make an application to set aside the order granting Galsworthy leave to enforce the foreign award (setting aside application) as it had elected to proceed in the English court and, accordingly, the application before the Singapore court amounted to an abuse of process. GWS had the opportunity of choosing either the supervisory or enforcement court to mount its challenge and had elected to proceed on the former. The Court saw the setting aside application as a considered decision on the part of GWS to avoid the need to furnish security for costs. GWS had elected its forum of challenge and should be bound by it.

The Court noted that to allow the application would be against the principle of comity of nations that required the Singapore courts to be slow to undermine the orders made by other courts, other than in exceptional circumstances that did not exist in Glory Wealth Shipping. Allowing the application may also result in a duplication or conflict of judicial orders as, if GWS's application was heard on the merits and failed, it may then be entitled to challenge the enforcement of the final award.

The Court also held, in the alternative, that GWS had not, on a balance of probabilities, established its case that the award should not be enforced under the grounds for challenge set out in the Singapore International Arbitration Act (IAA).

Enforcement of an arbitral award confirming a Dispute Adjudication Board decision issued under the FIDIC Conditions of Contract for Construction

In CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK (2011) SGCA 33, the Singapore Court of Appeal had to consider the status or effect of a Dispute Adjudication Board (DAB) decision issued pursuant to the Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer (1st Ed, 1999) (FIDIC Conditions of Contract) published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC). The FIDIC Conditions of Contract set out terms for adjudication and arbitration in the event of a dispute between parties who incorporate its provisions into a construction contract. The status of such a decision and the manner of its enforcement has been an open question both in Singapore and internationally for some time and academic opinion on the subject has been divided. The decision of the Court of Appeal in this case has settled the position in Singapore.

Facts of the case

The appellant and the respondent entered into a construction contract, which incorporated provisions of the FIDIC Conditions of Contract. When a dispute arose, in accordance with the terms of the contract, the parties referred the dispute to a DAB. The DAB issued a decision (DAB's Decision) in favour of the appellant. The respondent filed a notice of dissatisfaction (NOD) and the appellant filed a request for arbitration for the sole purpose of 'giving prompt effect to the (DAB's Decision)'.

A preliminary hearing was convened by the arbitral tribunal in order to consider whether the appellant was entitled to immediate payment pursuant to the DAB's Decision and whether the respondent was entitled to request the tribunal to open up, review and revise the DAB's Decision. The parties were informed that if the response to the second of the two questions was affirmative, then the arbitral tribunal would issue appropriate directions to the parties for further steps to be taken in the arbitration proceedings.

After the preliminary hearing, the arbitral tribunal issued its decision, which was described as a 'final award'. It decided that the appellant was entitled to immediate payment, and that the respondent was not entitled to request the tribunal to open up, review and revise the DAB's

Decision. However, it also decided that the respondent had a right to commence another arbitration to revise the DAB's Decision. The appellant applied to the Singapore courts to enforce the arbitral award against the respondent, while the respondent applied to set the Final Award aside. The High Court allowed the application to set aside the Final Award and the appellant appealed to the Court of Appeal.

The Court of Appeal's decision

One of the key issues before the Court of Appeal was the effect of sub-clause 20.4 of the FIDIC Conditions of Contract, which provides that a decision of a DAB shall be 'binding' on the parties, who shall 'promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award'.

In considering the effect of a DAB decision, the Court drew a distinction between the terms 'binding' and 'final', noting that they were not synonymous, thus:

- under the FIDIC Conditions of Contract, if a NOD is not given, the DAB's decision becomes both binding and final. As such, it is unalterable and is not open to further review. Under those circumstances, non-compliance with the DAB decision can be referred to arbitration for the sole purpose of enforcement; but
- if, on the other hand, a NOD is given, the DAB decision remains binding and has contractual force; each party is bound to give effect to that decision. However, it is not conferred the status of a final decision. If that decision calls for payment to be made by one party to the other, then the decision should be enforceable directly by an interim or partial award.

Where arbitral proceedings are held to consider non-compliance with a DAB decision in respect of which a NOD has been given, sub-clause 20.6 provides that 'any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration'. Clause 20.6 also states that 'arbitrator(s) shall have full power to open up, review and revise […] any decision of the DAB, relevant to the dispute'. The respondent to the proceedings may raise the issues that it wishes the arbitral tribunal to consider either in its defence or in the form of a counterclaim or both. Even if both parties were to file NODs in respect of the DAB decision, all the disputes have to be resolved in a consolidated arbitration.

Applying those principles to the facts of the case, the Court held that it was, therefore, not open to the arbitral tribunal to issue a final award without reviewing the merits of the NOD and the DAB decision. What the arbitral tribunal ought to have done was to make an interim award in favour of the appellant for the amount assessed by the DAB (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a final award.

The tribunal's decision to not go into the merits of the NOD ran counter to the scheme set out in sub-clause 20.6 of the FIDIC Conditions of Contract. Accordingly, the Court held that the failure of the tribunal to consider the merits of the DAB's decision before making the final award meant that it exceeded its jurisdiction in making that award, and the decision to set aside the final award was upheld.

Public policy considerations in setting aside an arbitral award

In a significant decision, the Singapore Court of Appeal in AJU v AJT (2011) SGCA 41 (AJU v AJT) overturned the High Court's decision to set aside an arbitral award on the basis

that it enforced an illegal agreement and was therefore in conflict with the public policy of Singapore. In last year's chapter, we noted that this High Court decision was the first reported judgment in Singapore where an arbitration award was successfully set aside on the grounds that it was in conflict with public policy.

The Court of Appeal has now held that the High Court had erred in reopening the arbitral tribunal's finding of fact that the agreement in issue was not illegal and in so holding, the Court of Appeal reaffirmed the narrow scope of the public policy ground for challenging arbitral awards under Article 34(2)(b)(ii) of the Model Law.

The traditional understanding of the public policy ground under the Model Law for setting aside arbitral awards is that it is to be construed narrowly. It is reserved for exceptional cases, to ensure that arbitral awards which 'shock the conscience' or 'violate the forum's most basic notions of morality' (per the Singapore Court of Appeal in PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA (2007) 1 SLR(R) 597) are set aside or not enforced or both. It should not be used as a basis to revisit and second guess findings of fact made by an arbitral tribunal, as this would undermine the legislative objective of the IAA and that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community. In this regard, the Court of Appeal's decision in AJU v AJT is to be welcomed as a timely judicial reaffirmation of the established principles.

Facts of the case

The respondent was a British Virgin Islands company and the appellant was a public company incorporated under the laws of Thailand. The respondent initiated SIAC arbitration proceedings in Singapore against the appellant for alleged wrongful termination of an agreement (the rights under that agreement having been assigned to the respondent). After arbitration had been initiated, the appellant made a complaint to the Thai police of fraud against the respondent's sole director and shareholder and two of its related companies on the basis of an alleged forged document faxed to the appellant. The complaint led to criminal charges being laid for joint fraud, forgery and use of a forged document. The latter charges were non-compoundable offences under Thai law and any agreements to compromise such offences were against Thai public policy.

While the police investigations were continuing, the parties negotiated a settlement of their disputes and entered into an agreement that provided, amongst other things, for each party to terminate and withdraw all actions. After the agreement was signed, the appellant withdrew its complaint to the police and cessation and non-prosecution orders were issued in respect of the criminal charges. However, the respondent refused to terminate the arbitration proceedings, contending that the charges could still be reactivated by new or additional information. The appellant formally applied to the arbitral tribunal to terminate the arbitration on the grounds that the parties had reached full and final settlement of their claims.

The respondent challenged the validity of the agreement on the grounds that it amounted to an illegal agreement to stifle the prosecution of a non-compoundable offence in Thailand. The parties subsequently agreed that the tribunal was to determine the respondent's illegality contention.

The tribunal ruled that the agreement was not illegal and directed that the arbitration be terminated. The respondent appealed to the High Court, where the critical issue was whether

the court could, in exercising its supervisory jurisdiction, reopen the tribunal's findings of fact or law or both and decide for itself whether the agreement was illegal. The court held that it could do so in 'an appropriate case'.

Reversal of the High Court's decision by the Court of Appeal

Our firm acted for the appellant and succeeded in having the order setting aside the tribunal's award reversed. The Court of Appeal robustly affirmed the prevailing judicial and legislative policy of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards. A few aspects of the Court of Appeal's decision are worth noting:

- the Court of Appeal expressly declined to adopt the approach taken by the English Court of Appeal in Soleimany v Soleimany (1999) QB 875, where the English court had held that where enforcement of an arbitral award was resisted on the ground of illegality in the underlying contract, the court could, in an appropriate case, reopen the tribunal's finding that there was no such illegality;
- instead, the Court of Appeal preferred the approach taken by the majority of the English Court of Appeal in Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others (2000) 1 QB 288. In that case, it was held that where an arbitral award was challenged on the basis of illegality in the underlying contract despite the arbitral tribunal having found that the contract was legal, it was only in cases where the challenge was based on facts not placed before the arbitral tribunal that the court would intervene and reopen the arbitral tribunal's finding; and
- the Court of Appeal reaffirmed the principle that even if an arbitral tribunal's findings of law or fact or both are wrong, such errors would not, per se, engage the public policy of Singapore. The court did, however, clarify that an erroneous finding of law by an arbitral tribunal as to the public policy of Singapore would be grounds for setting aside the award.

Conclusions

The last 12 months have seen Singapore make further strides in developing as a significant and important jurisdiction for international arbitration. The coming months and years will undoubtedly see further developments in line with the changing face of global commerce and finance.

In 2012, Singapore will host the 21st ICCA Congress. This will be yet another milestone for Singapore.

Notes

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Table taken from the SIAC website at www.siac.org.sg

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Malaysia

Chong Yee Leong

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In previous years, we discussed the general position of the law applicable to arbitrations in Malaysia. We had highlighted that all arbitrations commenced in Malaysia on or after 15 March 2006 are governed by the Arbitration Act 2005 (2005 Act) and that it repealed the statute that previously governed arbitrations in Malaysia, the Arbitration Act 1952 (1952 Act) and also repealed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFAA Act). As mentioned before, the 1952 Act is not altogether irrelevant now as it is still applicable to arbitrations commenced before 15 March 2006.

In this article, we discuss several of the recent cases decided in the Malaysian courts that clarified certain positions of law relating to arbitration, which were previously ambiguous or were never considered before by the courts. We also discuss the adoption of the revised UNCITRAL Arbitration Rules by the Kuala Lumpur Regional Arbitration Centre (KLRAC) and the significant revisions made by UNCITRAL.

Stay of proceedings in court

The issue of whether the court retains any discretion to not granting a stay of proceedings in the courts in favour of arbitration when the subject matter of dispute is subject to an arbitration agreement had been considered several times before. In this regard, it is pertinent to note that there is a clear difference in the provisions relating to the power of the High Court to stay legal proceedings in the 2005 Act when compared with similar provisions in the 1952 Act.

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the subject matter of the dispute is the subject of an arbitration agreement. Section 10 (1) of the 2005 Act reads as follows:

> A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

This is unlike section 6 of the 1952 Act, which provides as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement,

> and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The difference between section 10 of the 2005 Act and section 6 of the 1952 Act is that while the former makes it mandatory for the High Court to grant a stay, the latter allows the court to use its discretion to grant a stay or otherwise.

Another difference between the provisions is that section 10 of the 2005 Act provides only two instances in which the court does not need to grant a stay; firstly, if the arbitration agreement is null and void, inoperative or incapable of being performed and secondly, if there exists, in fact, no dispute between the parties in regard to the matters to be referred. Such conditions are not stated in section 6 of the 1952 Act and this allows the court broad discretion by stating that a stay need not be granted if the court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration. However, both sections have a common provision that a stay will not be granted if the applicant has taken part in the proceedings.

When the 2005 Act initially came into force, it was argued that the courts, in a manner similar to the express provision in the 1952 Act and also by way of the inherent jurisdiction of the court, retains its discretion on the issue of granting a stay of proceedings. However, over the years, the courts have clearly established that section 10 of the 2005 Act mandates that a stay be granted if the subject matter of the dispute is the subject of an arbitration agreement. Recently, in the case of Chut Nyak Hisham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd,[1] the court used the occasion to restate the desire of the legislature to reform the law relating to arbitration and to give primacy to arbitration proceedings over court proceedings in circumstances where parties have agreed to resolve their disputes by arbitration. The High Court stated that in such circumstances, the court has to grant a stay of proceedings regardless of whether the arbitration is international or domestic in nature and that it would be rare for a court not to grant a stay under the 2005 Act. It is also pertinent to note that the High Court was also of the view that, notwithstanding that the agreement between parties to which the matter relates was signed in 2005, the applicable statute is the 2005 Act, as the notice to arbitrate was only issued in 2008 (after 15 March 2006).

Similarly, the position taken by the second highest court in the country, the Court of Appeal, in the case of Renault Sa v Inokom Corporation Sdn Bhd & Anor And Other Applications[2] was no different. The Court of Appeal held that a stay is mandatory under section 10 of the 2005 Act. The court further observed that unlike the 1952 Act, which provides the High Court powers to hear disputes on questions of fraud relating to the arbitration agreement (section 25), the 2005 Act deems the same to be within the competent jurisdiction of the arbitrator and is not to be treated any different than other matters.

The court, in the case of Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd,[3] noted that, under the 1952 Act, it has the discretion to grant a stay of court proceedings if certain conditions are met, one of which being that the applicant has demonstrated that he or she is ready and willing to arbitrate the dispute, while there is no such requirement under the 2005 Act.

The court held that in both the 1952 Act and 2005 Act, a stay will only be granted if the party seeking to stay the proceedings has not taken part in the proceedings. In this case, the Court held that the defendant, by requesting and obtaining an extension of time to file its defence,

had taken a step in the proceedings and therefore had deprived itself of the right to stay proceedings.

In Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad,4 the High Court, having both an application for stay and summary judgment before it, held that the it has no discretion under the 2005 Act but to grant a stay unless section 10(1)(a) or (b) applied. The plaintiff in this case argued that section 10(1)(b) applied, to which the court observed that the application of section 10(1)(b) should be shown in the answer opposing the stay application and not by a separate summary judgment application.

In addition to the two instances provided under Section 10 of the 2005 Act, the decision in the case of Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd & Another Appeal-5 seems to give rise to a further ground for not granting a stay of court proceedings in rare circumstances where estoppels will arise. Although the general rule under section 10 still stands, when parties have subsequently displaced their original discretion to refer their disputes to arbitration by expressly submitting to the jurisdiction of the court, the doctrine of estoppels may be invoked to prevent a party from asserting otherwise.

Arbitral awards

There is no definition of 'award' in the 1952 Act. In the 2005 Act, however, section 2(1) defines an award as a decision of the tribunal on the substance of the dispute and that it includes any final, interim or partial award and any award on costs or interests. Section 36(1) of the 2005 Act both further provide that all awards are final and binding.

Both the 1952 Act and 2005 Act are silent in regard to appeal procedures against an award. However, both acts have provisions relating to setting aside an award. Section 24 (2) of the 1952 Act states as follows:

> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

Similarly, section 37 of the 2005 Act provides the various grounds for High Court to set aside an award.

Recently, the Court of Appeal, in the case of Cairn Energy India Pty Ltd v The Government of India,6 held that, under the 1952 Act, an arbitration award is ordinarily final and conclusive unless a contrary intention is provided for in the arbitration agreement. The Court of Appeal also noted that, accordingly, the civil courts do not have appellate jurisdiction over the arbitrator's decision if it has been fairly reached. The Court of Appeal, however, also stated that in limited and exceptional circumstances, the court may still set aside an award if there was an error of law on the face of the award.

This is based on common law principles. Jeffery Tan JCA states:

> The remedy of 'error of law on the face of the award' was not provided in the Arbitration Act 1952. But Malaysian law was not and is not limited to the Arbitration Act alone. '…courts in Malaysia have regularly considered arbitration applications on the basis that error of law on the face of the award is available for consideration under our law.7

The Court of Appeal was of the view that a question of construction is a question of law and if the question of construction itself is the very thing that had been referred to the arbitrator

for determination, the court would not set aside the findings of the arbitrator only because the court itself would have come to a different conclusion. Further, the Court of Appeal also stated that an erroneous decision of an arbitrator on a specific question of construction does not in itself make it a bad award capable of being set aside. However, where a tribunal has had to determine a question of law that became material to its decision in the dispute that was referred to it - and that question of law was determined erroneously - then curial interference is possible on the ground that there has been an error of law on the face of the award. As observed by the Court of Appeal, the grounds for setting aside an award under the 2005 Act are very limited and, additionally, section 8 of the 2005 Act provides that no court shall intervene in any matters governed by the 2005 Act except as provided. Therefore, it is unlikely that the decision of Cairn Energy India would be of any relevance under the 2005 Act.

A similar position that the Malaysian courts would be unlikely to set aside or refuse recognition of an arbitration award is seen in the recent case of Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd.[8] In this case, the High Court considered both an application to set aside an award (the plaintiff's application) as well as an application to register an award for purposes of enforcement (the defendant's application). The court observed that the plaintiff, in relying on sections 37 or 42 as the basis of its application, had failed to properly identify and state which subsection is applicable and as a result, the court held that the plaintiff's application should be dismissed for prolixity, especially since the 2005 Act does not allow the courts to intervene in matters that do not strictly fall within any of the sub-sections of section 37. Further, the plaintiff's general arguments that the arbitrator had breached rules of natural justice also could not be accepted by the court in view of the failure to set out the prejudice suffered and the proof thereof. In regard to the defendant's application, the court was of the opinion that there was not much merit in the plaintiff's arguments (that the final award does not deal with the dispute contemplated by the parties) to oppose the said application on the basis that the arbitrator had general jurisdiction to deal with all matters relating to the dispute. The court also stated that the 2005 Act makes it compulsory for courts to respect the decision of the arbitrator and that real proof is required before the courts would meddle with an award.

Another relevant case in relation to enforcement and recognition of an award is the case of Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd).[9] The High Court in this case had to decide on the appropriate statute to be used for making an application for the recognition and enforcement of an award if the arbitration was commenced under the 1952 Act. The defendant argued that since the award was being registered after 15 March 2006, the application for enforcement should be made under the 2005 Act. The High Court considered the Indian case of Thyssen Stahlunion Gmbh v Steel Authority of India,[10] that dealt with a similar point and held that to enforce an award under the 1952 Act (under which the arbitration proceedings were commenced) is an accrued right and that legislature did not intend to take away a vested right by introduction of the 2005 Act; therefore the application was indeed made under the appropriate statute.

Similarly in the recent case of Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd,[11] the court observed that, in almost all cases, failure to make an application to set aside an award is fatal to a defendant resisting a recognition or enforcement application and that merely filing an affidavit to oppose registration is insufficient. Therefore, it is advisable that

a party seeking to oppose the registration of an award also make an application to set aside the award.

CREFAA Act

Enforcement of awards pursuant to arbitration agreements under the New York Convention or arbitrations held outside Malaysia in states which were party to the New York Convention are governed by the CREFAA Act. This statute allows the courts in Malaysia to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states.

In the case of Sri Lanka Cricket v World Sports Nimbus Pte Ltd,12 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, notwithstanding that the state was indeed a signatory to the New York Convention. This decision was reaffirmed once again by the Court of Appeal in the case of Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd.13 However, late in 2009, the Federal Court had reversed the decision of the Court of Appeal in the latter case14 and held that gazette notification is evidentiary in nature and not a pre-condition for purposes of enforcing an award from a state that is a signatory to the New York Convention.

It should be noted that there are no similar provisions in the 2005 Act pertaining to the gazette notification by his majesty (as in the repealed CREFAA Act) and thus this issue does not arise for the recognition and enforcement of an award under the 2005 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 that is a signatory to the New York Convention under the Act.

Adoption of the revised UNCITRAL Arbitration Rules by the KLRCA

The development of arbitration law over the year also most recently saw the adoption of the recently revised UNCITRAL Arbitration Rules by the KLRCA on 15 August 2010, the first arbitration centre in the world to do so. The United Nations Commission on International Trade Law (UNCITRAL) had decided in 2006 that the UNCITRAL Arbitration Rules should be revised to meet the changes in arbitral practice that has occurred over the past 30 years since they were first adopted in 1976. The revised UNCITRAL Arbitration Rules were adopted by UNCITRAL on 25 June 2010 and were effective as of 15 August 2010. With KLRCA adopting the revised UNCITRAL Arbitration Rules, all changes made therein are relevant to and effects arbitrations held in the KLRCA.

The revised UNCITRAL Arbitration Rules saw more provisions being added to the rules with the aim of filling the gaps that became apparent over the years. UNCITRAL states that 'the revision is aimed at enhancing the efficiency of arbitration under the rules and does not alter the original structure of the text, its spirit or drafting style'.

Revision of article 2 shows the rules taking into account modern technology in regard to notice of arbitrations and other communications as well as conduct of the hearing. Where previously, the rules required that notices be physically delivered, the revision of the rules allows for notices and other communications to be 'transmitted by any means of communications that provides or allows for a record of its transmission'. A point to note is that when communications are conducted via e-mail or facsimile, a designated or authorised address must be used. The revision of the UNCITRAL Arbitration Rules also includes the addition of article 28(4) that provides that witnesses may 'be examined through means

of telecommunication that do not require their physical presence at the hearing' with the example of teleconference being stated.

Article 6 has been revised to reduce the time a party needs to wait before making a request to the Secretary General of the Permanent Court of Arbitration at The Hague (PCA) in regard to disputes relating to the appointment of an appointing authority from 60 to 30 days. Additionally, it is also now expressly stated that the PCA may be requested by the parties to act as an appointing authority. These changes are reflected in Malaysia under Section 13 of the 2005 Act that provides for the request for appointment to be made to the Director of the KLRCA. The default position in regard to the appointment of three arbitrators in the event parties fail to agree to a sole arbitrator has been retained. However, the appointing authority may appoint a sole arbitrator if either of the parties does not appoint a second arbitrator or a party makes such a request and the circumstances are that it is more appropriate to use a single arbitrator.

Among the significant additions to the revised UNCITRAL Arbitration Rules relating to the conduct of arbitrators, is that it is now provided that the tribunal 'shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute' (article 17(1)) and that 'the tribunal shall as soon as practicable establish a provisional timetable of the arbitration' (article 17(2)). There are also now additional provisions dealing with the issue of arbitrator's conflict of interest, whereby model statements of independence pursuant to a new article 11 are annexed to the revised rules. Also in regard to arbitrators' conduct, article 16 provides a clause excluding the liability of the tribunal (and also that of the appointing authority) except for intentional wrongdoing. This would most certainly guarantee that the arbitrators can proceed with the arbitration without fear of any negative repercussions from the parties.

Excessive tribunal remuneration would also not be possible now that the revised UNCITRAL Arbitration Rules state that the fees shall be reasonable in amount (article 41). The rules also require that the arbitral tribunal inform the parties of how it proposes to determine its fees soon after the tribunal is constituted and also how the fees and expenses have been fixed. The parties may refer the proposal or the determination of the fees of the tribunal for review to the appointing authority.

Notes

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(2009) 9 CLJ 32.

2(2010) 5 CLJ 32.

3(2010) 3 CLJ 634.

4(2010) 6 CLJ 277.

5(2010) 9 CLJ 532.

6(2010) 9 CLJ 532.

7Supra page 440.

8(2010) 5 CLJ 83.

9(2008) 8 MLJ 471.

10AIR 1999 SC 3923.

11(2009) 1 LNS 1321.

12(2006) 3 MLJ 117.

13(2009) 3 MLJ 289.

14(2010) 1 CLJ 137.

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Japan

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Introduction

Japan has, in recent years, become one of the most arbitration friendly jurisdictions in the world for two primary reasons: (i) in 2004, Japan adopted the new Arbitration Act-1 that follows the UNCITRAL model law (Model Law), and (ii) the Japanese courts have consistently taken a non-interventionist approach towards both domestic and international arbitration. In June 2011 a court decision came out to set aside an arbitration award for the first time in Japan.2 However, the fundamental trend of Japanese courts to approach arbitration with a favourable disposition remains intact. This article aims to briefly introduce the Japanese Arbitration Act, to discuss arbitration-friendly courts in Japan, together with the latest somewhat controversial court decision, and finally to highlight some of the present trends in arbitration in Japan.

Arbitration Act

New Arbitration Act

The original law on arbitration was enacted in 1890, forming part of the Code of Civil Procedure of 1890 which was basically a translation of the German Code of Civil Procedure of 1877. The original arbitration law remained virtually unchanged until 2003. This outdated arbitration law was blamed by many commentators as being responsible for the limited use of arbitration as a means of resolving international commercial disputes in Japan.

In 1999 a widespread judicial reform effort was launched in Japan. The judicial reform was called for in response to the deregulation of Japanese society, that saw a move away from a society where administrative bodies engaged in extensive ante-facto review of various transactions or undertakings to a society in which administrative bodies do not conduct such an extensive ante-facto review, but instead rely on a more general post-facto review by the judiciary. Amid the increasing role of the judicial system in Japanese society, the arbitration law was completely modernised in 2003, essentially following the Model Law, in order to facilitate the use of arbitration as a means of resolving international commercial disputes, with the hope of reducing the burden on the court system.3

Slight differences from the Model Law

The new Arbitration Act adopted the Model Law in principle, with slight modifications. For example, while the Model Law pertains to international commercial arbitration, the Arbitration Act applies to arbitration seated in Japan regardless of whether it is domestic or international, civil or commercial.4 Another key difference is that, absent an agreement between the parties, the arbitral tribunal will apply the substantive law of the state most closely connected to the dispute under the Arbitration Act.5 On this point, the Model Law provides that the tribunal is to apply the law as determined by the conflict of laws rules that the tribunal considers applicable.6 The Japanese Arbitration Act follows the laws of Germany and Korea in order to increase predictability for the parties with respect to applicable substantive laws that apply to the disputes.

The new Arbitration Act also has certain unique provisions that are not found in the Model Law. For example, arbitrators, while an arbitral proceeding is pending, may attempt to settle the dispute subject to the arbitration upon agreement of the parties.7 This reflects the practice in Japanese courts to encourage the parties to settle pending litigation. On the other hand, the Arbitration Act restricts the use of arbitration where disputes involve consumers and employees.8 As stated, while the new Arbitration Act essentially adopts the Model Law, the Act makes some additions and slight modifications to address certain concerns in an attempt to further improve the arbitration system and to reflect existing practices in Japan.

Arbitration-friendly courts

The courts in Japan offer various forms of assistance in relation to arbitration proceedings, but do not intervene in a given arbitration proceeding unless it is so permitted under the Arbitration Act.9 In fact, regardless of whether an arbitration award is rendered domestically or outside of Japan, the Japanese courts never seem to refuse the enforcement of an arbitration award, and no Japanese court had ever set aside an arbitration award until June 2011.

Court assistance

The courts in Japan may offer various forms of assistance in relation to arbitration, including with respect to appointment, challenge and removal of arbitrators and examination of evidence of third parties.10 In principle, such assistance is only provided for arbitration proceedings that are seated in Japan. However, some services, such as appointment, challenge and removal of arbitrators, may be provided even before the seat of arbitration is determined, as long as such arbitration could be seated within Japan and the Japanese court has jurisdiction over any of the parties to the arbitration.

The courts in Japan may also offer provisional measures with respect to disputes subject to arbitration, not only before arbitration commences, but also during the pendency of arbitration. Provisional measures are available for arbitration regardless of whether or not it is seated in Japan. Such provisional measures11 include provisional attachment, provisional disposition of the subject matter in dispute and preliminary injunction. While the arbitral tribunal may also issue provisional orders, provisional orders issued by the courts in Japan, particularly provisional attachment, are very useful and convenient for a party seeking monetary payment in arbitration to secure the other party's funds for payment, as such orders can be commonly obtained at an ex parte proceeding within one or two days upon provision of security to the court.

Challenge and enforcement of an arbitration award

An arbitration award is effective only when it meets the requirements listed in the Arbitration Act, and the courts in Japan may set aside an award upon the request of a party to the arbitration if those requirements are not met.12 Consistent with the Model Law, the requirements pertain to validity of the arbitration agreement, fundamental due process of the arbitration proceeding (for example, a party may apply to set aside an award on the basis that it was not given the opportunity to be heard, notices were not properly given, and so on) and consistency with public policy in Japan. As such, in principle, the courts in Japan are not permitted to review whether or not there were any errors in fact-finding or the application of law. In fact, it is said that until June 2011, there were no published court decisions that had ever set aside an arbitration award.

An arbitration award, whether domestic or international, must be recognised by the courts in Japan in order to be enforced in Japan.13 As a signatory to the New York Convention, and

consistent with the Model Law, the courts may refuse to enforce an award only where there are fundamental procedural errors or the award is contrary to the public policy of Japan. Again, as a matter of practice, there do not appear to be any published court decisions in which the court has refused to enforce an arbitration award. This is in contrast to the various court decisions in which the court has refused to enforce a foreign court decision due to lack of proper service of process.

Simply put, the courts in Japan have taken a non-interventionist approach when it comes to the challenge and enforcement of arbitration awards.

New case - first court decision to set aside an award

Amid the backdrop outlined above, in June 2011 the Tokyo District Court took the unprecedented step of setting aside a Japan Commercial Arbitration Association (JCAA) award.[14] It is said that this is the first time that a Japanese court has ever set aside an arbitral award. The decision is yet to be published; however, it has already drawn the attention of the arbitration community in Japan and has been received with mixed reactions. The below summary is understood to reflect the decision and rationale of the court.

The facts

In 1979, a US company and a Japanese company formed a joint venture (JV) to sell certain products in Japan that were manufactured by the Japanese JV partner under a licence granted by the US JV partner. Under the Manufacturing Licence and Technical Assistance Agreement between the JV partners, the US JV partner granted a licence under a Japanese patent to, and shared know-how with, the Japanese JV partner. In return, the Japanese JV partner paid 10 per cent of the ex-factory sales price of the products to the JV company. The licensed patent expired in 1992, but the Japanese JV partner continued to pay the royalty under the licence to the US JV partner. The JV suffered net losses and was eventually dissolved. At the time of dissolution, in 2001, the JV partners agreed that (i) the Japanese JV partner would assume the business of the JV and (ii) the Japanese JV partner would pay a 'technology services fee' to the US JV partner as long as the Japanese JV partner continued to manufacture and sell licensed products. The Japanese JV partner subsequently refused to pay the technical service fee and sent a termination notice to the US JV partner in 2007.

JCAA arbitration

In December 2008, the US JV partner filed an arbitration request in Tokyo under the JCAA rules. One of the most disputed facts was the nature and characterisation of the technical service fee. This is because, under the Japanese anti-monopoly law, in principle, collecting royalties, without justifiable reason, for patent licences after the expiry of licensed patents or for know-how after it becomes public (without involving licensee's breach of contract) is a violation of the anti-monopoly law in Japan and, therefore, if the technical service fee could be regarded as a royalty, the US JV partner's claim would likely have been void.

Not surprisingly, the Japanese JV partner contended that the 2001 agreement was void ab initio and that the US JV partner was not entitled to receive a 'technical service fee' because the licensed patent expired in 1992 and there was no longer any know-how or trade secret being provided under the agreement. Conversely, the US JV partner argued that the technical service fee was not a royalty, but rather constituted a continued split of the profits of the JV business since no consideration was paid for the transfer of the JV business to the Japanese JV partner.

The solo arbitrator issued an award on 20 August 2009 in which he found that the technical service fee was 'undisputedly' a split of profits of the JV business and ordered the Japanese

JV partner to pay approximately ¥ 50 million for the technical service fee plus approximately ¥ 25 million for the recovery of arbitration costs incurred by the US JV partner. In essence, while the nature of the technical service fee was the centre of the dispute, the arbitrator seemed to have treated the nature of the technical service fee as if it were an undisputed fact.

Decision to set aside the award

The Japanese JV partner filed a request with the Tokyo District Court in 2009 seeking to set aside the award on the ground that the award violated public policy in Japan because (i) the tribunal treated the central issue in the dispute as undisputed and (ii) the award is in breach of the anti-monopoly law in Japan. The court held that in Japan it is very likely that charging a royalty for the use of patented technology after the expiry of the patent constitutes a violation of the anti-monopoly law and any such agreement to this effect could be found null and void. Accordingly, whether or not the technical service fee is a royalty for the patented technology is a matter central to the dispute that could have affected the outcome of the arbitration. Treating such a matter as undisputed deprives the parties of due process and accordingly violated public policy in Japan. The court did not review whether the technical service fee was in fact a royalty under licence or a split of profits of the JV business.

Impact of the decision

As stated earlier, the court in Japan has consistently denied requests to set aside awards that have been filed by dissatisfied parties. The court has held on a number of occasions that a breach of public policy can be found only when enforcement of the arbitration award would lead to a violation of public policy and mere improper fact-finding or improper application of law does not in and of itself constitute a violation of public policy and therefore would not be a ground to set aside an award.

At first glance, the latest Tokyo District Court, in its recent decision, seems to have taken an approach inconsistent with such a long standing tradition of Japan having an arbitration-friendly court. On this point, however the author does not believe this case represents a shift in the approach of the court and considers that the impact of the Tokyo District Court decision is limited. In fact this decision could be viewed as not really deviating from the non-interventionist approach consistently adopted by the court in Japan.

While the court found a breach of public policy because the arbitrator treated the fundamental matter in dispute as undisputed, in reality the court seemed to be more concerned about a possibility of breach of public policy caused by the failure of fact-finding. In other words, the court did not seem to take the position that the court may set aside an award whenever the arbitral tribunal fails to find material facts by treating facts in dispute as undisputed facts, but rather the court set aside the award because such failure of fact -finding could likely result in breach of public policy in Japan.

The court did not go so far as to make a finding on the merits of the facts that were treated as undisputed (namely, whether the technical serve fee was in fact a royalty or split of the JV profits.) The court seems to have intentionally avoided reviewing the facts found by the tribunal. This is not only because the evidence in the record of the arbitration appeared to be insufficient for fact-finding, but also because the court considered that it should not review the arbitrator's fact-finding as the court is not permitted to review the substance of disputes on the merits under the Arbitration Act.

In principle, it is true that the court may review significant procedural errors but not the substance of disputes. However, when a breach of public policy is involved, it is the author's

view that the court should have certain powers to find facts on the merits, particularly when a tribunal has failed to find facts by treating disputed central facts as undisputed facts, and the court should only set aside an award where the court, in fact, finds a breach of public policy based on proper fact-finding.15 The question of the permitted scope of judicial review when public policy is involved, however, is vast and beyond the scope of this article. In this case, the court, presumably in an attempt not to review the substance of the case so as to adhere to its non-interventionist principles, rendered a decision that could be construed as having quite the opposite effect, namely, that the court may set aside an award whenever a tribunal fails to find a fact by erroneously treating disputed central facts as undisputed facts, regardless of whether or not a breach of public policy could be implicated. However, the author believes that this is not the intention of the Tokyo District Court in its latest court decision.

The unprecedented approach adopted by the Tokyo District Court, once published, will surely generate debate among the arbitration community in Japan. The key point here is that for the reasons discussed above, the impact of the court decision should not be over-stated.

Recent trends in arbitration in Japan

Japan has been known for not being a particularly litigious country, in general. Many Japanese companies have traditionally preferred to settle disputes without going through official dispute resolution procedures, be it litigation or arbitration. However, the author has observed some changes in such a general approach in recent years. This change appears to reflect an increasing demand for accountability within Japanese companies, which is leading them to resort to arbitration in order to obtain the neutral and fair decision of a third party. The recent increased level of overseas investment by Japanese companies, particularly in emerging markets, has further spurred the adoption of arbitration agreements, particularly when the judicial system in such overseas jurisdiction is viewed as being less reliable. The increase in the number of court cases involving a request to set aside or refusal to enforce the award (particularly with respect to China International Economic and Trade Arbitration Commission (CIETAC) arbitrations16) itself demonstrates the increased utilisation of arbitration by Japanese companies to resolve international commercial disputes. Further, the recent case of an arbitration award issued in Japan not being recognised in China has caused concerns within the Japanese arbitration community. In that case, the Chinese court refused to recognise the JCAA award on the grounds that the award was rendered in alleged breach of the JCAA rules that formed a part of the arbitration agreement and therefore the award was not based on the arbitration agreement.17

All these disputes and concerns indicate that arbitration is in fact being used more and more by Japanese companies and in the author's view such a trend is unlikely to be reversed.

Notes

1
Act No. 138 of 2003. An unofficial translation of the Act is available at www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html

2Tokyo District Court, 13 June 2011 (Heisei 21 (Chu) No. 6), yet to be published as of 5 September 2011.

3As a part of the judicial reform, the so called ADR Act was enacted to register private ADR organisations and thereby facilitate mediation administered by private ADR organisations. The legislative intent behind this Act is, like the new Arbitration Act, to facilitate out-of-court dispute resolution.

4Article 1 of the Arbitration Act.

5Article 36 of the Arbitration Act.

6Article 28(1) of the Model Law.

7Articles 38(4)(5) of the Arbitration Act.

8Articles 3 and 4 of the Supplemental Provisions of the Arbitration Act.

9Article 4 of the Arbitration Act.

10The Japanese courts can examine (i) evidence owned or controlled by a party other than parties to arbitration and (ii) witnesses who are not a party to the arbitration. This is based on the assumption that the arbitral tribunal should have a strong influence over the parties such that it can successfully persuade the parties to produce evidence owned or controlled by parties to the arbitration and cause party witnesses to appear before the tribunal for examination and therefore court assistance is not needed in order to examine such evidence. See Junya Naito, 'Examination of Witnesses in Court for Arbitration Proceedings in Japan' (JCAA Newsletter No. 18, March 2007): www.jcaa.or.jp/e/arbitration/docs/news18.pdf.

11Civil Provisional Remedies Act (Act No. 91 of 1989).

12Article 44 of the Arbitration Act; Article 34 of the Model Law.

13Article 45 of the Arbitration Act, Article 35 of the Model Law.

14Tokyo District Court, 13 June 2011 (Heisei 21 (Chu) No. 6).

15Similar arguments have been made by commentators in the context of enforcement of foreign court judgments.

16In contrast, so far, there seems to be no published court decisions in which the court in Japan refused to enforce an award of arbitration administered by CIETAC.

17Shin-Etsu Chemical Co Ltd v Jiangsu Zhongtian Technologies Co Ltd Nantong Intermediate People's Court, (16 April 2008) article 5, paragraph 1 (d) of the New York Convention. The court found that the alleged breaches of the JCAA rules were a failure of the tribunal to (i) render its award within the dates set by the tribunal and (ii) notify the timing of the award once the tribunal missed the date originally set by the tribunal. (The award was said to be rendered on 20 September 2005 but was, in fact, rendered on 23 February 2006.) For the sake of fairness, the court in the PRC has recognised some other JCAA arbitration awards in the past.

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South Korea

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The year 2011 has already been an eventful one for the arbitration community in Korea. The trend of increasing international arbitrations involving Korean parties continues unabated as Korean companies have enthusiastically embraced arbitration as the most favoured method for resolving international and cross-border commercial disputes. This trend is expected to continue as Korean companies continue to expand and develop commercial relationships with companies all over the world, spanning numerous legal jurisdictions, languages and cultures.

In addition, this year the Korean Commercial Arbitration Board (KCAB) has introduced important revisions to its International Rules (as discussed in more detail below), which should increase the utilisation of the KCAB's International Rules in future international arbitrations. 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 International Rules of the KCAB.

This article will briefly introduce the Korean Arbitration Act, discuss the recent revisions to the KCAB's International Rules and briefly describe the procedures and jurisprudence relating to the recognition and enforcement of arbitral awards in Korea.

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 a few provisions that apply to international arbitrations regardless of the seat of the arbitration. These provisions are generally intended to promote and support international arbitrations both in Korea and in other jurisdictions. Article 9 of the Act 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. Article 10 allows a party in an arbitration in Korea or elsewhere to seek interim relief pending the outcome of the arbitration in the Korean courts. In addition to these provisions, 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. For example, 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. The Act also omits the provision at article 34(4) of the Model Law that provides that a court may, where appropriate and so requested by a party, suspend its proceedings in an action challenging an arbitral award to give the tribunal an opportunity to resume the arbitral proceedings or take other action which in the tribunal's opinion may eliminate the grounds for setting aside the award. 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 revised International Rules of the Korean Commercial Arbitration Board

Established in 1970 by what is now the Ministry of Knowledge Economy, the KCAB is the only officially recognised arbitral institution in Korea. The KCAB currently handles over 200 cases annually, the majority of which are domestic arbitrations.

Until January 2007, the KCAB had one set of arbitration rules, which applied to all arbitrations administered by the KCAB. In January 2007, however, the KCAB implemented a separate set of Rules of International Arbitration (the International Rules). The International Rules were promulgated in order to encourage foreign parties to arbitrate disputes in Korea under the auspices of the KCAB. Unfortunately, this effort has been less than successful; to date no arbitration has been conducted under the International Rules.

The primary reason for the under-utilisation of the International Rules was the fact that the original (domestic) KCAB Arbitration Rules (the Domestic Rules) remained the default rules for all arbitrations under the KCAB, regardless of whether the underlying disputes involved domestic or international parties. The International Rules could apply only where the parties had specifically designated the KCAB's International Rules in the arbitration agreement or by agreement in writing between the parties. Otherwise, a reference to arbitration under the rules of the KCAB was deemed to refer to the Domestic Rules.

This led to many problems, as foreign parties agreeing to KCAB arbitrations found themselves in arbitrations governed by the KCAB's Domestic Rules, with its somewhat arcane procedures, Korean as the default language, et cetera. Recognising this problem, the KCAB has recently revised its two sets of rules in order to ensure that international arbitrations take place under the International Rules unless otherwise agreed by the parties. The revisions, which came into effect on 1 September 2011, also introduce expedited procedures into the International Rules, and increase the remuneration for arbitrators in order to bring the KCAB into line with other international arbitral institutions. The Domestic Rules were revised to eliminate references to international arbitrations.

While several problems remain with the International Rules, these most recent revisions must be seen as a step in the right direction for the KCAB. This article will discuss the major revisions to the International Rules, and point out areas of concern for possible revision in the future.

Application of the revised International Rules

The most important aspect of the revisions to the International Rules is the scope of its prospective application. Formerly, article 3 of the International Rules provided that the International Rules would apply 'where the parties have agreed in writing to refer their disputes to an international arbitration under the KCAB International Arbitration Rules.' The KCAB applied this provision quite literally and strictly, and refused to consider administering any arbitrations under its International Rules absent such an explicit agreement in writing, even where a foreign party could make a strong case that the parties intended the International Rules to apply. This language created the problem described above: although the KCAB has administered over 200 cases involving foreign parties since the introduction of the International Rules in 2007, not one of these cases proceeded under the International Rules.

Revised article 3 of the International Rules provides that an arbitration will proceed under the International Rules if (i) the parties have agreed in writing to refer their disputes to arbitration under the International Rules, or (ii) where the parties have agreed in writing to refer their disputes to arbitration before the KCAB and the arbitration is an international arbitration. Article 2 defines an international arbitration as an arbitration in which (i) at least one party, at the time of the conclusion of the agreement to arbitrate, has its place of business in any state other than Korea, or (ii) the seat of arbitration is in any state other than Korea. A 'place of business' for this purpose is (i) a party's principal place of business, if a party has more than one place of business, or (ii) a party's habitual residence, if a party does not have a place of business.

The Supplemental Provisions of the revised International Rules provide that the revised International Rules will apply where the agreement to arbitrate was concluded after 1 September 2011. For arbitration agreements concluded prior to 1 September 2011, the parties may agree in writing to apply the revised International Rules. The Supplemental Provisions even provide that for arbitrations that have commenced under the former rules, the parties may agree in writing to apply the revised International Rules from 1 September 2011, 'without affecting the validity of the arbitration proceedings held prior to this date.'

Thus, the revised International Rules will now be the default rules which apply to international arbitrations arising under arbitration agreements concluded after 1 September 2011. The parties may also agree to apply these rules to arbitrations arising under arbitration agreements concluded prior to 1 September 2011. Parties to an arbitration that has already commenced under the KCAB's Domestic Rules are even permitted to agree to switch to the International Rules in the middle of the arbitration. This could potentially create more problems than it resolves, of course, but may be appropriate in the very early stages of an arbitration.

In any event, it is hoped that these changes will promote more efficient, transparent and cost-effective international arbitrations under the auspices of the KCAB. Foreign parties arbitrating under the Domestic Rules, previously the default rules for all KCAB arbitrations, have complained about the slow pace and arcane procedures of the KCAB arbitrations, and the International Rules will no doubt be an improvement.

Expedited procedures

The most important substantive change to the International Rules is the addition of expedited procedures (chapter VI, articles 38 to 44). This chapter was introduced in response to the introduction of expedited procedures by the Singapore International Arbitration Centre, as well as the increased popularity of expedited proceedings under the KCAB's Domestic Rules.

Article 38 provides that an arbitration under the International Rules will proceed under these expedited procedures if (i) the claim amount does not exceed 200 million won or (ii) the parties agree to be subject to the expedited procedures. Under article 39, if a counterclaim exceeds 200 million won, the expedited procedures will not apply unless the parties agree. Likewise, if either party revises its claim to exceed 200 million won, the expedited procedures will no longer apply, unless the parties agree that the expedited procedures shall continue to apply and the tribunal, if constituted, approves.

Article 40 provides that the KCAB secretariat shall appoint a sole arbitrator from its Roster of International Arbitrators, and that if the arbitration agreement calls for three arbitrators,

'the Secretariat may encourage the parties to agree to refer the case to a sole arbitrator.' It is not clear what procedure is to be followed if the parties nevertheless do not agree to refer the case to a sole arbitrator, however.

Article 41 provides that the hearing under the expedited procedures shall be held only once, unless the tribunal deems it necessary to hold subsequent hearings. The tribunal may also require the submission of additional documents after the hearing. Pursuant to article 42, unless otherwise agreed by the parties, and where neither party's claim exceeds 200 million won, the dispute is to be resolved on the basis of documentary evidence only. However, even under these circumstances, the tribunal may elect to hold a hearing at the request of either party or on its own initiative.

Finally, article 44 provides that the award shall be made within three months from the date of the constitution of the tribunal. However, this deadline may be extended by the KCAB secretariat at the request of the tribunal or on its own initiative. Unless otherwise agreed by the parties, the tribunal shall state, in summary form, the reasons upon which the award is based.

As many parties have complained about the increasing time and attendant costs associated with international arbitration, the introduction of expedited procedures is a positive development. However, we have several concerns regarding the expedited procedures contained in the KCAB's International Rules. First, as no arbitrations have ever been conducted under the International Rules, the KCAB Secretariat has no experience in administering a normal international arbitration, much less an expedited proceeding. More importantly, however, the expedited procedures seem to introduce several problems into the International Rules.

For example, there is no provision allowing for the use of the expedited procedures by application of a party. Rather, the expedited procedures are to apply automatically if the claim amount is below 200 million won, apparently regardless of the view of the parties, or if the parties affirmatively agree to apply the expedited procedures. We believe that the expedited procedures should apply by application of a party to the KCAB Secretariat if the amount in dispute does not exceed a certain amount, if the party can show that there is an urgent need for the expedited resolution of the dispute or if the parties agree that the expedited procedures should apply. Not all disputes requiring an urgent resolution are small in value. The expedited procedures should be available for disputes of any size where a party can demonstrate the urgency of resolving the dispute.

As currently drafted, the rules provide an easy way for a reluctant party to avoid the expedited procedures. Under article 39, if the counterclaim exceeds 200 million won, the expedited procedures will no longer apply absent agreement of the parties. A party may also cause the same result by amending its claim amount to exceed 200 million won. Where one party seeks urgent resolution of the dispute, this provides the other party with a perfect way to avoid an expedited resolution. This problem is of a similar nature to that described in the preceding paragraph: because the application of the expedited procedures is automatically triggered by the amount in claim rather than by the application of a party to the KCAB Secretariat, there is no room for the KCAB to consider matters such as the need for an urgent resolution of the dispute. A reluctant party may cause tremendous delay by simply playing with the amount of its claim. 200 million won is a very small amount; it would not be difficult in the least to fabricate a claim in that amount in order to avoid the expedited procedures.

Another potential problem relates to the appointment of the arbitrator(s). As noted above, article 40(1) provides that the KCAB Secretariat shall appoint a sole arbitrator from the Roster of International Arbitrators, unless otherwise agreed by the parties. Article 40(2), however, provides that if the arbitration agreement provides for three arbitrators, the Secretariat may merely 'encourage' the parties to refer the case to a sole arbitrator. These provisions are too weak. If the arbitration is to be expedited, it should be heard by a sole arbitrator, unless the KCAB Secretariat determines that three arbitrators are necessary. It is not realistic to expect the parties to agree on this matter where one party may wish to cause delay. Moreover, there is no provision for the appointment of three arbitrators under the expedited procedures, so the provisions of article 12 must apply. This is anything but expeditious.

Finally, article 42 provides that no hearing will be held where neither party's claim exceeds 200 million won, but that the tribunal 'may' hold a hearing at the request of a party or on its own initiative. We believe that the default position should be that a hearing will be held, unless the parties agree that the dispute may be resolved on the basis of documentary evidence only. Failure to hold a hearing could lead to problems with enforceability of the award. For example, unless the parties have explicitly agreed that no hearing is required, a losing party seeking to resist enforcement of the award may argue that it was not given a full opportunity to present its case.

Other minor issues arise. Three months may be too optimistic for the rendering of the award in many cases, for example. Generally, however, the KCAB should be commended for taking the step of introducing expedited procedures. It is hoped that in the next round of revisions to the International Rules, some of the problems identified herein will be remedied.

Remuneration of arbitrators

Another important revision to the International Rules relates to the remuneration of arbitrators. The KCAB has traditionally had difficulty attracting qualified international arbitrators to arbitrate its cases. This was due to many factors, including its extremely low pay schedule and the arbitrators' lack of familiarity with the KCAB's Domestic Rules. With the introduction of the revised International Rules, the upgrading of its Roster of International Arbitrators, and its improved schedule of remuneration for arbitrators, the KCAB hopes to attract higher calibre arbitrators for its international cases in the future.

The KCAB bases administrative costs and arbitrators' fees upon the amount of the claims to be decided in the arbitration. Appendix II to the revised International Rules sets the ranges within which the KCAB Secretariat may set an arbitrator's fees, taking into account the nature of the dispute, the amount in dispute, the time required and other relevant factors. For example, for a case in which the amount in dispute is between about US$500,000 and US$1 million, the arbitrator's fees may range from about US$4,500 to about US$30,500. This is quite a broad range, and it is anticipated that the KCAB will apply the upper end of the range for complex disputes involving seasoned arbitrators, and the lower end to relatively simple disputes involving less experienced arbitrators.

While the KCAB is still less expensive than other arbitral institutions, it is hoped that by increasing its remuneration for arbitrators the KCAB will be able to attract more experienced and proven international arbitrators, thereby improving the quality of its arbitrations.

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 that is subject to the New York Convention shall be governed by that convention, while foreign arbitral awards that 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 enforcement of awards subject to the New York Convention and the grounds for enforcement of foreign court judgments under Korean law.

Article V of the New York Convention sets forth the very limited grounds that 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 '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 a jurisdiction that is a signatory to the New York Convention shall be 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). In the same decision, the Supreme Court reaffirmed the very high bar for refusal to recognise and enforce foreign arbitral awards based upon the public policy exception in Korea.

Conclusion

Several factors seem to have converged to ensure that the utilisation of international arbitration will continue to grow in Korea. Korean companies are already sophisticated and enthusiastic users of international arbitration. As their leverage and influence on the global stage increases, Korea will inevitably become the seat of an increasing number of international arbitrations, whether under the auspices of the KCAB or other international arbitral institutions. As described above, Korea has a progressive Arbitration Act modelled on the UNCITRAL Model Law, and courts that are extremely friendly to arbitration.

The recent revision of the International Rules by the KCAB has also improved the environment for international arbitration in Korea. Arbitration at the KCAB continues to be a work in progress, and the KCAB is striving to improve in order to become a credible centre for international arbitration in the region.

To meet the needs of international transactions of domestic and foreign businesses, Korean law firms have greatly expanded the size and calibre of their international arbitration teams by hiring both Korean and foreign licensed attorneys with experience in various jurisdictions and fluency in English and other languages. It seems safe to say that the trend in favour of international arbitration for the resolution of international commercial disputes by Korean parties will continue well into the future.

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Introduction

After much discussion and deliberation, the new Hong Kong Arbitration Ordinance (chapter 609) (new Ordinance) came into force in 2011. This article examines the key features of the new Ordinance. It also highlights two important court cases relating to arbitration in which judgments were handed down in 2011, including the landmark case of Democratic Republic of the Congo and Ors v. FG Hemisphere Associates LLC FACV nos. 5, 6 & 7 of 2010.

The new Ordinance

Until June 2011, the principal statute governing arbitration in Hong Kong was the Arbitration Ordinance (chapter 341). This ordinance provided for two distinct regimes: (i) the domestic regime, which was based largely on the English Arbitration Acts 1950, 1975, 1979 and 1996; and (ii) the international regime, which was based on the UNCITRAL Model Law (Model Law). The significant difference between the two regimes was that the domestic regime gave the Hong Kong courts additional powers to intervene in and assist with the arbitration process; powers that were not available under the international regime. The international regime, based on the UNCITRAL Model Law, followed 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) established the Committee on Hong Kong Arbitration Law in cooperation with the Hong Kong International Arbitration Committee (HKIAC). The HKIAC was established with the support of the Hong Kong Secretary for Justice to consider further and to take forward proposed reforms to the arbitration legislation identified in 1996. The HKIAC published its report in 2003. The HKIAC's primary recommendations were that:

- the distinction between domestic and international arbitrations should be abolished and a unitary arbitration regime, based on the UNCITRAL Model Law, should be established;
- the UNCITRAL Model Law should continue to be scheduled to the new Ordinance and to have the force of law in Hong Kong subject only to necessary amendments; and
- the new Ordinance should follow the order and chapter headings of the UNCITRAL Model Law and the UNCITRAL Model Law and additional provisions should be set out in the main body of the new Ordinance to make it as user-friendly as possible.

In addition, the HKIAC recommended that parties should still be able to agree to 'opt-in' to provisions similar to those that were part of the former domestic regime in Hong Kong.

The new Ordinance was enacted on 10 November 2010 and came into force on 1 June 2011. The new Ordinance has abolished the bifurcated regime and adopts a unitary regime for arbitration in Hong Kong based on the UNCITRAL Model Law (as amended in 2006).

In practical terms, this means that the changes for international clients that would have been subject to the international regime under the old Arbitration Ordinance, are not as significant as for parties that would have been subject to the domestic regime. In practical terms for lawyers, the new Ordinance means that they no longer have to spend time working out which particular provisions apply to any given arbitration. The same provisions apply equally to a domestic or an international arbitration.

Under schedule 3, section 1, the old Arbitration Ordinance will continue to apply to arbitrations commenced on or before 31 May 2011, and the new Ordinance will apply to arbitrations commenced on and after 1 June 2011.

There are 112 sections and four schedules, bringing together the relevant 2006 Model Law provisions, amended or supplemented or both as required.

Some key features

Confidentiality

An important and attractive feature of the new legislation is the express provisions relating to confidentiality. Under section 16 the general rule is that proceedings under the new Ordinance will be held otherwise than in open court subject to the court's right (on the application of a party or on its own motion) to have the proceedings heard in open court. Section 2D of the old Arbitration Ordinance provided that proceedings under that Ordinance would be heard otherwise than in open court on the application of any party to the proceedings.

The parties' obligations of confidentiality (and exceptions) are dealt with in section 18. Under section 18 no party may publish, disclose or communicate any information regarding the arbitral proceedings or an award made in those arbitral proceedings. This is subject to the more usual specific exceptions regarding disclosure of information to protect a legal right, to enforce or challenge the award, or disclosure required by law or to professional advisers of the parties.

Minimal court intervention

One of the main objects of the new Ordinance is to minimise judicial intervention in the arbitration of a dispute (sections 3 (2)(b) and 12) and to support party autonomy in the arbitral process. By adopting article 5 of the Model Law in section 12 of the new Ordinance, without any amendment, the court's power to intervene has been diluted. Under the domestic regime provided for in the previous Ordinance, for example, the court had the power to consolidate arbitral proceedings, to decide a preliminary question of law, to review any determination of law made by an arbitral tribunal and to hear a question of law arising out of an arbitral award. Although there are still many instances under the new Ordinance where the court's intervention is permitted, the role of the court is limited to providing 'arbitration assistance and supervision'.

Interestingly, Hong Kong is one of only a few jurisdictions to have specifically legislated for functions referred to in article 6 of the Model Law to be given to a non-judicial authority, namely to the Hong Kong International Arbitration Centre (HKIAC) (sections 13, 23, 24, 32 new Ordinance). These include functions such as the appointment of the third arbitrator in default of appointment by the parties or arbitrators, determining the number of arbitrators in cases where the parties fail to agree and the appointment of a mediator in default of appointment by an appointing institution or person.

Interim measures

In keeping with one of the main themes of the new Ordinance, the devolution of power to arbitral tribunals, by adopting the 2006 Model Law guidelines relating to interim measures, arbitral tribunals seated in Hong Kong are able to grant temporary measures. These include, for example, the preservation of assets or evidence, and expressly include, to maintain or restore the status quo, the power to grant injunctions. In addition, an arbitral tribunal may issue preliminary orders that are binding but not subject to enforcement by a court to any party (sections 35-42 new Ordinance; articles 17, 17A-G Model Law). Another new feature is the peremptory orders that may be made by arbitral tribunals, specifying time limits for parties' compliance in order to assist with the enforcement of their orders or directions. Arbitral tribunals retain the power to award security for costs and to direct the discovery of documents or the delivery of interrogatories (section 56 new Ordinance).

In addition, section 45(5) of the new Ordinance expressly provides that the Hong Kong court can grant interim measures in aid of arbitrations outside Hong Kong, where the arbitral proceedings are capable of giving rise to an award (interim or final) that may be enforced in Hong Kong and where the interim measure belongs to a type or description of interim measure that may be granted in Hong Kong. Previously, this was not expressed and formed part of the court's inherent jurisdiction.

Equal treatment of the parties

Section 46 modifies article 18 of the Model Law and sets out fundamental requirements of natural justice to be followed by the arbitral tribunal that includes equality of treatment between the parties (a new provision), impartiality, independence and fairness. Parties are given a 'reasonable' (rather than a 'full') opportunity to present their cases and to deal with the cases of their opponents (section 46(3)(b)). The reasonable opportunity test accords with article 18 of the Model Law and is in line with similar provisions adopted by the ICC Rules (article 15.2), the LCIA Rules 1998 (article 14.1), the UNCITRAL Arbitration Rules (article 17.1) and the HKIAC Administered Rules (article 14.1). It also fits in with the primary object of the new Arbitration Ordinance which is 'to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense' (section 3).

Costs

Provisions dealing with costs have been modified under the new Ordinance under sections 74 to 76. The arbitral tribunal has, like many other jurisdictions, a wide discretion to award costs of arbitral proceedings. The tribunal will assess costs (section 74) unless court taxation has been agreed by the parties (section 75, and where the tribunal does not otherwise direct in its award). Under section 74(6), the tribunal is not obliged to follow the scales and practices adopted by the court on taxation, but under section 74(7) must only allow costs that are reasonable having regard to all the circumstances and, unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration. Under section 2GJ(1) of the old Arbitration Ordinance, the tribunal was empowered to tax and settle the amount of costs to be paid, but section 2GJ(2) provided that costs were taxable by the court unless the award otherwise directed.

Payments into court

Payments into court in support of arbitral proceedings have been abolished.

Opt-in provisions (that reflect the old domestic regime)

Part 11 (sections 99-103) of the new Ordinance allows parties to an arbitration agreement to expressly 'opt-in' to any or all of the provisions, set out in schedule 2 to the new Ordinance,

that were applicable to domestic arbitrations under the previous Ordinance. Further, in certain circumstances the opt-in provisions will apply automatically (sections 100-101). For example, and unless the parties agree in writing otherwise, the opt-in provisions contained in schedule 2 will apply automatically to arbitration agreements entered into before, or within six years after, the commencement of the new Ordinance, where those arbitration agreements provide that the arbitration is a domestic arbitration.

The opt-in provisions, which, in the main, permit greater court intervention, provide for the following:

- the determination of a dispute by a sole arbitrator;
- the consolidation of two or more arbitral proceedings or for different proceedings to be heard at the same time or one immediately after the other;
- the decision of a preliminary question of law by the Court of First Instance; and
- the challenge of an arbitral award on the ground of serious irregularity (by application to the Court of First Instance); and
- the appeal against an arbitral award on a question of law.

Mediation

One of the underlying intentions of the new Ordinance is to encourage the use of mediation-arbitration (Med-Arb), where a mediator is appointed to try to resolve the dispute before arbitral proceedings are commenced, and arbitration-mediation (Arb-Med), where the arbitral tribunal assumes the role of mediator part way through the proceedings with a view to settlement of the dispute. In the new Ordinance 'mediation' replaces 'conciliation'. Mediation, as a form of alternative dispute resolution, has become increasingly popular in South East Asia and, in Hong Kong in particular, its increasing importance is reflected in the civil justice reforms that have been brought in by the judiciary, under which mediation is actively promoted by the courts in its management of cases. Litigants and practitioners who fail unreasonably to engage in mediation face adverse costs consequences. Section 32 of the new Ordinance sets out the statutory procedure under which parties may agree to submit to mediation (Med-Arb). Section 33 establishes the framework for arbitration-mediation procedures (Arb-Med). Subject to the parties' written consent, a mediator may act as an arbitrator in the same dispute, and vice versa. Med-Arb is being increasingly used in mainland China but to date it is less popular in Hong Kong, mainly due to the concerns that an arbitrator may be unduly influenced by confidential matters disclosed to him or her during the course of a mediation.[1]

The practical implications of the Court of Final Appeal's decision in Democratic Republic of Congo v. FG Hemisphere Associates LLC

In last year's Hong Kong update, we reported on the decision of Hong Kong's Court of Appeal (CA) in the FG Hemisphere case in which the CA, by a majority decision (2:1), held that the restrictive approach of state immunity continued to apply in Hong Kong after the handover of Hong Kong to the People's Republic of China (PRC) on 1 July 1997.[2]

In March 2011, an appeal of the CA's decision was heard by the Hong Kong Court of Final Appeal (CFA). On 8 June 2011,[3] the CFA held by a majority (3:2) that Hong Kong cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity that differs from that adopted by the Central People's government (CPG) of the PRC. The CFA's judgment was a provisional judgment pending an interpretation by the Standing Committee

of the National People's Congress (SCNPC) of the PRC4 as required under Article 158 of Hong Kong's Basic Law (HK's constitutional document). On 26 August 2011, the SCNPC issued its interpretation confirming that the policy on state immunity that has been consistently applied by the PRC, namely absolute immunity, must apply in Hong Kong. On 8 September 2011, the CFA confirmed that its judgment was final.

The CFA judgment

Facts

The CFA judgment was concerned with FG Hemisphere's application to enforce two foreign ICC arbitration awards against the assets in Hong Kong of the Democratic Republic of Congo (DRC). The CFA considered: (i) sovereign immunity - whether the law of Hong Kong required application of the doctrine of absolute immunity from suit and execution (as adopted by the PRC), as opposed to the restrictive doctrine; and (ii) waiver of immunity - whether, by agreeing to refer a dispute to arbitration, the DRC had waived such state immunity from suit and execution to which it might otherwise be entitled.

Sovereign immunity:

There are two doctrines of sovereign (state) immunity:

- 'absolute immunity': under the 'absolute' doctrine, the domestic courts of one state would not normally have jurisdiction to adjudicate upon matters in which another state is named as defendant. This is subject only to the exception where the defendant state waives immunity before the forum state; and
- 'restrictive immunity': by contrast, 'restrictive' immunity recognises a commercial exception:
    - in the context of immunity from jurisdiction, states do not enjoy immunity from suit where they are engaged in purely commercial transactions; and
    - in the context of immunity from execution, if the relevant assets are used for a commercial purpose they will not be immune from the process of execution.

CFA finding

Absolute immunity applies: overturning the CA's decision, the CFA, by a majority, ruled that the doctrine of state immunity practised in Hong Kong, as in the rest of the PRC, is a doctrine of absolute immunity.

As to waiver, the common law applies: upholding the CA's findings on waiver, the majority confirmed that Hong Kong has reverted to the common law position on waiver of immunity from suit and from execution. Under common law principles, any such waiver must be given at the time when the forum state's jurisdiction is invoked against the impleaded state. In short, unless a relevant state to state treaty applies to establish waiver (which we return to at point (v) below), the defendant state must expressly consent to submit to the jurisdiction before the forum state to that state's jurisdiction. Further, a waiver of state immunity at the execution stage must be established at two distinct stages: the impleaded state must have waived both its jurisdictional immunity from suit in the forum state (namely, in the context of leave to enforce an arbitral award or judgment) and the immunity of its property from execution by the forum state's process.

Practical implications - a summary

The CFA judgment has raised a number of questions that are of practical importance, as well as concerns, some misplaced, which are addressed below.

In summary:

(i) The Hong Kong courts continue to be judicially independent and the CFA's findings have not detracted from that in any way. The CFA's reference of specific questions to the SCNPC is consistent with the Basic Law (Hong Kong's constitution) and was triggered in limited circumstances under the 'one country, two systems' principle that has applied since the handover of Hong Kong to mainland China in June 1997.5

(ii) The decision is also of limited application: it applies only in the context of enforcement of arbitral awards or court judgments against a foreign state's assets held in Hong Kong. In this respect, a foreign state's assets will be immune from execution in Hong Kong, unless the foreign state is found to have waived its immunity from suit and from execution. Importantly, immunity cannot be claimed in respect of the jurisdiction of an arbitral tribunal. This is discussed further at point (vii) below.

(iii) An effective waiver of immunity can be established in one of two ways. First, the defendant state may waive its immunity 'in the face of the court' by making an unequivocal submission to the Hong Kong courts at the time when Hong Kong jurisdiction is invoked against it: namely, by submitting to the jurisdiction of the Hong Kong courts when the suit and execution actions are pursued against that defendant state. In this case it was held at first instance, on appeal and again on final appeal that the DRC had not waived its immunity in the face of the court.

(iv) Importantly, the CFA's findings confirm that written waiver clauses given by foreign states in private agreements (including arbitration clauses) will not be sufficient to establish an effective waiver at the enforcement stage and will not confer jurisdiction upon the Hong Kong courts. This is not new law. The CFA was applying general common law principles.

(v) Secondly, following comments made by the CA that were not disturbed by the CFA, it should also be possible to establish advance waiver in the form of consent given in an international treaty between the defendant state and China. Therefore, it is arguable that if the defendant state and the state in which the arbitral award is rendered are both parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), this will amount to an effective waiver in respect of the enforcement of that award in Hong Kong, noting that China (and through China, Hong Kong) is party to the New York Convention. The CFA did not, however, make a definitive finding on this question (crucially, the DRC is not a signatory to the New York Convention) and further clarification is required, ideally in a future court decision.

(vi) The FG Hemisphere case does not change the position in respect of enforcement against Chinese 'crown' assets in Hong Kong. The case of Hua Tian Long (Intraline Resources Sdn Bhd v The Owners of The Ship or Vessel Hua Tian Long)6 (a first instance decision) is authority that sovereign immunity does not apply between the PRC and Hong Kong. Rather, after the handover, the PRC, and in turn the Central People's government (CPG), enjoys 'crown' immunity in Hong Kong, which is also absolute.7 Nonetheless, the common law principles on waiver of that crown immunity, discussed in the FG Hemisphere case, will apply.8

(vii) The FG Hemisphere case highlights the important role that arbitration and agreements to arbitrate play when contracting with a foreign state, or with the CPG. Although the CFA held that an agreement to arbitrate does not amount to an effective waiver when seeking

to enforce an arbitration award against sovereign or crown assets in Hong Kong, the CFA did not overturn the CA's finding that an agreement to arbitrate operates to remove state immunity in respect of the jurisdiction of the arbitral tribunal over the state. The effect of this is that by agreeing to arbitrate (rather than litigate) in Hong Kong, the foreign state (or the CPG) cannot later claim to be immune from the jurisdiction of the arbitral tribunal. A Hong Kong arbitral award against the state will continue to be enforceable against that state's commercial assets in other jurisdictions that are signatories to the New York Convention and that adopt restrictive (rather than absolute) immunity, in accordance with the law of the jurisdiction in which enforcement is sought.

Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd
[9]

The case of Pacific China Holdings has sparked interest in arbitration circles because it relates to a Court of First Instance decision by the Honourable Mr Justice Saunders, the judge in Hong Kong currently specialising in arbitration, to set aside an International Chamber of Commerce (ICC) award under article 34 of the Model Law.

Such a finding by the Hong Kong courts is unusual: Hong Kong has an excellent enforcement record. Indeed, Saunders J himself confirmed in his judgment that: 'It is beyond argument that the overall scheme of both the (old Arbitration Ordinance) and the Model Law reflect a view of arbitration that the award will generally be upheld and enforced'.

Nonetheless, on the specific facts of the case, Saunders J set aside the ICC award on the basis that the applicant had been unable to present its case and the procedure adopted by the tribunal was not in line with the agreement of the parties, being grounds set out in the Model Law upon which enforcement may be refused.

The facts

Pacific China Holdings Ltd (PCH) was said to be indebted to Grand Pacific Holdings (GPH) by US$40 million in respect of certain joint venture agreements. A loan agreement in respect of the debt was expressly governed by New York law and contained an arbitration clause. In 2004, demands were made by GPH of PCH to pay the sums due. The parties were unable to resolve the issue and so GPH commenced arbitration proceedings in 2006. PCH argued that the loan agreement was illegal under the law of its place of performance (Taiwan) and hence also under the governing law (New York). PCH alleged that the illegality arose because the consideration (the transfer of the joint-venture interests) was false and accordingly reduced the value of PCH. Central to PCH's case was expert evidence and submissions on Taiwanese law.

PCH argued that it was unable to present its case and that the arbitral procedure was not in accordance with agreement of the parties because the tribunal:

- required PCH to include its 'best case' on the Taiwanese law issue at very short notice (one working day before the evidential hearing) yet allowed GPH to reserve its full argument to be filed 10 days after PCH had filed, and in doing so adopted a procedure that was inherently unfair, contrary to Article 34(2)(a)(ii) of the Model Law;
- refused permission for PCH to adduce three foreign law authorities on the joint expert argument, again rendering PCH unable to present its best case; and
- allowed GPH to make submissions on Hong Kong law but refused permission for PCH to do so. The arbitration agreement required that arbitration be conducted in accordance with the ICC Rules.

The test and the court's discretion

In the course of its judgment, the court considered previous Hong Kong authorities on the exercise of its discretion, where grounds for setting aside an award have been established and accepted PCH's submission that the right to be heard was such a fundamental right according to Hong Kong's own principles of fairness and due process that the court should not exercise its discretion in favour of enforcement (of the award), irrespective of what the outcome would have been. In exercising its discretion, the court must ask itself whether it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different. If the court cannot exclude that possibility, a real as opposed to a remote possibility that the result might be different, then it will not be beyond any doubt that the decision would have remained the same. Such a determination is made by the court examining the nature and quality of the violation and the potential consequences that flow from the violation, rather than by examining the merits of the award itself. In other words, if a party has been denied the opportunity to make a submission central to its case on the award, it will be rare that the court will be able to say that the result could not be different. Accordingly, the court found that all three grounds, set out above, had been established by PCH and exercised its discretion to set aside the award under article 34(2).

Appeal

The defendant (GPH) has appealed Saunders J's decision in Pacific China Holdings to the CA and so, for now, it is unclear whether the decision and Saunders J's reasoning on the court's residual discretion will be upheld. Pending the outcome of the appeal, the decision still serves as a useful reminder to arbitrators and counsel of the importance of all parties being seen to have been afforded a reasonable opportunity to present their case.

Conclusion

Although this article highlights the few instances in which arbitral awards have not been enforced, the reality is that Hong Kong continues to be a leading, safe and reliable seat for international arbitration and an obvious choice for Asia-related cross-border deals, particularly for China-related deals. The updated Arbitration Ordinance is further evidence of the Hong Kong government's commitment to meeting arbitration global best practice.

In relation to enforcement against China and foreign state assets, unless the PRC government or a foreign government waives its rights under a treaty or before the Hong Kong courts, an arbitral award (whether from Hong Kong, Singapore, London or elsewhere) against those assets will no longer be enforced. Although this has led to concern that awards may not be enforced against Chinese state-owned enterprises (SOEs), Mr Fei Li, deputy head of the legal affairs committee of the SCNPC of the PRC has recently stated that:

> State immunity rules cover the cases where foreign states and their assets are defendants […] Our State-owned enterprises (SOEs) will not become a state entity of any foreign state. According to the laws of the Mainland (PRC) after promulgation of the General Principles of Civil Law in 1986 and the Company Law, SOEs, including central SOEs, have all become limited liability corporations. When they interact with business entities, in Hong Kong or elsewhere, they assume liabilities for debts according to relevant laws and contracts, so there is no issue that SOEs in Hong Kong will abuse the state immunity to evade paying their debts. 10

Notes

1

In a recent case heard before the CFI, Gao Haiyan v Keeneye Holdings (2011) 3 HKC 157, the Hong Kong court, in refusing to enforce a mainland China arbitral award, held that a fair-minded observer would 'apprehend a real risk of bias' when an arbitrator-turned-mediator in China wined and dined a friend of an arbitral party and requested the friend to attempt to persuade the arbitral party to accept the mediator's settlement proposal. As a matter of Hong Kong public policy, enforcement of such an award would be, the court said, an affront to the court's sense of justice.

2CACV 373/2008 and CACV 43/2009.

3FACV Nos. 5,6 & 7 of 2010.

4The Standing Committee of the National People's Congress (SCNPC) of the PRC exercises, jointly, the power of legislation with the NPC. The legislative rights of the SCNPC mainly include: drafting and revising laws, interpreting the Constitution and laws, supervision of the work of other state organs, such as the State Council, the Central Military Commission and the Supreme People's Court, and, when the NPC is not in session, the SCNPC decides on the appointment and removal of ministers in charge of ministries and state commissions: http://www.gov.cn

5The principle of 'one country, two systems' was first proposed by Deng Xiaoping, then premier of the PRC, in talks with the then British Prime Minister, Margaret Thatcher, in the negotiations over the future of Hong Kong when the lease of the New Territories of Hong Kong was about to expire in 1997. The same principle was proposed in talks with Portugal about Macau and since then has been raised regarding the future of the Republic of Taiwan.

6(2010) 3 HKLRD 611.

7By contrast, the government of the HKSAR does not enjoy absolute immunity and proceedings can be brought against the Hong Kong government in accordance with the provisions of the Crown Proceedings Ordinance (Chapter 300).

8It should be noted that the New York Convention would not establish a waiver in the context of the enforcement of a (non-Hong Kong) Convention award against a PRC 'crown' entity in Hong Kong. This is because the promise given by China to Hong Kong in respect of the enforcement of arbitral awards has been given pursuant to the Memorandum of Understanding on the 'Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards' and not pursuant to the New York Convention.

9(2011) HKLRD 188.

10See: http://caofeidian.china.com.cn/zhibo/2011-08/26/content23273254.htm

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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally, arbitration was largely confined to areas such as building and construction. However, the strong and steady growth of the Australian economy over the past decade and the opening of the Asian markets in the mid-1990s 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) and six free trade agreements (FTAs), with a further nine being negotiated. Australia has entered into 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, Indonesia, India and the Gulf Cooperation Council, in addition to the Pacific Agreement on Closer Economic Relations (PACER) Plus and the Trans-Pacific Partnership 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, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or under any other arbitration rules. The procedures and remedies available under the Australia-Chile FTA are significantly broader than those included in the existing BIT between Australia and Chile and represents the most comprehensive outcome in trade negotiations since the Closer Economic Relations Trade Agreement with New Zealand in 1983.

While most of Australia's existing BITs designate investor-state dispute settlement for the resolution of disputes arising under these treaties, in a Trade Policy Statement released in April 2011, the Australian Government stated that it would no longer include provisions providing for investor-state dispute settlement in future BITs and FTAs. However, the government has signalled that it will continue to support the principle of National Treatment, to ensure that foreign and domestic businesses are treated equally under the law.

Arbitration law reforms in Australia

In July 2010 the International Arbitration Amendment Act 2010 (Amendment Act) introduced some major amendments to Australia's international arbitration legislation. The intention behind the revision of the International Arbitration Act 1974 (Cth) (IAA) was to ensure that the act remains at the forefront of international arbitration practice and to develop Australia as an attractive hub for international arbitration.

The Amendment Act introduces a number of significant changes to the IAA. Foremost, the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) now replaces the 1985 version as the applicable law under the IAA. As such, the provisions on the enforcement of interim measures to which parties could previously opt-in under the IAA became obsolete and have therefore been repealed. The enforcement of interim measures is now covered by article 17H of the Model Law.

There have been a number of other noteworthy amendments to the IAA. For example, the repeal of the former section 21 IAA, which allowed the parties to agree to resolve their dispute 'other than in accordance with the Model Law'. Under the revised IAA such contracting-out of the Model Law is no longer possible. The primary reason for this was to create certainty and consistency in the application of Australian arbitration law and to avoid any further confusion that resulted from the infamous decision by the Queensland Court of Appeal in Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd (2001) 1 Qd R 461 (Eisenwerk). Eisenwerk is authority for the proposition - under the old IAA - that where the parties select (in that particular case) the ICC Arbitration Rules, they have contracted out of the Model Law and as a result the domestic arbitration legislation of the states and territories, the largely uniform Commercial Arbitration Acts, would apply. Recently, in Cargill International SA v Peabody Australia Mining Ltd (2010) NSWSC 887, the New South Wales Supreme Court held that the decision in Eisenwerk was 'plainly wrong'.

Reforms are also taking place on a domestic arbitration level. In early 2010, the Standing Committee of Attorneys-General agreed to introduce uniform arbitration legislation in all states and territories based on the 2006 Model Law. This is a significant step forward in modernising Australia's domestic arbitration legislation and bringing domestic arbitration legislation into alignment with the federal system (namely, the IAA). So far only New South Wales and Tasmania have introduced a new Commercial Arbitration Act that incorporates the 2006 Model Law. Unlike the IAA, the Commercial Arbitration Act 2010 (NSW) and the Commercial Arbitration Act 2011 (Tas) (collectively referred to as the 'new CAAs') includes confidentiality provisions, which apply unless the parties specifically opt-out. In contrast to the IAA, the new CAAs allow for an appeal from the arbitration award if certain pre-conditions are met. Another significant change under the new CAA is that the exercising of the courts' power to stay court proceedings in the presence of an arbitration agreement is now compulsory, removing the courts' discretion to stay proceedings previously available.

Following the recent amendments to the IAA, the Commonwealth Parliament has further entrenched the use of ADR processes by passing the Civil Disputes Resolution Bill 2011 (Cth). The purpose of the Bill is to 'ensure that, as far as possible, parties take 'genuine steps' to resolve a civil dispute before proceedings are commenced in the Federal Court or the Federal Magistrates Court.' The Bill provides a non-exhaustive list of examples of 'genuine steps' which includes participation in arbitration, mediation or direct negotiations. The Bill is an explicit recognition by Parliament that litigation should be a last resort in resolving disputes, rather than the first port of call.

Institutional arbitration in Australia: ACICA

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitration institution. Following the successful launch of the ACICA Arbitration Rules (ACICA Rules) in 2005, ACICA has recently revised its Expedited Arbitration Rules (ACICA Expedited Rules), which were first published in late 2008. The ACICA Expedited Rules aim to 'provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved' (article 3.1 of the ACICA Expedited Rules). Further, ACICA have adopted an opt-in approach for these rules, requiring parties to explicitly select them (rather than the ACICA Rules) in their arbitration agreement.

Moreover, ACICA has updated its Arbitration Rules to include a set of 'emergency arbitrator' provisions, which are found in schedule 2. These new provisions enable the appointment of an 'emergency arbitrator' in arbitrations that have commenced under the ACICA Rules but have not yet had a tribunal appointed. Therefore, by accepting ACICA arbitration, parties accept not only arbitration according to the ACICA Rules, but also to be bound by the emergency rules and any decision of an emergency arbitrator. The power of the emergency arbitrator applies to all arbitrations conducted under ACICA Rules, unless the parties expressly opt out of it in writing.

Also included in recent amendments to the ACICA Rules are new provisions for 'Application for Emergency Interim Measures of Protection'. These provisions, also found in schedule 2, provide that the emergency arbitrator may grant any interim measures of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate. Such emergency interim measures may take the form of an award or of an order and must be made in writing and contain the date when it was made and reasons for the decision. These emergency procedures generally following the same approach as the ACICA Rules on interim measures and will not prejudice a party's right to apply to any competent court for interim measures.

Both these provisions came into force on 1 August 2011 and it is hoped that these provisions will provide businesses with a prompt and efficient option for obtaining urgent interlocutory relief in their cross-border disputes before an arbitral tribunal is constituted.

On 2 March 2011, the International Arbitration Regulations 2011 (Cth) came into force, prescribing the ACICA as the sole default appointing authority competent to perform the functions under article 11(3) and 11(4) of the Model Law that deal with the appointment of arbitrators. This means that ACICA will, from time to time, be asked to appoint arbitrators to international arbitrations seated in Australia, where the parties have not agreed upon an appointment procedure or where their appointment procedure fails. This landmark development removes the requirement for parties to commence proceedings in one of the State or Territory Supreme Courts or in the Federal Court to have an arbitrator appointed under the IAA.

Giving effect to ACICA's appointment as sole appointing authority, ACICA adopted the ACICA Appointment of Arbitrators Rules 2011 in March 2011 that establish a streamlined process through which a party can apply to have an arbitrator appointed to a dispute seated in Australia. A board comprising representatives of the Attorney General, the Chief Justices of the High Court and Federal Court, the President of the Australian Bar Association, the President of the Law Council of Australia and other industry representatives will oversee the appointment process. ACICA has ensured that the process can happen efficiently and that a nomination can be made without delay.

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.

Most recently, ACICA entered into a cooperation agreement with the Australian International Disputes Centre (AIDC), from which it operates at a new venue in Sydney. The AIDC was established in 2010 with the assistance of the Australian government and the government of the State of New South Wales. The centre houses leading ADR providers, which, in addition to ACICA, include the Chartered Institute of Arbitrators Australia, AMTAC and the Australian Commercial Disputes Centre (ACDC). The AIDC provides state-of-the-art hearing facilities that are equipped with audio-visual conferencing equipment.

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, has recently undergone a revision to incorporate the 2006 Model Law. 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 provisions on the parties' right to obtain subpoenas, requiring a person to produce certain documents or to attend examination before the arbitral tribunal. While these provisions apply unless the parties expressly opt-out, there are other provisions such as those dealing with confidentiality or consolidation of proceedings which only apply if the parties expressly opt-in. 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 of the IAA implements Australia's obligations as a signatory to 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 the ICSID Convention, 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 Acts (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 and are commonly referred to as the 'Uniform Acts'. As mentioned above, the CAAs are currently undergoing significant reforms.

The New South Wales government was the first state to enact new legislation with the passage of the Commercial Arbitration Act 2010 (NSW), which came into force on 1 October 2010. This was followed by Tasmania with the enactment of the Commercial Arbitration Act 2011 (Tas) in June 2011. Both Acts are based on and supplement the 2006 Model Law and apply to domestic commercial arbitrations constituted by an arbitration agreement.

Following suit, South Australia, Western Australia, the Northern Territory and recently Victoria have introduced Uniform Commercial Arbitration Bills. The Australian Capital Territory and Queensland are the only Australian states and territories yet to introduce the Bill.

In the following paragraphs, any reference to the 'Uniform Acts' is therefore a reference to the CAAs of all states and territories except New South Wales and Tasmania. Reference to the newly enacted New South Wales and Tasmanian Commercial Arbitration Acts will be referred to as the 'new CAAs'.

Arbitration agreements

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. Article 7 of the Model Law provides that an 'arbitration agreement is in writing if its content is recorded in any form that provides a record of the agreement, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means'. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

Similarly, domestic arbitrations under both the Uniform Acts and the new CAA requires an arbitration agreement to be in writing. However, in contrast to the Uniform Acts, the new CAA adopts the more expansive definition contained in article 7 of the Model Law. Additionally, the new CAA provides that an arbitration agreement can be evidenced through electronic communication or in an exchange of statements of claim and defence, or incorporated by reference in a contract to any other document containing an arbitration clause.

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. 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.

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 that operate under the Uniform Acts, section 53(2) 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. In contrast, section 8 of the new CAA gives greater primacy to the arbitration agreement. So long as there is an arbitration agreement which is not null or void, inoperative or incapable of being performed, the court must refer the parties to arbitration. There is no scope for the court to exercise discretion not to enforce an arbitration agreement.

For international arbitrations, Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute, if the subject matter of the dispute is arbitrable (section 7(2) of the IAA). 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. Pursuant to section 7(5) of the IAA, courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative, or incapable of being performed. The courts may impose such conditions as they think fit in respect of the order to stay court proceedings.

Similarly, article 8 of the Model Law mandates 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 decision by the New South Wales Supreme Court clarified that this limitation applies to both insurance and reinsurance contracts (HIH Casualty & General Insurance Limited (in liquidation) v Wallace (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

Arbitrability

The issue of which disputes are arbitrable has not yet been fully resolved. Particularly in relation to competition, bankruptcy and insolvency matters, 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 (Cth).

Considerations such as these commonly arise in relation to the Competition and Consumer Act 2010 (Cth), (formally known as the Trade Practices Act 1974 (Cth) (TPA)), 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 TPA 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 TPA 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 TPA for 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 faced by the courts is that which 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 v Kiukiang Maritime Carriers (1998) 159 ALR 142).

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 (see Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449).

However, under the revised IAA, courts now have the power to issue subpoenas for the purpose of arbitral proceedings, requiring a third party to produce to the arbitral tribunal particular documents or to attend for examination before the arbitral tribunal (section 23(3) of the IAA).

Similarly, under the new CAA, a party may obtain a court order compelling a person to produce documents under section 27A. The Uniform Acts allow parties to approach the court to obtain subpoenas, to require a person to attend for examination before the arbitrator, or to produce documents to the arbitrator. These powers remain, but a party now requires approval of the arbitral tribunal before approaching the court (section 27A(20) of the new CAA).

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. The revised IAA (article 18A) supplements the justifiable doubt test required by article 12(1) and (2) of the Model Law by stating that a justifiable doubt as to the arbitrator's impartiality or independence only exists if 'there is a real danger of bias on part of' the arbitrator.

Where the parties fail to agree on the number of arbitrators to be appointed, section 6 of the Uniform Acts and section 10 of the new 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 the new CAA, and section 8 of the Uniform Acts prescribe a procedure for the appointment of arbitrators.

Where the parties have not agreed upon an appointment procedure or where their appointment procedure fails, parties are able to seek the appointment of arbitrators for international arbitrations from ACICA in its capacity as sole appointing authority. This provides parties with a timely and cost effective means of appointing arbitrators as they do not to resort to the courts. Pursuant to article 11(5) of the Model Law, any appointment made by ACICA is unreviewable by a court, further reducing the potential for delays or increased costs. ACICA also has more experience and knowledge of arbitrators than the courts such that it is best placed to appoint an appropriate person.

Furthermore, the emergency arbitrator provisions found in schedule 2 of the ACICA Rules enable the appointment of an emergency arbitrator in arbitrations commenced under the ACICA Rules but before the case is referred to an arbitral tribunal. The emergency procedure calls for ACICA to use its best endeavours to appoint the emergency arbitrator within one business day of its receipt of an application for emergency relief. The arbitrator will be selected to the extent possible from ACICA's panel of arbitrators, based on his or her expertise and immediate availability. While the Rules make no provision for the parties themselves to choose the emergency arbitrator, they do not preclude ACICA from appointing a person selected by the parties.

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).

Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary

Like the Uniform Acts, the new CAA contains provisions under section 27D to facilitate med-arb, a process whereby an arbitrator may act as a mediator or conciliator or other 'non-arbitral intermediary'

in order to try and resolve the dispute. Med-arb may occur if the arbitration agreement provides for it or the parties have consented to it. Under the new CAA, an arbitrator who has acted as a mediator in mediation proceedings that have been terminated may not

conduct subsequent arbitration proceedings in relation to the dispute, unless all parties to the arbitration consent in writing (section 27D(4) of the new CAA).

Challenge of arbitrators

For arbitrations under the IAA, 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 Uniform Acts, 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 (section 45 of the Uniform Acts).

Mirroring the provisions in the IAA, under the new CAA, it will be harder to remove arbitrators because of a perceived lack of independence and impartiality, as any challenge to an arbitrator will need to demonstrate that there is a 'real danger' that the arbitrator is biased (section 12 of the new CAA). This replaces the previous test, which required only a 'reasonable apprehension of bias' to be established.

Liability of arbitrators

Both the Uniform Acts, at section 51, the new CAA, at section 39 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. In addition, an entity that appoints, or fails or refuses to appoint, a person as an arbitrator is also not liable in relation to the appointment if it acted in good faith (section 28(2) of the IAA).

The arbitral procedure

The principle of party autonomy is generally held in high regard by Australian tribunals. As a result of this, arbitral procedure tends to vary significantly according to the particulars of the dispute and the needs of the parties involved.

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. Party autonomy is a fundamental principle of the UNCITRAL Model Law and, subject to certain mandatory requirements, parties are free to determine the procedure to govern the arbitration (article 19 of the Model Law). The most significant limitation on party autonomy is the requirement of article 18 of the UNCITRAL Model Law that the parties be treated with equality, and be afforded a reasonable opportunity of presenting its case. This cannot be derogated from by the parties' agreement and applies to domestic arbitrations as well as to international arbitrations.

The relevant law governing procedure for international arbitrations is the IAA. The procedural provisions of the IAA are not extensive, and largely accommodate party autonomy by

operating on an opt-out basis. For domestic arbitration, the relevant legislation in New South Wales and Tasmania are the new CAAs and the Uniform Acts operate domestically in all other Australian states.

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 and therefore the IAA, are very restricted. However, courts may:

- grant interim measures of protection (article 17J);
- 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)).

In addition to those functions prescribed in the Model Law, courts have additional powers specified under provisions of the IAA. These include, for example, the power to issues subpoenas pursuant to section 23 of the IAA, as discussed above.

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

The new CAA provides much more limited grounds for judicial intervention. Section 5 makes it clear that there is no scope for the court to intervene except in circumstances provided for under the Act, these include:

- where there is a failure to agree on the appointment of an arbitrator, the court may appoint an arbitrator at the request of a party;
- deciding on a challenge to an arbitrator;
- terminating the mandate of an arbitrator who is unable to perform the arbitrator's functions;
- reviewing an arbitral tribunal's decision that it has jurisdiction; and
- making orders in relation to the costs of an abortive arbitration.

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.

For domestic arbitrations, the requirements are more restrictive. Section 20(1) of the Uniform Acts 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.

Mirroring the IAA, section 24A of the new CAA provides no restrictions on representation allowing parties to be represented by another person of their choice. There is no equivalent provision in the Model Law.

Confidentiality of proceedings

In the past 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.

The new IAA now includes provisions dealing in detail with the confidentiality of different aspects of the arbitration proceedings (sections 23C-G of the IAA). In particular, the provisions deal with circumstances in which confidential information may be disclosed and the process for such disclosure, as well as the power of the courts and the tribunal to allow or prohibit disclosure under certain circumstances. Since these provisions operate on an opt-in basis, it is advisable to agree to their application in the arbitration agreement if confidentiality is to be preserved.

The Uniform Acts contain no confidentiality provisions, therefore the common law position will apply to domestic arbitrations seated in states and territories that have not yet enacted the new CAA. In contrast, the new CAA contains provisions (section 27E to 27F) prohibiting the disclosure of confidential information about arbitral proceedings, except in limited circumstances (identical to those circumstances provided for under the IAA) and where the parties have agreed otherwise. Domestic courts are also empowered to review orders of the arbitral tribunal prohibiting or allowing the disclosure of confidential information.

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 of the new CAA, and section 19(3) of the Uniform Acts).

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 (IBA Rules). 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(2) of the new CAA and section 19(3) of the Uniform Acts, 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 and the new CAA, 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. Since the 2006 Model Law has been incorporated into the IAA the position with respect to the courts' power to grant interim measures in support of foreign arbitration has been clarified. Article 17J of the Model Law now states that a court has the power to order interim measures 'irrespective of whether [the seat] is in the territory of this State'. Likewise, courts now also have the power to enforce interim measures issued by a foreign arbitral tribunal (article 17H of the Model Law).

Under section 14 of the Uniform Acts, the arbitrator has the 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.

The new CAA contains detailed provisions dealing with interim measures in Part 4A. The added advantage of the new CAA is that there will be a mechanism for the recognition and enforcement of interim measures by the courts. The courts will be obliged to enforce an interim measure granted in any state or territory, except in limited circumstances. Further, the parties may ask the court to order interim measures in relation to arbitration proceedings. The new CAA makes clear that it is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court.

Form of the award

The proceedings are formally ended with the issuing of a final award. Neither the Model Law nor the Uniform Acts 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 (section 31(1) of the new CAA and section 29 of the Uniform Acts). Although there is no express requirement for the award to state the date and place of the arbitration, it is recommended to do so. The parties may also choose for the award to be delivered orally, with a subsequent written statement of reasons and terms by the arbitrator (section 29(2) of the Uniform Acts). 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 (section 48(1) of the Uniform Acts). The effect of such a time limit in Model Law proceedings is not settled. Under article 32 of the Model Law and the new CAA, 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 (article 14(1) of the Model Law and the new CAA), 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 and the new CAA, any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the Uniform Acts provides that the decision of a presiding arbitrator shall prevail if no majority can be reached (section 15). The Model Law and the new CAA allows a similar power of the presiding arbitrator, though only with regard to procedural matters (article 29 of the Model Law and the new CAA).

Recourse against award

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 Uniform Acts allows for broader means to challenge 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)). 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 (section 38(5) of the Uniform Acts). 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 Gordian Runoff Limited v Westport Insurance Corporation (2010) 267 ALR 74, the New South Wales Court of Appeal held that arbitral tribunals are not obliged to provide reasons that meet the standard expected of the judiciary. This decision represents a significant departure from previous authority, which required arbitrators to be held to the standard of reasons of judges (Oil Basins Ltd v BHP Billiton Ltd (2007) VSCA 255). From a practical perspective, this decision limits the grounds for challenging an award and recognises the importance of finality and efficiency in arbitration. Currently on appeal to the High Court, the outcome of this decision will necessarily affect the application of the new

CAA, and the standard of reasons required under the Uniform Acts for the jurisdictions in which they remain in force.

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

With regard to the position in New South Wales and Tasmania, section 34 of the new CAA allows for an award to be set aside on identical grounds as article 34 of the Model Law. Additionally and in contrast to the IAA, section 34A of the new CAA allows an appeal of the award under limited circumstances. An appeal on a question of law is only possible with the leave of the court or if the parties agree to the appeal before the end of the appeal period. Further, the court must be satisfied that all of the following requirements are satisfied:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one which the arbitral tribunal was asked to determine;
- the decision of the tribunal on the question is obviously wrong (or is one of general public importance); and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

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. It should be noted, however, 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 35 of the new CAA or section 33 of the Uniform Acts for domestic awards, applies.

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